COURT FILE NUMBER	1103 14112
COURT:	COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE:	EDMONTON
	IN THE MATTER OF THE TRUSTEE ACT, RSA 2000, c T-8, AS AMENDED
	IN THE MATTER OF THE SAWRIDGE BAND INTER VIVOS SETTLEMENT CREATED BY CHIEF WALTER PATRICK TWINN, OF THE SAWRIDGE INDIAN BAND, NO 19 now known as SAWRIDGE FIRST NATION ON APRIL 15, 1985
APPLICANTS:	ROLAND TWINN, CATHERINE TWINN, WALTER FELIX TWIN, BERTHA L'HIRONDELLE and CLARA MIDBO, as Trustees for the 1985 Sawridge Trust
DOCUMENT	**WRITTEN SUBMISSIONS OF THE SAWRIDGE FIRST NATION**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	PARLEE McLAWS LLP 1500 Manulife Place 10180 – 101 Street Edmonton, AB T5J 4K1 **Attention**: Edward H. Molstad, Q.C. Telephone: (780) 423-8500 Facsimile: (780) 423-2870 **File Number**: 64203-7/EHM

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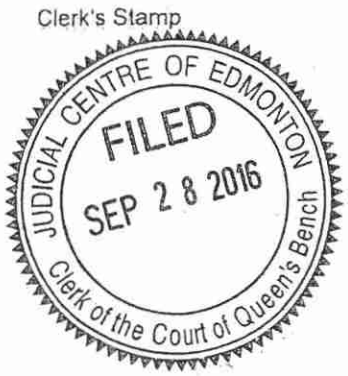

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I. INTRODUCTION

1. These submissions concern the Sawridge First Nation's ("**Sawridge**") application to be granted status to intervene in the application by Maurice Felix Stoney and his brothers and sisters (the "**Applicants**"), filed on August 12, 2016 (the "**Stoney Application**"), to be added as a party or intervener to this Action. Additionally, these submissions contain Sawridge's response to the merits of the Stoney Application.

2. These submissions have been submitted along with Sawridge's application for intervenor status, and the Affidavit of Chief Roland Twinn, sworn on September 21, 2016, in accordance with the directions given by Justice D.R.G. Thomas during the case management conference that occurred on August 24, 2016.

3. It is Sawridge's position that the Stoney Application represents the latest in a series of attempts by Maurice Stoney and his family to assert that they have an entitlement to membership in Sawridge. Sawridge has been involved in litigation and administrative hearings with Maurice Stoney for decades. The membership issue that is at the forefront of the Stoney Application has been adjudicated as part of that previous litigation, and has resulted in findings being made on a number of grounds that Maurice Stoney and his family did not have any right to membership in Sawridge. Maurice Stoney and his brothers and sisters are not members of Sawridge and have never been members of Sawridge at any time so as to qualify them as beneficiaries to the 1982 and 1985 Trusts, as alleged in the Stoney Application.

4. In light of the fact that the Stoney Application again raises the issue of Maurice Stoney and his family's entitlement to membership in Sawridge, Sawridge submits that it is appropriate to grant it status to intervene in the Stoney Application. Any findings made in relation to membership would have a direct impact on Sawridge. Furthermore, given Sawridge's prior dealings with Mr. Stoney and his family concerning these membership-related issues, it is able to provide a perspective that is unique to any of the other parties to this Action.

5. With regards to the merits of the Stoney Application, Sawridge submits that the application should be struck, as the basis for Mr. Stoney and his family to request status as a party is directly connected to their assertion that they are or have been members of Sawridge. As

that issue is *res judicata*, the Stoney Application constitutes an abuse of process. In the alternative, the fact that the membership-related matters at the heart of the Stoney Application have already been adjudicated is a basis for dismissing said application.

6. Given Maurice Stoney's zealous approach to litigating his alleged entitlement to membership in Sawridge (notwithstanding the fact that the issue is *res judicata*), it is submitted that it is appropriate to award solicitor and his own client costs against the Applicants. The fact that Maurice Stoney has refused to pay costs awards against him arising from prior proceedings involving Sawridge further supports this position.

II. FACTS

A. *Background regarding the Stoney family*

7. Maurice Stoney ("**Maurice**") was born in 1941. Maurice's father was William Stoney, and his grandfather was Johnny Stoney.

Affidavit of Maurice Stoney, sworn May 17, 2016 ["***Stoney Affidavit***"], at paras 6 and 8.
Affidavit of Chief Roland Twinn, sworn September 21, 2016 ["***Twinn Affidavit***"], at para 4.

8. In 1944, William Stoney voluntarily gave up his Indian status and was enfranchised. As a result, William's family (including his wife and their two sons, Maurice and Alvin) were enfranchised and were consequently no longer members of Sawridge. At the time of his and his family's enfranchisement, it is Sawridge's understanding that, based on the enfranchisement documents that were completed, William Stoney only had two sons, being Maurice and Alvin.

Twinn Affidavit, at paras 5, 31 and 32.

9. Maurice has alleged that a number of his brothers and sisters were born following his family's enfranchisement. The materials filed in support of the Stoney Application do not contain any records that would serve to verify any of the assertions made regarding his family.

Stoney Affidavit, at para 8.

B. *Membership disputes with Maurice Stoney*

10. Bill C-31 was enacted by the Federal Government on April 17, 1985. It gave Maurice the right to have his Indian status restored, but did not give him any rights in relation to membership in Sawridge. At most, he was able to apply for membership in Sawridge. Any such application was to be adjudicated in accordance with Sawridge's own membership rules, as Sawridge had assumed control of its membership process on July 8, 1985, in accordance with section 10 of the *Indian Act*.

Twinn Affidavit, at paras 6 and 7.

11. Sawridge took the position following the enactment of Bill C-31 that said bill did not grant Maurice or any of his family members an automatic right to membership in Sawridge.

12. Maurice, two of his cousins (Aline Huzar and June Kolosky), and a number of others filed a claim in Federal Court against Sawridge in 1995, wherein they sought damages related to Sawridge's decision to not grant them membership following the enactment of Bill C-31 (the "**1995 Action**"). The plaintiffs in that action sought an order that their names be added to Sawridge's membership list.

Twinn Affidavit, at paras 8-10.

13. The plaintiffs in the 1995 Action brought an application to amend their Statement of Claim to include a request for a declaration that Sawridge's membership rules were discriminatory and exclusionary, and were accordingly invalid. The application was initially granted. That decision was appealed by Sawridge to the Federal Court of Appeal.

Twinn Affidavit, at paras 11 and 12.

14. On June 13, 2000, the Federal Court of Appeal delivered its decision regarding Sawridge's appeal. It agreed with Sawridge, and allowed the appeal of the decision amending the Statement of Claim, with costs payable to Sawridge for both the initial application and the appeal.

Huzar v Canada, 2000 CanLII 15589 (FCA), at para 6. [**Tab 1**]

Twinn Affidavit, at para 29.

15. One of the arguments that was raised during the 1995 Action was that the plaintiffs were entitled to membership in Sawridge as a result of Bill C-31. Specifically, it was argued that Bill C-31 invalidated Sawridge's membership rules, and that accordingly, Maurice and the other plaintiffs were entitled to membership. In response to that argument, the Federal Court of Appeal noted as follows:

> It was conceded by counsel for the respondents that, without the proposed amending paragraphs, the unamended statement of claim discloses no reasonable cause of action in so far as it asserts or assumes that the respondents are entitled to Band membership without the consent of the Band.
>
> It is clear that, until the Band"s membership rules are found to be invalid, they govern membership of the Band and that the respondents have, at best, a right to apply to the Band for membership. Accordingly, the statement of claim against the appellants, Walter Patrick Twinn, as Chief of the Sawridge Indian Band, and the Sawridge Indian Band, will be struck as disclosing no reasonable cause of action.

Huzar v Canada, 2000 CarswellNat 1132 (FCA), at paras 4 and 5. [**Tab 1**]

16. Maurice's next step in relation to his claim for membership in Sawridge was to complete a membership application pursuant to Sawridge's membership rules. His completed application for membership was submitted on August 30, 2011. Contrary to the assertions made in Maurice's Affidavit filed in support of the Stoney Application, that application was never ignored.

Twinn Affidavit, at paras 15.and 16

17. Maurice's application for membership was denied on or around December 7, 2011. According to the letter that was sent to Maurice enclosing Sawridge's decision, his application was rejected (i) because he did not have any specific right to membership, and (ii) because Sawridge's Council did not consider that his admission would be in the best interests and welfare of Sawridge and as a result did not see any reason to exercise its discretion under its membership rules to admit him as a member.

Twinn Affidavit, at para 16.

Stoney Affidavit, at Exhibit "L".

18. In accordance with Sawridge's membership rules and its Constitution, Maurice appealed the decision regarding his membership to Sawridge's Appeal Committee. The hearing of that appeal occurred on April 21, 2012. The committee upheld the initial decision to deny the application for membership.

Twinn Affidavit, at para 17.

19. Maurice brought an application for judicial review of the decision to deny him membership. That application was filed on May 11, 2012 (the "**2012 Action**").

Twinn Affidavit, at para 18.

20. As part of the 2012 Action, Maurice advanced a number of grounds which he alleged were cause to overturn the decision to deny him membership. Those grounds are listed in Maurice's Notice of Application that was filed with the Federal Court. They concern his alleged right to membership as a result of the enactment of Bill C-31. Additionally, the submissions filed by Maurice refer to arguments regarding allegations of bias, and arguments pursuant to section 15 of the *Charter*, as well as section 35 of the *Constitution Act, 1982*.

Notice of Application, Federal Court Action No. T-923-12. [**Tab 2**]

21. Maurice swore an Affidavit as part of the 2012 Action. In that Affidavit, he alleged (much like in the Affidavit sworn in support of the Stoney Application) that he was entitled to automatic membership in Sawridge as a result of the enactment of Bill C-31.

Affidavit of Maurice Felix Stoney, sworn May 22, 2012, Federal Court Action No. T-923-12, at para 8. [**Tab 3**]

22. Chief Roland Twinn swore an Affidavit on June 26, 2012, in response to the Affidavit sworn by Maurice in the 2012 Action. In his Affidavit, Chief Twinn affirmed, *inter alia*, the following:

(a) Sawridge did not receive a completed membership application from Maurice until August 30, 2011;

(b) Sawridge's decision to deny Maurice's application for membership was based on a consideration of a number of records, including his completed membership application, historical documents, and media articles;

(c) Maurice was given the ability to make both written and oral submissions to Sawridge's Appeal Committee, both of which were done by his counsel; and

(d) Maurice's father (and as a result his whole family) voluntarily enfranchised in 1944.

Twinn Affidavit, at para 19 and at Exhibit "2" at paras 2, 3, 8, 11, 12, and 18.

23. Maurice's application for judicial review in the 2012 Action proceeded on March 5, 2013, before Justice Barnes of the Federal Court (Trial Division). Justice Barnes dismissed Maurice's application, and awarded costs to Sawridge.

Stoney v Sawridge First Nation, 2013 FC 509. [**Tab 4**]

24. In his written reasons, Justice Barnes engaged in a thorough analysis of Mr. Stoney's argument regarding his entitlement to membership under Bill C-31. He found that Bill C-31 did not provide Maurice with an automatic right to membership in Sawridge. Rather, Justice Barnes noted that Maurice lost his right to membership when his father obtained enfranchisement for the entire Stoney family:

> I also cannot identify anything in Bill C-31 that would extend an automatic right of membership in the Sawridge First Nation to William Stoney. He lost his right to membership when his father sought and obtained enfranchisement for the family. The legislative amendments in Bill C-31 do not apply to that situation.

Stoney v Sawridge First Nation, 2013 FC 509, at paras 11-15. [**Tab 4**]

25. Additionally, Justice Barnes wrote that the judicial review application that was the subject matter of the 2012 Action was an attempt by Maurice to re-litigate the matters that were in issue in the 1995 Action, being his entitlement to membership as a result of Bill C-31. The Justice accordingly concluded that the arguments related to Bill C-31 were barred under the doctrine of issue estoppel.

Stoney v Sawridge First Nation, 2013 FC 509, at para 17. [**Tab 4**]

26. With regards to a number of the other arguments advanced by Maurice, the Justice wrote that there was a lack of evidence and submissions put forward by Maurice related to same. Accordingly, those arguments were dismissed.

Stoney v Sawridge First Nation, 2013 FC 509, at paras 19-22. [**Tab 4**]

27. Following the issuing of Justice Barnes' reasons in the 2012 Action, Sawridge proceeded to take steps to assess the costs that were payable by Maurice. A Federal Court Assessment Officer determined that Sawridge was entitled to $2,995.65 in costs. These costs have never been paid.

Twinn Affidavit, at paras 22 and 29.

28. On January 31, 2014, Maurice filed a complaint with the Canadian Human Rights Commission ("**CHRC**") regarding Sawridge's decision to deny him membership (the "**CHRC Complaint**"). Much like in both the 1995 Action and the 2012 Action, Mr. Stoney's complaint was based on an allegation that Sawridge's decision to deny his membership was discriminatory.

Twinn Affidavit, at para 24.

29. The Deputy Chief Commissioner of the CHRC issued a decision regarding the complaint by Maurice on April 15, 2015. The commissioner refused to address the complaint, as the subject matter of the complaint had already been dealt with as part of the 1995 Action and the 2012 Action:

> The complainant has been a party to two different proceedings before the Federal Court with respect to the matters raised in this complaint: an action against the respondent [Sawridge] which was struck by the Federal Court of Appeal in 2000 and an application for judicial review which was dismissed in May 2013. The essence of the complaint, i.e., the respondent's denial of the complainant's membership in the band, was central to both proceedings. The complainant clearly raised discrimination in his application for judicial review when he alleged that the decision violated the Charter; however, he did not provide adequate evidence for the Federal Court to overturn the decision of the respondent. The Supreme Court in *Figliola* held that human rights commissions must respect the finality of decisions made by other administrative decision-makers with concurrent jurisdiction to apply human rights legislation when the issues raised in

> both processes are the same. In this instance, the other decision-makers are judges of the Federal Court and the Federal Court of Appeal and could have clearly considered the human rights allegations raised. Therefore, it would not be unfair for the Commission to decide not to deal with this complaint.

Record of Decision re: File 20140008, dated April 15, 2015; *Twinn Affidavit*, at Exhibit "5".

30. Most recently, Maurice attempted to become involved in this Action in late 2015. Specifically, he attempted to file an appeal of a case management decision made by Justice D.R.G. Thomas, being *1985 Sawridge Trust v Alberta (Public Trustee)*, 2015 ABQB 799 ("***Sawridge #3***"). Maurice was not a party to this Action at that time. In light of the fact that Maurice's counsel had failed to file a Civil Notice of Appeal within the requisite time under the *Rules of Court*, Mr. Stoney brought an application to extend the time for him to file an appeal of *Sawridge #3*. That application was heard by Justice J. Watson of the Court of Appeal on February 17, 2016.

Stoney v 1985 Sawridge Trust, 2016 ABCA 51. [**Tab 5**]

31. On February 26, 2016, Justice Watson issued his reasons for decision regarding Maurice's application. The Justice dismissed the application, and awarded costs to the parties that participated in that application, which included Sawridge.

Stoney v 1985 Sawridge Trust, 2016 ABCA 51, at paras 23 and 24. [**Tab 5**]

32. In his written reasons, Justice Watson provided an overview of the basis of Maurice's argument that he should participate in this Action:

> The application before me now is by a gentleman named Maurice Stoney. Mr. Stoney claims, with some vigour, that he is a member of the First Nation in question and that he has been for a long time, and that as a member of the First Nation, certain legal rights of his follow from this.
>
> [...] As mentioned, Mr. Stoney's position is that he is a member of the Sawridge First Nation and that as a consequence of that he presumably has a right to some share in the distribution of the trust when that is eventually carried out.

Stoney v 1985 Sawridge Trust, 2016 ABCA 51, at paras 2 and 3. [**Tab 5**]

33. With regards to Maurice's allegations regarding his membership in Sawridge, while Justice Watson did not make any findings regarding same, he did note the following:

> It therefore follows that in terms of determining reasonable chance of success in the appeal, the embargo against the participation of Mr. Stoney that is or has been created by the various proceedings that have occurred in various courts including the Federal Court as raised by the First Nation, has an enhanced status for the purposes of determining the extension of time here. That is because, on the face of things, Mr. Stoney does not have a participatory right in relation to the proceedings on the trust, does not have standing to appeal within the meaning of the case of Dreco Energy Services Ltd et al v Wenzel Downhole Tools Ltd, 2008 ABCA 36 (CanLII), 429 AR 51 at paras 5 to 8, and is, in fact, a stranger to the proceedings insofar as an appeal from the decision of Mr. Justice Thomas to the Court of Appeal is concerned. [***Emphasis Added***]

Stoney v 1985 Sawridge Trust, 2016 ABCA 51, at para 20. [**Tab 5**]

34. Pursuant to Justice Watson's decision, Sawridge prepared a Bill of Costs regarding the application. That Bill of Costs was agreed to by Maurice's counsel, and was filed on June 14, 2016. Pursuant to that Bill of Costs, he is required to pay Sawridge $898.70. To date, he has not paid Sawridge these costs.

Twinn Affidavit, at paras 28 and 29.

C. *Membership disputes with other applicants*

35. Sawridge received inquiries regarding membership from William C. Stoney, Bernie Stoney, and Gail Stoney. With regards to William C. Stoney, he submitted two applications for membership, one on January 14, 2009 and the other on January 25, 2011. In both cases, his application was denied. It is not clear if William C. Stoney is the individual referred to as "Billy" in the Affidavit sworn by Maurice in support of the Stoney Application.

Twinn Affidavit, at paras 33-35.

36. With regards to Bernie and Gail Stoney, Sawridge provided both of them with membership application forms, but Sawridge has never received a completed application form from either of them.

Twinn Affidavit, at paras 34 and 35.

37. None of the other siblings listed in Maurice's Affidavit sworn in support of the Stoney Application have requested a membership application forms from Sawridge or submitted a completed application to Sawridge.

Twinn Affidavit, at para 36.

38. In any event, Maurice has deposed that a number of his brothers and sisters were born following his family's enfranchisement in 1944, namely: Angeline, Linda, Bernie, Betty Jean, Gail, Alma, Alva, and Bryan. It is clear from the decisions issued in the 1995 Action and the 2012 Action that any siblings born after his family's enfranchisement were not members of Sawridge and could not become members of Sawridge without applying for and being granted membership by Sawridge. As such, these siblings are not, and have never been, members of Sawridge.

Stoney Affidavit, at para 8.
Twinn Affidavit, at para 30.

III. ISSUES

39. Sawridge submits that the issues before this Honourable Court are as follows:

(a) Should Sawridge be granted the status to intervene in the Stoney Application, pursuant to Rule 2.10 of the *Rules of Court*?

(b) Should the Stoney Application be struck, in whole or in part, pursuant to Rule 3.68 of the *Rules of Court*?

(c) In the alternative, should the Stoney Application be dismissed?

(d) If the Stoney Application is struck and/or dismissed by this Honourable Court, is Sawridge entitled to costs on a solicitor and his own client basis, or, in the alternative, costs on an enhanced basis?

IV. ANALYSIS

A. ***Sawridge should be granted intervenor status***

40. This Honourable Court's authority to grant intervenor status comes from Rule 2.10 of the *Rules of Court*. That rule simply states that a Court may grant a person status to intervene subject to any terms and conditions deemed appropriate:

> 2.10 On application, a Court may grant status to a person to intervene in an action subject to any terms and conditions and with the rights and privileges specified by the Court.

Rules of Court, Alta Reg 124/2010, at 2.10. [**Tab 6**]

41. In light of the fact that Rule 2.10 does not expressly state how a Court should adjudicate a request for intervenor status, reliance must be placed on the common law that has developed surrounding applications for intervenor status. In *Papaschase Indian Band (Descendants of) v Canada (Attorney General)*, Chief Justice Fraser summarized the process for reviewing applications to intervene as follows:

> A two-step approach is commonly used to determine an intervener application. The Court typically first considers the subject matter of the proceeding and second, determines the proposed intervener's interest in that subject matter.

Papaschase Indian Band (Descendants of) v Canada (Attorney General), 2005 ABCA 320, at para 5. [**Tab 7**]

42. With regards to the second step of the aforementioned two-step approach, Courts have generally held that a party should be given intervenor status if (i) it is specially affected by the decision in a matter, or (ii) it has some special expertise or perspective concerning the issues in a matter.

Edmonton (City) v Edmonton (Subdivision and Development Appeal Board), 2014 ABCA 340, at para 8. [**Tab 8**]

43. Alberta Courts have interpreted Rule 2.10 as allowing them to order that a person may intervene in an application. In *Suncor Energy Inc. v Unifor, Local 707 A*, for example, Chief Justice Wittmann granted intervenor status to two not-for-profit organization in a judicial review application. Specifically, the Chief Justice stated that the intervenors had the ability to make written and oral submissions in relation to the application.

Suncor Energy Inc. v Unifor, Local 707 A, 2014 ABQB 555, at paras 4, 7-8 and 21-22. [**Tab 9**]

44. In the present matter, Sawridge is seeking an order allowing it to respond to the Stoney Application, including (i) the right to question the Applicants on any Affidavits filed as part of this application, (ii) the right to put forward a cross-application to strike the Stoney Application, and (iii) the right to make submissions. With regards to the issue of questioning the Applicants on any Affidavits, Sawridge was advised that it was the position of Maurice that Sawridge was not a party to the Stoney Application and as a result, was not allowed to attend or participate in the questioning of Maurice that occurred on September 23, 2016.

45. Sawridge has a clear direct interest in the Stoney Application, because of the link between the issue of Maurice and his family's entitlement to be named as parties to this Action, and the issue of their membership in Sawridge. As noted above, the basis of the Applicants' argument in the Stoney Application is that they have at all material times been members in Sawridge, and are accordingly beneficiaries under the 1985 Sawridge Trust. A finding that any of the Applicants have standing as beneficiaries of the 1985 Sawridge Trust would accordingly result in some finding being made regarding membership in Sawridge.

46. As a self-governing First Nation who, pursuant to the *Indian Act*, has control of its own membership list, Sawridge has a strong interest in ensuring that it maintains control over who is deemed a member. That interest is particularly pronounced in circumstances such as the present, where some of the Applicants have made applications for membership that have been denied pursuant to Sawridge's membership rules. Any Court decision related to the issue of membership accordingly has a significant effect on Sawridge.

47. Furthermore, Sawridge would be directly affected by a decision in the Stoney Application, as it could negatively impact Sawridge's ability to ensure that the issue of membership is adjudicated in the proper forum. As membership is governed by Sawridge's own membership rules, and given that the operations of First Nations are generally regulated at a Federal level, it is appropriate for determinations regarding membership to be heard in the Federal Court. The importance of preserving the Federal Court's jurisdiction in matters involving membership was addressed by Justice Thomas in *Sawridge #3*:

> The same is true for this Court attempting to regulate the operations of First Nations, which are 'Bands' within the meaning of the *Indian Act*. The Federal Court is the better forum and now that the Federal Court has commented on the SFN membership process in ***Stoney v Sawridge First Nation,*** there is no need, nor is it appropriate, for this Court to address this subject. If there are outstanding disputes on whether or not a particular person should be admitted or excluded from Band membership then that should be reviewed in the Federal Court, and not in this 1985 Sawridge Trust modification and distribution process.

1985 Sawridge Trust v Alberta (Public Trustee), 2015 ABQB 799, at para 35. [**Tab 10**]

48. In relation to the issue of Sawridge's expertise, it brings a significant amount of expertise forward regarding Maurice and his family's claims regarding their membership in Sawridge. Unlike the other parties to this Action, Sawridge has been directly involved in matters relating to Maurice and his family's allegations of membership. That involvement has spanned over two decades and has necessitated the adjudication of a number of the same claims that are advanced as part of the Stoney Application. Having already responded to many of the Applicants' claims, Sawridge is in a position to offer a significant amount of insight to this Honourable Court regarding the Stoney Application.

49. As eluded to above, Sawridge's perspective is unique from those of the other parties to this Action, given that it has significant experience dealing with both the more general issue of membership in Sawridge and the more specific issue of the Applicants' entitlement to membership.

B. The Stoney Application should be struck

50. Rule 3.68 of the *Rules of Court* provides that a Court may take one of a number of actions if a commencement document constitutes an abuse of process. Those actions include striking all or any part of a claim.

Rules of Court, Alta Reg 124/2010, at 3.68. [**Tab 6**]

51. The expression "abuse of process" does not have a fixed definition; as Justice Slatter explained in *Reece v Edmonton (City)*, there are a number of ways to define an abuse of process. Establishing whether conduct constitutes an abuse of process will depend on the particular context of a matter and whether said conduct has a deleterious effect on the

administration of justice. A number of types of conduct have been considered abuses of process, including the re-litigation of settled issues.

Reece v Edmonton (City), 2011 ABCA 238, at paras 16-20. [**Tab 11**]

52. With regards to the relationship between the doctrine of abuse of process and the doctrines of issue estoppel and *res judicata*, Justice Slatter noted that all of these doctrines were connected, and that the doctrine of abuse of process could be used to prevent re-litigation of matters that did not fall directly into either of the other tests:

> Both parties discussed *Toronto (City) v. Canadian Union of Public Employees Local 79,* 2003 SCC 63 (CanLII), [2003] 3 S.C.R. 77 in some detail. *Toronto v. CUPE* is primarily concerned with limits on the ability to re-litigate settled issues. It sets out the tests for the application of the doctrines of issue estoppel and *res judicata*. The most important aspect of *Toronto v. CUPE*, however, is its confirmation that there is a residual discretion in the courts, using the doctrine of abuse of process, to prevent re-litigation of issues even when the preconditions for issue estoppel and *res judicata* are not present.

Reece v Edmonton (City), 2011 ABCA 238, at para 17. [**Tab 11**]

53. In *Stoney Nakoda Nations v Canada (Attorney General)*, Justice McIntryre was faced with an application that is similar in nature to Sawridge's application to strike the Stoney Application. The plaintiffs in that case were members and representatives of the Stoney Nakoda Nation who had brought a claim against the Federal and Provincial governments in relation to their surrender of reserve lands to TransAlta Utilities in 1907, 1914 and 1929. The defendants brought an application to strike the plaintiffs' claim, on the basis that it constituted an abuse of process. The plaintiffs had commenced a number of actions concerning the surrender of the lands and their subsequent sale to TransAlta Utilities. Based on its assessment of the other actions that had been commenced by the plaintiffs, the Justice held that the action before him constituted an abuse of process.

Stoney Nakoda Nations v Canada (Attorney General), 2015 ABQB 565, at paras 1, 16-25, 77-79. [**Tab 12**]

54. In coming to his decision in *Stoney Nakoda*, Justice McIntyre affirmed that a litigant's court history was relevant to establishing if an abuse of process existed. Furthermore,

he noted the following regarding the burden of establish that an action constituted an abuse of process:

> The Plaintiffs argue that to strike the claim in its entirety, the Defendants must show that the Dixon action is the same as or is a duplication of the previous actions or the Wesley action. The case law above shows that the test is not so strict. Rather, the overall integrity of the administration of justice, including the principles of fairness, judicial economy, consistency, and finality are at the heart of the doctrine of abuse of process. [***Emphasis Added***]

Stoney Nakoda Nations v Canada (Attorney General), 2015 ABQB 565, at para 25. [**Tab 12**]

55. Much like the plaintiffs in *Stoney Nakoda*, Maurice has commenced a number of proceedings related to his entitlement to membership in Sawridge. A review of the decisions and the materials in each of those proceedings indicates that he argued that he and his family should be granted automatic membership in Sawridge as a result of the enactment of Bill C-31. Additionally, he advanced constitutional arguments that appear to be similar to what is being put forward in the Stoney Application.

56. A review of the materials filed in support of the Stoney Application confirms that the Applicants are trying to insert themselves into this Action based on past arguments relating to their purported rights to membership. Maurice's Affidavit, for example, in paragraph 9, asserts that he and his family have "acquired rights" to membership pursuant to Bill C-31. That Affidavit also refers on a number of occasions to some of the aforementioned proceedings involving Maurice (i.e., the 1995 Action and the 2012 Action). Similarly, the Application filed by the Applicants addresses the issue of Maurice and his family's membership in Sawridge. These points, as noted above, have already been adjudicated, and have resulted in findings that Maurice and his family did not have any entitlement to membership.

57. In summary, the Stoney Application is an attempt by Maurice and his family to re-litigate matters that have previously been decided regarding membership. Taking into account these previous proceedings, it is clear that the Stoney Application constitutes an abuse of process. Accordingly, it is submitted that this Honourable Court should strike the Stoney Application in its entirety.

C. ***The Stoney Application should be dismissed***

58. If this Honourable Court is not prepared to grant Sawridge's request for an order striking the Stoney Application, then it is submitted that the Application should be dismissed, on the basis that the membership-related matters addressed therein are (i) barred under the doctrine of issue estoppel, (ii) barred under the doctrine of cause of action estoppel, and (iii) are an abuse of process.

a. Issue estoppel

59. Much like the doctrine of abuse of process, issue estoppel is a doctrine that aims to stop a party from re-litigating a matter that was previously decided. In order to find that a party is estopped from advancing an action based on this doctrine, a Court must find that the following three preconditions have been met:

- Has the same question been decided?
- Was the judicial decision which is said to create the estoppel final?
- Were the parties to the decision or their privies were the same in both proceedings?

Penner v Niagara (Regional Police Services Board), 2013 SCC 19, at paras 28-29, and 36. [**Tab 13**]

Danyluk v Ainsworth Technologies Inc., 2001 SCC 44, at para 25. [**Tab 14**]

60. With regards to the first of the three above-listed preconditions, case law is clear that issue estoppel applies where a right, question or fact has been put into issue and determined.

Danyluk v Ainsworth Technologies Inc., 2001 SCC 44, at paras 23 and 24. [**Tab 14**]

61. In relation to the third precondition, case law is clear that issue estoppel can apply where the parties to a subsequent action are not the exact same as the parties involved in the previous matter upon which the estoppel claim is based. As noted above, the test for finding issue estoppel requires that parties or their privies are involved in both proceedings. The Supreme Court of Canada has affirmed that this precondition is, "somewhat elastic." In *Banque Nationale de Paris (Canada) v Canadian Imperial Bank of Commerce*, the Ontario Court of Appeal, quoting the often-cited House of Lords case of *Carl-Zeiss-Stiftung v Rayner & Keeler*

Ltd. (No. 2), affirmed that the requisite privity would exist where there is, "privity of either blood, of title or of interest." The third of these types of privity refers to the fact that there is a strong link between the interests of a party involved in prior proceedings and another party involved in later proceedings.

Danyluk v Ainsworth Technologies Inc., 2001 SCC 44, at paras 59 and 60. [**Tab 14**]
Banque Nationale de Paris (Canada) v Canadian Imperial Bank of Commerce, 2001 CarswellOnt 25 (CA), at paras 26-29. [**Tab 15**]

62. Once the above three preconditions have been met, then a Court is required to determine if it should exercise its discretion to apply the doctrine. Case law has affirmed that the discretion to not apply issue estoppel once all of the preconditions are met is very limited. That discretion should only be relied upon where applying the doctrine would lead to an injustice.

Danyluk v Ainsworth Technologies Inc., 2001 SCC 44, at paras 33, 62-64. [**Tab 14**]

63. Sawridge submits that the three preconditions under the test for issue estoppel are met in this case. In relation to the first precondition, the arguments raised by Maurice and his family regarding their entitlement to membership have already been decided in the context of the aforementioned proceedings. Those proceedings involved identical allegations regarding the effect of the Constitution and Bill C-31 on the Stoney family's right to membership. Furthermore, the record before the Court in those cases was very similar to the record that has been put forward by Maurice in this application.

64. Insofar as the second precondition, it is clear that the decisions taken in the 1995 Action, the 2012 Action, the CHRC Complaint, and the Alberta Court of Appeal are all final. Maurice and the other parties are not able to advance any further appeals of these decisions, as the relevant appeal periods have lapsed.

65. The third precondition regarding the privity of the parties is also met in this case. As noted above, only certain of the Stoney Applicants have been directly involved in membership-related proceedings. Furthermore, Maurice is the only one of the Applicants who has been involved in the various court proceedings regarding membership. As is clear from the Ontario Court of Appeal's decision in *Banque Nationale de Paris*, the fact that the Applicants are

all purportedly blood relatives is sufficient to establish the requisite privity / mutuality. Furthermore, the Applicants' interests in obtaining membership in Sawridge are identical to the interest that was advanced by Maurice as part of the earlier proceedings, because in both cases, the claims for membership are being advanced based on identical arguments. Accordingly, there are two grounds upon which to find that the third precondition is met in the circumstances.

66. Finally, it is submitted that there is nothing that militates in favour of not applying the doctrine of issue estoppel. Maurice and various members of his family have spent years advancing similar or identical arguments regarding their entitlement to membership in Sawridge. Dismissing the Stoney Application based on the doctrine of issue estoppel would fall in line directly with the objective of that doctrine, as it would stop any further judicial resources being wasted on addressing something that has long been resolved.

b. *Cause of action estoppel*

67. Much like issue estoppel, cause of action estoppel is a doctrine that looks to prevent the re-litigation of matters that have already been before a Court. Unlike issue estoppel however, cause of action estoppel targets a party's cause of action as a whole, and not just particular issues. The test for establishing cause of action estoppel is a four-part test that was initially articulated by Justice Ritchie in *Grandview v Doering*, [1976] 2 SCR 621, and was re-articulated as follows:

- There must be a final decision of a court of competent jurisdiction in the prior action;
- The parties to the subsequent litigation must have been parties to or in privy with the parties to the prior action (mutuality);
- The cause of action in the prior action must not be separate and distinct; and
- 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.

Bjarnarson v Manitoba, 1987 CarswellMan 193 (QB), at paras 6-7. [**Tab 16**]

68. Determining whether a cause of action in a new action is separate and distinct from a previous action requires an analysis of the substance of the two actions. In *Scherer v Price Waterhouse Ltd.*, the Court provided the following description of the test for establishing whether a cause of action was separate and distinct:

> That certainly does not mean that parties should have to join in one action all causes of action that they may have against one another, or risk being met with the defence of res judicata. There are many situations, probably the majority of situations, where traditional criteria based upon the distinctness causes of action are quite appropriate as the basis for deciding whether a matter is res Judicata. Examples abound, including claims with respect to different motor accidents, or based on quite different contracts, or based on claims arising out of quite different transactions not part of a longer whole or related series of transactions. But where the prior litigation and the subsequent litigation arise out of the same transaction a claimant should not, particularly in a bankruptcy situation where there is an imperative about settling all claims because, for practical purposes, one of the parties may be going to disappear, be able after failing with a contract claim to bring, with no new evidence, a claim in tort to recover substantially the same amount in respect of the same transaction, or, having failed with a legal claim to bring in the same circumstances a claim based on equity, in each case attempting to rely on the fact that different causes of action are involved. In such circumstances the different cause of action should be treated as if it were no more than a different argument advanced to achieve essentially the same recovery, and the above-quoted dictum from *Hoystead v. Commissioner of Taxation* should be applied. That would be to treat the real confrontation and issues between the parties as the res or the substance or matter of the prior litigation and make it unnecessary to attempt to apply to issue estoppel the expanded scope of res judicata established in *Henderson v. Henderson*. [***Emphasis Added***]

Scherer v Price Waterhouse Ltd., 1985 CarswellOnt 3839 (HCJ), at para 73. [**Tab 17**]

69. In the present action, Maurice and the other Applicants are all attempting to advance a cause of action that is, as the Court described in *Scherer*, a different argument to achieve the result that was sought in the previous proceedings involving Maurice (i.e., membership in Sawridge). The Applicants are using the beneficiary designation issue in this Action as a vehicle for advancing the same cause of action that was dealt with in the 1995 Action, the 2012 Action, and the CHRC Complaint. While there may be some nuances to the Stoney Application that differ from these proceedings, it is clear that at their core, all of these proceedings (including the Stoney Application) ultimately concern the same cause of action.

70. A review of the materials filed to date by the Applicants confirms that their attempt to become involved in this Action is a means of re-arguing the issue of their entitlement to membership. The Applicants are again relying on Bill C-31, the effect of their family's enfranchisement, and the Constitution as a basis for advancing arguments in relation to them having an automatic right to membership. The fact that these arguments are being made in the context of trust-related litigation does not detract from the fact that all of the arguments are connected to a cause of action that has been dealt with on three previous occasions.

71. Furthermore, even if the Applicants are advancing some new basis for arguing that they are members of Sawridge, there is no indication that said argument could not or should not have been argued as part of the earlier proceedings.

72. Finally, with regards to the other two parts of the test for finding cause of action estoppel, Sawridge submits that (much like its submissions regarding issue estoppel) there have been final decisions that involved parties with the requisite level of mutuality. As such, it is Sawridge's position that the doctrine of cause of action estoppel would be a bar to the Applicants' claim that they are beneficiaries under the 1985 Sawridge Trust, and would be grounds to dismiss their application.

c. *Abuse of process*

73. The law regarding the doctrine of abuse of process was summarized in the previous section of these written submissions. Sawridge submits that, for the reasons cited in that section, the doctrine could also be relied upon as a basis for defeating the Stoney Application if this Honourable Court is not prepared to strike the application pursuant to Rule 3.68.

D. ***Sawridge should be awarded enhanced costs***

74. According to the *Rules of Court*, a Court has significant discretion concerning awards of costs. Rule 10.33 outlines a list of considerations that can be taken into account when assessing costs. That list includes the following considerations:

- The conduct of a party that was unnecessary or that unnecessarily lengthened or delayed the action or any stage or step of the action;

- Whether any application, proceeding or step in an action was unnecessary, improper or a mistake; and
- Whether a party has engaged in misconduct.

Rules of Court, Alta Reg 124/2010, at 10.29, 10.31 and 10.33. [**Tab 6**]

75. Courts have recognized that solicitor-clients costs should be awarded against a losing party where that party's conduct was, "reprehensible, scandalous or outrageous."

Young v Young, [1993] 4 SCR 3, at paras 260 and 261. [**Tab 18**]

76. In *Jackson v Trimac Industries Ltd.*, the Court provided an overview of the various circumstances in which it is appropriate to award solicitor-client costs. Among other circumstances, it noted that solicitor-client costs were appropriate in the following instance:

> ...where there is evidence that the plaintiff did something to hinder, delay or confuse the litigation, where there was no serious issue of fact or law which required these lengthy, expensive proceedings, where the positively misconducting party was "contemptuous" of the aggrieved party in forcing that aggrieved party to exhaust legal proceedings to obtain that which was obviously his;...

Jackson v Trimac Industries Ltd., (1993) 8 Alta LR (3d) 403 (QB), at paras 28 and 31. (Aff'd in 1994 ABCA 199, at para 29). [**Tab 19**]

77. The Applicants have unnecessarily delayed this Action by bringing the Stoney Application. This action has been ongoing since 2011. Rather than bringing an application at the early stages of this matter to be added as parties, the Applicants waited until essentially the final pre-trial moment in this Action to make their application. Their decision to wait until the last minute to make this application has resulted in the parties expending time and resources addressing which could have been utilized to advance this Action to trial.

78. The Applicants have also engaged in conduct which could clearly be considered unnecessary and improper. This Application represents the most recent step in a longstanding pattern of Maurice and his family using any and all judicial means to try and assert some entitlement to membership. Maurice has not brought anything new forward to the Stoney Application; rather, he is using the issue of the beneficiary definition under the 1985 Sawridge Trust to engage in a collateral attack of the issue of membership.

79. Taking into account all of Maurice's prior conduct, as well as the fact that he has consistently refused to pay any costs arising from proceedings, Maurice's attempt to involve himself in this Action falls into the type of conduct that the above-cited cases indicated was worthy of an award of solicitor and his own client costs, or, at the very least, of an award for enhanced costs.

V. RELIEF REQUESTED

80. For the above reasons, Sawridge prays that this Honourable Court order that Sawridge be granted the status to intervene in the Stoney Application, pursuant to Rule 2.10 of the *Rules of Court*, on terms which include the following:

(a) Sawridge shall have the right to question the Applicants on any Affidavits filed as part of the Stoney Application;

(b) Sawridge shall have the right to apply to strike the Stoney Application and/or to have the Stoney Application dismissed;

(c) Sawridge shall have the right to make submissions in response to the Stoney Application; and

(d) Sawridge shall have the right to seek costs as against Maurice with respect to the Stoney Application.

81. If Sawridge is granted the status to intervene in the Stoney Application, then Sawridge prays that this Honourable Court orders as follows:

(a) That the Stoney Application be struck pursuant to Rule 3.68 of the *Rules of Court*;

(b) In the alternative, that the Stoney Application be dismissed; and

(c) That costs be paid to Sawridge by the Applicants on a solicitor and his own client basis, or on an enhanced basis.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 30th day of September, 2016.

PARLEE McLAWS LLP

EDWARD H. MOLSTAD, Q.C.
Solicitors for the Sawridge First Nation

LIST OF AUTHORITIES

TAB 1

2000 CarswellNat 1132
Federal Court of Appeal

Huzar v. Canada

2000 CarswellNat 1132, 2000 CarswellNat 5603, [2000] F.C.J. No. 873, 258 N.R. 246

Her Majesty the Queen, in Right of Canada, Department of Indian and Northern Affairs Canada and Walter Patrick Twinn, as Chief of the Sawridge Indian Band and the Sawridge Indian Band, Defendants (Appellants) and Aline Elizabeth Huzar, June Martha Kolosky, William Bartholomew McGillivray, Margaret Hazel Anne Blair, Clara Hebert, John Edward Joseph McGillivray, Maurice Stoney, Allen Austin McDonald, Lorna Jean Elizabeth McRee, Frances Mary Tees, Barbara Violet Miller (nee McDonald), Plaintiffs (Respondents)

Décary J.A., Evans J.A., Sexton J.A.

Judgment: June 13, 2000
Docket: A-326-98

Counsel: *Mr. Philip P. Healey*, for Defendants/Appellants.
Mr. Peter V. Abrametz, for Plaintiffs/Respondents.

Subject: Public; Civil Practice and Procedure

Headnote

Native law --- Bands and band government — Miscellaneous issues

Practice --- Pleadings — Amendment — Application to amend — Practice and procedure

Administrative law --- Action for declaration

Table of Authorities

Statutes considered:

Federal Court Act, R.S.C. 1985, c. F-7

s. 2(1) "federal board, commission or other tribunal" [rep. & sub. 1990, c. 8, s. 1(3)] — considered

s. 18(3) [en. 1990, c. 8, s. 4] — considered

s. 18.1 [en. 1990, c. 8, s. 5] — considered

APPEAL from order granting plaintiffs' motion to amend statement of claim and dismissing defendants' motion to strike the claim.

Evans J.A.:

1 This is an appeal against an order of the Trial Division, dated May 6th, 1998, in which the learned Motions Judge granted the respondents' motion to amend their statement of claim by adding paragraphs 38 and 39, and dismissed the

motion of the appellants, Walter Patrick Twinn, as Chief of the Sawridge Indian Band, and the Sawridge Indian Band, to strike the statement of claim as disclosing no reasonable cause of action.

2 In our respectful opinion, the Motions Judge erred in law in permitting the respondents to amend and in not striking out the unamended statement of claim. The paragraphs amending the statement of claim allege that the Sawridge Indian Band rejected the respondents' membership applications by misapplying the Band membership rules (paragraph 38), and claim a declaration that the Band rules are discriminatory and exclusionary, and hence invalid (paragraph 39).

3 These paragraphs amount to a claim for declaratory or prerogative relief against the Band, which is a federal board, commission or other tribunal within the definition provided by section 2 of the *Federal Court Act*. By virtue of subsection 18(3) of that Act, declaratory or prerogative relief may only be sought against a federal board, commission or other tribunal on an application for judicial review under section 18.1. The claims contained in paragraphs 38 and 39 cannot therefore be included in a statement of claim.

4 It was conceded by counsel for the respondents that, without the proposed amending paragraphs, the unamended statement of claim discloses no reasonable cause of action in so far as it asserts or assumes that the respondents are entitled to Band membership without the consent of the Band.

5 It is clear that, until the Band's membership rules are found to be invalid, they govern membership of the Band and that the respondents have, at best, a right to apply to the Band for membership. Accordingly, the statement of claim against the appellants, Walter Patrick Twinn, as Chief of the Sawridge Indian Band, and the Sawridge Indian Band, will be struck as disclosing no reasonable cause of action.

6 For these reasons, the appeal will be allowed with costs in this Court and in the Trial Division.

Appeal allowed.

TAB 2

3

No. T-[illegible]-12

FEDERAL COURT

BETWEEN:

Maurice Felix Stoney

Applicant

- and -

Sawridge First Nation

Respondent

NOTICE OF APPLICATION

TO THE RESPONDENT: Sawridge First Nation

A PROCEEDING HAS BEEN COMMENCED by the Applicant, Maurice Felix Stoney. The relief claims by the Applicant appears on the following page.

THIS APPLICATION will be heard by the Court at a time and place to be fixed by the Judicial Administrator. Unless the Court orders otherwise, the place of hearing will be as requested by the Applicant. The Applicant requests that this Application be heard at Edmonton, Alberta.

IF YOU WISH TO OPPOSE THIS APPLICATION, to receive notice of any step in the Application or to be served with any documents in the application, you or a solicitor acting for you, must prepare a notice of appearance in Form 305 prescribed by the *Federal Courts Rules*, and serve it on the Applicant's Solicitor, or where the Applicant is self-represented, on the Applicant, WITHIN 10 DAYS after being served with this Notice of Application.

4

Copies of the *Federal Courts Rules*, information concerning the local offices of the Court and other necessary information may be obtained on request to the Administrator of this Court at Ottawa (telephone 613-992-4238) or at any local office.

IF YOU FAIL TO OPPOSE THIS APPLICATION, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU.

May 11, 2012.

ISSUED BY: ORIGINAL SIGNED BY G. CHAMPAGNE A SIGNÉ L'ORIGINAL
Registry Officer

Address of Local Office: Edmonton
Scotia Place Tower 1
Suite 530, 10060 Jasper Avenue
Edmonton, AB, T5J 3R8

TO: Sawridge First Nation

I HEREBY CERTIFY that the above document is a true copy of the original issued out of / filed in the Court on the ____ day of MAY 11 2012 A.D. 20__

Dated this ____ day of MAY 11 2012 20__

G. CHAMPAGNE
REGISTRY OFFICER
AGENT DU GREFFE

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4. In or about 1912, Johnny Stoney and his family were recognized on the first paylist for the Sawridge Band. He was a member of Sawridge, on the paylist until his death in 1956. In 1920, Johnny Stoney was advised that his lands would be part of the Sawridge Reserve.

5. William Stoney, father of Maurice, was the son of Johnny Stoney, and a member of the Sawridge Band. William Stoney lived in Slave Lake. The Sawridge Indian Reserve is located on the northeast boundary of Slave Lake. In 1944, William Stoney and his family, along with other members of Sawridge Band, were enfranchised because he was working.

6. Maurice Stoney applied to Sawridge in 1985 for recognition of his membership which was automatic as a result of Bill C-31 on April 17, 1985 to correct the discrimination under the *Indian Act* membership provisions. The Sawridge Membership Rules did not become effective until September 26, 1985 and these Rules required recognition of all "acquired rights" members including Maurice;

7. Sawridge refused to review the membership application of Maurice submitted in 1985 until December 7, 2011 when Maurice was advised that the Council of Sawridge First Nation had denied his application for membership. On December 19, 2011, Maurice appealed this decision. The Appeal Committee heard this appeal for Maurice's membership on April 21, 2012 and provided their decision on May 7, 2012 upholding the decision of Chief and Council denying his membership.

8. Such further and other matters as this Honourable Court shall permit;

This application will be supported by the following materials:

i. The Resolution Adopting Membership Rules dated July 4, 1985;

ii. Notice from the Minister of Indian Affairs and Northern Development to Sawridge Indian Band dated September 26, 1985;

iii. The Decision of the Sawridge First Nation for Maurice Felix Stoney;

iv. The Membership Application Decision of the Sawridge First Nation for Maurice Stoney dated December 7, 2011;

v. Appeal of Maurice Stoney dated December 19, 2011;

vi. Such further and other materials as may be filed.

7

Notice pursuant to Rule 317

The Applicant requests that the Appeal Committee provide all material relevant to his application on April 21, 2012 including:

(a) All documents related to the membership application of Maurice Stoney and to the decision of Chief and Council and the Appeal Committee.

May 11, 2012.

DAVIS, LLP.

Per: _____
Priscilla Kennedy

DAVIS, LLP.
Barristers and Solicitors
1201 Scotia Tower 2
10060 Jasper Avenue
Edmonton, AB, T5J 4E5
Tel: (780) 429-6830
Fax: (780) 702-4383

TAB 3

8

Federal Court No. T-923-12

FEDERAL COURT

BETWEEN:

Maurice Felix Stoney

Applicant

- and -

Sawridge First Nation

Respondent

AFFIDAVIT OF MAURICE STONEY

I, MAURICE STONEY, of Slave Lake, Alberta, MAKE OATH AND SAY:

1. I was born a member of the Sawridge First Nation and as such I have knowledge of the matters deposed to in this Affidavit unless stated to be made on information and belief, in which case, I do verily believe them to be true.

2. My grandfather, Johnny Stoney (also known as John Stephens), was a member of the Alexander Band under *Treaty No. 6*, who married Henrietta Sinclair, and became a member of what was known as the Lesser Slave Lake Band with Chief Kinosayoo in or about 1895.

3. Chief Kinosayoo signed *Treaty No. 8* in 1899 on behalf of the Lesser Slave Lake Band.

4. Johnny Stoney possessed Lands on the banks of the Lesser Slave River where he operated a stopping place from 1895 on. These lands were initially considered to be held by him in severalty under *Treaty No. 8*. Attached as **Exhibit "A"** is the list of Kinnosayo's Band, Sawridge showing Johnny Stony as number 18 and showing that Johnny Stony transferred from Alexander's Band on September 14, 1910. Attached as **Exhibit "B"** is a letter dated April 15, 1903 to the Deputy Superintendent General; attached as **Exhibit "C"** is a letter dated April 16, 1903 from Indian Affairs; attached as **Exhibit "D"** is a letter dated April 17, 1903 from Indian Affairs; attached as **Exhibit "E"** is a letter dated December 9, 1911 from the Assistant Indian Agent; attached as **Exhibit "F"** is a copy of a letter dated April 18, 1913; attached as **Exhibit "G"** is a copy of a letter dated September 23, 1912(?); and as **Exhibit "H"** is a copy of a letter dated August 19, 1920.

5. In or about 1912, Johnny Stoney and his family were recognized on the first paylist for the Sawridge Band. He was a member of Sawridge, on the paylist until his death in 1956. In 1920, Johnny Stoney was advised by Indian Affairs that his lands would be part of the Sawridge Reserve.

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6. My father was William Stoney, the son of Johnny Stoney, and a member of the Sawridge Band. William Stoney lived in Slave Lake. The Sawridge Indian Reserve is located on the northeast boundary of Slave Lake.

7. In 1944, my father William Stoney and all of his family including me, along with other members of Sawridge Band, were enfranchised because he was working. This meant that I did not have to attend Residential School but I have been involved with the Sawridge First Nation all of my life.

8. I applied to Sawridge First Nation in 1985 for recognition of my membership which was automatic as a result of Bill C-31 on April 17, 1985 to correct the discrimination under the *Indian Act* membership provisions. The Sawridge Membership Rules did not become effective until September 26, 1985 and these Rules required recognition of all "acquired rights" members. Attached as **Exhibit "I"** is a copy of a letter dated September 26, 1985 from the Minister of Indian Affairs and Northern Development to Chief Walter Twinn.

7. Sawridge refused to review my membership application submitted in 1985 until December 7, 2011 when I was advised that the Council of Sawridge First Nation had denied my application for membership. On December 19, 2011, I appealed this decision. The Appeal Committee heard this appeal for my membership on April 21, 2012 and provided their decision on May 7, 2012 upholding the decision of Chief and Council denying my membership. I filed a judicial review of this appeal decision in the Federal Court on May 11, 2012.

8. I make this Affidavit in support of my application for judicial review.

SWORN BEFORE ME at the City of Slave Lake, in the Province of Alberta, this 22 day of May, 2012.

A COMMISSIONER FOR OATHS IN AND FOR THE PROVINCE OF ALBERTA

COLLEEN G. GHOSTKEEPER
A COMMISSIONER FOR OATHS
IN AND FOR THE PROVINCE OF ALBERTA
MY COMMISSION EXPIRES JUNE 25, 20 14

Maurice Stoney

Davis LLP
1201 Scotia Tower 2,
10060 Jasper Ave
Edmonton, Alberta T5J 4E5
Attention: Priscilla Kennedy
Phone: 780-429-6830
Fax: 780-702-4383
File No.: 84021-00001

TAB 4

2013 FC 509, 2013 CF 509
Federal Court

Stoney v. Sawridge First Nation

2013 CarswellNat 1434, 2013 CarswellNat 2006, 2013 FC 509,
2013 CF 509, 228 A.C.W.S. (3d) 605, 432 F.T.R. 253 (Eng.)

Maurice Felix Stoney, Applicant and Sawridge First Nation, Respondent

Aline Elizabeth (McGillivray) Huzar and June Martha (McGillivray)
Kolosky, Applicants and Sawridge First Nation, Respondent

R.L. Barnes J.

Heard: March 05, 2013
Judgment: May 15, 2013
Docket: T-923-12, T-922-12

Counsel: Priscilla Kennedy, for Applicants
Edward H. Molstad, for Respondent

Subject: Public

Headnote

Aboriginal law --- Government of Aboriginal people — Membership

Applicants were descendants of individuals who were at one time members of First Nation group, but who, either voluntarily or by operation of law, lost their band memberships — Applicants were excluded from membership in First Nation by chief and council — Appeal committee upheld chief and council's decision — Applicants brought application for judicial review — Application dismissed — Applicants did not qualify for automatic band membership — Applicants' only option was to apply for membership in accordance with membership rules promulgated by First Nation — Further, applicants were named as plaintiffs in previous action seeking mandatory relief requiring that their names be added to First Nation's membership list, and that action was struck out — Attempt by applicants to reargue question of their automatic right of membership in First Nation was barred by principle of issue estoppel — There was no evidence to make finding of institutional bias — There was no evidence to support finding of breach of s. 15 of Canadian Charter of Rights and Freedoms.

Table of Authorities

Cases considered by *R.L. Barnes J.*:

Danyluk v. Ainsworth Technologies Inc. (2001), 54 O.R. (3d) 214 (headnote only), 201 D.L.R. (4th) 193, 10 C.C.E.L. (3d) 1, 2001 C.L.L.C. 210-033, 272 N.R. 1, 149 O.A.C. 1, 7 C.P.C. (5th) 199, 34 Admin. L.R. (3d) 163, 2001 CarswellOnt 2434, 2001 CarswellOnt 2435, 2001 SCC 44, [2001] 2 S.C.R. 460 (S.C.C.) — referred to

Huzar v. Canada (2000), 2000 CarswellNat 5603, 258 N.R. 246, 2000 CarswellNat 1132 (Fed. C.A.) — referred to

Lavallee v. Louison (1999), 1999 CarswellNat 1771, 1999 CarswellNat 5553 (Fed. T.D.) — referred to

Sawridge Band v. R. (2003), 2003 FCT 347, 2003 CarswellNat 1212, 2003 CFPI 347, 2003 CarswellNat 2857, [2003] 3 C.N.L.R. 344, (sub nom. *Sawridge Indian Band v. Canada*) 232 F.T.R. 54, (sub nom. *Sawridge Band v. Canada*) [2003] 4 F.C. 748 (Fed. T.D.) — considered

Sawridge Band v. R. (2004), 2004 FCA 16, 2004 CarswellNat 130, (sub nom. *Sawridge Indian Band v. Canada*) 316 N.R. 332, 2004 CAF 16, 2004 CarswellNat 966, (sub nom. *Sawridge Indian Band v. Canada*) 247 F.T.R. 160 (note), [2004] 2 C.N.L.R. 316, (sub nom. *Sawridge Indian Band v. Canada*) [2004] 3 F.C.R. 274 (F.C.A.) — considered

Sweetgrass First Nation v. Favel (2007), 63 Admin. L.R. (4th) 207, 2007 CarswellNat 5180, 2007 CF 271, 2007 FC 271, 2007 CarswellNat 567 (F.C.) — referred to

Statutes considered:

Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11
s. 15 — referred to

Federal Courts Act, R.S.C. 1985, c. F-7
s. 18.1 [en. 1990, c. 8, s. 5] — pursuant to

Gender Equity in Indian Registration Act, S.C. 2010, c. 18
Generally — referred to

Indian Act, R.S.C. 1927, c. 98
Generally — referred to

s. 6 — considered

s. 10(7) — considered

s. 114 — referred to

Indian Act, Act to amend the, S.C. 1985, c. 27
Generally — referred to

APPLICATION for judicial review of appeal committee's decision upholding chief and council's decision to exclude applicants from membership in First Nation.

R.L. Barnes J.:

1 This is an application for judicial review pursuant to section 18.1 of the *Federal Courts Act*, RSC, 1985, c F-7. The Applicants are all descendants of individuals who were at one time members of the Sawridge First Nation, but who, either voluntarily or by operation of the law at the time, lost their band memberships. As a result the Applicants were excluded from membership in the Sawridge First Nation. They now ask this Court to review the Sawridge First Nation Appeal Committee's decision to uphold the Sawridge Chief and Council's decision which denied their applications for membership.

2 The father of the Applicant Maurice Stoney was William J. Stoney. William Stoney was a member of the Sawridge First Nation but in April 1944 he applied to the Superintendent General of Indian Affairs to be enfranchised under section 114 of the *Indian Act*, c 98, RSC 1927. In consideration of payments totalling $871.35, William Stoney surrendered his Indian status and his membership in the Sawridge First Nation. By operation of the legislation, William Stoney's wife, Margaret Stoney, and their two children, Alvin Stoney and Maurice Stoney, were similarly enfranchised thereby losing their Indian status and their membership in the Sawridge First Nation.

3 The Applicants Aline Huzar and June Kolosky are sisters and, like Mr. Stoney, they are the grandchildren of Johnny Stoney. The mother of Ms. Huzar and Ms. Kolosky was Johnny Stoney's daughter, Mary Stoney. Mary Stoney married Simon McGillivray in 1921. Because of her marriage Mary Stoney lost both her Indian status and her membership in Sawridge by operation of law. When Ms. Huzar and Ms. Kolosky were born in 1941 and 1937 respectively Mary Stoney was not a member of the Sawridge Band First Nation and she did not reacquire membership before her death in 1979.

4 In 1985, with the passing of Bill C-31, *An Act to amend the Indian Act*, 33 - 34 Eliz II c 27, and pursuant to section 10 of the *Indian Act*, the Sawridge First Nation delivered its membership rules, supporting documentation and bylaws to the Deputy Minister of Indian and Northern Affairs, who accepted them on behalf of the Minister. The Minister subsequently informed Sawridge that notice would be given pursuant to subsection 10(7) of the *Indian Act* that the Sawridge First Nation had control of its membership. From that point on, membership in the Sawridge First Nation was determined based on the Sawridge Membership Rules.

5 Ms. Kolosky submitted her application for membership with the Sawridge First Nation on February 26, 2010. Ms. Huzar submitted her application on June 21, 2010. Mr. Stoney submitted his application on August 30, 2011. In letters dated December 7, 2011, the Applicants were informed that their membership applications had been reviewed by the First Nation Council, and it had been determined that they did not have any specific "right" to have their names entered in the Sawridge Membership List. The Council further stated that it was not compelled to exercise its discretion to add the Applicants' names to the Membership list, as it did not feel that their admission would be in the best interests and welfare of Sawridge.

6 After this determination, "Membership Processing Forms" were prepared that set out a "Summary of First Nation Councils Judgement". These forms were provided to the Applicants and outlined their connection and commitment to Sawridge, their knowledge of the First Nation, their character and lifestyle, and other considerations. In particular, the forms noted that the Applicants had not had any family in the Sawridge First Nation for generations and did not have any current relationship with the Band. Reference was also made to their involvement in a legal action commenced against the Sawridge First Nation in 1995 in which they sought damages for lost benefits, economic losses, and the "arrogant and high-handed manner in which Walter Patrick Twinn and the Sawridge Band of Indians has deliberately, and without cause, denied the Plaintiffs reinstatement as Band Members...". The 1995 action was ultimately unsuccessful. Although the Applicants were ordered to pay costs to the First Nation, those costs remained unpaid.

7 In accordance with section 12 of the Sawridge Membership Rules, the Applicants appealed the Council's decision arguing that they had an automatic right to membership as a result of the enactment of Bill C-31. On April 21, 2012 their appeals were heard before 21 Electors of the Sawridge First Nation, who made up the Appeal Committee. Following written and oral submissions by the Applicants and questions and comments from members of the Appeal Committee, it was unanimously decided that there were no grounds to set aside the decision of the Chief and Council. It is from the Appeal Committee's decision that this application for judicial review stems.

8 The Applicants maintain that they each have an automatic right of membership in the Sawridge First Nation. Mr. Stoney states at para 8 of his affidavit of May 22, 2012 that this right arises from the provisions of Bill C-31. Ms. Huzar and Ms. Kolosky also argue that they "were persons with the right to have their names entered in the [Sawridge] Band List" by virtue of section 6 of the *Indian Act*.

9 I accept that, if the Applicants had such an acquired right of membership by virtue of their ancestry, Sawridge had no right to refuse their membership applications: see *Sawridge Band v. R.*, 2004 FCA 16 (F.C.A.) at para 26, [2004] F.C.J. No. 77 (F.C.A.).

10 Ms. Huzar and Ms. Kolosky rely on the decisions in *Sawridge Band v. R.*, 2003 FCT 347, [2003] 4 F.C. 748 (Fed. T.D.), and *Sawridge Band v. R.*, 2004 FCA 16, [2004] F.C.J. No. 77 (F.C.A.) in support of their claims to automatic Sawridge membership. Those decisions, however, apply to women who had lost their Indian status and their band membership by virtue of marriages to non-Indian men and whose rights to reinstatement were clearly expressed in the amendments to the *Indian Act*, including Bill C-31. The question that remains is whether the descendants of Indian women who were also deprived of their right to band membership because of the inter-marriage of their mothers were intended to be protected by those same legislative amendments.

11 A plain reading of sections 6 and 7 of Bill C-31 indicates that Parliament intended only that persons who had their Indian status and band memberships directly removed by operation of law ought to have those memberships unconditionally restored. The only means by which the descendants of such persons could gain band membership (as distinct from regaining their Indian status) was to apply for it in accordance with a First Nation's approved membership rules. This distinction was, in fact, recognized by Justice James Hugessen in *Sawridge Band v. R.*, 2003 FCT 347 (Fed. T.D.) at paras 27 to 30, [2003] 4 F.C. 748 (Fed. T.D.):

> 27 Although it deals specifically with Band Lists maintained in the Department, section 11 clearly distinguishes between automatic, or unconditional, entitlement to membership and conditional entitlement to membership. Subsection 11(1) provides for automatic entitlement to certain individuals as of the date the amendments came into force. Subsection 11(2), on the other hand, potentially leaves to the band's discretion the admission of the descendants of women who "married out."
>
> 28 The debate in the House of Commons, prior to the enactment of the amendments, reveals Parliament's intention to create an automatic entitlement to women who had lost their status because they married non-Indian men. Minister Crombie stated as follows (*House of Commons Debates*, Vol. II, March 1, 1985, page 2644):
>
> > ... today, I am asking Hon. Members to consider legislation which will eliminate two historic wrongs in Canada's legislation regarding Indian people. These wrongs are discriminatory treatment based on sex and the control by Government of membership in Indian communities.
>
> 29 A little further, he spoke about the careful balancing between these rights in the Act. In this section, Minister Crombie referred to the difference between status and membership. He stated that, while those persons who lost their status and membership should have both restored, the descendants of those persons are only automatically entitled to status (*House of Commons Debates*, idem, at page 2645):
>
> > This legislation achieves balance and rests comfortably and fairly on the principle that those persons who lost status and membership should have their status and membership restored. [page766] While there are some who would draw the line there, in my view fairness also demands that the first generation descendants of those who were wronged by discriminatory legislation should have status under the Indian Act so that they will be eligible for individual benefits provided by the federal Government. However, their relationship with respect to membership and residency should be determined by the relationship with the Indian communities to which they belong.
>
> 30 Still further on, the Minister stated the fundamental purposes of amendments, and explained that, while those purposes may conflict, the fairest balance had been achieved (*House of Commons Debates*, idem, at page 2646):
>
> > ... I have to reassert what is unshakeable for this Government with respect to the Bill. First, it must include removal of discriminatory provisions in the Indian Act; second, it must include the restoration of status and

> membership to those who lost status and membership as a result of those discriminatory provisions; and third, it must ensure that the Indian First Nations who wish to do so can control their own membership. Those are the three principles which allow us to find balance and fairness and to proceed confidently in the face of any disappointment which may be expressed by persons or groups who were not able to accomplish 100 per cent of their own particular goals...
>
> [Emphasis added]

This decision was upheld on appeal in *Sawridge Band v. R.*, 2004 FCA 16, [2004] F.C.J. No. 77 (F.C.A.).

12 The legislative balance referred to by Justice Hugessen is also reflected in the 2010 Legislative Summary of Bill C-3 titled the *Gender Equity in Indian Registration Act*, SC 2010, c 18. There the intent of Bill C-31 is described as follows:

> Bill C-31 severed status and band membership for the first time and authorized bands to control their own membership and enact their own membership codes (section 10). For those not exercising that option, the Department of Indian Affairs would maintain "Band Lists" (section 11). Under the legislation's complex scheme some registrants were granted automatic band membership, while others obtained only conditional membership. The former group included women who had lost status by marrying out and were reinstated under paragraph 6(1)(c). The latter group included their children, who acquired status under subsection 6(2).
>
> [Emphasis added]

13 While Mary Stoney would have an acquired right to Sawridge membership had she been alive when Bill C-31 was enacted, the same right did not accrue to her children. Simply put neither Ms. Huzar or Ms. Kolosky qualified under section 11 of Bill C-31 for automatic band membership. Their only option was to apply for membership in accordance with the membership rules promulgated by Sawridge.

14 This second generation cut-off rule has continued to attract criticism as is reflected in the Legislative Summary at p 13, para 34:

> 34. The divisiveness has been exacerbated by the Act's provisions related to band membership, under which not all new or reinstated registrants have been entitled to automatic membership. As previously mentioned, under provisions in Bill C-31, women who had "married out" and were reinstated did automatically become band members, but their children registered under subsection 6(2) have been eligible for conditional membership only. In light of the high volume of new or returning "Bill C-31 Indians" and the scarcity of reserve land, automatic membership did not necessarily translate into a right to reside on-reserve, creating another source of internal conflict.

Notwithstanding the above-noted criticism, the legislation is clear in its intent and does not support a claim by Ms. Huzar and Ms. Kolosky to automatic band membership.

15 I also cannot identify anything in Bill C-31 that would extend an automatic right of membership in the Sawridge First Nation to William Stoney. He lost his right to membership when his father sought and obtained enfranchisement for the family. The legislative amendments in Bill C-31 do not apply to that situation.

16 Even if I am wrong in my interpretation of these legislative provisions, this application cannot be sustained at least in terms of the Applicants' claims to automatic band membership. All of the Applicants in this proceeding, among others, were named as Plaintiffs in an action filed in this Court on May 6, 1998 seeking mandatory relief requiring that their names be added to the Sawridge membership list. That action was struck out by the Federal Court of Appeal in a decision issued on June 13, 2000 for the following reasons:

> [4] It was conceded by counsel for the respondents that, without the proposed amending paragraphs, the unamended statement of claim discloses no reasonable cause of action in so far as it asserts or assumes that the respondents are entitled to Band membership without the consent of the Band.

> [5] It is clear that, until the Band's membership rules are found to be invalid, they govern membership of the Band and that the respondents have, at best, a right to apply to the Band for membership. Accordingly, the statement of claim against the appellants, Walter Patrick Twinn, as Chief of the Sawridge Indian Band, and the Sawridge Indian Band, will be struck as disclosing no reasonable cause of action.

See *Huzar v. Canada*, [2000] F.C.J. No. 873, 258 N.R. 246 (Fed. C.A.).

17 It is not open to a party to relitigate the same issue that was conclusively determined in an earlier proceeding. The attempt by these Applicants to reargue the question of their automatic right of membership in Sawridge is barred by the principle of issue estoppel: see *Danyluk v Ainsworth Technologies Inc.* 2001 SCC 44, [2001] 2 S.C.R. 460 (S.C.C.) .

18 The Applicants are, nevertheless, fully entitled to challenge the lawfulness of the appeal decision rejecting their membership applications.

19 The Applicants did not challenge the reasonableness of the appeal decision but only the fairness of the process that was followed. Their argument is one of institutional bias and it is set out with considerable brevity at para 35 of the Huzar and Kolosky Memorandum of Fact and Law:

> 35. It is submitted that the total membership of Sawridge First Nation is small being in the range of 50 members. Only three applicants have been admitted to membership since 1985 and these three are (were) the sisters of deceased Chief, Walter Twinn. The Appeal Committee consisted of 21 of the members of Sawridge and three of these 21 were the Chief, Roland Twinn and Councillors, Justin Twinn and Winona Twin, who made the original decision appealed from.

20 In the absence of any other relevant evidence, no inference can be drawn from the limited number of new memberships that have been granted by Sawridge since 1985. While the apparent involvement of the Chief and two members of the Band Council in the work of the Appeal Committee might give rise to an appearance of bias, there is no evidence in the record that would permit the Court to make a finding one way or the other or to ascertain whether this issue was waived by the Applicants' failure to raise a concern at the time.

21 Indeed, it is surprising that this issue was not fully briefed by the Applicants in their affidavits or in their written and oral arguments. It is of equal concern that no cross-examinations were carried out to provide an evidentiary foundation for this allegation of institutional bias. The issue of institutional bias in the context of small First Nations with numerous family connections is nuanced and the issue cannot be resolved on the record before me: see *Sweetgrass First Nation v. Favel*, 2007 FC 271 (F.C.) at para 19, [2007] F.C.J. No. 347 (F.C.), and *Lavallee v. Louison*, [1999] F.C.J. No. 1350 (Fed. T.D.) at paras 34-35, (1999), 91 A.C.W.S. (3d) 337 (Fed. T.D.).

22 The same concern arises in connection with the allegation of a section 15 Charter breach. There is nothing in the evidence to support such a finding and it was not advanced in any serious way in the written or oral submissions. The record is completely inadequate to support such a claim to relief. There is also nothing in the record to establish that the Crown was provided with any notice of what constitutes a constitutional challenge to the *Indian Act*. Accordingly, this claim to relief cannot be sustained.

23 For the foregoing reasons these applications are dismissed with costs payable to the Respondent.

Judgment

THIS COURT'S JUDGMENT is that these applications are dismissed with costs payable to the Respondent.

Application dismissed.

End of Document

TAB 5

2016 ABCA 51
Alberta Court of Appeal

Stoney v. Twinn

2016 CarswellAlta 238, 2016 ABCA 51, [2016] A.W.L.D. 859, 264 A.C.W.S. (3d) 17

In the Matter of the Trustee Act, RSA 2000, c T-8 as amended

In the Matter of The Sawridge Band Inter Vivos Settlement Created by Chief Walter Patrick Twinn, of the Sawridge Indian Band, No. 19, now known as the Sawridge First Nation, on April 15, 1985 (the "1985 Sawridge Trust")

Maurice Stoney, Applicant (Putative) and Roland Twinn, Catherine Twinn, Walter Felix Twinn, Bertha L'Hirondelle, and Clara Midbo, As Trustees for the 1985 Sawridge Trust, Respondents and Public Trustee of Alberta, Respondent

Jack Watson J.A.

Heard: February 17, 2016
Judgment: February 26, 2016
Docket: Edmonton Appeal 1603-0033-AC

Counsel: P.E. Kennedy, for Applicant / Putative
M.S. Poretti, D.C.E. Bonara, for Respondents, Roland Twinn, Walter Felix Twinn, Bertha L'Hirondelle, and Clara Midbo (Sawridge Trustees)
E.H. Molstad, Q.C., for Respondent, Sawridge First Nation
C. Osualdini, for Respondent, Catherine Twinn
E. Meehan, Q.C., J.L. Hutchinson, for Respondent, Public Trustee of Alberta

Subject: Civil Practice and Procedure; Estates and Trusts; Public

Headnote

Aboriginal law --- Practice and procedure — Appeals — Miscellaneous

Sawridge Band Trust was created in 1985 to hold property in trust for members of Sawridge First Nation — Applicant claimed he was member of First Nation and that as consequence of that he had right to some share in distribution of trust when that was eventually carried out — Court issued decision in 2015 concerning involvement of Public Guardian and Trustee and production of documents — Case management judge sought to provide well-defined process to achieve fair and just distribution of trust assets — That decision was under appeal by two parties — Applicant sought extension of time to appeal — First Nation claimed that applicant was merely intermeddler seeking to intrude issue of membership into appeal — Application dismissed — In decision under appeal, case management judge avoided issue of membership — Decision was attempting to regulate processes for dealing with trust — Issue of whether or not applicant should be considered to be entitled to be beneficiary in trust had not yet arisen and would be decided at some future date whether or not appeal went ahead — On face of things, applicant did not have participatory right in relation to proceedings on trust, did not have standing to appeal within meaning of case decided by Court of Appeal and was, in fact, stranger to proceedings insofar as appeal from decision to Court of Appeal was concerned — Mere existence of decision under appeal and of potential decision of Court of Appeal in relation to it did not create condition that would give rise to right of appeal on behalf of applicant in this respect — There was not, at this point in time, arguable point by applicant as against judgment under appeal — There was no reasonable chance of success on appeal by applicant.

Table of Authorities

Cases considered by *Jack Watson J.A.*:

Attila Dogan Construction and Installation Co. v. AMEC Americas Ltd. (2015), 2015 ABCA 206, 2015 CarswellAlta 1090, 602 A.R. 135, 647 W.A.C. 135 (Alta. C.A.) — distinguished

Cairns v. Cairns (1931), [1931] 3 W.W.R. 335, 26 Alta. L.R. 69, [1931] 4 D.L.R. 819, 1931 CarswellAlta 52 (Alta. C.A.) — considered

Dreco Energy Services Ltd. v. Wenzel (2008), 2008 ABCA 36, 2008 CarswellAlta 131, 429 A.R. 51, 421 W.A.C. 51 (Alta. C.A.) — followed

1985 Sawridge Trust (Trustees of) v. Alberta (Public Trustee) (2015), 2015 ABQB 799, 2015 CarswellAlta 2373 (Alta. Q.B.) — referred to

Statutes considered:

Trustee Act, R.S.A. 2000, c. T-8
Generally — referred to

Words and phrases considered:

Sawridge Band *Inter Vivos* Settlement

The Sawridge Band *Inter Vivos* Settlement created back on April 15, 1985 . . . is referred to in the various proceedings as the Sawridge Band Trust.

APPLICATION to extend time to file appeal.

***Jack Watson J.A.*:**

1 This is Court of Appeal file number 1603-0033-AC, In the Matter of the *Trustee Act*, RSA 2000, c T-8 as amended; and In the Matter of The Sawridge Band *Inter Vivos* Settlement Created by Chief Walter Patrick Twinn, of the Sawridge Indian Band, No. 19, now known as the Sawridge First Nation, on April 15, 1985 (the "1985 Sawridge Trust").

2 The application before me now is by a gentleman named Maurice Stoney. Mr. Stoney claims, with some vigour, that he is a member of the First Nation in question and that he has been for a long time, and that as a member of the First Nation, certain legal rights of his follow from this.

3 The matter that is under appeal by two parties now — and for which the subject matter before me is a motion for an extension of time for a further appeal — is a decision by Mr. Justice Thomas that was given at [*1985 Sawridge Trust (Trustees of) v. Alberta (Public Trustee)*] 2015 ABQB 799 (Alta. Q.B.). His decision was in the course of a proceeding which dealt with The Sawridge Band *Inter Vivos* Settlement created back on April 15, 1985, which is referred to in the various proceedings as the Sawridge Band Trust. As mentioned, Mr. Stoney's position is that he is a member of the Sawridge First Nation and that as a consequence of that he presumably has a right to some share in the distribution of the trust when that is eventually carried out.

4 The application that is specifically is before me at this time is by Mr. Stoney for an extension of time to appeal the judgment of Mr. Justice Thomas. The part of the reasons of Mr. Justice Thomas which are objected to in the proposed appeal by Mr. Stoney arise from his role as a case manager in connection with the ongoing proceeding dealing with the trust. His position is that both inappropriately and unfairly, Mr. Justice Thomas in his role as case manager has made final determinations which seriously and adversely affect his situation *vis-à-vis* his rights to participate in the trust. It is interesting to note that in the course of so arguing, his supporting affidavit which was sworn on October 27, 2015 in para 13 contains the broader assertion that:

> For thirty years, I have been seeking to have my membership in Sawridge be recognized.

In that respect, therefore, Mr. Stoney has the concern that his membership is also an issue in the judgment of Mr. Justice Thomas, either directly or indirectly, by virtue of these case management determinations which Mr. Justice Thomas made.

5 During the course of argument with counsel, I referred counsel to para 56 of the judgment of Mr. Justice Thomas in which he purported to designate what he described as: "the potential recipients of a distribution of the 1985 Sawridge Trust...". I say purported because the existing two appeals from his decision dispute what he has said and done. He identified six categories.

6 The other appeals by the other parties in relation to that turn very much on that paragraph. I will, therefore, not offer any extensive discussion about what the implications are of that paragraph nor whether it is the product of fair process, nor whether it is accurate or anything of that sort. I merely observe that that paragraph would appear to be a key triggering paragraph in particular for Mr. Stoney's request that he also be part of the process before the Court of Appeal, in relation to the challenges to the judgment of Mr. Justice Thomas.

7 Indeed, Mr. Stoney's arguments to a large extent replicate points put forward by the appellants that have existing appeals against the judgment of Mr. Justice Thomas on the question of fair process. Certainly, Ms. Kennedy in her eloquent submissions on behalf of Mr. Stoney made considerable remarks in connection with the manner in which the issue of para 56 and, indeed, paras 32 and following in Mr. Justice Thomas' judgment arose. She takes the position that, in effect, Mr. Justice Thomas has seriously side-swiped the interest of Mr. Stoney and, although they are not appellants, the interest of the other two ladies whose names have been mentioned in the course of these proceedings.

8 The position that has been taken in answer to the application for an extension of time is to invoke firstly, the Reasons for Judgment of Mr. Justice Slatter in *Attila Dogan Construction and Installation Co. v. AMEC Americas Ltd.*, 2015 ABCA 206, 602 A.R. 135 (Alta. C.A.). The position taken on behalf of the First Nation, although the First Nation has not been, strictly speaking, a party to the proceedings before Mr. Justice Thomas, is that the objections and complaints made by Mr. Stoney (and, although they are not here, made by the two ladies presumably) are long since settled by the Federal Court and by other proceedings and other courts. The First Nation contends that the claims of Mr. Stoney, therefore, are not live questions here, whether or not they were implicitly raised in Mr. Justice Thomas' decision. They are certainly not the subject matter of the current appeals from Mr. Justice Thomas' decision, at least in the opinion of the First Nation.

9 The response in answer to the extension of time application given by the Trustees of the trust — albeit not for this purpose including a dissenting Trustee — are that Mr. Stoney's position does not meet any of the criteria contained in para 4 of the judgment of *Attila Dogan* to which I have just made reference. The position taken on that aspect should be addressed, therefore, first.

10 The position taken by the Trustees is that having regard to the way in which the record unfolded in this matter, there is not really adequate evidence before this Court to make a determination as to whether the principles in *Cairns v. Cairns*, [1931] 4 D.L.R. 819 (Alta. C.A.), which are quoted by Mr. Justice Slatter in *Attila Dogan*, are met. The situation

is that they are suggesting that the affidavit evidence does not provide a reasonable explanation for the failure to file on time and it further does not provide an indication of a *bona fide* intention to appeal while the right of appeal existed.

11 I am prepared to infer that, in fact, there would have been intention to appeal while the right of appeal existed had Ms. Kennedy been aware of the judgment of Mr. Justice Thomas. Further, while there are certainly some strengths to the argument against Ms. Kennedy's position relative to the explanation for failure to file the appeal on time, I am satisfied that that would not be of itself a basis upon which to apply the *Attila Dogan* and *Cairns* test against the application being made on behalf of Mr. Stoney.

12 It seems to me that the real issue that comes to the forefront of this matter is whether under para 4(e) of *Attila Dogan* there is a reasonable chance of success on the appeal, which Justice Slatter goes on to describe as a reasonably arguable appeal. This brings back into focus the objection made by the First Nation relative to whether or not the position of Mr. Stoney, at this stage, is merely that of an intermeddler seeking to intrude the issue of membership into an appeal to the Court of Appeal from Mr. Justice Thomas when Mr. Justice Thomas did not deal with membership.

13 Indeed, it is quite clear from the reasoning of Mr. Justice Thomas that he attempted to avoid the question of membership. That was because he was taking on, in his view, the strict issue of the administration of the trust. From the reasons that he provided, the Federal Court was the proper location in which to determine whether a person is or is not a member of that particular First Nation. Whether or not that is correct and whether or not that issue would be resolved later by this Court on the existing two appeals is an interesting point which I do not need to come to grips with here. But the point of the matter is that Mr. Justice Thomas, at least, did not consider himself to be dealing with the question of membership.

14 Mr. Justice Thomas' decision, in this respect, was attempting to regulate the processes for dealing with the trust. Insofar as doing so is concerned, it is clear that the administration of the trust would have a considerable effect on people who are entitled to be beneficiaries. The argument placed before me for Mr. Stoney is that a person who has a legitimate status as a member, and who has been foreclosed in the opportunity to put that position forward so far, may still very well be a person who should at some point by a competent authority be determined to be a beneficiary under the trust.

15 The difficulty with the argument in that respect, however, from the point of view of the viability of an appeal under the *Attila Dogan* case, is that once the appeal gets to the Court of Appeal from Mr. Justice Thomas' decision, the impact of the decision upon Mr. Stoney's situation is yet to be understood.

16 It seems to me that if the arguments that are put forward by the existing appellants from Mr. Justice Thomas' reasons hold sway in some way or another — and I would have to speculate what might happen there — that could very well address entirely the position of Ms. Kennedy's client. At least it would arguably do so insofar as her concern that Mr. Justice Thomas' judgment somehow stands in the path of Mr. Stoney in terms of getting some rights as a beneficiary.

17 It has already been pointed out in the argument before me that there has not been, up to now, an application made by Ms. Kennedy's client, Mr. Stoney, to be a participant in the proceedings before Mr. Justice Thomas, in any formal way at least. He is certainly not named as a party there, but with admirable fairness, Ms. Bonora, counsel for the Trustees, appreciates that there is no specific time running on this point before Mr. Justice Thomas. That is because the issue of who is a beneficiary for the purposes of division of this trust has not actually been made yet.

18 In fact, one of the reasons why Mr. Justice Thomas got to making his decision under appeal in the first place was because he was attempting to make determinations for the process to determine who gets to decide who is beneficiary and so forth.

19 That being the case, Ms. Bonora quite fairly points out that Mr. Stoney's position as to whether or not he should be considered to be entitled to be a beneficiary in the trust has not arisen yet before Justice Thomas. That is going to have to be decided at some future date whether or not the appeal goes ahead from Mr. Justice Thomas and whether

or not Mr. Justice Thomas' judgment, in this particular regard, is upheld or changed or in some way dealt with by the Court of Appeal.

20 It therefore follows that in terms of determining reasonable chance of success in the appeal, the embargo against the participation of Mr. Stoney that is or has been created by the various proceedings that have occurred in various courts including the Federal Court as raised by the First Nation, has an enhanced status for the purposes of determining the extension of time here. That is because, on the face of things, Mr. Stoney does not have a participatory right in relation to the proceedings on the trust, does not have standing to appeal within the meaning of the case of *Dreco Energy Services Ltd. v. Wenzel*, 2008 ABCA 36, 429 A.R. 51 (Alta. C.A.) at paras 5 to 8, and is, in fact, a stranger to the proceedings insofar as an appeal from the decision of Mr. Justice Thomas to the Court of Appeal is concerned.

21 Since Mr. Stoney is interested in matters which were not entirely addressed by Mr. Justice Thomas, and which may or may not be addressed by the Court in the medium of other arguments by other parties before the Court of Appeal, I am left with the situation where it seems to be quite clear that there is no reasonable chance of success on an appeal by Mr. Stoney. That is because no one is going to say anything about him, particularly when the appeal is heard. If incidentally the result of the appeal is that somehow his status or ability to apply as a beneficiary is improved, so be it. The mere existence of that judgment and of a potential decision of the Court of Appeal in relation to the judgment of Mr. Justice Thomas does not, it seems to me, create a condition that would give rise to a right of appeal on behalf of Mr. Stoney in this respect.

22 Having said all that, then, I am not satisfied that an extension of time should be granted to Mr. Stoney to appeal the decision of Mr. Justice Thomas, even if I could discern precisely what it is about the decision of Mr. Justice Thomas that is directly under attack, or would be under attack, on an appeal by Mr. Stoney. I can make inferences about what Mr. Stoney might hope might unfold on appeal, but there is not, at this point in time, an arguable point by Mr. Stoney as against Justice Thomas' judgment, bearing in mind what the judgment is and what it says.

23 The application is dismissed.

[Discussion with counsel re costs]

Jack Watson J.A.:

24 Costs will follow for the parties that participated on the motion itself. And any parties who did not, do not get anything.

Application dismissed.

TAB 6

Province of Alberta

JUDICATURE ACT

ALBERTA RULES OF COURT

Alberta Regulation 124/2010

With amendments up to and including Alberta Regulation 85/2016

Office Consolidation

Queen's Printer Bookstore
7th Floor, Park Plaza
10611 - 98 Avenue
Edmonton, AB T5K 2P7
Phone: 780-427-4952
Fax: 780-452-0668

E-mail: qp@gov.ab.ca
Shop on-line at www.qp.alberta.ca

Note

All persons making use of this consolidation are reminded that it has no legislative sanction, that amendments have been embodied for convenience of reference only. The official Statutes and Regulations should be consulted for all purposes of interpreting and applying the law.

Intervenor status

2.10 On application, a Court may grant status to a person to intervene in an action subject to any terms and conditions and with the rights and privileges specified by the Court.

Division 2
Litigation Representatives

Litigation representative required

2.11 Unless otherwise ordered by the Court, the following individuals or estates must have a litigation representative to bring or defend an action or to continue or to participate in an action, or for an action to be brought or to be continued against them:

(a) an individual under 18 years of age;

(b) an individual declared to be a missing person under section 7 of the *Public Trustee Act*;

(c) an adult who, in respect of matters relating to a claim in an action, lacks capacity, as defined in the *Adult Guardianship and Trusteeship Act*, to make decisions;

(d) an individual who is a represented adult under the *Adult Guardianship and Trusteeship Act* in respect of whom no person is appointed to make a decision about a claim;

(e) an estate for which no personal representative has obtained a grant under the *Surrogate Rules* (AR 130/95) and that has an interest in a claim or intended claim.

AR 124/2010 s2.11;122/2012

Types of litigation representatives and service of documents

2.12(1) There are 3 types of litigation representatives under these rules:

(a) an automatic litigation representative described in rule 2.13;

(b) a self-appointed litigation representative under rule 2.14;

(c) a Court-appointed litigation representative under rule 2.15, 2.16 or 2.21.

(2) Despite any other provision of these rules, if an individual has a litigation representative in an action,

(a) a reply is filed and served by a plaintiff, plaintiff-by-counterclaim or third party plaintiff, as the case may be, or

(b) the time for filing and serving a reply expires,

whichever is earlier.

(3) The close of pleadings against one party represents the close of pleadings against all parties to that pleading.

Division 5
Significant Deficiencies in Claims

Court options to deal with significant deficiencies

3.68(1) If the circumstances warrant and a condition under subrule (2) applies, the Court may order one or more of the following:

(a) that all or any part of a claim or defence be struck out;

(b) that a commencement document or pleading be amended or set aside;

(c) that judgment or an order be entered;

(d) that an action, an application or a proceeding be stayed.

(2) The conditions for the order are one or more of the following:

(a) the Court has no jurisdiction;

(b) a commencement document or pleading discloses no reasonable claim or defence to a claim;

(c) a commencement document or pleading is frivolous, irrelevant or improper;

(d) a commencement document or pleading constitutes an abuse of process;

(e) an irregularity in a commencement document or pleading is so prejudicial to the claim that it is sufficient to defeat the claim.

(3) No evidence may be submitted on an application made on the basis of the condition set out in subrule (2)(b).

(4) The Court may

(a) strike out all or part of an affidavit that contains frivolous, irrelevant or improper information;

(b) strike out all or any pleadings if a party without sufficient cause does not

(i) serve an affidavit of records in accordance with rule 5.5,

(ii) comply with rule 5.10, or

(iii) comply with an order under rule 5.11.

Division 6
Refining Claims and Changing Parties

Subdivision 1
Joining and Separating Claims and Parties

Joining claims

3.69(1) A party may join 2 or more claims in an action unless the Court otherwise orders.

(2) A party may sue or be sued in different capacities in the same action.

(3) If there is more than one defendant or respondent, it is not necessary for each to have an interest

(a) in all the remedies claimed or sought, or

(b) in each claim included in the action.

Parties joining to bring action

3.70(1) Two or more parties may join to bring an action, and a plaintiff or originating applicant may make a claim against 2 or more persons as defendants or respondents in an action, if

(a) the claim arises out of the same transaction or occurrence or series of transactions or occurrences,

(b) a question of law or fact common to the parties is likely to arise, or

(c) the Court permits.

(2) This rule applies irrespective of the remedy claimed by the plaintiff or originating applicant and whether or not 2 or more plaintiffs or originating applicants seek the same remedy.

(c) any further written argument.

(5) The respondent to the appeal must, within 10 days after service of the notice of appeal, file and serve on the appellant any written argument the respondent wishes to make.

Decision of judge

10.27(1) After hearing an appeal from a review officer's decision, the judge may, by order, do one or more of the following:

(a) confirm, vary or revoke the decision;

(b) revoke the decision and substitute a decision;

(c) revoke all or part of the decision and refer the matter back to the review officer or to another review officer;

(d) make any other order the judge considers appropriate.

(2) If the amount of lawyer's charges payable pursuant to the decision of the review officer has been paid and, after payment, is reduced on appeal, the lawyer may be ordered to return the excess and, if the lawyer fails to do so, the lawyer, in addition to being liable for that amount, may be found guilty of a civil contempt.

AR 124/2010 s10.27;163/2010

Division 2
Recoverable Costs of Litigation

Subdivision 1
General Rule, Considerations and Court Authority

Definition of "party"

10.28 In this Division, "party" includes a person filing or participating in an application or proceeding who is or may be entitled to or subject to a costs award.

General rule for payment of litigation costs

10.29(1) A successful party to an application, a proceeding or an action is entitled to a costs award against the unsuccessful party, and the unsuccessful party must pay the costs forthwith, notwithstanding the final determination of the application, proceeding or action, subject to

(a) the Court's general discretion under rule 10.31,

(b) the assessment officer's discretion under rule 10.41,

(c) particular rules governing who is to pay costs in particular circumstances,

(d) an enactment governing who is to pay costs in particular circumstances, and

(e) subrule (2).

(2) If an application or proceeding is heard without notice to a party, the Court may

(a) make a costs award with respect to the application or proceeding, or

(b) defer making a decision on who is liable to pay the costs of the application or proceeding until every party is served with notice of the date, time and place at which the Court will consider who is liable to pay the costs.

When costs award may be made

10.30(1) Unless the Court otherwise orders or these rules otherwise provide, a costs award may be made

(a) in respect of an application or proceeding of which a party had notice, after the application has been decided,

(b) in respect of a settlement of an action, application or proceeding, or any part of any of them, in which it is agreed that one party will pay costs without determining the amount, and

(c) in respect of trials and all other matters in an action, after judgment or a final order has been entered.

(2) If the Court does not make a costs award or an order for an assessment officer to assess the costs payable when an application or proceeding is decided or when judgment is pronounced or a final order is made, either party may request from an assessment officer an appointment date for an assessment of costs under rule 10.37.

Court-ordered costs award

10.31(1) After considering the matters described in rule 10.33, the Court may order one party to pay to another party, as a costs award, one or a combination of the following:

(a) the reasonable and proper costs that a party incurred to file an application, to take proceedings or to carry on an action, or that a party incurred to participate in an application, proceeding or action, or

(b) any amount that the Court considers to be appropriate in the circumstances, including, without limitation,

(i) an indemnity to a party for that party's lawyer's charges, or

(ii) a lump sum instead of or in addition to assessed costs.

(2) Reasonable and proper costs under subrule (1)(a)

(a) include the reasonable and proper costs that a party incurred to bring an action;

(b) unless the Court otherwise orders, include costs incurred by a party

(i) in an assessment of costs before the Court, or

(ii) in an assessment of costs before an assessment officer;

(c) do not include costs related to a dispute resolution process described in rule 4.16 or a judicial dispute resolution process under an arrangement described in rule 4.18 unless a party engages in serious misconduct in the course of the dispute resolution process or judicial dispute resolution process;

(d) do not include, unless the Court otherwise orders, the fees and other charges of an expert for an investigation or inquiry or the fees and other charges of an expert for assisting in the conduct of a summary trial or a trial.

(3) In making a costs award under subrule (1)(a), the Court may order any one or more of the following:

(a) one party to pay to another all or part of the reasonable and proper costs with or without reference to Schedule C;

(b) one party to pay to another an amount equal to a multiple, proportion or fraction of an amount set out in any column of the tariff in Division 2 of Schedule C or an amount based on one column of the tariff, and to pay to another party or parties an amount based on amounts set out in the same or another column;

(c) one party to pay to another party all or part of the reasonable and proper costs with respect to a particular issue, application or proceeding or part of an action;

(d) one party to pay to another a percentage of assessed costs, or assessed costs up to or from a particular point in an action.

(4) The Court may adjust the amount payable by way of deduction or set-off if the party that is liable to pay a costs award is also entitled to receive an amount under a costs award.

(5) In appropriate circumstances, the Court may order, in a costs award, payment to a self-represented litigant of an amount or part of an amount equivalent to the fees specified in Schedule C.

(6) The Court's discretion under this rule is subject to any specific requirement of these rules about who is to pay costs and what costs are to be paid.

Costs in class proceeding

10.32 In a proceeding under the *Class Proceedings Act* or in a representative action, the Court, in determining whether a costs award should be made against the unsuccessful representative party, may take into account one or more of the following factors, in addition to any other factors the Court considers appropriate:

(a) the public interest;

(b) whether the action involved a novel point of law;

(c) whether the proceeding or action was a test case;

(d) access to justice considerations.

Court considerations in making costs award

10.33(1) In making a costs award, the Court may consider all or any of the following:

(a) the result of the action and the degree of success of each party;

(b) the amount claimed and the amount recovered;

(c) the importance of the issues;

(d) the complexity of the action;

(e) the apportionment of liability;

(f) the conduct of a party that tended to shorten the action;

(g) any other matter related to the question of reasonable and proper costs that the Court considers appropriate.

(2) In deciding whether to impose, deny or vary an amount in a costs award, the Court may consider all or any of the following:

(a) the conduct of a party that was unnecessary or that unnecessarily lengthened or delayed the action or any stage or step of the action;

(b) a party's denial of or refusal to admit anything that should have been admitted;

(c) whether a party started separate actions for claims that should have been filed in one action or whether a party unnecessarily separated that party's defence from that of another party;

(d) whether any application, proceeding or step in an action was unnecessary, improper or a mistake;

(e) an irregularity in a commencement document, pleading, affidavit, notice, prescribed form or document;

(f) a contravention of or non-compliance with these rules or an order;

(g) whether a party has engaged in misconduct.

Court-ordered assessment of costs

10.34(1) The Court may order an assessment of costs by an assessment officer and may give directions to the assessment officer about the assessment.

(2) The Court must keep a record on the court file of a direction

(a) given to an assessment officer,

(b) requested by a party and refused by the Court, or

(c) requested by a party that the Court declines to make but leaves to an assessment officer's discretion.

Subdivision 2
Assessment of Costs by Assessment Officer

Preparation of bill of costs

10.35(1) A party entitled to payment of costs must prepare a bill of costs in Form 44

(a) if that party wishes or is required to have the costs assessed by an assessment officer, or

TAB 7

2005 ABCA 320
Alberta Court of Appeal

Papaschase Indian Band No. 136 v. Canada (Attorney General)

2005 CarswellAlta 1407, 2005 ABCA 320, [2005] A.J. No. 1273, 143 A.C.W.S. (3d) 211, 363 W.A.C. 301, 380 A.R. 301

Rose Lameman, Francis Saulteaux, Nora Alook, Samuel Waskewitch, and Elsie Gladue on their own behalf and on behalf of all descendants of the Papaschase Indian Band No. 136 (Respondents / Appellants / Plaintiffs) and Attorney General of Canada (Respondent / Respondent / Defendant) and Her Majesty the Queen in Right of Alberta (Respondent / Respondent / Third Party) and Federation of Saskatchewan Indian Nations (Applicant)

Fraser C.J.A., Picard J.A., and Russell J.A.

Heard: September 22, 2005
Judgment: September 22, 2005
Docket: Edmonton Appeal 0403-0299-AC

Counsel: J. Tannahill-Marcano for Respondents, Rose Lameman et al.
M.E. Annich for Respondent, Attorney General of Canada
S. Latimer for Respondent, Canada
D.N. Kruk for Respondent, Alberta
M.J. Ouellette for Applicant Proposed Intervener, Federation of Saskatchewan Indian Nations

Subject: Public; Civil Practice and Procedure; Constitutional

Headnote

Aboriginal law --- Practice and procedure — Parties — Intervenors

Lawsuit brought by Indian band against Crown sought declaration that P Band No. 136 was recognized band under Treaty 6 and Indian Act — Matter was appealed — Federation of Saskatchewan Indian Nations ("FSIN") represented 74 First Nations in Saskatchewan — FSIN applied for intervenor status at appeal hearing — Application granted — Issues in case involved whether provincial limitation periods can oust protection afforded under s. 35(1) of Constitution Act, 1982, and whether appellants had standing to pursue their claim — FSIN should be permitted to intervene with respect to those issues — FSIN possessed some special expertise and insight that will assist court in determining outcome of appeal on certain issues.

Civil practice and procedure --- Parties — Intervenors — General principles

Lawsuit brought by Indian band against Crown sought declaration that P Band No. 136 was recognized band under Treaty 6 and Indian Act — Matter was appealed — Federation of Saskatchewan Indian Nations ("FSIN") represented 74 First Nations in Saskatchewan — FSIN applied for intervenor status at appeal hearing — Application granted — Issues in case involved whether provincial limitation periods can oust protection afforded under s. 35(1) of Constitution Act, 1982, and whether appellants had standing to pursue their claim — FSIN should be permitted to intervene with respect to those issues — FSIN possessed some special expertise and insight that will assist court in determining outcome of appeal on certain issues.

Table of Authorities

Cases considered by *Fraser C.J.A.*:

Alberta Sports & Recreation Assn. for the Blind v. Edmonton (City) (1993), 20 C.P.C. (3d) 101, 14 Alta. L.R. (3d) 301, 146 A.R. 117, [1994] 2 W.W.R. 659, 1993 CarswellAlta 192 (Alta. Q.B.) — considered

Canada (Minister of Indian & Northern Affairs) v. Corbiere (1996), (sub nom. *Corbiere v. Canada (Minister of Indian & Northern Affairs)*) 199 N.R. 1, 1996 CarswellNat 667 (Fed. C.A.) — considered

Federation of Saskatchewan Indians v. Canada (Attorney General) (2002), 2002 FCT 1001, 2002 CarswellNat 2600, 2002 CFPI 1001, 2002 CarswellNat 4303, (sub nom. *Bellegarde v. Canada (Attorney General)*) 223 F.T.R. 60 (Fed. T.D.) — considered

R. v. Morgentaler (1993), [1993] 1 S.C.R. 462, 1993 CarswellNS 429, 1993 CarswellNS 429F (S.C.C.) — considered

R. v. Trang (2002), 2002 ABQB 185, 2002 CarswellAlta 247, [2002] 8 W.W.R. 755, 4 Alta. L.R. (4th) 161 (Alta. Q.B.) — considered

Reference re Workers' Compensation Act, 1983 (Newfoundland) (1989), (sub nom. *Reference re ss. 32 & 34 of the Workers' Compensation Act*) 96 N.R. 231, [1989] 2 S.C.R. 335, (sub nom. *Reference re Sections 32 & 34 of the Workers' Compensation Act, 1983*) 76 Nfld. & P.E.I.R. 185, (sub nom. *Reference re Sections 32 & 34 of the Workers' Compensation Act, 1983*) 235 A.P.R. 185, 1989 CarswellNat 740, 1989 CarswellNat 740F (S.C.C.) — considered

Skapinker v. Law Society of Upper Canada (1984), [1984] 1 S.C.R. 357, 9 D.L.R. (4th) 161, 53 N.R. 169, 3 O.A.C. 321, 20 Admin. L.R. 1, 11 C.C.C. (3d) 481, 8 C.R.R. 193, 1984 CarswellOnt 796, 1984 CarswellOnt 800 (S.C.C.) — considered

Statutes considered:

Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), c. 11, reprinted R.S.C. 1985, App. II, No. 44
s. 35(1) — considered

Treaties considered:

Treaty No. 6, 1876 (Between Her Majesty the Queen and the Plain and Wood Cree Indians and other Tribes of Indians at Fort Carlton, Fort Pitt and Battle River), 1876
Generally — referred to

APPLICATION by federation of Saskatchewan First Nations for leave to intervene in appeal of action involving constitutional rights of aboriginal band.

***Fraser C.J.A.*:**

1 This is an application for intervener status by the Federation of Saskatchewan Indian Nations (FSIN). The respondents in this application, Rose Lameman et al. (who are the appellants in the main action and are referred to

herein as the "appellants"), support FSIN's application, but the application is opposed by the respondent, Canada. The respondent, Her Majesty the Queen in Right of Alberta, takes no position on this issue.

2 It may be fairly stated that, as a general principle, an intervention may be allowed where the proposed intervener is specially affected by the decision facing the Court or the proposed intervener has some special expertise or insight to bring to bear on the issues facing the court. As explained by the Supreme Court of Canada in *R. v. Morgentaler*, [1993] 1 S.C.R. 462 (S.C.C.) at para. 1: "[t]he purpose of an intervention is to present the court with submissions which are useful and different from the perspective of a non-party who has a special interest or particular expertise in the subject matter of the appeal."

3 That said, it is clear as noted by the Federal Court of Appeal in *Canada (Minister of Indian & Northern Affairs) v. Corbiere* (1996), 199 N.R. 1 (Fed. C.A.) that ". . . an intervenor in an appellate court must take the case as she finds it and cannot, to the prejudice of the parties, argue new issues which require the introduction of fresh evidence."

4 FSIN applies for intervener status on the basis that it represents 74 First Nations in Saskatchewan whose interests will be specially affected by the outcome of this appeal. It also claims expertise in the subject matters of the appeal. The FSIN's mandate is to enhance, protect and promote treaty and inherent rights of its member First Nations, and under its land and resource portfolio, the FSIN runs the Indian rights and treaties research program responsible for researching, preparing and submitting specific claims on behalf of Saskatchewan First Nations. FSIN points to this research work as an indication of the expertise that it has developed in a number of the issues facing this Court. As a result, FSIN proposes to make submissions as an intervener in support of the appellants on certain of those issues.

5 A two-step approach is commonly used to determine an intervener application. The Court typically first considers the subject matter of the proceeding and second, determines the proposed intervener's interest in that subject matter. It is clear from reviewing the appellants' factum that there are three main issues on the appeal:

> 1. The tests for striking pleadings and summary judgment and, in particular, whether summary judgment is appropriate for resolution of complex evidentiary and novel legal issues based on aboriginal and treaty rights.
>
> 2. Whether the appellants lack standing to assert claims based on aboriginal and treaty rights because they are not a band. This, in turn, involves a number of potential issues including treaty rights under Treaty 6 and constitutional protection of treaty and aboriginal rights under s. 35(1) of the *Constitution Act, 1982*.
>
> 3. To what extent, if any, provincial limitation periods can be invoked to extinguish aboriginal or treaty rights.

6 In cases involving constitutional issues or which have a constitutional dimension to them, courts are generally more lenient in granting intervener status: *R. v. Trang*, [2002] 8 W.W.R. 755, 2002 ABQB 185 (Alta. Q.B.), and *Alberta Sports & Recreation Assn. for the Blind v. Edmonton (City)* (1993), [1994] 2 W.W.R. 659 (Alta. Q.B.). Similarly, appellate courts are more willing to consider intervener applications than courts of first instance. As noted by Hugessen J. in *Federation of Saskatchewan Indians v. Canada (Attorney General)*, 2002 FCT 1001 (Fed. T.D.):

> . . . [T]he test for allowing intervener standing for argument at the appellate level is necessarily different from that which is used at trial; trials must remain manageable and the parties must be able to define the issues and the evidence on which they will be decided. An appellate court on the other hand deals with a pre-established record that is not normally subject to change. And an appellate court, while benefiting from the different viewpoints expressed by interveners, is far better equipped to limit and control the length and nature of their interventions.

7 In this case, in assessing the subject matter of the issues in dispute, we see two key issues on which it can be argued that the FSIN should be permitted to intervene. The first relates to whether provincial limitation periods can oust the protection afforded under s. 35(1) of the *Constitution Act, 1982* including whether other constitutional issues are therefore engaged. The second involves the issue of standing, that is whether the appellants have the standing to pursue their claim.

8 The next step is to consider the FSIN's interest in the subject matter, which should be more than simply jurisprudential.

9 In constitutional cases, if an applicant can show its interests will be affected by the outcome of the litigation, intervener status should be granted: *Skapinker v. Law Society of Upper Canada* (1984), 9 D.L.R. (4th) 161 (S.C.C.). Or, as already noted, if the intervener applicant possesses some expertise which might be of assistance to the court in resolving the issues before it, that too will do. As explained by Brian Crane in *Practice and Advocacy in the Supreme Court*, (British Columbia Continuing Legal Education Seminar, 1983), at p. 1.1.05, and approved by the Supreme Court of Canada in *Reference re Workers' Compensation Act, 1983 (Newfoundland)*, [1989] 2 S.C.R. 335 (S.C.C.), at 340:

> an intervention is welcomed if the intervener will provide the Court with fresh information or a fresh perspective on an important constitutional or public issue.

10 In our view, for purposes of the subject appeal, the FSIN possesses some special expertise and insight that will assist this Court in determining the outcome of the appeal on certain issues. Having concluded that this is so, it is not necessary to consider whether some or all of FSIN's membership may be affected by the appeal. The test for intervention has been met.

11 We are equally satisfied however that the grounds on which the FSIN should be permitted to intervene should properly be limited to the two key issues we have identified. Therefore, we grant intervener status to the FSIN.

12 Dealing first with the limitations issue, the FSIN is permitted to file a factum and make oral submissions on provincial statutes of limitation and their relationship or application to treaty and aboriginal rights in light of treaty interpretation and s. 35(1) of the *Constitution Act, 1982*. With respect to the standing issue, the FSIN is permitted to file a factum and make oral submissions on whether the appellants have standing to pursue the subject claims. This includes addressing the status of First Nations not recognized as such whether because of alleged surrender of treaty rights or claimed amalgamations with other First Nations or otherwise.

(Discussion as to when factums are to be filed)

13 The FSIN factums will be filed and served by the end of the day on October 31, 2005. The reply factums from each of Canada and Alberta are to be filed and served by the end of the day on November 23, 2005.

(Discussion as to costs)

14 We order that each party and the intervener bear its own costs.

Application granted.

TAB 8

2014 ABCA 340
Alberta Court of Appeal

Edmonton (City) v. Urban Development Institute

2014 CarswellAlta 1875, 2014 ABCA 340, [2014] A.W.L.D. 4645, 246 A.C.W.S. (3d) 10, 584 A.R. 255, 61 C.P.C. (7th) 309, 623 W.A.C. 255, 7 Alta. L.R. (6th) 338

City of Edmonton, Respondent and City of Edmonton (Subdivision and Development Appeal Board), Respondent and HV Nine Ltd., Respondent and Urban Development Institute, Applicant

Thomas W. Wakeling J.A.

Heard: October 7, 2014
Judgment: October 20, 2014
Docket: Edmonton Appeal 1403-0130-AC

Counsel: M.S. Gunther, for Respondent, City of Edmonton
P.A.L. Smith, Q.C., for Respondent, City of Edmonton (Subdivision and Development Appeal Board)
F.A. Laux, Q.C, for Respondent, HV Nine Ltd.
J.A. Agrios, Q.C., for Applicant

Subject: Civil Practice and Procedure; Property; Public

Headnote

Civil practice and procedure --- Parties — Intervenors — As friend of the court

City brought appeal from decision of city subdivision appeal board — Urban development institute was not party to action — Institute claimed that outcome of action would affect its plans for future transit expansion in city — Institute claimed that city, residents and developers would be affected by outcome as well — Institute applied for intervenor status — Application granted — Institute had different and important perspective to grant to litigation — Institute members' commercial interests would be directly affected by litigation — Developers had special expertise that could be of assistance to court — Costs of allowing institute to intervene did not outweigh benefits to court — Institute would bear costs of their own submissions.

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C.L.C. v. Bhindi (1985), 61 B.C.L.R. 85, 2 C.P.C. (2d) 28, 17 D.L.R. (4th) 193, 1985 CarswellBC 61 (B.C. C.A.) — considered

Canadian Council of Churches v. R. (1992), (sub nom. *Canadian Council of Churches v. Canada*) 132 N.R. 241, 5 C.P.C. (3d) 20, 2 Admin. L.R. (2d) 229, (sub nom. *Canadian Council of Churches v. Canada*) 88 D.L.R. (4th) 193, 16 Imm. L.R. (2d) 161, (sub nom. *Canadian Council of Churches v. Canada (Minister of Employment & Immigration)*) 8 C.R.R. (2d) 145, (sub nom. *Canadian Council of Churches v. Canada (Minister of Employment*

& Immigration) [1992] 1 S.C.R. 236, 1992 CarswellNat 650, 1992 CarswellNat 25, 49 F.T.R. 160 (note) (S.C.C.) — considered

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Edmonton (City) v. Edmonton (City) (Subdivision and Development Appeal Board) (2014), 2014 CarswellAlta 1881, 2014 ABCA 337 (Alta. C.A.) — referred to

Iron v. Saskatchewan (Minister of the Environment & Public Safety) (1992), [1993] 3 W.W.R. 308, 106 Sask. R. 247, 1992 CarswellSask 388 (Sask. Q.B.) — referred to

Knox v. Conservative Party of Canada (2007), 404 A.R. 383, 76 Alta. L.R. (4th) 56, 394 W.A.C. 383, 2007 ABCA 143, 2007 CarswellAlta 528, 39 C.P.C. (6th) 242 (Alta. C.A.) — referred to

Lockerbie & Hole Industrial Inc. v. Alberta (Director, Human Rights & Citizenship Commission) (2010), 2010 ABCA 184, 2010 CarswellAlta 1031 (Alta. C.A.) — referred to

MacMillan Bloedel Ltd. v. Mullin (1985), [1985] 3 W.W.R. 380, [1985] 2 C.N.L.R. 54, 50 C.P.C. 298, 66 B.C.L.R. 207, 13 C.R.R. 283, 1985 CarswellBC 269 (B.C. C.A. [In Chambers]) — referred to

Mohr v. Scoffield (1991), 1991 CarswellAlta 73, 80 Alta. L.R. (2d) 97 (Alta. C.A.) — referred to

Norcan Ltd. v. Lebrock (1969), [1969] S.C.R. 665, 5 D.L.R. (3d) 1, 1969 CarswellQue 51 (S.C.C.) — considered

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Papaschase Indian Band No. 136 v. Canada (Attorney General) (2005), 2005 ABCA 320, 2005 CarswellAlta 1407, (sub nom. *Lameman v. Canada (Attorney General)*) 380 A.R. 301, (sub nom. *Lameman v. Canada (Attorney General)*) 363 W.A.C. 301 (Alta. C.A.) — referred to

R. v. Big M Drug Mart Ltd. (1983), [1984] 1 W.W.R. 625, 5 D.L.R. (4th) 121, 49 A.R. 194, 28 Alta. L.R. (2d) 289, 9 C.C.C. (3d) 310, 7 C.R.R. 92, 1983 CarswellAlta 180 (Alta. C.A.) — referred to

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Royal Canadian Legion Norwood (Alberta) Branch 178 v. Edmonton (City) (1993), 141 A.R. 290, 46 W.A.C. 290, 1993 CarswellAlta 635 (Alta. C.A.) — referred to

Telus Communications Inc. v. T.W.U. (2006), 2006 ABCA 297, (sub nom. *Telus Communications Inc. v. Telecommunications Workers Union*) 401 A.R. 57, (sub nom. *Telus Communications Inc. v. Telecommunications Workers Union*) 391 W.A.C. 57, 2006 CarswellAlta 1310 (Alta. C.A.) — considered

Temagami Wilderness Society v. Ontario (Minister of the Environment) (1989), 33 O.A.C. 356, 1989 CarswellOnt 806 (Ont. Div. Ct.) — referred to

U.T.U., Locals 1778 & 1923 v. B.C. Rail Ltd. (1990), 45 C.P.C. (2d) 33, 1990 CarswellBC 521 (B.C. C.A.) — referred to

Yellowknife Public Denominational District Education Authority v. Northwest Territories (Local Authorities Election Act, Returning Officer) (2008), 2008 NWTCA 1, (sub nom. *Yellowknife Public Denomination District Education Authority v. Euchner*) 166 C.R.R. (2d) 240, 2008 CarswellNWT 5, (sub nom. *Yellowknife Public Denomination District Education Authority v. Euchner*) 425 A.R. 254, (sub nom. *Yellowknife Public Denomination District Education Authority v. Euchner*) 418 W.A.C. 254, [2008] 4 W.W.R. 234, 75 Admin. L.R. (4th) 307 (N.W.T. C.A.) — referred to

Statutes considered:

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Generally — referred to

Human Rights, Citizenship and Multiculturalism Act, R.S.A. 2000, c. H-14
Generally — referred to

Lord's Day Act, R.S.C. 1970, c. L-13
Generally — referred to

Rules considered:

Alberta Rules of Court, Alta. Reg. 124/2010
R. 14.26(2)(b) — considered

R. 14.26(3) — considered

R. 14.58(1) — considered

R. 14.58(2) — considered

R. 14.58(3) — considered

Alberta Rules of Court Amendment Regulation, 2014, Alta. Reg. 41/2014
Generally — referred to

Rules of the Supreme Court of Canada, SOR/2002-156

R. 59(2) — considered

APPLICATION by development institute to intervene in appeal, brought by city from decision of city appeal board.

Thomas W. Wakeling J.A.:

I. Introduction

1 The Urban Development Institute — Edmonton Region [1] seeks intervenor status [2] in an appeal brought by the City of Edmonton [3] against a decision of the Subdivision and Development Appeal Board for the City of Edmonton. [4] At issue in the appeal is the validity of a Board decision to delete a condition attached to a subdivision permit granted to HV Nine Ltd. by the subdivision authority. The outcome of the appeal will affect the funding model for future light rail transit expansion through undeveloped land in Edmonton. The City, residents of Edmonton and developers will be directly affected by the disposition of this appeal.

II. Questions Presented

2 Has the Institute demonstrated that it will be directly and significantly affected by the outcome of the appeal or that it has some special expertise or perspective which will be of assistance to the Court hearing the appeal?

III. Brief Answers

3 The developer members of the Institute will be directly and significantly affected by the outcome of this appeal. Its members are responsible for the development of most of the raw land in Edmonton. This is a direct and significant interest which justifies granting the applicant intervenor status. As well, the Institute has a special expertise or perspective which will assist the Court with its deliberations.

4 Permission to intervene is granted. [5]

IV. Statement of Facts

5 The question before the Court of Appeal is whether the Board acted lawfully in deleting a condition imposed by the City's subdivision authority in a subdivision permit granted to HV Nine Ltd. requiring HV Nine Ltd., at its cost, to provide the City with an LRT corridor through the proposed subdivision.

6 In granting the City leave to appeal, I noted that "[t]he answer to this question is of importance to the City, the residents of Edmonton and developers. The diversity of the interests affected and the effect a cost-distribution methodology will have on all these interests leads to the conclusion that the legal question is of sufficient importance to merit appellate review". [*Edmonton (City) v. Edmonton (City) (Subdivision and Development Appeal Board)*] 2014 ABCA 337 (Alta. C.A.), ¶17.

7 The chair of the Institute, in a July 18, 2014 affidavit, explained why it wished to participate in the appeal if this Court granted the City leave to appeal.

> 4. In accordance with its objectives, UDI has acted as the coordinating and liaison body between its members and ... the City of Edmonton ... regarding various issues relating to subdivision, development and servicing of land within the City.
>
> 5. UDI has 186 members of whom 41 are developers. It is my belief ..., that on average, over the past 5 years, between 85 to 95% of raw land servicing in the City is carried out by UDI developer members.

6. The decision from which the City is seeking leave dealt with whether the City could impose a requirement to dedicate land for an LRT station and LRT lines without compensation as a condition of a specific subdivision approval. While the decision appears to be fact based, the grounds on which leave is sought are framed more broadly. Therefore, if the Court is inclined to consider the broader issues raised by the grounds of appeal (as opposed to strictly dealing with the case on its facts), then the grounds raised in the Notice of Motion will have implications for development in the City in general, which in turn will directly impact on UDI developer members.

7. Further, UDI has a different perspective regarding the grounds on which leave is sought than the specific development in this case. My expectation is that the developer's focus will be directed at the specific facts of this case. On the other hand, UDI has a broader perspective as it is concerned with potential implications of this case on development in the City in general and not solely with the specific facts of this case.

V. Analysis

A. The Court May Grant Intervenor Status to an Applicant Whose Participation Will Assist the Court in Its Deliberations

8 My review of the case law on intervention leads me to conclude that the following proposition is sound:

A single appeal judge may [6] grant permission to intervene in an appeal if satisfied that the applicant

(a) will be directly and significantly affected [7] by the outcome of the appeal or

(b) has special expertise or perspective [8] relating to the subject matter of the appeal [9] that will assist the Court in its deliberations. [10]

9 The Supreme Court of Canada has declared that the "purpose of an intervention is to present the court with submissions which are useful and different from the perspective of a non-party who has a special interest or particular expertise in the subject matter of the appeal". [11] As Justice Major stated, "The implied promise of the intervener is that intervention will be useful and different from the submission of the appellant and respondent". "Interveners and the Supreme Court of Canada", May 1999 National 27. An applicant who can enhance the Court's understanding of the competing interests is an excellent candidate for intervenor status.

10 A court must be reluctant to decline assistance from an organization whose members are major participants in a business or other sector that will be directly affected by the Court's decision and would be in a position to address the implications of different potential solutions. [12] At the same time, a court must not be oblivious to the fact that an intervenor most likely will increase the private and public costs of the litigation. [13] A balanced assessment of these conflicting values is required.

B. The Applicant's Interests Will Be Directly and Specially Affected by the Outcome of this Appeal

11 In granting the City of Edmonton leave to appeal the Court expressly acknowledged the impact the LRT funding model would have on developers who carry on business in Edmonton. 2014 ABCA 337 (Alta. C.A.), ¶17.

12 The developer members of the Institute will be directly and significantly affected by the outcome of this appeal. Their commercial interests are at stake. What portion of the infrastructure costs associated with the LRT corridor are to be borne by developers affects the profitability of their businesses. The unchallenged affidavit evidence of the applicant's chair is that the developer members of the Institute have been responsible over the last five years for "between 85 to 90% raw land servicing in the City". In addition, the Institute's chair deposed that "UDI ... is concerned with potential implications of this case on development in the City in general". That the Institute's connection to this issue is through its

developer members does not diminish the effect the outcome of the appeal will have on it. [14] It represents its members' interests.

13 The applicant's interests will be directly and significantly affected by the outcome of this appeal. A person whose commercial interests are engaged is motivated to marshal and present the best arguments on the questions before the Court.

C. The Applicant Offers Special Insight and Perspective Which Will Assist the Court in Its Deliberations

14 The Institute will be in a position to offer special insight and perspective which will assist the Court in its deliberations. Its members are major players in the development business in Edmonton. They are ideally situated to assist the Court appreciate the consequences of any potential outcome. The Court benefits from the participation of an organization whose members have special expertise in the subject matter of an appeal. This is particularly so if the issue is an unsettled question of law [15] the answer to which may have unanticipated consequences.

15 This is a second reason to grant the Institute permission to intervene.

16 The extra costs associated with granting the Institute intervenor status do not exceed the benefits hearing from the Institute in this important case represents to the adjudication process.

VI. Conclusion

17 The Institute has permission to intervene in this appeal. It must bear its own costs of this application. [16]

18 Pursuant to rule 14.26(2)(b) of the *Alberta Rules of Court*, Alta. Reg., 124/2010 as amended, the intervenor may file a factum up to thirty pages in length. Its factum must not contain arguments that are substantially the same as those made by HV Nine Ltd. To ensure that the Institute's factum does not contain arguments substantially the same as those made by HV Nine Ltd. — a duplication which would not assist the Court, [17] the Institute may file its factum up to two business days after the factum of HV Nine Ltd. is due.

19 The intervenor is entitled to make an oral submission up to thirty minutes in length after the respondents have made their oral presentations unless the panel hearing the appeal directs otherwise.

20 I leave the question of costs on appeal to the panel that hears the appeal. [18]

Application granted.

Footnotes

* A corrigendum issued by the court on October 28, 2014, has been incorporated herein.

1 Referred to in this decision as the "Institute".

2 Rule 14.58(1) of the *Alberta Rules of Court*, Alta. Reg. 124/2010, as amended by the *Alberta Rules of Court Amendment Regulation, 2014*, Alta. Reg. 41/2014 provides that "a single appeal judge may grant status to a person to intervene in an appeal, subject to any terms and conditions and with the rights and privileges specified by the judge". Rules 14.26(3) and 14.58(2) and (3) refer to the person granted leave to intervene as the "intervenor". Before September 1, 2014, the date the *Alberta Rules of Court Amendment Regulation, 2014* came into force, Alberta courts generally referred to this person as an "intervener". E.g., *Telus Communications Inc. v. T.W.U.* (2006), 401 A.R. 57 (Alta. C.A.), 59. So does r. 59(2) of the *Rules of the Supreme Court of Canada*, SOR/2002-156.

3 Referred to in this decision generally as the "City".

4 Referred to in this decision as the "Board".

5 The City, HV Nine Ltd. and the Institute asked the Court to make its decision based on the Court's review of filed written material.

6 This is a discretionary decision. See *Reference re Workers' Compensation Act, 1983 (Newfoundland)*, [1989] 2 S.C.R. 335 (S.C.C.), 339 ("Rule 18 [of the Rules of the Supreme Court of Canada] gives this Court a wide discretion in deciding whether to allow a person to intervene as well as the discretion to determine the terms and conditions of the intervention"); *Norcan Ltd. v. Lebrock*, [1969] S.C.R. 665 (S.C.C.), 666 ("any interest is sufficient to support an application under ... [rule 60] subject always to the exercise of discretion") & *R. v. N. (L.C.)* (1996), 184 A.R. 359 (Alta. C.A.), 363 ("intervenor status is discretionary, and ought to be exercised sparingly").

7 *Ontario (Attorney General) v. Winner*, [1951] S.C.R. 887 (S.C.C.) (the Court accorded intervenor status to Canadian National Railway Co. and Canadian Pacific Railway in a case determining whether a provincial regulation applied to interprovincial or international undertakings); *Lockerbie & Hole Industrial Inc. v. Alberta (Director, Human Rights & Citizenship Commission)*, 2010 ABCA 184 (Alta. C.A.), ¶¶8-9 (the Court granted intervenor status to the Construction Owners Association of Alberta and Construction Labour Relations-an Alberta Association because their members would be significantly affected if Syncrude was adjudged to be an employer of a contractor's employees); *Chiasson v. Kellogg Brown & Root (Canada) Co.*, 2007 ABCA 175 (Alta. C.A.), ¶4 (the Court granted intervenor status to Syncrude Canada Ltd., Suncor Energy Inc., Imperial Oil Ltd. and Nexon Inc. and others in a case determining whether pre-employment drug testing contravened the *Human Rights and Citizenship and Multiculturalism Act*); *R. v. Big M Drug Mart Ltd.* (1983), 5 D.L.R. (4th) 121 (Alta. C.A.), 125 (the Court granted intervenor status in the Sunday-closing case to the Seventh Day Adventist Church in Canada, whose members celebrate the Sabbath on Saturday, and London Drugs Ltd., a business charged with contravening the *Lord's Day Act*); *U.T.U., Locals 1778 & 1923 v. B.C. Rail Ltd.* (1990), 45 C.P.C. (2d) 33 (B.C. C.A.), 37 (the Court granted an organization representing businesses which were adversely affected by a railway workers' strike intervenor status); *Iron v. Saskatchewan (Minister of the Environment & Public Safety)* (1992), [1993] 3 W.W.R. 308 (Sask. Q.B.) (the Court granted intervenor status to a company whose pulp supply would be adversely affected if the Court granted a judicial review applicant the requested relief) & *Temagami Wilderness Society v. Ontario (Minister of the Environment)* (1989), 33 O.A.C. 356 (Ont. Div. Ct.), 357 (the Court granted intervenor status to two lumber companies and a local industry association because the applicants "have established ... that the economic viability of their lumber operations in the area to be served by the road in question may be adversely affected by the ruling of this court").

8 *MacMillan Bloedel Ltd. v. Mullin* (1985), 50 C.P.C. 298 (B.C. C.A. [In Chambers]), 301 (the Court granted intervenor status to Indian Tribunal Councils and the Union of B.C. Indian Chiefs so that they could, from their special perspective, address "[t]he issue whether aboriginal rights existed and whether, if they did, they were extinguished".

9 Regardless of the directness and significance of the impact the court's determination may have on the applicant or the special expertise or perspective the applicant may have, if the court concludes that the applicant cannot provide enough or any assistance, it will dismiss an intervenor application. *Royal Canadian Legion Norwood (Alberta) Branch 178 v. Edmonton (City)* (1993), 141 A.R. 290 (Alta. C.A.), 290 (the Court denied intervenor status to the Alberta Urban Municipalities Association because the Court was satisfied that the City would present all sound arguments on a narrow statutory construction point) & *Mohr v. Scoffield* (1991), 80 Alta. L.R. (2d) 97 (Alta. C.A.), 97 (the Court denied intervenor status to the Canadian Paraplegic Association Alberta because the appeal may be disposed of for reasons which would make it unnecessary to address the constitutional issue the applicant wished to address).

10 *Telus Communications Inc. v. T.W.U.* (2006), 401 A.R. 57 (Alta. C.A.), 59 ("As a general principle, an intervention may be allowed when the proposed intervener is specially affected by the decision facing the court, or the proposed intervener has some special expertise or insight to bring to bear on the issues facing the court").

11 *R. v. Morgentaler*, [1993] 1 S.C.R. 462 (S.C.C.), 463. See *R. v. Finta*, [1993] 1 S.C.R. 1138 (S.C.C.), 1143 ("these applicants each have distinctive contributions to make in the area of international law theory, comparative law, the Nuremberg principles, and the criminal justice obligations and position of Canada vis-à-vis the victims of war crimes"); *Canadian Council of Churches v. R.*, [1992] 1 S.C.R. 236 (S.C.C.), 256 ("The views and submissions of interveners on issues of public importance frequently provide great assistance to the courts"); *Reference re Workers' Compensation Act, 1983 (Newfoundland)*, [1989] 2 S.C.R. 335

(S.C.C.), 340 ("an intervention is welcomed if the intervener will provide the Court with fresh information or a fresh perspective on an important ... public issue") & *R. v. N. (L.C.)* (1996), 184 A.R. 359 (Alta. C.A.), 366 ("The essential question is whether, bearing in mind the appellant's interest and expertise, the applicant will be a hindrance or a help to the Court in deciding the issue").

12 *Chiasson v. Kellogg Brown & Root (Canada) Co.*, 2007 ABCA 175 (Alta. C.A.), ¶¶5 &6 (the Court awarded intervenor status to substantial mining companies and a business association so that they could contribute to the Court's understanding of the impact pre-employment drug testing has on their workplaces) & *Adler v. Ontario* (1992), 8 O.R. (3d) 200 (Ont. Gen. Div.) (the Court granted intervenor status to the Toronto School Board and the Ontario Public School Boards Association in an action considering the right of Jewish schools to state support).

13 Counsel must prepare and review additional material. The parties to the appeal and the intervenor must absorb these extra costs. The judges must read this work product. Oral presentations may take more court time. *Adler v. Ontario* (1992), 8 O.R. (3d) 200 (Ont. Gen. Div.), 205 & *MacMillan Bloedel Ltd. v. Mullin* (1985), 50 C.P.C. 298 (B.C. C.A. [In Chambers]), 301.

14 *Lockerbie & Hole Industrial Inc. v. Alberta (Director, Human Rights & Citizenship Commission)*, 2010 ABCA 184 (Alta. C.A.), ¶¶8 & 9 (the Court expressly relied on an affidavit filed by the applicants which stated that "a finding that Syncrude is an employer under ... the Alberta Human Rights Act [of workers who are not its employees under any other enactment] raises the question whether CLR members who serve as prime contractors and prime subcontractors on industrial construction projects may be employers under the Alberta Human Rights Act of unionized construction workers who are not their employees under the Labour Relations Code"); *Chiasson v. Kellogg Brown & Root (Canada) Co.*, 2007 ABCA 175 (Alta. C.A.), ¶¶5 & 6 & *U.T.U., Locals 1778 & 1923 v. B.C. Rail Ltd.* (1990), 45 C.P.C. (2d) 33 (B.C. C.A.), 37 ("the members of the [Business] Council [of British Columbia who have 250,000 employees] dependent upon a public carrier surely have a direct interest in quick resolution of industrial relation disputes involving that public carrier").

15 *Telus Communications Inc. v. T.W.U.* (2006), 401 A.R. 57 (Alta. C.A.), 59 (one of the Court's reasons for denying intervenor status to Syncrude Canada Ltd. and Canadian National Railway may have been the Court's opinion that the "law is reasonably well settled").

16 *Reference re Workers' Compensation Act, 1983 (Newfoundland)*, [1989] 2 S.C.R. 335 (S.C.C.), 341; *Yellowknife Public Denominational District Education Authority v. Northwest Territories (Local Authorities Election Act, Returning Officer)*, [2008] 4 W.W.R. 234 (N.W.T. C.A.), 240; *Chiasson v. Kellogg Brown & Root (Canada) Co.*, 2007 ABCA 175 (Alta. C.A.), ¶7; *Knox v. Conservative Party of Canada* (2007), 404 A.R. 383 (Alta. C.A.), 389; *Papaschase Indian Band No. 136 v. Canada (Attorney General)* (2005), 380 A.R. 301 (Alta. C.A.), 305 & *Iron v. Saskatchewan (Minister of the Environment & Public Safety)* (1992), [1993] 3 W.W.R. 308 (Sask. Q.B.), 313 (the successful applicants for intervenor status were ordered to bear their own costs).

17 *C.L.C. v. Bhindi* (1985), 61 B.C.L.R. 85 (B.C. C.A.), 87 ("It is undesirable that an applicant be permitted to intervene if he will do no more than echo the evidence and submissions of others who are already parties").

18 *Norcan Ltd. v. Lebrock*, [1969] S.C.R. 665 (S.C.C.), 667 & *Lockerbie & Hole Industrial Inc. v. Alberta (Director, Human Rights & Citizenship Commission)*, 2010 ABCA 184 (Alta. C.A.), ¶11 (the Court resolving the merits of the appeal is in the best position to address costs).

TAB 9

2014 ABQB 555
Alberta Court of Queen's Bench

Suncor Energy Inc. v. Unifor, Local 707 A

2014 CarswellAlta 1655, 2014 ABQB 555, [2014] A.W.L.D. 4600, 245 A.C.W.S. (3d) 198, 596 A.R. 390

Suncor Energy Inc., Applicant and Unifor, Local 707 A, Respondent

Neil Wittmann C.J.Q.B.

Heard: September 4, 2014
Judgment: September 8, 2014
Docket: Calgary 1401-03831

Counsel: Peter A. Gall, Q.C., for Applicants
John Carpenter, Vanessa Cosco, for Respondent, Unifor
Barbara Johnston, Q.C., April Kosten, for Respondent, Suncor

Subject: Civil Practice and Procedure; Public; Labour

Headnote

Labour and employment law --- Labour law — Labour arbitrations — Judicial review — Procedure upon review

Union and employer were parties to policy grievance arbitration with respect to random alcohol and drug testing policy of employer — Three-member panel decided by majority that policy was unreasonable exercise of employer's management rights and allowed grievance — Employer sought judicial review — Applicants brought application seeking leave to attain intervener status, jointly, in judicial review application — Application granted — Proper exercise of discretion in matter was to allow applicants joint intervener status at judicial review application — Applicants had special and direct interest — Applicants would bring special or fresh perspective to issue before court — Applicants' interests might not be fully protected by employer — From constitutional and public interest dimensions, underlying issue was important.

Table of Authorities

Cases considered by *Neil Wittmann C.J.Q.B.*:

Alberta (Minister of Justice) v. Métis Settlements Appeal Tribunal (2005), 8 C.P.C. (6th) 195, 2005 ABCA 143, 2005 CarswellAlta 431, 367 A.R. 34, 346 W.A.C. 34 (Alta. C.A.) — referred to

Camp Hill Hospital v. N.S.N.U. (1989), (sub nom. *N.S.N.U. v. Camp Hill Hospital*) 94 N.S.R. (2d) 430, (sub nom. *N.S.N.U. v. Camp Hill Hospital*) 247 A.P.R. 430, (sub nom. *N.S.N.U. v. Camp Hill Hospital*) 66 D.L.R. (4th) 711, 1989 CarswellNS 424 (N.S. C.A.) — referred to

Carbon Development Partnership v. Alberta (Energy & Utilities Board) (2007), 2007 ABCA 231, 2007 CarswellAlta 896 (Alta. C.A. [In Chambers]) — referred to

CEP, Local 707 v. Suncor Energy Inc. (2012), (sub nom. *Communications, Energy and Paperworkers Union, Local 707 v. Suncor Energy Inc.*) 548 A.R. 195, 2012 ABQB 627, 2012 CarswellAlta 1719, 84 Alta. L.R. (5th) 170 (Alta. Q.B.) — considered

CEP, Local 707 v. Suncor Energy Inc. (2012), (sub nom. *Communications, Energy and Paperworkers Union, Local 707 v. Suncor Energy Inc.*) 539 A.R. 206, (sub nom. *Communications, Energy and Paperworkers Union, Local 707 v. Suncor Energy Inc.*) 561 W.A.C. 206, 10 C.C.E.L. (4th) 43, 2012 ABCA 373, 2012 CarswellAlta 2071, 84 Alta. L.R. (5th) 181 (Alta. C.A.) — referred to

Gift Lake Métis Settlement v. Métis Settlements Appeal Tribunal (Land Access Panel) (2008), 2008 ABCA 391, 2008 CarswellAlta 2256 (Alta. C.A.) — referred to

Goudreau v. Falher Consolidated School District No. 69 (1993), (sub nom. *Goudreau v. Board of Education of the Falher Consolidated School District No. 69*) 46 W.A.C. 21, 1993 ABCA 72, 8 Alta. L.R. (3d) 205, (sub nom. *Goudreau v. Board of Education of the Falher Consolidated School District No. 69*) 141 A.R. 21, 16 C.P.C. (3d) 295, [1993] 4 W.W.R. 434, 1993 CarswellAlta 296 (Alta. C.A.) — referred to

Irving Pulp & Paper Ltd. v. CEP, Local 30 (2013), 52 Admin. L.R. (5th) 1, (sub nom. *Irving Pulp & Paper Ltd. v. Communications, Energy and Paperworkers Union of Canada, Local 30*) 1048 A.P.R. 1, (sub nom. *Irving Pulp & Paper Ltd. v. Communications, Energy and Paperworkers Union of Canada, Local 30*) 404 N.B.R. (2d) 1, (sub nom. *C.E.P.U., Local 30 v. Irving Pulp & Paper, Ltd.*) 77 C.H.R.R. D/304, 2013 SCC 34, 2013 CarswellNB 275, 2013 CarswellNB 276, 359 D.L.R. (4th) 394, (sub nom. *Irving Pulp & Paper Ltd. v. Communications, Energy and Paperworkers Union of Canada, Local 30*) 445 N.R. 1, 231 L.A.C. (4th) 209, (sub nom. *Communications, Energy and Paperworkers Union of Canada, Local 30 v. Irving Pulp & Paper Ltd.*) 285 C.R.R. (2d) 150, D.T.E. 2013T-418, (sub nom. *CEPU, Local 30 v. Irving Pulp & Paper*) 2013 C.L.L.C. 220-037, (sub nom. *Communications, Energy and Paperworkers Union of Canada, Local 30 v. Irving Pulp & Paper, Ltd.*) [2013] 2 S.C.R. 458 (S.C.C.) — considered

Knox v. Conservative Party of Canada (2007), 404 A.R. 217, 394 W.A.C. 217, 42 C.P.C. (6th) 62, 2007 ABCA 141, 2007 CarswellAlta 524 (Alta. C.A.) — referred to

Papaschase Indian Band No. 136 v. Canada (Attorney General) (2005), 2005 ABCA 320, 2005 CarswellAlta 1407, (sub nom. *Lameman v. Canada (Attorney General)*) 380 A.R. 301, (sub nom. *Lameman v. Canada (Attorney General)*) 363 W.A.C. 301 (Alta. C.A.) — considered

Pedersen v. Van Thournout (2008), 2008 CarswellAlta 648, 2008 ABCA 192, (sub nom. *Pedersen v. Thournout*) 432 A.R. 219, (sub nom. *Pedersen v. Thournout*) 424 W.A.C. 219 (Alta. C.A.) — referred to

R. v. Dyment (1988), 10 M.V.R. (2d) 1, 1988 CarswellPEI 7, 1988 CarswellPEI 73, 66 C.R. (3d) 348, 89 N.R. 249, [1988] 2 S.C.R. 417, 45 C.C.C. (3d) 244, 73 Nfld. & P.E.I.R. 13, 229 A.P.R. 13, 55 D.L.R. (4th) 503, 38 C.R.R. 301 (S.C.C.) — considered

R. v. Finta (1993), 150 N.R. 370, 61 O.A.C. 321, [1993] 1 S.C.R. 1138 (S.C.C.) — referred to

R. v. Shoker (2006), 2006 SCC 44, 212 C.C.C. (3d) 417, 271 D.L.R. (4th) 385, 353 N.R. 160, 2006 CarswellBC 2458, 2006 CarswellBC 2459, [2006] 2 S.C.R. 399, 41 C.R. (6th) 1, 230 B.C.A.C. 1, 380 W.A.C. 1, 146 C.R.R. (2d) 358 (S.C.C.) — considered

Reference re Workers' Compensation Act, 1983 (Newfoundland) (1989), 1989 CarswellNat 740, 1989 CarswellNat 740F, (sub nom. *Reference re ss. 32 & 34 of the Workers' Compensation Act*) 96 N.R. 231, [1989] 2 S.C.R. 335, (sub nom. *Reference re Sections 32 & 34 of the Workers' Compensation Act, 1983*) 76 Nfld. &

P.E.I.R. 185, (sub nom. *Reference re Sections 32 & 34 of the Workers' Compensation Act, 1983*) 235 A.P.R. 185 (S.C.C.) — referred to

Stewart Estate v. 1088294 Alberta Ltd. (2014), 2014 CarswellAlta 1065, 2014 ABCA 222 (Alta. C.A.) — referred to

United Taxi Drivers' Fellowship of Southern Alberta v. Calgary (City) (2002), 33 M.P.L.R. (3d) 1, 2002 ABCA 243, 2002 CarswellAlta 1243, 312 A.R. 351, 281 W.A.C. 351 (Alta. C.A.) — referred to

University of British Columbia Faculty Assn. v. University of British Columbia (2008), 2008 CarswellBC 2031, 2008 BCCA 376, 263 B.C.A.C. 3, 443 W.A.C. 3 (B.C. C.A. [In Chambers]) — considered

Statutes considered:

Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11
Generally — referred to

Rules considered:

Alberta Rules of Court, Alta. Reg. 124/2010
R. 2.10 — considered

APPLICATION by applicants seeking leave to attain intervener status, jointly, in judicial review application.

***Neil Wittmann C.J.Q.B.*:**

Introduction

1 Unifor, Local 707 A ("the Union") and Suncor Energy Inc. ("the Employer"), are parties to a policy Grievance Arbitration, [2014] A.G.A.A. No. 6, with respect to the Random Alcohol and Drug Testing Policy ("the Policy") of the Employer. A three member panel decided by a majority that the Policy was an unreasonable exercise of the Employer's management rights and allowed the grievance. The Employer has sought judicial review in this Court and a hearing has been scheduled for October 23rd and 24th, 2014. The Applicants, the Mining Association of Canada ("MAC") and Enform Canada ("Enform") have sought leave to attain intervener status, jointly, in the judicial review application. The Union opposes this Court granting intervener status to the Applicants. The Employer supports this Court granting intervener status to the Applicants.

Background

2 The Random Alcohol and Drug Testing Policy Grievance Arbitration to be reviewed consists of 592 paragraphs without appendices. The dissent is 242 paragraphs.

3 From that decision, it appears that alcohol and drug testing in the workplace takes on many forms including testing post-incident, testing upon reasonable grounds, testing as follow-up post rehabilitation and return to work testing. Collectively, it is common ground that this is "for cause" testing. Random testing is the issue in the Grievance Arbitration. At bottom, the parties seem to agree, supported by case authority, most recently, *Irving Pulp & Paper Ltd. v. CEP, Local 30*, 2013 SCC 34 (S.C.C.), that the arbitration jurisprudence involves balancing safety in the workplace against privacy concerns. In the Grievance Arbitration, the majority relied heavily on *Irving Pulp & Paper*

4 MAC is a non-profit national organization purporting to be the voice of the Canadian mining and mineral processing industry. One of its top priorities is workplace safety. Enform is similarly a not for profit organization which promotes workplace safety in the upstream oil and gas industry. It is comprised of six trade associations representing different aspects of the upstream oil and gas industry. Those six associations are the Canadian Association of Petroleum Producers, the Petroleum Services Association of Canada, the Canadian Association of Oil Well Drilling Contractors, the Canadian Energy Pipeline Association, the Canadian Association of Geophysical Contractors, and the Explorers and Producers Association of Canada.

5 The Applicants' written brief is replete with the safety objectives of their respective organizations.

6 There appears to be no dispute that parts of the Union workplace in the oil sands may be classified as dangerous. A description of the activities performed, including the equipment used, its size, the number of incidents or accidents occurring, including deaths, seems to demonstrate danger. As will be briefly seen however, the issue is how dangerous, weighed against the privacy concerns or rights of the individuals who work there, who are members of the Union.

The Test for Intervener Status

7 Although the *Alberta Rules of Court* ("ARC") in ARC 2.10 provide that a Court may grant status to a person to intervene subject to any terms and conditions and with the rights and privileges specified by the Court, no test is set forth to guide the Court in intervention applications. The common law governs.

8 None of the parties disputes the test to guide judicial discretion. As set forth in the Applicants' brief, the considerations are as follows:

> 1. Will the proposed interveners be specially or directly affected by the decision of the Court: *Papaschase Indian Band No. 136 v. Canada (Attorney General)*, 2005 ABCA 320, [2005] A.J. No. 1273 (Alta. C.A.) at paragraph 2; *Knox v. Conservative Party of Canada*, 2007 ABCA 141 (Alta. C.A.) at paragraph 5; *Alberta (Minister of Justice) v. Métis Settlements Appeal Tribunal*, 2005 ABCA 143 (Alta. C.A.) at paragraph 4; *R. v. Finta*, [1993] 1 S.C.R. 1138 (S.C.C.), at 1143; *Carbon Development Partnership v. Alberta (Energy & Utilities Board)*, 2007 ABCA 231, [2007] A.J. No. 727 (Alta. C.A. [In Chambers]) at paragraph 10.
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> 2. Will the proposed interveners bring special expertise or insight to bear on the issues facing the Court: *Papaschase* at paragraph 2; *Goudreau v. Falher Consolidated School District No. 69*, 1993 ABCA 72 (Alta. C.A.) at paragraph 17. This question is akin to whether an intervener would provide "fresh information or fresh perspective". *Reference re Workers' Compensation Act, 1983 (Newfoundland)*, [1989] 2 S.C.R. 335 (S.C.C.), at 340; *Stewart Estate v. 1088294 Alberta Ltd.*, 2014 ABCA 222 (Alta. C.A.) at paragraph 7.
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> 3. Are the proposed interveners' interests at risk of not being fully protected or fully argued by one of the parties: *United Taxi Drivers' Fellowship of Southern Alberta v. Calgary (City)*, 2002 ABCA 243 (Alta. C.A.) at paragraph 2; *Gift Lake Métis Settlement v. Métis Settlements Appeal Tribunal (Land Access Panel)*, 2008 ABCA 391 (Alta. C.A.) at paragraph 6; Metis Settlements Appeal Tribunal at paragraph 4.
>
> 4. Will the interveners presence "provide the Court with fresh information or a fresh perspective on a constitutional or public issue" *Reference re Workers' Compensation Act, 1983 (Newfoundland)* at 340; *Papaschase* at paragraph 9.

Another factor is whether granting a right to intervene would unduly prejudice a party.

9 Not surprisingly, although the parties and the proposed interveners agree on the factors articulated above, they disagree on the proper application of them.

Applying the Test

1. Specially or Directly Affected

10 The Applicants say they are specially affected by the issue before the Court and have a direct material interest in making certain that the safety concerns presented by alcohol and drug use of employees, in high risk or safety sensitive industries, are addressed when determining the legality of random drug and alcohol testing. They reference not only a social and corporate responsibility, but also numerous regulatory statutes. The Applicants make the point that this Court's decision in the Judicial Review application will have a significant precedential effect on subsequent arbitrations and court cases dealing with random testing and therefore a significant impact on the Applicants' industries and interests.

11 The Union says the Applicants do not have any special or direct interest and point out that it is insufficient for the proposed intervener to be simply "concerned about the effect of a decision" or "its precedential value": *University of British Columbia Faculty Assn. v. University of British Columbia*, 2008 BCCA 376, [2008] B.C.J. No. 1823 (B.C. C.A. [In Chambers]) at paragraphs 9-10. They state that it must be more than "simply jurisprudential": *Papaschase* at paragraph 8. The Union points out that one arbitration board is not bound by the decision of another, even on a similar issue: *Camp Hill Hospital v. N.S.N.U.* (1989), 66 D.L.R. (4th) 711 (N.S. C.A.), at 714 -715.

12 On this issue, I accept that the Applicants have a special and direct interest. Their concerns and mandates include workplace safety in a dangerous workplace. The industries they represent and the associations involved include the Employer that will be before the Court, an oil sands employer. While it may not be enough for an intervener to concern itself with the jurisprudential or precedential effect of a decision which directly affects them, if the implementation of the decision has direct ramifications for the Applicants' members, surely they have a direct and special interest, not necessarily in the specific outcome of the case, but in the proper balancing test that will be applied to determine whether a random alcohol and drug testing is allowed in any Applicants' workplace.

2. Special Expertise / Insight into the Issue

13 The Applicants refer to MAC being permitted to intervene in a wide range of cases including those involving drug and alcohol testing. Enform, they say, has special expertise or insight with respect to the reasonableness of random drug and alcohol testing as part of broad risk mitigation. The Union says the Applicants have no special expertise, nor any fresh perspective. The Union argues because you say you have it doesn't make it so: *Pedersen v. Van Thournout*, 2008 ABCA 192, [2008] A.J. No. 543 (Alta. C.A.) at paragraph 11. There, the Court stated that the special expertise or unique insight must be articulated so as to demonstrate the special expertise or fresh perspective which was not done in that case.

14 During oral argument, the Applicants' counsel tendered the Employer's brief for the Judicial Review which was ordered filed by this Court approximately two months in advance of the hearings. The brief was provided to the Court without objection by the Union. It contains 133 pages plus appendices. Counsel for the Applicants referred to the index and indicated the Applicants have no intention of repeating arguments made in the Judicial Review by the Employer but rather wish to argue the broader perspective, from an industry standpoint, as to what *Irving Pulp & Paper* actually decided in terms of how or what factors ought to be properly considered or weighed in balancing privacy interests against safety interests. The Union says that the only issue before the Judicial Review Court in this case will be whether the decision of the arbitration panel was reasonable. The Applicants, on the other hand, say that is only part of the issue, the other issue is whether the arbitration panel properly interpreted *Irving Pulp & Paper* and then applied it reasonably. The Applicants say that it is not necessary to demonstrate a culture of substance abuse of drugs or alcohol in the workplace, or that workplace accidents have been caused by drug and alcohol abuse, according to *Irving Pulp & Paper* The deterrent effect of random drug and alcohol testing ought to be considered, say the Applicants, and there was evidence that was before the arbitration panel that was not taken into account.

15 I am of the view that the Applicants will bring a special or fresh perspective to the issue before the Court and that this criterion has been satisfied.

3. Will the Proposed Interveners' Interests Be Fully Protected by the Employer and the Union

16 The Applicants acknowledge that Suncor is fully invested in the Judicial Review to urge the Court that the grievance arbitration panel decision is unreasonable in light of the evidence presented before it. This criterion significantly overlaps with the concern expressed by the Applicants about the precedential value of the reasoning that this Court may arrive at including its interpretation of *Irving Pulp & Paper* To the extent that the same concerns are present, the criteria has been satisfied. The Applicants' interests may not be fully protected by Suncor. The proper application of *Irving Pulp & Paper* in the context of the Grievance Arbitration may engage a broader issue than reasonableness. This criterion is satisfied.

4. Constitutional and Public Interest Importance

17 During oral argument, counsel for Suncor referenced the "quasi-constitutional" aspect of privacy interests. Counsel for the Applicants indicated, that in his view, there were no constitutional issues present. In the Grievance Arbitration, the majority at para 205, referred to *Irving Pulp & Paper* at para 23 in the context of individual privacy rights in Canada. The specific quote from *Irving Pulp & Paper* references the *Canadian Charter of Rights and Freedoms*, *R. v. Dyment*, [1988] 2 S.C.R. 417 (S.C.C.) at pp 431-432 and *R. v. Shoker*, 2006 SCC 44 (S.C.C.). Both cases reference the highly intrusive nature of testing urine, blood or breath, the effect on human dignity and a need for standards and safeguards to meet constitutional requirements. For the purposes of this application, I accept the statement of Suncor's counsel, that the issue before the Judicial Review Court will involve "quasi-constitutional" issues in terms of the nature and importance of the privacy rights of an individual.

18 With respect to the public interest, counsel for the Applicants stressed that the public has an interest in workplace safety as evidenced in regulatory and other statutes concerning the health and safety of not only workers who may have caused or contributed to workplace incidents or accidents, but also to others who may be affected. This includes other people in the workplace site, as well as health care workers and a vast array of health care and rehabilitation providers. Also involved, especially in an oil sands setting, is the protection of, and public interest in, the environment. Thus, from the constitutional and public interest dimensions, the underlying issue is important.

19 Two other factors deserve mention in this case. In *CEP, Local 707 v. Suncor Energy Inc.*, 2012 ABQB 627 (Alta. Q.B.), Macklin J, of this Court, granted an Interim Injunction prohibiting the Employer from implementing random drug and alcohol testing on the Union's members working in safety sensitive or specific positions. The new Policy was to be implemented October 15, 2012 and notification was given to the Union June 20, 2012. This decision was appealed. On the appeal, MAC was granted intervener status. All counsel were closely questioned as to whether there were Reasons from our Court of Appeal given for the granting of intervener status to MAC in this matter and counsel assured me that none were provided. The Union argued, somewhat aggressively, that the Court of Appeal's decision, found at 2012 ABCA 373 (Alta. C.A.) was rendered before the decision of the Supreme Court of Canada in *Irving Pulp & Paper* Therefore, the Union argues that such intervener status would not have been granted had that case been decided before the Court of Appeal heard the appeal on the Interim Injunction. The Union says because *Irving Pulp & Paper* "settled" the law on the test for random drug and alcohol testing MAC would not have received intervener status.

20 Finally, the Union argues that it will be severely prejudiced should intervener status be granted to the Applicants. When pressed in oral argument why this was so, the Union said that it would "have to face" the Applicants, as well as the Employer. Ultimately, Counsel for the Union indicated that the prejudice would be in the form of having to deal with an additional brief, additional oral argument, if that was to be granted, and the time and effort necessary to respond to each.

Decision

21 I am persuaded that the proper exercise of discretion in this matter is to allow the Applicants joint intervener status at the Judicial Review application. The Applicants meet the four criteria set forth above. This Court places particular weight on the constitutional and public interest aspects of the Judicial Review issues. In granting intervener status to the Applicants, their counsel agreed that the written submissions of the Applicant would be no more than 20 pages and that the Applicants would abide by any timelines set by this Court for the submission of their brief, which could be

done within one week of this decision if intervener status was allowed. Further, the Applicants accepted that the Judicial Review judge hearing the application could decide whether the Applicants would be permitted to make oral argument, although in their written materials they asked that they be permitted to make oral argument which they expect would not exceed one-half hour. The Union argued that if intervener status was granted, that they be permitted an extension of time from that already set for the response to the Employer's brief, namely approximately September 22nd, 2014, the Employer's brief being filed August 22nd, 2014.

22 Remembering that the application itself is scheduled for two full days, the Court finds it reasonable to allow oral argument on the part of the interveners not to exceed one-half hour, unless otherwise directed by the Judicial Review judge. Accordingly, there will be an Order granting intervener status to the Applicants, MAC and Enform on the condition that the Applicants file a brief not exceeding 20 pages on or before the close of business, September 22nd, 2014. The Union will have an opportunity to respond to this brief on or before the close of business, October 3rd, 2014. The Applicants may make oral submissions at the Judicial Review hearing, not to exceed one-half hour unless extended by the Judicial Review judge. Finally, in accordance with the submissions, not objected to by either the Employer or the Union, no costs will be awarded to the Applicants on this application or on the Judicial Review application, nor will any costs be awarded against them on the Judicial Review application.

Application granted.

TAB 10

2015 ABQB 799
Alberta Court of Queen's Bench

1985 Sawridge Trust (Trustees of) v. Alberta (Public Trustee)

2015 CarswellAlta 2373, 2015 ABQB 799, [2016] A.W.L.D. 313, 262 A.C.W.S. (3d) 1

In the Matter of the Trustees Act, RSA 2000, c T-8, as amended

In the Matter of The Sawridge Band Inter Vivos Settlement Created by Chief Walter Patrick Twinn, of the Sawridge Indian Band, No. 19, now known as the Sawridge Indian Band, on April 15, 1985 (the "1985 Sawridge Trust")

Ronald Twinn, Catherine Twinn, Walter Felix Twin, Bertha L'Hoirondelle and Clara Midbo, As Trustees for the 1985 Sawridge Trust, Respondents and Public Trustee of Alberta, Applicant

D.R.G. Thomas J.

Heard: September 2, 2015; September 3, 2015
Judgment: December 17, 2015
Docket: Edmonton 1103-14112

Counsel: Janet Hutchison, Eugene Meehan, Q.C., for Applicant, Public Trustee of Alberta
Edward H. Molstad, Q.C., for Respondent, Sawridge First Nation
Doris Bonora, Marco S. Poretti, for Respondents, 1985 Sawridge Trustees
J.J. Kueber, Q.C., for Ronald Twinn, Walter Felix Twin, Bertha L'Hoirondelle and Clara Midbo
Karen Platten, Q.C., for Catherine Twinn

Subject: Civil Practice and Procedure; Constitutional; Estates and Trusts; Public; Human Rights

Headnote

Aboriginal law --- Practice and procedure — Discovery — Miscellaneous

Band set up trust to hold Band property on behalf of its members — Trustees sought court advice and direction with respect to proposed definition to term "beneficiaries" of trust — Public Trustee brought successful application to be appointed litigation representative of interested minors, on condition that costs would be paid by trust and that it would be shielded from any costs liability — Public Trustee brought application for production of records and information from band — Information sought concerned band membership, members who had or were seeking band membership, processes involved to determine whether individuals may become part of band, records of application processes and associated litigation, and how assets ended up in trust — Band resisted application — Application dismissed — Public Trustee used legally incorrect mechanism to seek materials from Band — Band was third party to litigation and therefore was not subject to same disclosure proceedings as trustees, who were parties — Proximal relationships were not to be used as bridge for disclosure obligations — Only documents which were potentially disclosable in Public Trustee's application were those that were relevant and material to issue before court — It was further necessary to refocus proceedings and provide well-defined process to achieve fair and just distribution of trust assets — Future role of Public Trustee was to be limited to representing interests of existing and potential minor beneficiaries, examining manner in which property was placed in trust on behalf of minor beneficiaries, identifying potential but not yet identified minors who were children of band members or membership candidates, and supervising distribution process — Public trustee was to have until March 15, 2016, to prepare and serve application on band which identified documents it believed to be relevant and material to test fairness of proposed distribution arrangement to minors who are children of beneficiaries or potential beneficiaries — Public

Trustee was to have until January 29, 2016 to prepare and serve application on band identifying specific documents relevant and material to issue of assets settled in trust — Public Trustee may seek materials and information from Band, but only in relation to specific issues and subjects — Public Trustee had no right to engage, and was not to engage, in collateral attacks on membership processes of band and trustees had no right to engage in collateral attacks on band's membership processes.

Table of Authorities

Cases considered by *D.R.G. Thomas J.*:

Doucette (Litigation Guardian of) v. Wee Watch Day Care Systems Inc. (2008), 2008 SCC 8, 2008 CarswellBC 411, 2008 CarswellBC 412, 75 B.C.L.R. (4th) 1, [2008] 4 W.W.R. 1, 50 C.P.C. (6th) 207, 290 D.L.R. (4th) 193, (sub nom. *Doucette v. Wee Watch Day Care Systems Inc.*) 372 N.R. 95, (sub nom. *Juman v. Doucette*) [2008] 1 S.C.R. 157, (sub nom. *Doucette v. Wee Watch Day Care Systems Inc.*) 252 B.C.A.C. 1, 422 W.A.C. 1 (S.C.C.) — referred to

Ed Miller Sales & Rentals Ltd. v. Caterpillar Tractor Co. (1988), 63 Alta. L.R. (2d) 189, 94 A.R. 17, 1988 CarswellAlta 219 (Alta. Q.B.) — referred to

Esso Resources Canada Ltd. v. Stearns Catalytic Ltd. (1989), 98 A.R. 374, 45 C.C.L.I. 143, 1989 CarswellAlta 714 (Alta. Q.B.) — referred to

Gainers Inc. v. Pocklington Holdings Inc. (1995), 30 Alta. L.R. (3d) 273, [1995] 9 W.W.R. 117, 169 A.R. 288, 97 W.A.C. 288, 1995 CarswellAlta 200 (Alta. C.A.) — referred to

Huzar v. Canada (2000), 2000 CarswellNat 1132, 258 N.R. 246, 2000 CarswellNat 5603 (Fed. C.A.) — referred to

Kaddoura v. Hanson (2015), 2015 ABCA 154, 2015 CarswellAlta 780, [2015] 6 W.W.R. 535, 67 C.P.C. (7th) 376, 600 A.R. 184, 645 W.A.C. 184, 15 Alta. L.R. (6th) 37 (Alta. C.A.) — referred to

Poitras v. Sawridge Band (2013), 2013 FC 910, 2013 CF 910, 2013 CarswellNat 3938, 2013 CarswellNat 3939, (sub nom. *Poitras v. Sawridge Indian Band*) 438 F.T.R. 264 (Eng.) (F.C.) — considered

Royal Bank of Canada v. Trang (2014), 2014 ONCA 883, 2014 CarswellOnt 17254, 379 D.L.R. (4th) 601, 123 O.R. (3d) 401, 327 O.A.C. 199 (Ont. C.A.) — referred to

Stoney v. Sawridge First Nation (2013), 2013 FC 509, 2013 CarswellNat 1434, 2013 CF 509, 2013 CarswellNat 2006, 432 F.T.R. 253 (Eng.) (F.C.) — referred to

Strickland v. Canada (Attorney General) (2015), 2015 SCC 37, 2015 CSC 37, 2015 CarswellNat 2457, 2015 CarswellNat 2458, 386 D.L.R. (4th) 1, 87 Admin. L.R. (5th) 60, 473 N.R. 328, [2015] 2 S.C.R. 713 (S.C.C.) — considered

Toronto Dominion Bank v. Sawchuk (2011), 2011 ABQB 757, 2011 CarswellAlta 2131, 86 C.B.R. (5th) 1, 530 A.R. 172 (Alta. Master) — referred to

Trimay Wear Plate Ltd. v. Way (2008), 2008 ABQB 601, 2008 CarswellAlta 1330, 456 A.R. 371 (Alta. Q.B.) — referred to

Wasylyshen v. Canadian Broadcasting Corp. (September 5, 2006), Doc. 0403-08497 (Alta. Q.B.) — referred to

Weatherill Estate v. Weatherill (2003), 2003 ABQB 69, 2003 CarswellAlta 81, 49 E.T.R. (2d) 314, 11 Alta. L.R. (4th) 183, 337 A.R. 180, 40 E.T.R. (2d) 314 (Alta. Q.B.) — referred to

Z. (H.) v. Unger (2013), 2013 ABQB 639, 2013 CarswellAlta 2121, 49 C.P.C. (7th) 122, 573 A.R. 391 (Alta. Q.B.) — referred to

1985 Sawridge Trust (Trustees of) v. Alberta (Public Trustee) (2012), 2012 ABQB 365, 2012 CarswellAlta 1042, 75 Alta. L.R. (5th) 188, (sub nom. *Twinn v. Public Trustee (Alta.)*) 543 A.R. 90, (sub nom. *1985 Sawridge Trust v. Alberta (Public Trustee)*) [2013] 3 C.N.L.R. 395 (Alta. Q.B.) — considered

1985 Sawridge Trust (Trustees of) v. Alberta (Public Trustee) (2013), 2013 ABCA 226, 2013 CarswellAlta 1015, (sub nom. *1985 Sawridge Trust v. Alberta (Public Trustee)*) [2013] 3 C.N.L.R. 411, 85 Alta. L.R. (5th) 165, (sub nom. *Twinn v. Alberta (Public Trustee)*) 553 A.R. 324, (sub nom. *Twinn v. Alberta (Public Trustee)*) 583 W.A.C. 324 (Alta. C.A.) — referred to

783783 Alberta Ltd. v. Canada (Attorney General) (2010), 2010 ABCA 226, 2010 CarswellAlta 1379, 2010 D.T.C. 5125 (Eng.), [2010] 6 C.T.C. 194, 89 C.P.C. (6th) 21, 322 D.L.R. (4th) 56, 76 C.C.L.T. (3d) 32, 29 Alta. L.R. (5th) 37, [2010] 12 W.W.R. 472, 482 A.R. 136, 490 W.A.C. 136 (Alta. C.A.) — considered

Statutes considered:

Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11
Generally — referred to

Indian Act, R.S.C. 1985, c. I-5
Generally — referred to

s. 2(1) "band" — referred to

Personal Information Protection and Electronic Documents Act, S.C. 2000, c. 5
Generally — referred to

Rules considered:

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s. 209 — referred to

Alberta Rules of Court, Alta. Reg. 124/2010
Generally — referred to

Pt. V — referred to

R. 5.2 — referred to

R. 5.5-5.9 — referred to

R. 5.13 — considered

R. 5.13(1) — considered

R. 6.3 — considered

R. 9.19 — considered

Regulations considered:

Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.)
Federal Child Support Guidelines, SOR/97-175

Generally — referred to

APPLICATION by Public Trustee for production of records and information from band.

D.R.G. Thomas J.:

I Introduction

1 This is a decision on a production application made by the Public Trustee and also contains other directions. Before moving to the substance of the decision and directions, I review the steps that have led up to this point and the roles of the parties involved. Much of the relevant information is collected in an earlier and related decision, *1985 Sawridge Trust (Trustees of) v. Alberta (Public Trustee)*, 2012 ABQB 365 (Alta. Q.B.) ["*Sawridge #1*"], (2012), 543 A.R. 90 (Alta. Q.B.) affirmed 2013 ABCA 226, 553 A.R. 324 (Alta. C.A.) ["*Sawridge #2*"]. The terms defined in *Sawridge #1* are used in this decision.

II. Background

2 On April 15, 1985, the Sawridge Indian Band, No. 19, now known as the Sawridge First Nation [sometimes referred to as the "Band", "Sawridge Band", or "SFN"], set up the 1985 Sawridge Trust [sometimes referred to as the "Trust" or the "Sawridge Trust"] to hold some Band assets on behalf of its then members. The 1985 Sawridge Trust and other related trusts were created in the expectation that persons who had previously been excluded from Band membership by gender (or the gender of their parents) would be entitled to join the Band as a consequence of amendments to the *Indian Act*, RSC 1985, c I-5, which were being proposed to make that legislation compliant with the *Canadian Charter of Rights and Freedoms*, Part 1, *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [the "*Charter*"].

3 The 1985 Sawridge Trust is administered by the Trustees [the "Sawridge Trustees" or the "Trustees"]. The Trustees had sought advice and direction from this Court in respect to proposed amendments to the definition of the term "Beneficiaries" in the 1985 Sawridge Trust (the "Trust Amendments") and confirmation of the transfer of assets into that Trust.

4 One consequence of the proposed amendments to the 1985 Sawridge Trust would be to affect the entitlement of certain dependent children to share in Trust assets. There is some question as to the exact nature of the effects, although it seems to be accepted by all of those involved on this application that some children presently entitled to a share in the benefits of the 1985 Sawridge Trust would be excluded if the proposed changes are approved and implemented. Another concern is that the proposed revisions would mean that certain dependent children of proposed members of the Trust would become beneficiaries and be entitled to shares in the Trust, while other dependent children would be excluded.

5 Representation of the minor dependent children potentially affected by the Trust Amendments emerged as an issue in 2011. At the time of confirming the scope of notices to be given in respect to the application for advice and directions, it was observed that children who might be affected by the Trust Amendments were not represented by independent legal counsel. This led to a number of events:

August 31, 2011 - I directed that the Office of the Public Trustee of Alberta [the "Public Trustee"] be notified of the proceedings and invited to comment on whether it should act in respect of any existing or potential minor beneficiaries of the Sawridge Trust.

February 14, 2012 - The Public Trustee applied:

1. to be appointed as the litigation representative of minors interested in this proceeding;

2. for the payment of advance costs on a solicitor and own client basis and exemption from liability for the costs of others; and

3. for an advance ruling that information and evidence relating to the membership criteria and processes of the Sawridge Band is relevant material.

April 5, 2012 - the Sawridge Trustees and the SFN resisted the Public Trustee's application.

June 12, 2012 - I concluded that a litigation representative was necessary to represent the interests of the minor beneficiaries and potential beneficiaries of the 1985 Sawridge Trust, and appointed the Public Trustee in that role: *Sawridge #1*, at paras 28-29, 33. I ordered that Public Trustee, as a neutral and independent party, should receive full and advance indemnification for its activities in relation to the Sawridge Trust (***Sawridge #1***, at para 42), and permitted steps to investigate "... the Sawridge Band membership criteria and processes because such information may be relevant and material ..." (***Sawridge #1***, at para 55).

June 19, 2013 - the Alberta Court of Appeal confirmed the award of solicitor and own client costs to the Public Trustee, as well as the exemption from unfavourable cost awards (***Sawridge #2***).

April 30, 2014 - the Trustees and the Public Trustee agreed to a consent order related to questioning of Paul Bujold and Elizabeth Poitras.

June 24, 2015 - the Public Trustee's application directed to the SFN was stayed and the Public Trustee was ordered to provide the SFN with the particulars of and the basis for the relief it claimed. A further hearing was scheduled for June 30, 2015.

June 30, 2015 - after hearing submissions, I ordered that:

- the Trustee's application to settle the Trust was adjourned;

- the Public Trustee file an amended application for production from the SFN with argument to be heard on September 2, 2015; and

- the Trustees identify issues concerning calculation and reimbursement of the accounts of the Public Trustee for legal services.

September 2/3, 2015 - after a chambers hearing, I ordered that:

- within 60 days the Trustees prepare and serve an affidavit of records, per the *Alberta Rules of Court*, Alta Reg 124/2010 [the "*Rules*", or individually a "*Rule*"],

- the Trustees may withdraw their proposed settlement agreement and litigation plan, and

- some document and disclosure related items sought by the Public Trustee were adjourned *sine die*. ("September 2/3 Order")

October 5, 2015 - I directed the Public Trustee to provide more detailed information in relation to its accounts totalling $205,493.98. This further disclosure was intended to address a concern by the Sawridge Trustees concerning steps taken by the Public Trustee in this proceeding.

6 Earlier steps have perhaps not ultimately resolved but have advanced many of the issues which emerged in mid-2015. The Trustees undertook to provide an Affidavit of Records. I have directed additional disclosure of the activities of the legal counsel assisting the Public Trustee to allow the Sawridge Trustees a better opportunity to evaluate those legal accounts. The most important issue which remains in dispute is the application by the Public Trustee for the production of documents/information held by the SFN.

7 This decision responds to that production issue, but also more generally considers the current state of this litigation in an attempt to refocus the direction of this proceeding and the activities of the Public Trustee to ensure that it meets the dual objectives of assisting this Court in directing a fair distribution scheme for the assets of the 1985 Sawridge Trust and the representation of potential minor beneficiaries.

III. The 1985 Sawridge Trust

8 *Sawridge #1* at paras 7-13 reviews the history of the 1985 Sawridge Trust. I repeat that information verbatim, as this context is relevant to the role and scope of the Public Trustee's involvement in this matter:

> [8] In 1982 various assets purchased with funds of the Sawridge Band were placed in a formal trust for the members of the Sawridge Band. In 1985 those assets were transferred into the 1985 Sawridge Trust. [In 2012] the value of assets held by the 1985 Sawridge Trust is approximately $70 million. As previously noted, the beneficiaries of the Sawridge Trust are restricted to persons who were members of the Band prior to the adoption by Parliament of the *Charter* compliant definition of Indian status.
>
> [9] In 1985 the Sawridge Band also took on the administration of its membership list. It then attempted (unsuccessfully) to deny membership to Indian women who married non-aboriginal persons: ***Sawridge Band v. Canada***, 2009 FCA 123, 391 N.R. 375, leave denied [2009] S.C.C.A. No. 248. At least 11 women were ordered to be added as members of the Band as a consequence of this litigation: ***Sawridge Band v. Canada***, 2003 FCT 347, 2003 FCT 347, [2003] 4 F.C. 748, affirmed 2004 FCA 16, [2004] 3 F.C.R. 274. Other litigation continues to the present in relation to disputed Band memberships: ***Poitras v. Sawridge Band***, 2012 FCA 47, 428 N.R. 282, leave sought [2012] S.C.C.A. No. 152.
>
> [10] At the time of argument in April 2012, the Band had 41 adult members, and 31 minors. The Sawridge Trustees report that 23 of those minors currently qualify as beneficiaries of the 1985 Sawridge Trust; the other eight minors do not.
>
> [11] At least four of the five Sawridge Trustees are beneficiaries of the Sawridge Trust. There is overlap between the Sawridge Trustees and the Sawridge Band Chief and Council. Trustee Bertha L'Hirondelle has acted as Chief; Walter Felix Twinn is a former Band Councillor. Trustee Roland Twinn is currently the Chief of the Sawridge Band.
>
> [12] The Sawridge Trustees have now concluded that the definition of "Beneficiaries" contained in the 1985 Sawridge Trust is "potentially discriminatory". They seek to redefine the class of beneficiaries as the present members of the Sawridge Band, which is consistent with the definition of "Beneficiaries" in another trust known as the 1986 Trust.

[13] This proposed revision to the definition of the defined term "Beneficiaries" is a precursor to a proposed distribution of the assets of the 1985 Sawridge Trust. The Sawridge Trustees indicate that they have retained a consultant to identify social and health programs and services to be provided by the Sawridge Trust to the beneficiaries and their minor children. Effectively they say that whether a minor is or is not a Band member will not matter: see the Trustee's written brief at para. 26. The Trustees report that they have taken steps to notify current and potential beneficiaries of the 1985 Sawridge Trust and I accept that they have been diligent in implementing that part of my August 31 Order.

IV. The Current Situation

9 This decision and the June 30 and September 2/3, 2015 hearings generally involve the extent to which the Public Trustee should be able to obtain documentary materials which the Public Trustee asserts are potentially relevant to its representation of the identified minor beneficiaries and the potential minor beneficiaries. Following those hearings, some of the disagreements between the Public Trustee and the 1985 Sawridge Trustees were resolved by the Sawridge Trustees agreeing to provide a *Rules* Part V affidavit of records within 60 days of the September 2/3 Order.

10 The primary remaining issue relates to the disclosure of information in documentary form sought by the Public Trustee from the SFN and there are also a number of additional ancillary issues. The Public Trustee seeks information concerning:

1. membership in the SFN,

2. candidates who have or are seeking membership with the SFN,

3. the processes involved to determine whether individuals may become part of the SFN,

4. records of the application processes and certain associated litigation, and

5 how assets ended up in the 1985 Sawridge Trust.

11 The SFN resists the application of the Public Trustee, arguing it is not a party to this proceeding and that the Public Trustee's application falls outside the *Rules*. Beyond that, the SFN questions the relevance of the information sought.

V. Submissions and Argument

A. The Public Trustee

12 The Public Trustee takes the position that it has not been able to complete the responsibilities assigned to it by me in *Sawridge #1* because it has not received enough information on potential, incomplete and filed applications to join the SFN. It also needs information on the membership process, including historical membership litigation scenarios, as well as data concerning movement of assets into the 1985 Sawridge Trust.

13 It also says that, without full information, the Public Trustee cannot discharge its role in representing affected minors.

14 The Public Trustee's position is that the Sawridge Band is a party to this proceeding, or is at least so closely linked to the 1985 Sawridge Trustees that the Band should be required to produce documents/information. It says that the Court can add the Sawridge Band as a party. In the alternative, the Public Trustee argues that *Rules* 5.13 and 9.19 provide a basis to order production of all relevant and material records.

B. The SFN

15 The SFN takes the position that it is not a party to the Trustee's proceedings in this Court and it has been careful not to be added as a party. The SFN and the Sawridge Trustees are distinct and separate entities. It says that since the SFN has not been made a party to this proceeding, the *Rules* Part V procedures to compel documents do not apply to it. This is a stringent test: *Trimay Wear Plate Ltd. v. Way*, 2008 ABQB 601, 456 A.R. 371 (Alta. Q.B.); *Wasylyshen v. Canadian Broadcasting Corp.*, [2006] A.J. No. 1169 (Alta. Q.B.).

16 The only mechanism provided for in the *Rules* to compel a non-party such as the SFN to provide documents is *Rule* 5.13, and its function is to permit access to specific identified items held by the third party. That process is not intended to facilitate a 'fishing expedition' (*Ed Miller Sales & Rentals Ltd. v. Caterpillar Tractor Co.* (1988), 94 A.R. 17, 63 Alta. L.R. (2d) 189 (Alta. Q.B.)) or compel disclosure (*Gainers Inc. v. Pocklington Holdings Inc.* (1995), 169 A.R. 288, 30 Alta. L.R. (3d) 273 (Alta. C.A.)). Items sought must be particularized, and this process is not a form of discovery: *Esso Resources Canada Ltd. v. Stearns Catalytic Ltd.* (1989), 98 A.R. 374, 16 A.C.W.S. (3d) 286 (Alta. Q.B.).

17 The SFN notes the information sought is voluminous, confidential and involves third parties. It says that the Public Trustee's application is document discovery camouflaged under a different name. In any case, a document is only producible if it is relevant and material to the arguments pled: *Rule* 5.2; *Weatherill Estate v. Weatherill*, 2003 ABQB 69, 337 A.R. 180 (Alta. Q.B.).

18 The SFN takes the position that *Sawridge #1* ordered the Public Trustee to investigate two points: 1) identifying the beneficiaries of the 1985 Sawridge Trust; and 2) scrutiny of transfer of assets into the 1985 Sawridge Trust. They say that what the decision in *Sawridge #1* did not do was authorize interference or duplication in the SFN's membership process and its results. Much of what the Public Trustee seeks is not relevant to either issue, and so falls outside the scope of what properly may be sought under *Rule* 5.13.

19 Privacy interests and privacy legislation are also factors: *Royal Bank of Canada v. Trang*, 2014 ONCA 883 (Ont. C.A.) at paras 97, (2014), 123 O.R. (3d) 401 (Ont. C.A.) ; *Personal Information Protection and Electronic Documents Act*, SC 2000, c 5. The Public Trustee should not have access to this information unless the SFN's application candidates consent. Much of the information in membership applications is personal and sensitive. Other items were received by the SFN during litigation under an implied undertaking of confidentiality: *Doucette (Litigation Guardian of) v. Wee Watch Day Care Systems Inc.*, 2008 SCC 8, [2008] 1 S.C.R. 157 (S.C.C.). The cost to produce the materials is substantial.

20 The SFN notes that even though it is a target of the relief sought by the Public Trustee that it was not served with the July 16, 2015 application, and states the Public Trustee should follow the procedure in *Rule* 6.3. The SFN expressed concern that the Public Trustee's application represents an unnecessary and prejudicial investigation which ultimately harms the beneficiaries and potential beneficiaries of the 1985 Sawridge Trust. In *Sawridge #2* at para 29, the Court of Appeal had stressed that the order in *Sawridge #1* that the Public Trustee's costs be paid on a solicitor and own client basis is not a "blank cheque", but limited to activities that are "fair and reasonable". It asks that the Public Trustee's application be dismissed and that the Public Trustee pay the costs of the SFN in this application, without indemnification from the 1985 Sawridge Trust.

C. The Sawridge Trustees

21 The Sawridge Trustees offered and I ordered in my September 2/3 Order that within 60 days the Trustees prepare and deliver a *Rule* 5.5-5.9 affidavit of records to assist in moving the process forward. This resolved the immediate question of the Public Trustee's access to documents held by the Trustees.

22 The Trustees generally support the position taken by the SFN in response to the Public Trustee's application for Band documents. More broadly, the Trustees questioned whether the Public Trustee's developing line of inquiry was necessary. They argued that it appears to target the process by which the SFN evaluates membership applications. That is not the purpose of this proceeding, which is instead directed at re-organizing and distributing the 1985 Sawridge Trust in a manner that is fair and non-discriminatory to members of the SFN.

23 They argue that the Public Trustee is attempting to attack a process that has already undergone judicial scrutiny. They note that the SFN's admission procedure was approved by the Minister of Indian and Northern Affairs, and the Federal Court concluded it was fair: *Stoney v. Sawridge First Nation*, 2013 FC 509, 432 F.T.R. 253 (Eng.) (F.C.). Further, the membership criteria used by the SFN operate until they are found to be invalid: *Huzar v. Canada*, [2000] F.C.J. No. 873 (Fed. C.A.) at para 5, (2000), 258 N.R. 246 (Fed. C.A.). Attempts to circumvent these findings in applications to the Canadian Human Rights Commission were rejected as a collateral attack, and the same should occur here.

24 The 1985 Sawridge Trustees reviewed the evidence which the Public Trustee alleges discloses an unfair membership admission process, and submit that the evidence relating to Elizabeth Poitras and other applicants did not indicate a discriminatory process, and in any case was irrelevant to the critical question for the Public Trustee as identified in *Sawridge #1*, namely that the Public Trustee's participation is to ensure minor children of Band members are treated fairly in the proposed distribution of the assets of the 1985 Sawridge Trust.

25 Additional submissions were made by two separate factions within the Trustees. Ronald Twinn, Walter Felix Twin, Bertha L'Hoirondelle and Clara Midbo argued that an unfiled affidavit made by Catherine Twinn was irrelevant to the Trustees' disclosure. Counsel for Catherine Twinn expressed concern in relation to the Trustee's activities being transparent and that the ultimate recipients of the 1985 Sawridge Trust distribution be the appropriate beneficiaries.

VI. Analysis

26 The Public Trustee's application for production of records/information from the SFN is denied. First, the Public Trustee has used a legally incorrect mechanism to seek materials from the SFN. Second, it is necessary to refocus these proceedings and provide a well-defined process to achieve a fair and just distribution of the assets of the 1985 Sawridge Trust. To that end, the Public Trustee may seek materials/information from the Sawridge Band, but only in relation to specific issues and subjects.

A. Rule 5.13

27 I agree with the SFN that it is a third party to this litigation and is not therefore subject to the same disclosure procedures as the Sawridge Trustees who are a party. Alberta courts do not use proximal relationships as a bridge for disclosure obligations: *Trimay Wear Plate Ltd. v. Way*, at para 17.

28 If I were to compel document production by the Sawridge Band, it would be via *Rule* 5.13:

> 5.13(1) On application, and after notice of the application is served on the person affected by it, the Court may order a person who is not a party to produce a record at a specified date, time and place if
>
> (a) the record is under the control of that person,
>
> (b) there is reason to believe that the record is relevant and material, and
>
> (c) the person who has control of the record might be required to produce it at trial.
>
> (2) The person requesting the record must pay the person producing the record an amount determined by the Court.

29 The modern *Rule* 5.13 uses language that closely parallels that of its predecessor *Alberta Rules of Court*, Alta Reg 390/1968, s 209. Jurisprudence applying *Rule* 5.13 has referenced and used approaches developed in the application of that precursor provision: *Toronto Dominion Bank v. Sawchuk*, 2011 ABQB 757, 530 A.R. 172 (Alta. Master); *Z. (H.) v. Unger*, 2013 ABQB 639, 573 A.R. 391 (Alta. Q.B.). I agree with this approach and conclude that the principles in the pre-*Rule* 5.13 jurisprudence identified by the SFN apply here: *Ed Miller Sales & Rentals Ltd. v. Caterpillar Tractor Co.*; *Gainers Inc. v. Pocklington Holdings Inc.*; *Esso Resources Canada Ltd. v. Stearns Catalytic Ltd.*

30 The requirement for potential disclosure is that "there is reason to believe" the information sought is "relevant and material". The SFN has argued relevance and materiality may be divided into "primary, secondary, and tertiary" relevance, however the Alberta Court of Appeal has rejected these categories as vague and not useful: *Kaddoura v. Hanson*, 2015 ABCA 154 (Alta. C.A.) at para 15, (2015), 15 Alta. L.R. (6th) 37 (Alta. C.A.).

31 I conclude that the only documents which are potentially disclosable in the Public Trustee's application are those that are "relevant and material" to the issue before the court.

B. Refocussing the role of the Public Trustee

32 It is time to establish a structure for the next steps in this litigation before I move further into specific aspects of the document production dispute between the SFN and the Public Trustee. A prerequisite to any document disclosure is that the information in question must be *relevant*. Relevance is tested *at the present point*.

33 In *Sawridge #1* I at paras 46-48 I determined that the inquiry into membership processes was relevant because it was a subject of some dispute. However, I also stressed the exclusive jurisdiction of the Federal Court (paras 50-54) in supervision of that process. Since *Sawridge #1* the Federal Court has ruled in *Stoney v. Sawridge First Nation* on the operation of the SFN's membership process.

34 Further, in *Sawridge #1* I noted at paras 51-52 that in *783783 Alberta Ltd. v. Canada (Attorney General)*, 2010 ABCA 226, 322 D.L.R. (4th) 56 (Alta. C.A.), the Alberta Court of Appeal had concluded this Court's inherent jurisdiction included an authority to make findings of fact and law in what would nominally appear to be the exclusive jurisdiction of the Tax Court of Canada. However, that step was based on *necessity*. More recently in *Strickland v. Canada (Attorney General)*, 2015 SCC 37 (S.C.C.), the Supreme Court of Canada confirmed the Federal Courts decision to refuse judicial review of the *Federal Child Support Guidelines*, SOR/97-175, not because those courts did not have potential jurisdiction concerning the issue, but because the provincial superior courts were better suited to that task because they "... deal day in and day out with disputes in the context of marital breakdown ...": para 61.

35 The same is true for this Court attempting to regulate the operations of First Nations, which are 'Bands' within the meaning of the *Indian Act*. The Federal Court is the better forum and now that the Federal Court has commented on the SFN membership process in *Stoney v. Sawridge First Nation*, there is no need, nor is it appropriate, for this Court to address this subject. If there are outstanding disputes on whether or not a particular person should be admitted or excluded from Band membership then that should be reviewed in the Federal Court, and not in this 1985 Sawridge Trust modification and distribution process.

36 It follows that it will be useful to re-focus the purpose of the Public Trustee's participation in this matter. That will determine what is and what is not *relevant*. The Public Trustee's role is not to conduct an open-ended inquiry into the membership of the Sawridge Band and historic disputes that relate to that subject. Similarly, the Public Trustee's function is not to conduct a general inquiry into potential conflicts of interest between the SFN, its administration and the 1985 Sawridge Trustees. The overlap between some of these parties is established and obvious.

37 Instead, the future role of the Public Trustee shall be limited to four tasks:

1. Representing the interests of minor beneficiaries and potential minor beneficiaries so that they receive fair treatment (either direct or indirect) in the distribution of the assets of the 1985 Sawridge Trust;

2. Examining on behalf of the minor beneficiaries the manner in which the property was placed/settled in the Trust; and

3. Identifying potential but not yet identified minors who are children of SFN members or membership candidates; these are potentially minor beneficiaries of the 1985 Sawridge Trust; and

4. Supervising the distribution process itself.

38 The Public Trustee's attention appears to have expanded beyond these four objectives. Rather than unnecessarily delay distribution of the 1985 Sawridge Trust assets, I instruct the Public Trustee and the 1985 Sawridge Trustees to immediately proceed to complete the first three tasks which I have outlined.

39 I will comment on the fourth and final task in due course.

Task 1 - Arriving at a fair distribution scheme

40 The first task for the 1985 Sawridge Trustees and the Public Trustee is to develop for my approval a proposed scheme for distribution of the 1985 Sawridge Trust that is fair in the manner in which it allocates trust assets between the potential beneficiaries, adults and children, previously vested or not. I believe this is a largely theoretical question and the exact numbers and personal characteristics of individuals in the various categories is generally irrelevant to the Sawridge Trustee's proposed scheme. What is critical is that the distribution plan can be critically tested by the Public Trustee to permit this Court to arrive at a fair outcome.

41 I anticipate the critical question for the Public Trustee at this step will be to evaluate whether any differential treatment between adult beneficiaries and the children of adult beneficiaries is or is not fair to those children. I do not see that the particular identity of these individuals is relevant. This instead is a question of fair treatment of the two (or more) categories.

42 On September 3, 2015, the 1985 Sawridge Trustees withdrew their proposed distribution arrangement. I direct the Trustees to submit a replacement distribution arrangement by January 29, 2016.

43 The Public Trustee shall have until March 15, 2016 to prepare and serve a *Rule* 5.13(1) application on the SFN which identifies specific documents that it believes are relevant and material to test the fairness of the proposed distribution arrangement to minors who are children of beneficiaries or potential beneficiaries.

44 If necessary, a case management meeting will be held before April 30, 2016 to decide any disputes concerning any *Rule* 5.13(1) application by the Public Trustee. In the event no *Rule* 5.13(1) application is made in relation to the distribution scheme the Public Trustee and 1985 Sawridge Band Trustees shall make their submissions on the distribution proposal at the pre-April 30 case management session.

Task 2 - Examining potential irregularities related to the settlement of assets to the Trust

45 There have been questions raised as to what assets were settled in the 1985 Sawridge Trust. At this point it is not necessary for me to examine those potential issues. Rather, the first task is for the Public Trustee to complete its document request from the SFN which may relate to that issue.

46 The Public Trustee shall by January 29, 2016 prepare and serve a *Rule* 5.13(1) application on the Sawridge Band that identifies specific types of documents which it believes are relevant and material to the issue of the assets settled in the 1985 Sawridge Trust.

47 A case management hearing will be held before April 30, 2016 to decide any disputes concerning any such *Rule* 5.13(1) application by the Public Trustee.

Task 3 - Identification of the pool of potential beneficiaries

48 The third task involving the Public Trustee is to assist in identifying potential minor beneficiaries of the 1985 Sawridge Trust. The assignment of this task recognizes that the Public Trustee operates within its Court-ordered role when it engages in inquiries to establish the pools of individuals who are minor beneficiaries and potential minor

beneficiaries. I understand that the first category of minor beneficiaries is now identified. The second category of potential minor beneficiaries is an area of legitimate investigation for the Public Trustee and involves two scenarios:

1. an individual with an unresolved application to join the Sawridge Band and who has a child; and

2. an individual with an unsuccessful application to join the Sawridge Band and who has a child.

49 I stress that the Public Trustee's role is limited to the representation of potential child beneficiaries of the 1985 Sawridge Trust only. That means litigation, procedures and history that relate to past and resolved membership disputes are not relevant to the proposed distribution of the 1985 Sawridge Trust. As an example, the Public Trustee has sought records relating to the disputed membership of Elizabeth Poitras. As noted, that issue has been resolved through litigation in the Federal Court, and that dispute has no relation to establishing the identity of potential minor beneficiaries. The same is true of any other adult Sawridge Band members.

50 As Aalto, J. observed in *Poitras v. Sawridge Band*, 2013 FC 910, 438 F.T.R. 264 (Eng.) (F.C.), "[M]any gallons of judicial ink have been spilt" in relation to the gender-based disputes concerning membership in the SFN. I do not believe it is necessary to return to this issue. The SFN's past practise of relentless resistance to admission into membership of aboriginal women who had married non-Indian men is well established.

51 The Public Trustee has no relevant interest in the children of any parent who has an unresolved application for membership in the Sawridge Band. If that outstanding application results in the applicant being admitted to the SFN then that child will become another minor represented by the Public Trustee.

52 While the Public Trustee has sought information relating to incomplete applications or other potential SFN candidates, I conclude that an open-ended 'fishing trip' for unidentified hypothetical future SFN members, who may also have children, is outside the scope of the Public Trustee's role in this proceeding. There needs to be minimum threshold proximity between the Public Trustee and any unknown and hypothetical minor beneficiary. As I will stress later, the Public Trustee's activities need to be reasonable and fair, and balance its objectives: cost-effective participation in this process (i.e., not unreasonably draining the Trust) and protecting the interests of minor children of SFN members. Every dollar spent in legal and research costs turning over stones and looking under bushes in an attempt to find an additional, hypothetical minor beneficiary reduces the funds held in trust for the known and existing minor children who are potential beneficiaries of the 1985 Sawridge Trust distribution and the clients of the Public Trustee. Therefore, I will only allow investigation and representation by the Public Trustee of children of persons who have, at a minimum, completed a Sawridge Band membership application.

53 The Public Trustee also has a potential interest in a child of a Sawridge Band candidate who has been rejected or is rejected after an unsuccessful application to join the SFN. In these instances the Public Trustee is entitled to inquire whether the rejected candidate intends to appeal the membership rejection or challenge the rejection through judicial review in the Federal Court. If so, then that child is also a potential candidate for representation by the Public Trustee.

54 This Court's function is not to duplicate or review the manner in which the Sawridge Band receives and evaluates applications for Band membership. I mean by this that if the Public Trustee's inquiries determine that there are one or more outstanding applications for Band membership by a parent of a minor child then that is not a basis for the Public Trustee to intervene in or conduct a collateral attack on the manner in which that application is evaluated, or the result of that process.

55 I direct that this shall be the full extent of the Public Trustee's participation in any disputed or outstanding applications for membership in the Sawridge Band. This Court and the Public Trustee have no right, as a third party, to challenge a crystalized result made by another tribunal or body, or to interfere in ongoing litigation processes. The Public Trustee has no right to bring up issues that are not yet necessary and relevant.

56 In summary, what is pertinent at this point is to identify the potential recipients of a distribution of the 1985 Sawridge Trust, which include the following categories:

1. Adult members of the SFN;

2. Minors who are children of members of the SFN;

3. Adults who have unresolved applications to join the SFN;

4. Children of adults who have unresolved applications to join the SFN;

5. Adults who have applied for membership in the SFN but have had that application rejected and are challenging that rejection by appeal or judicial review; and

6. Children of persons in category 5 above.

57 The Public Trustee represents members of category 2 and potentially members of categories 4 and 6. I believe the members of categories 1 are 2 are known, or capable of being identified in the near future. The information required to identify persons within categories 3 and 5 is relevant and necessary to the Public Trustee's participation in this proceeding. If this information has not already been disclosed, then I direct that the SFN shall provide to the Public Trustee by January 29, 2016 the information that is necessary to identify those groups:

1. The names of individuals who have:

a) made applications to join the SFN which are pending (category 3); and

b) had applications to join the SFN rejected and are subject to challenge (category 5); and

2. The contact information for those individuals where available.

58 As noted, the Public Trustee's function is limited *to representing minors*. That means the Public Trustee:

1. shall inquire of the category 3 and 5 individuals to identify if they have any children; and

2. if an applicant has been rejected whether the applicant has challenged, or intends to challenge a rejection by appeal or by judicial proceedings in the Federal Court.

59 This information should:

1. permit the Public Trustee to know the number and identity of the minors whom it represents (category 2) and additional minors who may in the future enter into category 2 and become potential minor recipients of the 1985 Sawridge Trust distribution;

2. allow timely identification of:

a) the maximum potential number of recipients of the 1985 Sawridge Trust distribution (the total number of persons in categories 1-6);

b) the number of adults and minors whose potential participation in the distribution has "crystalized" (categories 1 and 2); and

c) the number of adults and minors who are potential members of categories 1 and 2 at some time in the future (total of categories 3-6).

60 These are declared to be the limits of the Public Trustee's participation in this proceeding and reflects the issues in respect to which the Public Trustee has an interest. Information that relates to these issues is potentially relevant.

61 My understanding from the affidavit evidence and submissions of the SFN and the 1985 Sawridge Trustees is that the Public Trustee has already received much information about persons on the SFN's membership roll and prospective and rejected candidates. I believe that this will provide all the data that the Public Trustee requires to complete Task 3. Nevertheless, the Public Trustee is instructed that if it requires any additional documents from the SFN to assist it in identifying the current and possible members of category 2, then it is to file a *Rule* 5.13 application by January 29, 2016. The Sawridge Band and Trustees will then have until March 15, 2016 to make written submissions in response to that application. I will hear any disputed *Rule* 5.13 disclosure application at a case management hearing to be set before April 30, 2016.

Task 4 - General and residual distributions

62 The Sawridge Trustees have concluded that the appropriate manner to manage the 1985 Sawridge Trust is that its property be distributed in a fair and equitable manner. Approval of that scheme is Task 1, above. I see no reason, once Tasks 1-3 are complete, that there is any reason to further delay distribution of the 1985 Sawridge Trust's property to its beneficiaries.

63 Once Tasks 1-3 are complete the assets of the Trust may be divided into two pools:

Pool 1: trust property available for immediate distribution to the identified trust beneficiaries, who may be adults and/or children, depending on the outcome of Task 1; and

Pool 2: trust funds that are reserved at the present but that may at some point be distributed to:

a) a potential future successful SFN membership applicant and/or child of a successful applicant, or

b) an unsuccessful applicant and/or child of an unsuccessful applicant who successfully appeals/challenges the rejection of their membership application.

64 As the status of the various outstanding potential members of the Sawridge Band is determined, including exhaustion of appeals, the second pool of 'holdback' funds will either:

1. be distributed to a successful applicant and/or child of the applicant as that result crystalizes; or

2. on a pro rata basis:

a) be distributed to the members of Pool 1, and

b) be reserved in Pool 2 for future potential Pool 2 recipients.

65 A minor child of an outstanding applicant is a potential recipient of Trust property, depending on the outcome of Task 1. However, there is no broad requirement for the Public Trustee's direct or indirect participation in the Task 4 process, beyond a simple supervisory role to ensure that minor beneficiaries, if any, do receive their proper share.

C. Disagreement among the Sawridge Trustees

66 At this point I will not comment on the divergence that has arisen amongst the 1985 Sawridge Trustees and which is the subject of a separate originating notice (Docket 1403 04885) initiated by Catherine Twinn. I note, however, that much the same as the Public Trustee, the 1985 Sawridge Trustees should also refocus on the four tasks which I have identified.

67 First and foremost, the Trustees are to complete their part of Task 1: propose a distribution scheme that is fair to all potential members of the distribution pools. This is not a question of specific cases, or individuals, but a scheme that is fair to the adults in the SFN and their children, current and potential.

68 Task 2 requires that the 1985 Sawridge Trustees share information with the Public Trustee to satisfy questions on potential irregularities in the settlement of property into the 1985 Sawridge Trust.

69 As noted, I believe that the information necessary for Task 3 has been accumulated. I have already stated that the Public Trustee has no right to engage and shall not engage in collateral attacks on membership processes of the SFN. The 1985 Sawridge Trustees, or any of them, likewise have no right to engage in collateral attacks on the SFN's membership processes. Their fiduciary duty (and I mean all of them), is to the beneficiaries of the Trust, and not third parties.

D. Costs for the Public Trustee

70 I believe that the instructions given here will refocus the process on Tasks 1 - 3 and will restrict the Public Trustee's activities to those which warrant full indemnity costs paid from the 1985 Sawridge Trust. While in *Sawridge #1* I had directed that the Public Trustee may inquire into SFN Membership processes at para 54 of that judgment, the need for that investigation is now declared to be over because of the decision in *Stoney v. Sawridge First Nation*. I repeat that inquiries into the history and processes of the SFN membership are no longer necessary or relevant.

71 As the Court of Appeal observed in *Sawridge #2* at para 29, the Public Trustee's activities are subject to scrutiny by this Court. In light of the four Task scheme set out above I will not respond to the SFN's cost argument at this point, but instead reserve on that request until I evaluate the *Rule* 5.13 applications which may arise from completion of Tasks 1-3.

Application dismissed.

TAB 11

Most Negative Treatment: Distinguished
Most Recent Distinguished: Wasylyk v. Bonnyville (Municipal District No. 87) | 2012 ABQB 348, 2012 CarswellAlta 931, [2012] A.W.L.D. 2900, [2012] A.W.L.D. 2903, [2012] A.W.L.D. 2964, [2012] A.W.L.D. 3000, [2012] A.W.L.D. 3001, 540 A.R. 394, 217 A.C.W.S. (3d) 703, 99 M.P.L.R. (4th) 83 | (Alta. Q.B., May 24, 2012)

2011 ABCA 238
Alberta Court of Appeal

Reece v. Edmonton (City)

2011 CarswellAlta 1349, 2011 ABCA 238, [2011] 11 W.W.R. 1, [2011] A.W.L.D. 3422, [2011] A.W.L.D. 3436, [2011] A.J. No. 876, 204 A.C.W.S. (3d) 696, 243 C.R.R. (2d) 230, 335 D.L.R. (4th) 600, 46 Alta. L.R. (5th) 1, 513 A.R. 199, 530 W.A.C. 199, 85 M.P.L.R. (4th) 36, 9 C.P.C. (7th) 21

Tove Reece, Zoocheck Canada Incorporated and People for the Ethical Treatment of Animals, Inc., Appellants (Applicants) and The City of Edmonton, Respondent (Respondent)

Catherine Fraser C.J.A., Peter Costigan, Frans Slatter JJ.A.

Heard: March 29, 2011
Judgment: August 4, 2011
Docket: Edmonton Appeal 1003-0264-AC

Proceedings: affirming *Reece v. Edmonton (City)* (2010), 2010 ABQB 538, 2010 CarswellAlta 1631, 324 D.L.R. (4th) 172, 96 C.P.C. (6th) 275, 35 Alta. L.R. (5th) 204, [2011] 3 W.W.R. 529 (Alta. Q.B.)

Counsel: C.C. Ruby, for Appellants
S.F.E. Phipps, S.C. McAnsh, for Respondent

Subject: Civil Practice and Procedure; Criminal; Property; Natural Resources

Headnote

Civil practice and procedure --- Disposition without trial — Stay or dismissal of action — Grounds — Action frivolous, vexatious or abuse of process — Miscellaneous

Respondent city operated zoo which housed lone African elephant — Appellant activists claimed that city's treatment of elephant was harmful and in violation of animal protection law — Activists commenced action for declaration that city was in violation of law — Action was dismissed as abuse of process — Activists appealed finding of motions court — Appeal dismissed — Issue of declaration was not suitable for courts, as procedure of Humane Society complaint was more appropriate and had been launched by activists — As legality of government action was not at issue but rather policy, court could not interfere in choices made by city in operation of zoo — Allowing application such as that of activists could potentially lead to numerous similar applications which would overrun court's resources — Dissenting opinion focused on animal protection and evolution of animal rights — Government body was obligated to follow animal welfare laws — Allegations if proven would indicate that city had kept elephant in improper conditions, without proper companionship or care — Public interest was present in ensuring that animals were properly cared for and protected under applicable law, if pattern of conduct existed contrary to these laws — City records were admissible in form of affidavit evidence, and showed that treatment of elephant may have violated law — Actual determination of city's conduct was appropriate matter for trial judge, as declaratory relief should not be determined summarily.

Criminal law --- Offences — Cruelty to animals — Mistreatment of animals

Respondent city operated zoo which housed lone African elephant — Appellant activists claimed that city's treatment of elephant was harmful and in violation of animal protection law — Activists commenced action for declaration that city was in violation of law — Action was dismissed as abuse of process — Activists appealed finding of motions court — Appeal dismissed — Issue of declaration was not suitable for courts, as procedure of Humane Society complaint was more appropriate and had been launched by activists — As legality of government action was not at issue but rather policy, court could not interfere in choices made by city in operation of zoo — Allowing application such as that of activists could potentially lead to numerous similar applications which would overrun court's resources — Dissenting opinion focused on animal protection and evolution of animal rights — Government body was obligated to follow animal welfare laws — Allegations if proven would indicate that city had kept elephant in improper conditions, without proper companionship or care — Public interest was present in ensuring that animals were properly cared for and protected under applicable law, if pattern of conduct existed contrary to these laws — City records were admissible in form of affidavit evidence, and showed that treatment of elephant may have violated law — Actual determination of City's conduct was appropriate matter for trial judge, as declaratory relief should not be determined summarily.

The applicants were animal rights activists who opposed the treatment of an African elephant in the respondent city's zoo. The applicants applied for a declaration that the city was in violation of animal protection law. The motions court dismissed the application, and the applicants appealed.

Held: The appeal was dismissed.

Per Frans Slatter J.A. (Peter Costigan J.A. concurring): The applicants had no standing to bring their application, as the procedure they were seeking to use was not the most appropriate one. A Humane Society complaint could achieve the same result as the applicants were seeking. As it was government policy rather than the legality of government action that the applicants were taking issue with, the application could not be granted.

Per Catherine Fraser C.J.A. (dissenting): The applicants were following proper procedure in challenging the government's possible violation of animal protection laws. If the applicants' allegations were true, then they were entitled to declaratory relief against the respondents. There was a strong public interest in animal protection under the applicable law. The actual determination of the city's conduct was a proper matter for the trial judge, and was not to be determined summarily.

Table of Authorities

Cases considered by *Frans Slatter J.A.*:

C. (R.) v. McDougall (2008), [2008] 11 W.W.R. 414, 83 B.C.L.R. (4th) 1, (sub nom. *F.H. v. McDougall*) [2008] 3 S.C.R. 41, 2008 CarswellBC 2041, 2008 CarswellBC 2042, 2008 SCC 53, 60 C.C.L.T. (3d) 1, (sub nom. *H. (F.) v. McDougall*) 297 D.L.R. (4th) 193, 61 C.P.C. (6th) 1, 61 C.R. (6th) 1, (sub nom. *F.H. v. McDougall*) 380 N.R. 82, (sub nom. *F.H. v. McDougall*) 439 W.A.C. 74, (sub nom. *F.H. v. McDougall*) 260 B.C.A.C. 74 (S.C.C.) — referred to

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Rizzo & Rizzo Shoes Ltd., Re (1998), 1998 CarswellOnt 1, 1998 CarswellOnt 2, 50 C.B.R. (3d) 163, [1998] 1 S.C.R. 27, 33 C.C.E.L. (2d) 173, 154 D.L.R. (4th) 193, 36 O.R. (3d) 418 (headnote only), (sub nom. *Rizzo & Rizzo Shoes Ltd. (Bankrupt), Re*) 221 N.R. 241, (sub nom. *Rizzo & Rizzo Shoes Ltd. (Bankrupt), Re*) 106 O.A.C. 1, (sub nom. *Adrien v. Ontario Ministry of Labour*) 98 C.L.L.C. 210-006 (S.C.C.) — referred to

Ryan v. Victoria (City) (1999), 234 N.R. 201, 168 D.L.R. (4th) 513, 117 B.C.A.C. 103, 191 W.A.C. 103, 40 M.V.R. (3d) 1, 44 C.C.L.T. (2d) 1, 59 B.C.L.R. (3d) 81, 50 M.P.L.R. (2d) 1, [1999] 6 W.W.R. 61, [1999] 1 S.C.R. 201, 1999 CarswellBC 79, 1999 CarswellBC 80 (S.C.C.) — referred to

Stack v. Dowden (2007), [2007] 2 All E.R. 929, [2007] UKHL 17 (Eng. H.L.) — referred to

Thorson v. Canada (Attorney General) (No. 2) (1974), 1974 CarswellOnt 228, 1974 CarswellOnt 228F, [1975] 1 S.C.R. 138, 1 N.R. 225, 43 D.L.R. (3d) 1 (S.C.C.) — referred to

Toronto (City) v. C.U.P.E., Local 79 (2003), 232 D.L.R. (4th) 385, 9 Admin. L.R. (4th) 161, [2003] 3 S.C.R. 77, 17 C.R. (6th) 276, 2003 SCC 63, 2003 CarswellOnt 4328, 2003 CarswellOnt 4329, 311 N.R. 201, 2003 C.L.L.C. 220-071, 179 O.A.C. 291, 120 L.A.C. (4th) 225, 31 C.C.E.L. (3d) 216 (S.C.C.) — referred to

Toronto (City) v. Polai (1969), [1970] 1 O.R. 483, 8 D.L.R. (3d) 689, 1969 CarswellOnt 907 (Ont. C.A.) — referred to

Toronto (City) v. Polai (1972), [1973] S.C.R. 38, 28 D.L.R. (3d) 638, 1972 CarswellOnt 215, 1972 CarswellOnt 215F (S.C.C.) — referred to

Tottrup v. Alberta (Minister of Environment) (2000), 21 Admin. L.R. (3d) 58, 34 C.E.L.R. (N.S.) 250, 81 Alta. L.R. (3d) 27, [2000] 9 W.W.R. 21, (sub nom. *Tottrup v. Lund*) 255 A.R. 204, (sub nom. *Tottrup v. Lund*) 220 W.A.C. 204, 2000 CarswellAlta 365, 2000 ABCA 121, (sub nom. *Tottrup v. Lund*) 186 D.L.R. (4th) 226 (Alta. C.A.) — referred to

Valley Forge Christian College v. Americans United for Separation of Church & State Inc. (1982), 454 U.S. 464 (U.S. Pa.) — referred to

Statutes considered by *Frans Slatter J.A.*:

Animal Protection Act, R.S.A. 2000, c. A-41
Generally — pursuant to

s. 1(2) — considered

s. 2 — considered

s. 12(1) — considered

s. 12(2) — considered

Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11
s. 7 — referred to

s. 11 — referred to

Motor Carrier Act, R.S.N.S. 1967, c. 190
Generally — referred to

Wildlife Act, R.S.A. 2000, c. W-10
Generally — referred to

Statutes considered by *Catherine Fraser C.J.A.* (dissenting):

Alberta Evidence Act, R.S.A. 2000, c. A-18
s. 39 — referred to

Animal Care Act, S.M. 1996, c. 69
s. 2 — referred to

s. 3 — referred to

s. 4 — referred to

Animal Protection Act, R.S.A. 2000, c. A-41
Generally — referred to

s. 1(2) — referred to

s. 2 — referred to

s. 2(1) — referred to

s. 2(2) — referred to

s. 2.1 [en. 2005, c. 22, s. 4] — referred to

s. 2.1(d) [en. 2005, c. 22, s. 4] — referred to

s. 3 — referred to

s. 4 — referred to

s. 9 — referred to

s. 12(1) — referred to

s. 12(2) — referred to

s. 13(1) — referred to

Animal Protection Act, S.N.S. 2008, c 33
s. 21 — referred to

s. 22 — referred to

Animal Protection Act, R.S.Y. 2002, c. 6
s. 2(2) — referred to

s. 3 — referred to

Canada Assistance Plan, R.S.C. 1970, c. C-1
Generally — referred to

Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11
Generally — referred to

s. 7 — referred to

s. 11(d) — referred to

Companion Animal Protection Act,, S.P.E.I. 2001, c. 4
s. 3 — referred to

s. 4(3) — referred to

s. 9(5) — referred to

Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11, reprinted R.S.C. 1985, App. II, No. 44

s. 52 — referred to

Criminal Code, 1892, S.C. 1892, c. 29
s. 512 — referred to

Criminal Code, R.S.C. 1985, c. C-46
Generally — referred to

Pt. XIV — referred to

s. 445.1 [en. 2008, c. 12, s. 1] — referred to

s. 445.1(1) [en. 2008, c. 12, s. 1] — referred to

s. 504 — referred to

s. 507.1 [en. 2002, c. 13, s. 22] — referred to

s. 579 — referred to

s. 579.01 [en. 2002, c. 13, s. 47] — referred to

s. 795 — referred to

Cruelty to Animals, Act respecting, R.S.C. 1886, c. 172
s. 2 — referred to

Interpretation Act, R.S.A. 2000, c. I-8
s. 10 — referred to

Judicature Act, R.S.A. 2000, c. J-2
s. 11 — referred to

More Effectual Prevention of Cruelty to Animals, Act for the, 1849 (12 & 13 Vict), c. 92
s. 2 — referred to

s. 3 — referred to

Ontario Society for the Prevention of Cruelty to Animals Act, R.S.O. 1990, c. O.36
s. 11.1 [en. 2008, c. 16, s. 8] — referred to

s. 11.2 [en. 2008, c. 16, s. 8] — referred to

Provincial Offences Procedure Act, R.S.A. 2000, c. P-34
Generally — referred to

s. 3 — referred to

s. 4(1) — referred to

s. 4(2) — referred to

Society for the Prevention of Cruelty to Animals Act, R.S.N.B. 1973, c. S-12
s. 18 — referred to

s. 20 — referred to

s. 22 — referred to

United States Constitution
Article III — referred to

Wildlife Act, R.S.A. 2000, c. W-10
Generally — referred to

Rules considered by *Catherine Fraser C.J.A.* (dissenting):

Alberta Rules of Court, Alta. Reg. 390/68
Generally — referred to

R. 6 — referred to

R. 129(1)(a) — referred to

R. 129(1)(d) — referred to

R. 129(2) — referred to

R. 410 — referred to

R. 560 — referred to

Alberta Rules of Court, Alta. Reg. 124/2010
Generally — referred to

R. 3.2(6) — referred to

R. 3.68(1) — referred to

R. 3.68(1)(a) — referred to

R. 3.68(2)(b) — referred to

R. 3.68(2)(d) — referred to

R. 15.2(1) — referred to

Treaties considered by *Catherine Fraser C.J.A.* (dissenting):

Convention on Biological Diversity, 1992, 31 I.L.M. 818
Generally — referred to

Convention on the Conservation of Migratory Species of Wild Animals, 1651 U.N.T.S. 333, 19 I.L.M.15
Generally — referred to

Convention on International Trade in Endangered Species of Wild Fauna and Flora, C.T.S. 1975/32; 993 U.N.T.S. 243
Generally — referred to

Protocol (No. 33) on Protection and Welfare of Animals, 1997
Preamble — referred to

Treaty on the Functioning of the European Union, 2010
Article 13 — referred to

Regulations considered by *Catherine Fraser C.J.A.* (dissenting):

Animal Protection Act, R.S.A. 2000, c. A-41
Animal Protection Regulation, Alta. Reg. 203/2005

Generally — referred to

s. 2(3) — referred to

s. 10(1) — referred to

Wildlife Act, R.S.A. 2000, c. W-10
Wildlife Regulation, Alta. Reg. 143/97

Generally — referred to

APPEAL from judgment reported at *Reece v. Edmonton (City)* (2010), 2010 ABQB 538, 2010 CarswellAlta 1631, 324 D.L.R. (4th) 172, 96 C.P.C. (6th) 275, 35 Alta. L.R. (5th) 204, [2011] 3 W.W.R. 529, 85 M.P.L.R. (4th) 15 (Alta. Q.B.), dismissing applicant animal activists' application for declaratory relief against respondent city.

***Frans Slatter J.A.*:**

1 The issue on this appeal is whether the appellants are entitled to seek a declaration that the respondent City is in breach of the *Animal Protection Act*, R.S.A. 2000, c. A-41. It raises an important issue about the proper role of the courts in supervising day-to-day governmental operations.

Facts

2 The appellant organizations have had a long standing concern about the welfare of animals. The individual appellant is a resident of Sherwood Park who has a similar concern.

3 The respondent City holds a licence under the *Wildlife Act*, R.S.A. 2000, c. W-10 to operate a zoo, which houses a lone Asian elephant named Lucy. Lucy's presence at the zoo has been a controversial topic for some time. The appellants and others believe that Lucy's facilities and situation at the zoo are detrimental to her health, and that Lucy should be moved to an elephant sanctuary in a warmer climate where she can enjoy the companionship of other elephants. The respondent City concedes that Lucy has some health problems, but denies that her situation and facilities are inadequate or illegal, and argues that in any event she is not healthy enough to survive a long-distance move. The merits of this argument are not at issue in this appeal, all the evidence needed to resolve it is not found on this record, and this appeal does not deal with animal rights or the propriety of Lucy's care.

4 The appellants have mounted a campaign to have Lucy moved. The Edmonton Humane Society is charged with enforcing the *Animal Protection Act* in Edmonton, and on September 26, 2007 Zoocheck wrote a letter to it objecting to the conditions under which Lucy was kept. The Animal Protection Service of the Edmonton Humane Society investigated, and replied on November 19, 2007 that it had "concluded by the information provided that it would not be in Lucy's best interest to be transported".

5 Not having received the answer they wanted, on February 1, 2010 the appellants commenced this action by originating notice for an order:

> Declaring that the City of Edmonton is in violation of section 2 of the *Animal Protection Act*, R.S.A. 2000, c. A-41.

No other relief is asked for. The application is supported by a number of affidavits, including affidavits by a number of veterinarians.

6 The *Animal Protection Act* is a statute of general application that deals with the welfare of animals. It provides in part:

> 1(2) For the purposes of this Act, an animal is in distress if it is
>
> (a) deprived of adequate shelter, ventilation, space, food, water or veterinary care or reasonable protection from injurious heat or cold,
>
> (b) injured, sick, in pain or suffering, or
>
> (c) abused or subjected to undue hardship, privation or neglect.
>
> 2(1) No person shall cause or permit an animal of which the person is the owner or the person in charge to be or to continue to be in distress.
>
> (1.1) No person shall cause an animal to be in distress.
>
> (2) This section does not apply if the distress results from an activity carried on in accordance with the regulations or in accordance with reasonable and generally accepted practices of animal care, management, husbandry, hunting, fishing, trapping, pest control or slaughter.
>
> . . .
>
> 12(1) A person who contravenes this Act or the regulations is guilty of an offence and liable to a fine of not more than $20,000.
>
> (2) If the owner of an animal is found guilty of an offence under section 2, the Court may make an order restraining the owner from continuing to have custody of an animal for a period of time specified by the Court.

The *Act* restricts and controls the activities of persons; it does not create "rights" in animals or people that impose corresponding duties on others: *R. v. Barros*, 2010 ABCA 116, 477 A.R. 127, 25 Alta. L.R. (5th) 326 (Alta. C.A.) at para. 39.

7 In addition to the offence created by s. 2, the *Act* grants peace officers certain powers of investigation, inspection and enforcement, and authorizes them to seize distressed animals and turn them over to a humane society. The *Act* also authorizes the approval of humane societies, who are independent agencies (not agents of the Government of Alberta) charged with administering the *Act*.

8 The respondent City brought an application to have the originating notice struck out on the basis that the applicants have no standing, that the proceedings are an abuse of process, or alternatively that the appellants have chosen the wrong

procedure. Because of the nature of an application to strike, the City did not file any affidavits to rebut those of the appellants, although the City disputes the factual basis of the application.

Decision of the Chambers Judge

9 The chambers judge granted the application and struck out the originating notice: *Reece v. Edmonton (City)*, 2010 ABQB 538, 35 Alta. L.R. (5th) 204 (Alta. Q.B.). He concluded that the proceedings were an abuse of process because a private litigant cannot seek a declaration that the respondent is in breach of a penal provision in a statute. Alternatively, he concluded that the application should have been brought by way of statement of claim, not originating notice. Finally, while it was not necessary to rule on the matter, he concluded that the appellants had no private interest standing, and that there were barriers to them being awarded public interest standing.

10 The decision of the chambers judge raises issues of law, which are reviewed by this Court for correctness: *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235 (S.C.C.) at para. 8. A chambers judge's ruling on abuse of process is a discretionary finding based on specific facts, therefore, a review calls for deference, absent palpable and overriding error: *Enron Canada Corp. v. Husky Oil Operations Ltd.*, 2007 ABCA 27, 401 A.R. 291 (Alta. C.A.) at para. 13.

Issues on Appeal

11 The parties identified and addressed the following issues:

(a) Did the chambers judge err in denying the appellants standing to seek a declaration?

(b) Did the chambers judge err in concluding that the proceedings were an abuse of process?

A collateral issue which was identified by the parties was whether the proceedings were properly commenced by originating notice, or whether they should have been commenced by statement of claim.

12 A number of other issues were not raised or argued, for example the historical and legal context of animal protection laws, the effectiveness of those laws, possible reform of those laws, whether animals should be extended legal rights, whether a statutory or other legal duty of care is owed to or with respect to animals, the availability of unrequested legal remedies, and other corollary issues. Since those issues were not raised by the parties, they have not had an opportunity to address them, nor to address any references or authorities which were not before the Court at the time of oral argument. As the Court noted in *Rodaro v. Royal Bank* (2002), 59 O.R. (3d) 74, 157 O.A.C. 203 (Ont. C.A.) at para. 62:

> In addition to fairness concerns which standing alone would warrant appellate intervention, the introduction of a new theory of liability in the reasons for judgment also raises concerns about the reliability of that theory. We rely on the adversarial process to get at the truth. That process assumes that the truth best emerges after a full and vigorous competition amongst the various opposing parties. A theory of liability that emerges for the first time in the reasons for judgment is never tested in the crucible of the adversarial process.

In addition, it is generally not appropriate for a court to express open ended opinions on issues not needed to decide the appeal in hand.

13 In particular, it is unnecessary to deal at length with the evidence filed by the appellants about Lucy's health or Lucy's care and its adequacy. Those are not issues presently before the Court. Therefore, the evidence on them is not properly before the Court. Moreover, this proceeding could not be commenced by originating notice; any assessment of the evidence could only occur in a trial. The respondent City brought an application to strike out the pleadings on legal grounds. This is a well recognized procedure, and it is generally argued based on the pleadings alone, occasionally supplemented by evidence. But an application to strike pleadings (in a case like this) is not a decision on the merits of the dispute. The party seeking to strike pleadings as an abuse of process is not generally expected to file all of its evidence rebutting whatever evidence the applicant has filed in support of the action. The record is, by nature of an application to strike, one-sided at this stage. Further, the evidence has not yet been tested by cross-examination, it has not been

rebutted by the respondent, and it would be both unfair and unsafe to draw conclusions about Lucy's care at this time. Further, the issue of abuse of process is a question of law, and these collateral arguments do not assist in resolving it, even to the extent that they are said to provide "context".

14 This was not an application to strike out the pleadings for failure to disclose a cause of action. It is in that context that it is said it must be "plain and obvious" that no cause of action is disclosed, although that is not a prohibition on striking out claims just because the issues are complex. As was stated in the leading case of *Drummond-Jackson v. British Medical Assn.*, [1970] 1 W.L.R. 688 (Eng. C.A.) at p. 700 "... the question is whether, when the point has been argued, it has become plain and obvious that there can be but one result". It is questionable whether an application to strike a pleading because it is an abuse of process has to meet that test or standard. The leading cases on abuse of process cited below make no mention of such a test. The issue essentially comes down to whether the record before the court is sufficient to fairly decide whether an abuse of process is involved. If, as in this appeal, the record is sufficiently clear to determine that there is an abuse of process, then there is no need to defer the issue to trial. It would be inappropriate to allow a suit that has been shown in the context of the law and the litigation process to be an abuse of process to proceed just because its abusive nature, while clearly shown by the record, is complex or subtle: *Knight v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42 (S.C.C.) at paras. 19-20, 25.

15 An application to strike an action for abuse of process raises a pure question of law about the legal legitimacy of the pleadings. Applications to strike are routinely decided summarily, not after a trial. If the challenged proceedings are an abuse of process, it would be unjust to subject the respondent to that abuse, and only give relief at the end of a trial once the abuse has manifested itself. Further, trials are held primarily to make findings of fact. There are no disputed facts in this case that bear on the issue of abuse of process. What the pleadings contain is known, and the factors that are said to reveal an abuse of process are also known. There is no reason why the issue raised by the respondent City cannot be decided at this stage.

Abuse of Process

16 Abuse of process is a compendious principle that the courts use to control misuses of the judicial system. Abuses of process can arise in many different contexts, and there is no universal test or statement of law that encompasses all of the examples.

17 Both parties discussed *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63, [2003] 3 S.C.R. 77 (S.C.C.) in some detail. *Toronto (City) v. C.U.P.E.* is primarily concerned with limits on the ability to re-litigate settled issues. It sets out the tests for the application of the doctrines of issue estoppel and *res judicata*. The most important aspect of *Toronto (City) v. C.U.P.E.*, however, is its confirmation that there is a residual discretion in the courts, using the doctrine of abuse of process, to prevent re-litigation of issues even when the preconditions for issue estoppel and *res judicata* are not present. The Court (at para. 37) quoted with approval *Canam Enterprises Inc. v. Coles* (2000), 51 O.R. (3d) 481 (Ont. C.A.) at para. 55:

> 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.

Toronto v. CUPE discusses abuse of process in the context of the re-litigation of issues. It is not intended to be an exhaustive exploration of all the circumstances in which an abuse of process can arise. As the Court pointed out at para. 36: "The doctrine of abuse of process is used in a variety of legal contexts."

18 The test for abuse of process has been stated in different ways, as the context requires. For example, in *R. v. Scott*, [1990] 3 S.C.R. 979 (S.C.C.) the Court stated 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

> 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....

The issue in *Scott* was whether it was an abuse of process for the Crown to reactivate a criminal prosecution, after a stay had been entered. The test for abuse of process was stated in terms that were relevant to that issue.

19 It is therefore not appropriate to take any judicial statement of the ambit of the doctrine of abuse of process, and apply it mechanically to different factual settings and issues. Just because a particular proceeding does not fit into a particular authoritative recitation of the test for abuse of process does not mean that no abuse is present. Procedures that can "bring the administration of justice into disrepute" can take many forms.

20 The cases on abuse of process have tended to fall into a number of categories, such as the re-litigation of settled issues, fairness of trial procedures, delay in proceedings, and so forth. One such category is where proceedings are used to enforce or engage punitive penal statutes, other than by charging the party allegedly responsible with the applicable offence. Such proceedings are generally found to be an abuse of process. Sometimes the court reaches that result by finding that the applicant has no standing to apply for the requested relief.

21 The law has long recognized a limited ability to grant equitable or declaratory relief to a private litigant respecting a public wrong, provided that the applicant has also suffered some private wrong. That principle was recognized in *Gouriet v. Union of Post Office Workers* (1977), [1978] A.C. 435 (U.K. H.L.), where an injunction was sought to prevent postal workers from refusing to deliver mail to South Africa. The applicant in *Gouriet* asserted no private right, and merely sought to enjoin an anticipated breach of a criminal statute. The application was dismissed partly on the basis of standing, and partly on the basis that civil relief was not available to redress public wrongs:

- "And just as the Attorney-General has in general no power to interfere with the assertion of private rights, so in general no private person has the right of representing the public in the assertion of public rights. If he tries to do so his action can be struck out." (Lord Wilberforce at p. 477; see also Viscount Dilhorne at p. 494, Lord Diplock at pp. 499-500, Lord Edmund-Davies at pp. 508-9)

- "This is a right, of comparatively modern use, of the Attorney-General to invoke the assistance of *civil courts* in aid of the *criminal law*. It is an exceptional power confined, in practice, to cases where an offence is frequently repeated in disregard of a, usually, inadequate penalty ... in no case hitherto has it ever been suggested that an individual can act, through relator actions for public nuisance which may also involve a criminal offence, ... for 200 years." (Lord Wilberforce at p. 481)

The House of Lords concluded (at pp. 483, 495, 501, 522-3) that these problems could not be overcome by simply applying for a declaration instead of an injunction. In this analysis it makes little difference whether one says that the applicant has no standing to apply for the remedy, or that the type of relief requested is not available.

22 The same result is sometimes achieved by refusing to exercise the court's discretion to grant declarations where they are inappropriate: *Gouriet* at p. 501. In *Kourtessis v. Minister of National Revenue*, [1993] 2 S.C.R. 53 (S.C.C.), Sopinka J. stated at p. 116:

> ... As a general rule, this discretion should be exercised to refuse to entertain the action when declaratory relief is being sought as a substitute for obtaining a ruling in a criminal case. This will be the apt characterization of any declaration which is sought with respect to relief that could be obtained from a trial court which has been ascertained. The same considerations apply before a trial court has been ascertained if the relief sought will determine some issue in pending criminal proceedings and does not have as a substantial purpose vindication of an independent civil right....

In that case a civil declaration of unconstitutionality was granted, because there was no other way to effectively adjudicate the issue.

23 The central principle of *Gouriet*, that the applicant must have some private interest in addition to any public interest, has been followed in Canada. It was applied in *MacMillan Bloedel Ltd. v. Simpson*, [1996] 2 S.C.R. 1048 (S.C.C.), where the applicant was granted an injunction to restrain the blocking of a highway (which was also criminal conduct) because the applicant had a sufficient private interest in keeping the road open.

24 It is true that in a long series of cases, starting with *MacNeil v. Nova Scotia (Board of Censors)* (1975), [1976] 2 S.C.R. 265 (S.C.C.) through to *Finlay v. Canada (Minister of Finance)*, [1986] 2 S.C.R. 607 (S.C.C.), the test for standing in public law matters has been relaxed. But just because a private litigant might be granted standing in a public matter does not mean that there are no limits on the types of relief that can be obtained. None of the leading cases on standing involves an attempt to obtain a declaration that a particular respondent was in violation of a penal statute. The law of standing has been detached from an examination of the type of relief available to a private litigant in a public matter, but there are still limits on the type of relief that can be obtained.

25 In *Finlay* the applicant was a recipient of social assistance who sought a declaration that the cost-sharing arrangements between the federal and provincial governments were not in compliance with the governing statute. The Court concluded that the applicant did not have a sufficient private interest in the matter to warrant standing on that basis. The Court recognized, however, a jurisdiction to grant discretionary public interest standing to litigants who could not establish private interest standing. *Finlay* departs, therefore, from the strict view of standing stated in *Gouriet*. *Finlay* does not, however, stand for the proposition that the scope of declaratory relief is unlimited. As Le Dain J. stated at p. 635: "It is essential to distinguish, I think, between standing, or the right to seek particular relief, and the entitlement to such relief."

26 Even where the applicant has standing, the courts have generally denied applications for a declaration that the respondent is in breach of a penal statute. In *R. v. Shore Disposal Ltd.* (1976), 16 N.S.R. (2d) 538 (N.S. C.A.) the applicant sought a declaration that one of its competitors was operating a business of collection and disposal of refuse contrary to the provisions of the *Motor Carrier Act*, because the respondent did not have the necessary licence. The Court held:

> 24 This matter might be approached, as we have seen, on the basis that the respondents have no standing to take the action or on the closely related basis that they have no rights which would be protected, defined or declared by the declaration sought. It is better, however, to base our judgment on the principle that the Court, in proceedings where the plaintiffs are virtually private prosecutors, should not grant a declaration that the defendant has committed an offence. Such a declaration is gratuitous and almost impertinent advice to the summary conviction court and to the Public Utilities Board, and may also be in effect an injunction disregard of which may visit upon the defendant penalties harsher far then the legislature ordained.

27 In *Cassells v. University of Victoria*, 2010 BCSC 1213, 323 D.L.R. (4th) 180 (B.C. S.C.) the applicant sought an injunction to restrain the respondent University from dealing with an infestation of rabbits on its campus. The application was dismissed, in part because it essentially sought a declaration that the respondent was in breach of the statutes governing animal welfare (at paras. 3, 82-3).

28 Similar declarations or other remedies have been refused in a number of other cases: *Manitoba Naturalists Society Inc. v. Ducks Unlimited Canada* (1991), 79 Man. R. (2d) 15, 86 D.L.R. (4th) 709 (Man. Q.B.); *Rabbitt v. Craigmont Mines Ltd.* (1963), 42 W.W.R. 157 (B.C. S.C.); *Mid West Television Ltd. v. S.E.D. Systems Inc.* (1981), 9 Sask. R. 199, [1981] 3 W.W.R. 560 (Sask. Q.B.).

29 There are a number of reasons why the courts are reluctant to grant a declaration that someone is in breach of a penal statute, or other similar civil remedies. For one thing, the burden of proof in civil proceedings is on a balance of probabilities, whereas the burden of proof in penal regulatory proceedings is proof beyond a reasonable doubt: *C. (R.) v. McDougall*, 2008 SCC 53, [2008] 3 S.C.R. 41 (S.C.C.) at paras. 40, 49; *R. v. Lobbins (No. 2)*, [1940] 3 W.W.R. 301, 74 C.C.C. 274 (Alta. S.C. (App. Div.)). The presumption of innocence in penal proceedings is lost or undermined

in a declaratory action. In penal proceedings the respondent has the right to remain silent, and has no obligation to call evidence; in civil proceedings the respondent is often compelled to call evidence, or disclose its defence. Other evidentiary and procedural protections of the criminal process are lost: *Gouriet* at pp. 481, 487-9, 498-9; *Shore Disposal* at para. 25; *Manitoba Naturalists Society* at paras. 24-6; *R. c. Richard*, [1996] 3 S.C.R. 525 (S.C.C.) at para. 19; *R. v. Wigglesworth*, [1987] 2 S.C.R. 541 (S.C.C.) at p. 554. Where a person is charged with a penal offence the protections of ss. 7 and 11 of the *Charter* are engaged, and they should not be undermined by changing the form of the procedure.

30 Civil proceedings of this nature can also have the effect of undermining the jurisdiction of the criminal courts: *Shore Disposal*. In this case, if the respondent City had been charged with an offence under the *Act*, the trial would have been in the Provincial Court. The proceedings brought by the appellants had the effect of transferring the issue to the Court of Queen's Bench.

31 Civil proceedings of this sort also undermine the authority of the Attorney General in the enforcement of the law: *Gouriet* at pp. 477, 489-90, 506, 511-12, 521. If any complainant swore an information that the respondent City was in breach of the *Act*, the Attorney General would have the option of taking over the prosecution, or of staying the proceedings. Seeking a declaration takes the matter out of the hands of the Attorney General, and bypasses the penal sanctions contemplated by the *Act*.

32 Alternatively, to the extent that the declaration applied for effectively implies that the respondent City is in breach of its zoo licence, the present proceedings undermine the authority of those charged with granting or revoking such licences. If there has been any breach in that regard, public law remedies may be available. The Supreme Court has made it clear in *New Brunswick (Board of Management) v. Dunsmuir*, 2008 SCC 9, [2008] 1 S.C.R. 190 (S.C.C.) that deference is owed to the decisions of those exercising public functions, and the superior courts are not to second-guess their decisions by applying a correctness standard of review to what they do. By seeking a declaration, the appellants essentially have asked the Court of Queen's Bench to usurp the authority to make decisions about animal welfare entrusted to other public officials: *R. v. Consolidated Maybrun Mines Ltd.*, [1998] 1 S.C.R. 706 (S.C.C.) at paras. 43-4, 57; *Shore Disposal* at paras. 24, 47. The consequences of allowing this procedure can be illustrated by reversing the present proceedings. If the respondent City believed that the appropriate authorities were considering revoking or restricting its zoo licence, the City could not apply for a declaration that it was in full compliance and entitled to a licence, because that would undermine the entire licensing process. Such an application would essentially transfer the jurisdiction to issue licences from the appropriate public officials to the superior courts.

33 The appellants argue that if the courts will not engage the issues in their originating notice, then a level of executive action will be unsupervised by the superior courts. It is not, however, apparent on this record that any executive action has been properly identified and engaged: *Cassells v. University of Victoria* at para. 77. There is no suggestion on this record that the Attorney General has failed in his duty to enforce the law. Offences under the *Act* are routinely prosecuted in the province. There is no reason to assume that the Attorney General would countenance illegal acts by the City: see, for example, the prosecution in *R. v. Edmonton (City)*, 2006 ABPC 56, 20 C.E.L.R. (3d) 1 (Alta. Prov. Ct.). Even if the Attorney General were to assume control of any private prosecution, and were then to stay those proceedings, it is not self-evident that would be in any way improper. There is no indication on this record that the rule of law would be jeopardized by the courts declining to take jurisdiction in this case. The parties primarily responsible for animal welfare (the Edmonton Humane Society, the Attorney General, and the Department of Sustainable Resource Development) are independent of the respondent City, and there is no indication on this record that their ability to enforce the law has been compromised.

34 There are other more appropriate remedies available to the appellants. The Court was advised that after the decision of the chambers judge a further complaint was filed with the Edmonton Humane Society. A further investigation was conducted, following which it was decided not to lay any charges under the *Animal Protection Act*, although the Society indicated that its investigation "will remain open in order to follow up".

35 The appellants argue that there is no other effective alternative way to bring this issue before the courts. Stating the issue in that way presupposes that this is a suitable issue for the courts. Whether the City is discharging its operational duties in the care of Lucy is a hotly contested issue. It is not appropriate to expect the courts to take over the animal husbandry of the animals at the City zoo through the ability to issue declarations on points of law. As mentioned, there are other public officials who have that responsibility, and other appropriate legal procedures to possibly engage if they fail to discharge their duties. Further, it is not the role of the superior courts to review every operational decision made by government, and the courts do not have the resources needed to deal with the volume of applications that could be generated if the procedure chosen by the appellants was endorsed. The role of the superior courts is limited to reviewing the *legality* of executive action, and does not extend to examining the policy choices made by the executive branch. There are established procedures for judicial review, which have many built in controls that reflect the constitutional relationship between the executive branch and the judicial branch. As the Court stated in *Consolidated Maybrun Mines* at para. 25, "... the rule of law does not imply that the procedures for achieving [executive review] can be disregarded, nor does it necessarily empower an individual to apply to whatever forum he or she wishes in order to enforce compliance with it."

36 In summary, the chambers judge came to the correct conclusion that these proceedings are an abuse of process.

Other Issues

37 In light of the conclusion about abuse of process, it is not necessary to consider whether the appellants are entitled to standing, nor whether the form of procedure used by the applicants could be appropriately amended.

Conclusion

38 The appeal is dismissed.

Peter Costigan J.A.:

I concur:

***Catherine Fraser C.J.A.* (dissenting):**

I. Introduction

39 An elephant is a social animal. Thus, according to experts and zoo standards, elephants, especially female elephants, should not be kept alone. [1] This appeal involves Lucy, a 36 year old Asian elephant. She arrived at the Edmonton Valley Zoo, owned by the City of Edmonton, when she was only about two years of age. It is alleged that since then, Lucy has been housed at the Valley Zoo by herself at various times, most recently for almost four years. [2] It is also alleged that the size and structure of the shelter in which the City has confined Lucy for years fail to comply with the City's obligations at law. And that these deprivations have caused or aggravated a number of Lucy's long-standing health problems. Some may consider this appeal and the claims on behalf of Lucy inconsequential, perhaps even frivolous. They would be wrong. Lucy's case raises serious issues not only about how society treats sentient animals [3] — those capable of feeling pain and thereby suffering at human hands — but also about the right of the people in a democracy to ensure that the government itself is not above the law.

40 It must be stressed that this case does not involve the actions of a private citizen, but rather of government. Municipal governments are an integral part of government in our democratic society. [4] As the creation of the Legislature, the City exercises delegated authority in the carrying out of its administrative actions. That is so regardless of whether the activity in which it is engaged could, if performed by a non-governmental actor, be described as private. Therefore, all of the City's activities in carrying out the operations of the Valley Zoo are government actions. [5]

TAB 12

2015 ABQB 565
Alberta Court of Queen's Bench

Stoney Nakoda Nations v. Canada (Attorney General)

2015 CarswellAlta 1686, 2015 ABQB 565, [2015] A.W.L.D. 4040, 258 A.C.W.S. (3d) 730

Chief Darcy Dixon, David Bearspaw Jr., Gilbert Francis, Roderick Lefthand, Gordon Wildman, Chief Bruce Labelle, Henry Holloway, Homer Holloway, Charles Mark, Clifford Powderface, Chief Clifford Poucette, Charlie Abraham, Tater House, Watson Kaquitts and Hank Snow, on their own behalf and on behalf of all other members of the Stoney Nakoda Nations, also known as Stoney Indian Band, consisting of the Bearspaw First Nation, the Chiniki First Nation and the Wesley First Nation, Plaintiffs/Respondents and The Attorney General of Canada and Her Majesty the Queen In Right of Alberta, Defendants/Applicants

P.J. McIntyre J.

Heard: January 12, 2015; January 13, 2015; January 14, 2015; January 15, 2015; January 16, 2015
Judgment: September 11, 2015
Docket: Calgary 0601-014544

Counsel: Raymond Lee, David Shiroky, for Defendant / Applicant, Attorney General of Canada
Sandra Folkins, Neil Dobson, for Defendant / Applicant, Her Majesty the Queen in Right of Alberta
L. Douglas Rae, W.T. Osvath, B. Barrett, for Plaintiffs / Respondents

Subject: Civil Practice and Procedure; Property; Public

Headnote

Civil practice and procedure --- Pleadings — General requirements — Where constituting abuse of process

First Nations purportedly surrendered reserve land to federal Crown, of which three parcels were sold to power company — From about 1985 on, plaintiff member and representatives of First Nation had been litigating about these historical transfers of lands, with actions against federal Crown and power company dismissed or settled — In 2003, plaintiffs brought action against federal and provincial Crown, asserting aboriginal and treaty rights and aboriginal title over large portion of province that included parcels — In 2006, plaintiffs brought this action against defendants, federal and provincial Crown, alleging breach of trust and of fiduciary duty by improper taking of parcels of reserve land to enable power company to build hydroelectric dams and reservoirs — Defendants applied to strike out plaintiffs' pleadings as abuse of process under Rule 3.68 of Alberta Rules of Court — Application granted — Action was abuse of process, as it raised essentially same claims as other actions that were either settled or dismissed — Fact that province was not named as defendant in those actions did not preclude determination that action was abuse of process — Abuse of process was more flexible device to prevent misuse of court process that was not limited to strict requirements of res judicata or issue estoppel — Action was duplicative of concurrent 2003 action, as both actions made overlapping assertions of aboriginal and treaty rights over same land and natural resources and claims for improper use, occupation and exploitation of hydroelectic and other resources — Pleadings were not identical, but 2003 action was comprehensive action that captured this more specific action — Plaintiffs were not entitled to bring second action while first was still pending — Fairness to defendants and court, judicial economy and administration of justice required that plaintiffs bring one comprehensive claim, and 2003 action should proceed.

Table of Authorities

Cases considered by *P.J. McIntyre J.*:

Calgary (City) v. Alberta (Human Rights & Citizenship Commission) (2011), 2011 ABCA 65, 2011 CarswellAlta 231, 88 C.C.P.B. 1, [2011] 5 W.W.R. 412, 16 Admin. L.R. (5th) 237, 39 Alta. L.R. (5th) 104, 331 D.L.R. (4th) 715, (sub nom. *Calgary (City) v. Scobie*) 505 A.R. 115, (sub nom. *Calgary (City) v. Scobie*) 522 W.A.C. 115 (Alta. C.A.) — considered

Chutskoff Estate v. Bonora (2014), 2014 ABQB 389, 2014 CarswellAlta 1040, 590 A.R. 288 (Alta. Q.B.) — referred to

Edmonton Northlands v. Edmonton Oilers Hockey Corp. (1993), 147 A.R. 113, 23 C.P.C. (3d) 49, 15 Alta. L.R. (3d) 179, 1993 CarswellAlta 224 (Alta. Q.B.) — considered

Moulton Contracting Ltd. v. British Columbia (2013), 2013 SCC 26, 2013 CarswellBC 1158, 2013 CarswellBC 1159, 357 D.L.R. (4th) 236, 43 B.C.L.R. (5th) 1, [2013] 7 W.W.R. 1, 443 N.R. 303, (sub nom. *Behn v. Moulton Contracting Ltd.*) [2013] 3 C.N.L.R. 125, 333 B.C.A.C. 34, 571 W.A.C. 34, (sub nom. *Behn v. Moulton Contracting Ltd.*) [2013] 2 S.C.R. 227 (S.C.C.) — referred to

Moysa v. Alberta (Labour Relations Board) (1989), 34 C.P.C. (2d) 97, [1989] 1 S.C.R. 1572, [1989] 4 W.W.R. 596, 60 D.L.R. (4th) 1, 96 N.R. 70, 67 Alta. L.R. (2d) 193, 97 A.R. 368, 89 C.L.L.C. 14,028, 40 C.R.R. 197, 1989 CarswellAlta 86, 1989 CarswellAlta 616 (S.C.C.) — referred to

Osborne v. Pinno (1997), 1997 CarswellAlta 880, 208 A.R. 363, 56 Alta. L.R. (3d) 404, 19 C.P.C. (4th) 383 (Alta. Q.B.) — referred to

Reece v. Edmonton (City) (2011), 2011 ABCA 238, 2011 CarswellAlta 1349, 85 M.P.L.R. (4th) 36, 46 Alta. L.R. (5th) 1, [2011] 11 W.W.R. 1, 335 D.L.R. (4th) 600, 9 C.P.C. (7th) 21, 243 C.R.R. (2d) 230, 513 A.R. 199, 530 W.A.C. 199 (Alta. C.A.) — considered

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Stoney Band v. R. (2004), 2004 FC 122, 2004 CarswellNat 188, 2004 CarswellNat 887, (sub nom. *Stoney Indian Band v. Canada*) 245 F.T.R. 288, (sub nom. *Stoney Band v. Canada*) [2004] 4 C.N.L.R. 348 (F.C.) — referred to

Stoney Band v. R. (2005), 2005 FCA 15, 2005 CarswellNat 116, (sub nom. *Stoney Indian Band v. Canada*) 329 N.R. 201, (sub nom. *Stoney Band v. Canada*) 249 D.L.R. (4th) 274, 2005 CAF 15, 2005 CarswellNat 1459, (sub nom. *Stoney Band v. Canada*) [2005] 2 C.N.L.R. 371 (F.C.A.) — referred to

Stoney Nakoda Nations v. Canada (Attorney General) (2012), 2012 ABCA 316, 2012 CarswellAlta 1816, (sub nom. *Dixon v. Canada (Attorney General)*) [2013] 1 C.N.L.R. 52 (Alta. C.A.) — referred to

Toronto (City) v. C.U.P.E., Local 79 (2003), 2003 SCC 63, 2003 CarswellOnt 4328, 2003 CarswellOnt 4329, 2003 C.L.L.C. 220-071, 232 D.L.R. (4th) 385, 311 N.R. 201, 120 L.A.C. (4th) 225, 179 O.A.C. 291, 17 C.R. (6th) 276, [2003] 3 S.C.R. 77, 9 Admin. L.R. (4th) 161, 31 C.C.E.L. (3d) 216 (S.C.C.) — considered

Statutes considered:

Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11, reprinted R.S.C. 1985, App. II, No. 44
s. 35 — considered

Limitation of Actions Act, R.S.A. 1980, c. L-15
Generally — referred to

Limitations Act, R.S.A. 2000, c. L-12
Generally — referred to

Rules considered:

Alberta Rules of Court, Alta. Reg. 124/2010
R. 1.2(1) — considered

R. 3.68 — considered

R. 3.68(2)(d) — considered

R. 7.3 — considered

APPLICATION to strike out plaintiffs' action respecting purported surrender of reserve land as abuse of process.

***P.J. McIntyre J.*:**

Introduction

1 The Plaintiffs are members and representatives of several First Nations known as the Stoney Nakoda Nation or the Stoney Indian Band. Their action against the Defendants, the Attorney General of Canada ("Canada") and Her Majesty the Queen in right of Alberta ("Alberta") relates to the purported surrender of reserve lands to Canada and the sale of those lands in 1907, 1914, and 1929 to Calgary Power Ltd. (now TransAlta Utilities Corporation or TransAlta).

2 In this application, the Defendants seek to strike the Plaintiffs' pleadings as an abuse of process under Rule 3.68; alternately, they seek summary dismissal under Rule 7.3. They allege the amended statement of claim is an abuse of process, fails to disclose a cause of action, and is barred by the *Limitations Act*, RSA 2000, c L-12, or its predecessor, or by the equitable doctrines of laches, acquiescence and waiver.

Factual background

3 The Plaintiffs commenced this action (the "Dixon action") in December 2006 and amended their statement of claim in December 2007. The Defendants demanded particulars and the Plaintiffs filed replies. The Defendants filed their defences in 2011.

4 The Amended Statement of Claim alleges that Canada improperly took three parcels of land from the Stoney reserves in 1907, 1914, and 1929, the Horseshoe Lands, the Kananaskis Lands and the Ghost Lands, respectively, (collectively, "the Lands") to enable TransAlta to build hydroelectric dams and reservoirs. The Plaintiffs claim they understood the agreements to be leases of the surface, with reversionary rights to them when the Lands were no longer needed for hydroelectric purposes. The Plaintiffs allege the agreements were not understood to be surrenders and that TransAlta's use and occupation of the Lands constitutes a trespass and a nuisance.

5 The Plaintiffs also assert aboriginal and treaty rights to the Lands and to the Stoney Reserves, including rights to the lakes, rivers, and waterways, mines and minerals, both surface and subsurface. The pleadings also allege that Canada and Alberta breached the trust and/or fiduciary duties they owed to the Plaintiffs. The Plaintiffs seek a variety of declarations and significant sums of general damages.

6 The Plaintiffs have been litigating about these Lands in the Alberta Court of Queen's Bench and the Federal Court of Canada since 1985. The actions are briefly identified below as the TransAlta action, the Goodstoney action, the Bearspaw action, and the Wesley action. The pleadings in these actions will be discussed in more detail in the Analysis section.

7 On April 29, 1985 the Plaintiffs initiated their first claim regarding these lands against TransAlta in the Alberta Court of Queen's Bench, action no. 8501-10304. Neither Canada nor Alberta was named as a defendant in that action (the "TransAlta action"). The TransAlta action was settled in November 1994; a consent judgment was filed in 2002.

8 On August 22, 1988, the Plaintiffs commenced an action in the Federal Court against Canada, action no. T-1627-88 (the "Goodstoney action"). A portion of this claim was routed into Canada's specific claims process. In 1991, Canada settled the specific claim in relation to the mines and minerals in the Ghost Lands. Subsequently, there was a partial discontinuance of the Goodstoney action with respect to the mines and minerals in the Ghost Lands.

9 On July 29, 2003, the Federal Court Trial Division dismissed the Goodstoney action for delay. The Prothonotary found that no steps had been taken to advance the litigation since 1991. On the Plaintiffs' appeal, a judge of the Federal Court Trial Division overturned the discontinuance. The Federal Court of Appeal allowed Canada's appeal and upheld the Prothonotary's dismissal of the Goodstoney Action. See *Stoney Band v. R.*, 2005 FCA 15 (F.C.A.). The Supreme Court of Canada denied leave to appeal on September 15, 2005. Alberta was not named as a defendant in the Goodstoney action.

10 On December 1, 1988, the Bearspaw Band, which is part of the Stoney Indian Band, commenced a claim in the Federal Court against Canada and TransAlta in relation to the Lands, action no. T-2377-88 (the "Bearspaw Action"). On July 14, 1999, the Federal Court dismissed the Bearspaw action at a status review. Alberta was not a defendant in the Bearspaw Action. See recitation of facts at para 13 of *Stoney Band v. R.*, 2004 FC 122 (F.C.), reversed 2005 FCA 15 (F.C.A.), *supra*.

11 In December 2003, the Plaintiffs filed Alberta Court of Queen's Bench action no. 0301-19586 against Canada and Alberta (the "Wesley action"). The Plaintiffs amended the Wesley claim in November 2004. They filed an Amended Amended Statement of Claim in July 2014 and an Amended Amended Reply to Demands for Particulars in October 2014. In the Wesley action, the Plaintiffs assert aboriginal and treaty rights and aboriginal title over the lands and resources of a large portion of southern Alberta, an area that includes the Horseshoe, Kananaskis, and Ghost Lands. The Wesley action alleges ownership of the surface and subsurface lands, waters and natural resources, including mines and minerals. The Wesley action seeks various declarations, including that Canada and Alberta have trust and fiduciary obligations with respect to the lands and the natural resources.

12 Alberta has been named as a defendant only in the Wesley and Dixon actions.

13 The Defendants argue the Dixon action should be struck as an abuse of process for several reasons. First, they submit the Plaintiffs have engaged in multiple and repetitive litigation of the same issues in the Federal Court and in this Court. Second, they assert the Wesley action encompasses the same lands, waters, and mines and minerals that are at issue in the Dixon action. They argue the Wesley action also seeks some of the same relief. Furthermore, they submit that to the extent aboriginal and treaty rights are raised in the Dixon action, (which the Defendants do not admit, but deny), then the overlap and duplication with the Wesley action is even more apparent.

14 The Defendants also argue the pleadings do not reveal a reasonable cause of action and that the limitations period has expired. The Plaintiffs say there is a reasonable cause of action, deny a breach of limitations legislation, and raise

a Constitutional Question about the applicability of limitations legislation to these issues: "Can provincial limitations legislation, in particular the Alberta *Limitations of Actions* and the Alberta *Limitations Act*, be applied so as to result in the extinguishment or infringement of treaty rights, or aboriginal rights protected under section 35 of the *Constitution Act, 1982*, and in particular the treaty rights asserted in the Amended Statement of Claim?" See *Stoney Nakoda Nations v. Canada (Attorney General)*, 2012 ABCA 316 (Alta. C.A.) at paras 4 and 13.

Issues

15 Do the Plaintiffs' claims constitute an abuse of process? Alternately, should this Court grant summary dismissal?

Analysis

Law of abuse of process

16 Rule 3.68(2)(d) of the Alberta Rules of Court, Alta Reg 124/2010, empowers the court to strike all or any part of a claim if the pleading constitutes an abuse of process. Rule 3.68 also provides that pleadings can be amended or proceedings stayed.

17 An abuse of process is a compendious principle that the courts use to control misuses of the judicial system: *Reece v. Edmonton (City)*, 2011 ABCA 238 (Alta. C.A.) at para 15. An application to strike an action for abuse of process raises a pure question of law about the legal legitimacy of the pleadings: *Reece* at para 15.

18 The doctrine of abuse of process is characterized by its flexibility; unlike the concepts of *res judicata* and issue estoppel, abuse of process is unencumbered by specific requirements: *Moulton Contracting Ltd. v. British Columbia*, 2013 SCC 26 (S.C.C.) at para 40. Abuses of process can arise in many different contexts, and there is no universal test or statement of law that encompasses all of the examples: *Reece* at para 15.

19 The Supreme Court of Canada in *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63 (S.C.C.) at para 37, quoted with approval the following explanation of abuse of process:

> 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. ...

20 In *Reece*, the Alberta Court of Appeal noted that the doctrine of abuse of process is often used to prevent re-litigation of issues even when the preconditions for issue estoppel and *res judicata* are not present. In *Calgary (City) v. Alberta (Human Rights & Citizenship Commission)*, 2011 ABCA 65 (Alta. C.A.), the court stated at para 15 that "the risk of inconsistent results, or the wasting of resources through duplicitous proceedings, are managed through the doctrines of *res judicata*, issue estoppel, and abuse of process." The court explained at para 20 that there is no definitive test for finding an abuse of process in this context. In *Toronto (City) v. C.U.P.E., Local 79* the Supreme Court noted at para 37:

> ... 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.**
>
> [Emphasis added]

21 In *Calgary (City) v. Alberta (Human Rights & Citizenship Commission)* the court explained at para 20 that in applying the abuse of process doctrine, "the focus should be less on the interests or motives of the individual parties, and more on the integrity of the administration of justice."

22 In *Reece*, the court noted at paras 19-20 that "the cases on abuse of process have tended to fall into a number of categories, such as the re-litigation of settled issues, fairness of trial procedures, delay in proceedings, and so forth," but that "it is therefore not appropriate to take any judicial statement of the ambit of the doctrine of abuse of process, and apply it mechanically to different factual settings and issues. Just because a particular proceeding does not fit into a particular authoritative recitation of the test for abuse of process does not mean that no abuse is present. Procedures that can 'bring the administration of justice into disrepute' can take many forms."

23 A litigant's entire court history is relevant to the abuse of process of analysis and this may include litigation in other jurisdictions: *Chutskoff Estate v. Bonora*, 2014 ABQB 389 (Alta. Q.B.) at para 89. The court must consider the whole history of the matter and consider all relevant pleadings: *Osborne v. Pinno* (1997), 208 A.R. 363 (Alta. Q.B.) at para 12-15.

24 Duplicative proceedings waste court resources and may result in inconsistent findings on the same issue or double recovery for the same alleged wrong. A party is not entitled to bring a second action while the first is still pending since the same relief can be obtained in the first action. As stated by former Chief Justice Moore: "It is trite law that commencing a second action while one is currently pending is an abuse of process." *Edmonton Northlands v. Edmonton Oilers Hockey Corp.* (1993), 147 A.R. 113 (Alta. Q.B.) at para 26.

25 The Plaintiffs argue that to strike the claim in its entirety, the Defendants must show that the Dixon action is the same as or is a duplication of the previous actions or the Wesley action. The case law above shows that the test is not so strict. Rather, the overall integrity of the administration of justice, including the principles of fairness, judicial economy, consistency, and finality are at the heart of the doctrine of abuse of process.

26 I begin the abuse of process analysis with a summary of the pleadings in the current action, the prior related proceedings, and the concurrent Wesley action.

The current action: Dixon action

27 The Plaintiffs commenced the Dixon action in December 2006 and amended their pleadings in December 2007. The Defendants demanded particulars and the Plaintiffs filed replies.

28 The Amended Statement of Claim alleges that in 1907, 1914, and 1929, as a result of extensive dealings with Canada and TransAlta, the Plaintiffs executed documents that purported to surrender the Horseshoe Lands, the Kananaskis Lands, and the Ghost Lands, respectively, and the Plaintiffs' interest in the water power at those locations, for the construction of hydroelectric dams and reservoirs.

29 The Plaintiffs allege that they did not understand English at the relevant time and that they understood, as Canada represented to them, that the agreements were leases of surface rights required for water storage and dam construction, with reversionary rights if the Lands were not required or utilized for these purposes. The pleadings allege the Plaintiffs did not understand the agreements to be surrenders. They claim the surrenders are invalid, the subsequent conveyances to TransAlta are void, and TransAlta's use and occupation of the land is illegal and constitutes a trespass and a nuisance.

30 The Dixon action also alleges that the Plaintiffs had no intention of ceding, releasing, or relinquishing any aboriginal or treaty rights to the Stoney Reserves or the Lands, including the waters, mines and minerals, both surface and subsurface. They allege they have been wrongly deprived of these rights without compensation. With respect to Alberta, the Plaintiffs claim that Alberta's collection of royalties on mineral production and tax on mineral rights and production are invalid. In the alternative, the Plaintiffs allege that even if the surrenders are valid, the Plaintiffs have a proprietary interest in the mines and minerals.

31 The Dixon action further alleges improper and illegal use of easements and rights-of-way, particularly on the Ghost Lands. The pleadings acknowledge the 1991 Settlement Agreement between the Plaintiffs and Canada, but note that it

is limited to the mines and minerals on the Ghost Lands only; it did not resolve their claims related to water rights in and on the Ghost Lands and issues regarding the power line rights-of-way.

32 The pleadings also acknowledge the agreement-in-principle reached with TransAlta in 1994 settling all claims against TransAlta. The Plaintiffs allege, however, that this agreement-in-principle did not release Canada from any claims. Furthermore, the Plaintiffs claim that Canada delayed in reaching an agreement with TransAlta until 2002 resulting in further loss and damage to the Plaintiffs arising from the delay.

33 The Dixon action further alleges that works erected on the Lands by TransAlta are unauthorized and constitute trespass and nuisance and have caused unreasonable interference with the Plaintiffs' enjoyment of the Lands. The Plaintiffs further allege the Defendants have infringed on the Plaintiffs' water rights generally, by interfering with the flow of the rivers and the waters connected to or associated with the rivers.

34 The pleadings allege that Canada and Alberta owed trust or fiduciary duties to the Plaintiffs with respect to the Stoney Reserves. The Plaintiffs claim that Canada's conduct in obtaining the surrenders and conveying lands to TransAlta was a breach of the trust and fiduciary duties it owed to the Plaintiffs, particularly since Canada knew, or ought to have known, that the terms of the executed documents were not the same as the terms relied upon by the Plaintiffs and that the surrenders were not in the Plaintiffs' best interests.

35 The pleadings assert aboriginal title over large portions of what is now the Province of Alberta. In the Reply to Demand for Particulars, the Plaintiffs describe the territory over which they claim aboriginal title to be "an area bounded on the west by the Rocky Mountain divide, on the south by the 49 th Parallel, on the east by the Alberta-Saskatchewan border and to the north by approximately 54 degrees latitude North." (Edmonton is just south of the 54 th parallel and Alberta's northern border is the 60 th parallel.) The Plaintiffs assert in their Reply that they hold aboriginal title to the Bow River, Kananaskis River and Ghost River watersheds.

36 The pleadings also refer to Treaty 7 and state the Plaintiffs' rights to the Stoney Reserves include rights to lands and waters, both surface and subsurface, including all lakes, rivers and waterways on the Stoney Reserves. The Stoney Reserves are defined in the pleadings as "the lands and areas set apart for the Stoney Band identified as the Stoney Indian Reserves #142, #143, and #144, including the bed and waters of the Bow River flowing there through, and #142B, #144A and #216."

37 In the Reply to Demand for Particulars, the Plaintiffs state they have constitutionally recognized aboriginal and treaty rights, title and interests to the Reserve lands and to their traditional lands that encompass the broader area described above.

38 The pleadings against Alberta state that Alberta breached the trust and fiduciary duties and obligations it owed to the Plaintiffs by accepting title to the Lands from Canada. Specifically, Alberta accepted the transfer of the Lands "knowing, or not caring that the 1907, 1914 and 1929 purported surrenders and taking were invalid and illegal." Further, or in the alternative, the Plaintiffs allege that Alberta consented to or acquiesced in the transactions leading up to the transfer to TransAlta.

39 In sum, the Dixon action alleges the Plaintiffs have been "unlawfully deprived of access to, the use of, the full profits from, and the occupation and other benefits" arising from the Horseshoe and Kananaskis Lands, including all surface and subsurface waters, mines and minerals, such as irrigation rights and revenues, royalties, and rents. They have also been "unlawfully deprived of the access to, the use of, the full profits from, and the occupation and other benefits arising from, and all rights related to," the waters in and on the Ghost Lands and the power line rights-of-way appurtenant to the Ghost Lands. The Plaintiffs claim they have suffered significant and irreparable damage as a result.

40 The Dixon claim seeks a declaration that the Defendants were trustees or fiduciaries of the Lands for the Plaintiffs and that they were in breach of their trust and fiduciary obligations; the Plaintiffs seek a declaration that they are entitled

to $100 million in compensation for these breaches. The Plaintiffs seek a declaration that they own the rights to the mines and minerals, both surface and subsurface, on the Horseshoe Lands and Kananaskis Lands, underlying certain portions of the Bow River and in that portion of the Ghost Lands regarding the power line easement, and that the Defendants have interfered with these rights. They also seek a declaration that they own the rights to and the waters in and on all the Lands and that they are the beneficial owner of any structures and works in or affecting the Horseshoe Lands and Kananaskis Lands. They seek a declaration that they own the rights to waters, that they hold riparian rights and that they are the beneficial owners of the structures on the Lands. They seek a declaration that certain portions of the beds of the Bow and Kananaskis Rivers are lands reserved for Indians. They seek a declaration that the authorizations by Canada of works by TransAlta constitute trespass and nuisance.

41 The Plaintiffs also seek general damages for loss of water and irrigation rights in the amount of $250 million; general damages for the loss of mines and minerals of $250 million; general damages for the loss of mines and minerals underlying the Bow River of $50 million; general damages for trespass and nuisance of $50 million; general damages for the failure to enforce the Plaintiffs' reversionary rights of $50 million; and, general damages for the wrongful conversion of the Lands by the Defendants to their benefit of $50 million. The Plaintiffs also seek various special damages and an accounting for the use and benefit of lands, mines, minerals and improper easements.

42 The Plaintiffs also raise a Constitutional Question about the applicability of limitations legislation to these issues. See *Stoney Nakoda Nations v. Canada (Attorney General)*, 2012 ABCA 316 (Alta. C.A.) at para 13.

Previous related actions

TransAlta action

43 As stated above, the first claim regarding the Lands was initiated against TransAlta in the Alberta Court of Queen's Bench in April 1985. Neither Canada nor Alberta was named as a defendant in the TransAlta action. The pleadings claimed that in 1907, 1914, and 1929, as a result of extensive dealings with Canada and TransAlta, the plaintiffs executed documents that purported to surrender the Horseshoe Lands, the Kananaskis Lands, and the Ghost Lands, respectively, for construction of hydroelectric dams and reservoirs.

44 The pleadings alleged the plaintiffs had little understanding of English at the relevant time and they understood the agreements were leases of surface rights required for water storage and dam construction, with reversionary rights if the Lands were not required or utilized for these purposes. The pleadings claimed the plaintiffs were induced to execute these agreements and they did not understand them to be surrenders. They asserted that the surrenders were invalid and that TransAlta's use and occupation of the Lands were illegal.

45 The pleadings also claimed that although the surrender documents were silent as to mines and minerals, the plaintiffs and TransAlta had agreed that only the surface rights required for dam construction would be transferred. As such, they claimed TransAlta had wrongfully misappropriated the mines and minerals underlying these Lands and the plaintiffs had been deprived of the use, profits, occupation and other benefits of those mines and minerals.

46 The TransAlta action also raised allegations related to the improper use of agreed upon easements and rights-of-way, as well as illegal or invalid easements and rights-of-way.

47 The pleadings sought a declaration that the conveyance of the Lands was void and illegal and a declaration that the plaintiffs were entitled to the surrendered Lands and were the rightful owners of the Lands, or in the alternative, a declaration that the plaintiffs were entitled to and the rightful owners of the mines and minerals and the lands not required for water storage and dam construction. The pleadings also sought an accounting for the use and benefits of the Lands and the profits, benefits, royalties, and earnings derived from those lands. The plaintiffs also sought an accounting for the use and benefit of the improper easements and rights-of-way. In the further alternative, the pleadings sought general and special damages.

48 The TransAlta action was settled in November 1994; a consent judgment was filed in 2002.

Goodstoney action

49 The Goodstoney action against Canada was filed in Federal Court in August 1988. Alberta was not named as a defendant. In the Goodstoney action, the pleadings claimed that in 1907, 1914, and 1929, as a result of extensive dealings with Canada and TransAlta, the plaintiffs executed documents that purported to surrender the Horseshoe, Kananaskis and Ghost Lands, respectively, for the construction of hydroelectric dams and reservoirs. The pleadings claimed the plaintiffs had a poor understanding of English at the time and they understood the agreement was for the lease of surface rights required for water storage and dam construction, with reversionary rights to them if the Lands were not required for these purposes. The pleadings claimed the surrenders were invalid and the use and occupation of the Lands by TransAlta were illegal.

50 The pleadings alleged in the alternative that if the documents were not viewed as illegal and void, then in spite of their silence as to mines and minerals, Canada, TransAlta and the plaintiffs had agreed that only the surface rights required for dam construction and water storage were transferred. As such, the plaintiffs claimed TransAlta had wrongly misappropriated mines and minerals and the plaintiffs had been deprived of the use, profits, occupation and other benefits of the mines and minerals.

51 The pleadings also raised allegations related to the improper use of some easements and rights-of-way. They claimed that Canada failed to protect the plaintiffs' interests by allowing TransAlta to change the terms of some easements without the plaintiffs' agreement.

52 The pleadings also claimed that Canada breached its fiduciary duties by failing to advise the plaintiffs that the surrenders were not in their best interests. The pleadings alleged Canada also breached its fiduciary duties by failing to fully ascertain or comply with the plaintiffs' express directions and by misleading, coercing or persuading the plaintiffs to vote in favour of the surrenders. As a result of these breaches of duty by Canada, the pleadings claim the plaintiffs suffered alienation of the Lands from their reserve and the loss of use and benefit of occupation of the Lands and loss of opportunity and benefit from other use and development. They also suffered loss of value of the Lands because of the condition in which the Lands have been left as a result of TransAlta's use.

53 The pleadings sought a declaration that the conveyance of the Lands was void and illegal, or in the alternative, a declaration that the plaintiffs were entitled to the mines and minerals and lands not required for water storage and dam construction. The pleadings also sought an accounting for the use and benefit of the Lands, and the profits received therefrom for the conversion of the Lands and the profits, benefits, royalties and earnings derived therefrom. They also sought an accounting for the use and benefit of the improper easements and rights-of-way. In the further alternative, the pleadings sought general and special damages.

54 As mentioned above, in 1991, the Plaintiffs and Canada settled the specific claim in relation to the mines and minerals in the Ghost Lands. Eventually, the remainder of the Goodstoney action was dismissed at a status review.

Bearspaw action

55 In December 1988, the Bearspaw Band, a part of the Stoney Indian Band, commenced a further claim in Federal Court against Canada and TransAlta related to the Horseshoe, Ghost and Kananaskis Lands. Alberta was not named as a defendant in the Bearspaw action.

56 The pleadings alleged that the Bearspaw Band has had, since time immemorial, aboriginal title to the lands of the Stoney Nation, territory now forming a large part of the province of Alberta. The pleadings also referenced Treaty 7 and stated that at no time were the plaintiffs' aboriginal rights conveyed, ceded, transferred or extinguished by virtue

of the treaty. The pleadings alleged that by the terms of the treaty, a reserve was set aside, and that the plaintiffs have aboriginal title and rights to the land under the various rivers and lakes on the reserve.

57 The pleadings then alleged that Canada held these reserve lands, together with the aboriginal lands of the Stoney nation, including all waters, lakebeds and riverbeds, as a trustee for the plaintiffs under an express trust. The pleadings alleged the reserve lands included "the riverbeds of the Bow, Ghost and Kananaskis Rivers, and the lakebeds connected therewith, with the riparian rights and incorporeal hereditaments thereunto appertaining..."

58 The remainder of the pleadings in the Bearspaw action were similar to those in the TransAlta and Goodstoney actions. They alleged that in 1907, 1914, and 1929, after extensive negotiations with TransAlta, the plaintiffs executed documents purporting to surrender the Horseshoe, Kananaskis and Ghost Lands, respectively, for the purpose of building hydroelectric dams. The pleadings alleged the plaintiffs had a limited understanding of English at the relevant time and that they understood the agreements were for the lease of surface rights only, with reversionary rights to them if the lands were no longer needed for hydroelectric purposes. The pleadings alleged the surrenders are invalid and TransAlta's use and occupation of the Lands were illegal.

59 The pleadings made the same claims about mines and minerals as in the TransAlta and Goodstoney actions. The pleadings repeated the allegations regarding improper use of easements and rights-of-way.

60 The pleadings further alleged that TransAlta unlawfully constructed a number of dams, power houses and related hydroelectric facilities on the plaintiffs' reserve and aboriginal lands. The pleadings claimed the plaintiffs have not received any consideration or advantage arising from the construction of the dams and other structures. Further, the pleadings alleged the plaintiffs have been deprived of the productivity and the use and benefits of the lands, water and profits realized from them, including irrigation rights and revenues.

61 The pleadings also alleged that Canada breached its fiduciary obligations by failing to protect the plaintiffs' interests.

62 The pleadings sought a declaration that Canada was a trustee of the reserve and aboriginal lands for the benefit of the plaintiffs and that it was in breach of trust, as well as in breach of its fiduciary duties; the plaintiffs sought $100 million compensation for these breaches. The pleadings sought a declaration that all sales, transfers, and other surrenders of reserve and aboriginal lands were null and void and a declaration that the plaintiffs' aboriginal rights in the surrendered lands were valid and subsisting and had never been extinguished. The plaintiffs also sought a declaration that the structures on the riverbeds of the Bow, Kananaskis, and Ghost Rivers and lakes connected thereto were the plaintiffs' property, along with a declaration that the plaintiffs had riparian rights to the surrendered lands and were entitled to the mines and minerals. The pleadings sought general damages of $1 million for TransAlta's continuing trespass and special damages of $250 million for the loss of water and irrigation rights. They also sought an accounting for all proceeds from the surrender of the Lands.

63 On July 14, 1999, the Federal Court Trial Division dismissed the Bearspaw action at a status review.

The concurrent action: Wesley action

64 The plaintiffs filed the Wesley action in this Court in December 2003, amended their pleadings in November 2004 and again in July 2014. The Wesley action is a more comprehensive action than the above-described actions. The pleadings assert unextinguished aboriginal title, and aboriginal and treaty rights over the Stoney Traditional Lands and Natural Resources, and aboriginal and treaty rights to the Traditional Use Lands and Natural Resources. The Traditional Lands comprise the areas described as follows:

> An area bounded on the west by the Rocky Mountain divide, on the north by approximately 54 degrees latitude North, on the south by the 49th Parallel of latitude, and on the east by approximately Highway 22 (but excluding patented lands) and including all of the natural resources thereof;

65 The Traditional Lands also comprise seven additional areas in the regions of Sundre, Tay River, Nordegg-Edson, Buck Lake, Rimbey, Pigeon Lake, and Sharphead, which are more particularly described in the pleadings.

66 The Traditional Use Lands are considerably larger. They include all the Traditional Lands and the areas described as follows:

> a. An area bounded on the west by the Rocky Mountain divide, on the south by the 49 th Parallel, on the east by the Alberta-Saskatchewan border and to the north by approximately 54 degrees latitude North and including all of the natural resources thereof;

67 The pleadings explain that the Traditional Use Lands include national and provincial parks, and forest reserves and any other unpatented lands, but do not include Indian Reserves and the natural resources thereof set aside for other Indian nations and Aboriginal Peoples. The pleadings specifically assert aboriginal and treaty rights to the lands and natural resources in and to all Stoney Indian Reserves, particularly Indian Reserves No. 142, 143, 144, 142B, 144A, and 216.

68 Natural Resources is defined to include "living and inanimate things, and for greater certainty includes the forests and timber, surface and sub-surface waters, and the mines, minerals and oil and gas, in and throughout the Traditional Lands." In the Reply to Demand for Particulars, the plaintiffs further explain that Natural Resources include the following:

> a) animal resources of all kinds including all indigenous species of mammals, reptiles, amphibians, birds, fish, invertebrates and insects,
>
> b) plant resources of all kinds including berries, root plants and medicinal plants,
>
> c) forestry resources of every species,
>
> d) water resources of every nature including rivers, tributaries, lakes, streams and all bodies of water whether navigable or non-navigable, as well as all sub-surface aquifers;
>
> e) mineral resources of all categories including oil, gas, coal, metallic and industrial minerals, precious and semi-precious stones and gemstones, sand and gravel.

69 The plaintiffs assert a trust or fiduciary relationship between themselves and Canada that gave rise to obligations to preserve and protect the plaintiffs' aboriginal title, aboriginal rights and treaty rights in their lands and natural resources. They assert these duties also included the obligation to secure the lands and natural resources from interference by third parties and the duty to obtain the Plaintiffs' consent prior to authorizing or permitting any works on or exploitation of the natural resources in the lands. The plaintiffs allege that Canada has breached these trust and fiduciary obligations in a number of ways, including by granting various authorizations, permits, leases, licences and contracts pursuant to which works have been carried out on the lands and the natural resources extracted from them.

70 As a consequence, the plaintiffs allege they have been deprived of substantial revenues from their lands and natural resources and have suffered severe losses and damages exceeding $10 billion.

71 The plaintiffs allege they have received no benefit, no revenues, no compensation, nor monies of any kind from the development, exploitation, extraction, marketing or sale of the natural resources taken from their lands outside their Reserves.

72 The plaintiffs seek a declaration that they have unextinguished aboriginal title and existing aboriginal rights and treaty rights to their lands and natural resources. They also seek a declaration that they have had and continue to have the right to exclusive use, enjoyment and ownership of the natural resources. They seek a declaration that the

Defendants have breached their trust, fiduciary or other equitable obligations and that the Defendants have unlawfully issued authorizations respecting the lands and natural resources. The Reply to Demand for Particulars clarifies that the authorizations refer to any and all authorizations, permits, licences, contracts and leases pertaining in whole or in part to land within the lands and natural resources, which have been given or granted without specific prior consent of the plaintiffs. The Plaintiffs seek an order quashing all such authorizations incompatible with aboriginal title or inconsistent with the exercise of aboriginal or treaty rights.

73 The plaintiffs also seek a declaration that they have suffered losses and damages in the total amount of $20 billion, comprising $10 billion as a result of breaches by Canada and $10 billion for breaches by Alberta. The seek general damages in these amounts and an accounting for the value of all natural resources extracted from the lands including royalties, payments and fiscal revenues.

74 The plaintiffs seek interlocutory and permanent relief as required to prevent further or new interference with their asserted Aboriginal Title and rights over the lands and natural resources.

75 Further, they seek from Alberta general and special damages for losses arising as a result of the purported authorizations, permits, leases and contracts issued by Alberta and the natural resources extracted pursuant to them; an accounting for Alberta's administration as constructive trustee of the lands and the natural resources; and restitutionary or other equitable remedies for Alberta's unjust enrichment; as well as equitable compensation for all other losses.

76 The plaintiffs seek from Canada equitable compensation for losses arising as a result of the breaches of trust, fiduciary and equitable duties; an accounting for the administration as trustee or fiduciary of the lands and its natural resources; and restitutionary and other equitable remedies for Canada's unjust enrichment.

Decision

77 I hold the Dixon action to be an abuse of process. A review of the history of the actions, including all the relevant prior pleadings, makes it apparent that the Dixon action raises essentially the same claims regarding the Lands as those in the TransAlta, Goodstoney and Bearspaw actions. The Plaintiffs settled the TransAlta action. The Goodstoney action was partially settled. The Federal Court dismissed the remainder of the claim. The Federal Court dismissed the Bearspaw action.

78 Alberta was not named as a defendant in any of those previous actions, but that does not preclude a determination that the Dixon action is an abuse of process. A finding of abuse of process is not limited to the strict requirements of *res judicata* or issue estoppel. It is a more flexible mechanism for the court to prevent the misuse of its procedures. In fact, in some cases, the inclusion of new defendants can be seen as an indicator of abuse of process: *Chutskoff*, at para 92.

79 The Wesley action makes the abuse of process most obvious. I accept the Defendants' arguments that the Dixon action is duplicative of the Wesley action. Ultimately, the Dixon action and the Wesley action relate to the same lands and the same natural resources, and the same alleged underlying aboriginal and treaty rights. For example, both actions claim water and mineral rights over the same lands. In the Dixon action, the Plaintiffs assert that they have claims to the beds, mines and minerals and water on the Horseshoe, Ghost and Kananaskis Lands along with the Bow River and any other water courses connected to or flowing from the impugned lands.

80 By comparison, the Replies and Amended Replies to Particulars in the Wesley action state that the Plaintiffs' natural resource claims encompass "water resources of every nature including rivers, tributaries, lakes, streams and all bodies of water whether navigable or non-navigable, as well as all subsurface aquifers; mineral resources of all categories including oil, gas, coal, metallic and industrial minerals, precious and semi-precious stones and gemstones, sand and gravel" in their alleged traditional territories. The alleged traditional territories are defined so broadly as to include the Horseshoe, Kananaskis and Ghost Lands.

81 Furthermore, in the Dixon action, the Plaintiffs assert aboriginal title over large parts of what is now the Province of Alberta. The Plaintiffs also assert aboriginal and treaty rights to the specific Lands and to the bed and waters of the Bow River flowing through the Stoney Reserves. They also allege that Canada and Alberta breached trust and fiduciary obligations and seek compensation for those breaches, as well as compensation for the unlawful deprivation of the various rights associated with the Lands and its resources.

82 In the Wesley action, the Plaintiffs assert aboriginal title, and aboriginal and treaty rights over the Traditional Lands and Natural Resources and aboriginal and treaty rights over the Traditional Use Lands. The Traditional Use Lands include much of southern Alberta and include the Stoney Reserves. The Natural Resources include, among other things, all water and minerals resources. The Plaintiffs allege Canada and Alberta breached trust and fiduciary obligations and seek compensation for those breaches. They also seek a quashing of all authorizations related to their lands that are inconsistent with aboriginal title or inconsistent with the exercise of aboriginal or treaty rights.

83 The Plaintiffs attempt to distinguish the Dixon action and the Wesley action by stating that the factual foundation of the Dixon action is the loss of specific reserve lands, while the Wesley action does not include the loss of reserve lands as part of its claim. I accept the Defendants' argument that the Plaintiffs seek declaratory relief over their Traditional Lands and Traditional Use Lands, which include their reserve lands. I hold that the two actions make overlapping aboriginal and treaty rights claims against the same lands and natural resources.

84 In essence, in both the Dixon and Wesley actions, the Plaintiffs assert claims for improper use, occupation and exploitation of hydroelectric and other resources. The Wesley claim purports to assert such claims over the Plaintiffs' traditional territories, which includes much of southern Alberta, while the Dixon claim is focussed more specifically on the Horseshoe, Kananaskis, and Ghost Lands, but as referenced above, it too makes assertions about the entire traditional territories.

85 A party is not entitled to bring a second action while the first is still pending. There is no need for the pleadings to be identical to find an abuse of process. Duplicative actions are a waste of court resources. I conclude from my review of the pleadings and replies to demands for particulars that the Wesley action is a comprehensive claim that captures the more specific Dixon claim. I take guidance from the foundational rule 1.2(1) that states "the purpose of these rules is to provide a means by which claims can be fairly and justly resolved in or by a court process in a timely and cost effective way." Fairness to the Defendants and to this Court require that the Plaintiffs bring one complete claim; the Wesley action is that claim.

86 The Plaintiffs argue that this court should keep in mind, when addressing the procedural issue, the underlying importance of the substantive issues. They note that, to date, there have been no determinative rulings on the substantive issues in the previous actions. I hold that the substantive issues raised in the Dixon action can be addressed in the concurrent Wesley action. The lands and natural resources at issue in the Dixon action are also at issue in the Wesley action and should be pursued in that forum. Judicial economy requires that the Plaintiffs' claims be presented in one action. Furthermore, the administration of justice requires one decision on these issues, not multiple decisions. Finally, the Plaintiffs have been litigating these issues for 30 years. The interests of finality require them to pursue one action with diligence to its conclusion.

87 The Plaintiffs ask for some of the alternative remedies under rule 3.68, namely, that they be given the option to amend their pleadings or that the action be stayed rather than struck. They also suggest this court could give them the opportunity to better particularize their claims to show the differences between them.

88 I agree with the Defendants' submission that the Plaintiffs' request to amend their pleadings instead of having them struck is "indicative of the Plaintiffs working to keep their claim alive by: a) commencing a new action; and b) seeking the indulgence of the Court to once again allow them more time to amend their pleadings. At this stage of these multiple proceedings, the pleadings say what the pleadings say."

89 I agree that the Plaintiffs should not be given another opportunity to amend the Dixon action. I hold that the Plaintiffs have had sufficient opportunity to particularize their pleadings - I find some of the particulars highlight that the Wesley and Dixon actions are duplicative.

90 This action is an abuse of process. More particulars, or a stay, are not apt given this holding. The Wesley action, being comprehensive, is the action that should proceed.

91 After the conclusion of argument, Alberta sent a copy of the recent Federal Court decision in *Samson Indian Nation and Band v. Canada*, 2015 FC 836 (F.C.). Russell J held that limitation periods apply to Aboriginal claims for breach of fiduciary duty. However, having found an abuse of process, I will not address the Defendants' arguments supporting a summary dismissal application on limitations grounds. A decision in this type of litigation should be narrow. With respect to the Plaintiffs' limitations argument and the Constitutional Question in the Dixon action, the Court of Appeal stated at para 20 of its decision in this case, *supra*, that "it may be unnecessary for the court to rule on the constitutional question, if the matter can be disposed of without so doing." The Supreme Court of Canada has also stated that an unnecessary constitutional pronouncement is inappropriate: see *Moysa v. Alberta (Labour Relations Board)*, [1989] 1 S.C.R. 1572 (S.C.C.) at para 15-16.

Conclusion

92 The Defendants' application under Rule 3.68 to strike the Dixon action as an abuse of process is granted. The parties may speak to costs, if necessary.

Application granted; action dismissed.

TAB 13

2013 SCC 19
Supreme Court of Canada

Penner v. Niagara Regional Police Services Board

2013 CarswellOnt 3743, 2013 CarswellOnt 3744, 2013 SCC 19, [2013] 2 S.C.R. 125, [2013] S.C.J. No. 19, 118 O.R. (3d) 800 (note), 226 A.C.W.S. (3d) 139, 304 O.A.C. 106, 32 C.P.C. (7th) 223, 356 D.L.R. (4th) 595, 442 N.R. 140, 49 Admin. L.R. (5th) 1, J.E. 2013-639, EYB 2013-220248

Wayne Penner, Appellant and Regional Municipality of Niagara Regional Police Services Board, Gary E. Nicholls, Nathan Parker, Paul Koscinski and Roy Federkow, Respondents and Attorney General of Ontario, Urban Alliance on Race Relations, Criminal Lawyers' Association (Ontario), British Columbia Civil Liberties Association, Canadian Police Association and Canadian Civil Liberties Association, Interveners

McLachlin C.J.C., LeBel, Fish, Abella, Rothstein, Cromwell, Karakatsanis JJ.

Heard: January 11, 2012
Judgment: April 5, 2013
Docket: 33959

Proceedings: reversing *Penner v. Niagara Regional Police Services Board* (2010), [2010] O.J. No. 4046, 325 D.L.R. (4th) 488, 267 O.A.C. 259, 2010 ONCA 616, 2010 CarswellOnt 7164, 94 C.P.C. (6th) 262, (sub nom. *Penner c. Niagara (Commission des services policiers)*) 102 O.R. (3d) 700, (sub nom. *Penner v. Niagara (Police Services Board)*) 102 O.R. (3d) 688 (Ont. C.A.); affirming *Penner v. Niagara Regional Police Services Board* (2009), 2009 CarswellOnt 9420 (Ont. S.C.J.)

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Tim Gleason, Sean Dewart, for Intervener, Canadian Civil Liberties Association

Subject: Civil Practice and Procedure; Public; Torts; Contracts

Headnote

Civil practice and procedure --- Judgments and orders — Res judicata and issue estoppel — Issue estoppel — General principles

Professional disciplinary proceedings and private civil actions arising out of same facts — Plaintiff was arrested by defendant police officers, and alleged unlawful arrest and use of excessive force — Plaintiff brought civil action and also complained to defendant police services board — Board directed hearing into plaintiff's allegations, hearing officer dismissed complaint, and after multiple administrative and judicial steps, finding that officers had not misconducted themselves was upheld by Divisional Court — Officers then brought motion for order dismissing action as issue estopped by findings of hearings officer — Motion was granted, action was dismissed, plaintiff's appeal was dismissed and plaintiff appealed to Supreme Court of Canada — Appeal allowed — No rule barred police disciplinary proceedings from application of issue estoppel — However, relief from prima facie valid issue

estoppel may lie where fundamental difference exists between purpose of proceedings as between same parties — In present case, given different standards of proof and fact that plaintiff could obtain no personal relief in prior proceedings, it was appropriate to relieve plaintiff from impact of issue estoppel, and appeal was accordingly properly allowed.

Law enforcement agencies --- Police — Duties, rights and liabilities of officers — Statutory protection of police from civil liability — Limitation of actions

Issue estoppel — As between internal police disciplinary proceedings and private civil actions arising out of same set of facts — Plaintiff was arrested by defendant police officers, and alleged unlawful arrest and use of excessive force — Plaintiff brought civil action and also complained to defendant police services board — Board directed hearing into plaintiff's allegations, hearing officer dismissed complaint, and after multiple administrative and judicial steps, finding that officers had not misconducted themselves was upheld by Divisional Court — Officers then brought motion for order dismissing action as issue estopped by findings of hearings officer — Motion was granted, action was dismissed, plaintiff's appeal was dismissed and plaintiff appealed to Supreme Court of Canada — Appeal allowed — No rule barred police disciplinary proceedings from application of issue estoppel — However, relief from prima facie valid issue estoppel may lie where fundamental difference exists between purpose of proceedings as between same parties — In present case, given different standards of proof and fact that plaintiff could obtain no personal relief in prior proceedings, it was appropriate to relieve plaintiff from impact of issue estoppel, and appeal was accordingly properly allowed.

Administrative law --- Practice and procedure — In action for damages for unlawful administrative action

Issue estoppel — Professional disciplinary proceedings and private civil actions arising out of same facts — Plaintiff was arrested by defendant police officers, and alleged unlawful arrest and use of excessive force — Plaintiff brought civil action and also complained to defendant police services board — Board directed hearing into plaintiff's allegations, hearing officer dismissed complaint, and after multiple administrative and judicial steps, finding that officers had not misconducted themselves was upheld by Divisional Court — Officers then brought motion for order dismissing action as issue estopped by findings of hearings officer — Motion was granted, action was dismissed, plaintiff's appeal was dismissed and plaintiff appealed to Supreme Court of Canada — Appeal allowed — No rule barred police disciplinary proceedings from application of issue estoppel — However, relief from prima facie valid issue estoppel may lie where fundamental difference exists between purpose of proceedings as between same parties — In present case, given different standards of proof and fact that plaintiff could obtain no personal relief in prior proceedings, it was appropriate to relieve plaintiff from impact of issue estoppel, and appeal was accordingly properly allowed.

Procédure civile --- Jugements et ordonnances — Chose jugée et préclusion découlant d'une question déjà tranchée — Préclusion découlant d'une question déjà tranchée — Principes généraux

Mêmes faits ont donné lieu à des procédures judiciaires et à des actions civiles — Demandeur avait été arrêté par les agents de police défendeurs et on a fait valoir que l'arrestation avait été abusive et que la force utilisée avait été excessive — Demandeur a déposé une action au civil et a également déposé une plainte devant la commission des services de police défenderesse — Commission a ordonné la tenue d'une audience afin de vérifier les allégations du demandeur, le premier juge a rejeté la plainte et, au terme de nombreuses étapes administratives et judiciaires, la conclusion selon laquelle les agents de police ne s'étaient pas méconduits a été confirmée par la Cour divisionnaire — Agents de police ont alors déposé une requête demandant le rejet de l'action en raison de la préclusion découlant des conclusions du premier juge — Requête a été accueillie, l'action a été rejetée, l'appel du demandeur a été rejeté et ce dernier a formé un pourvoi devant la Cour suprême du Canada — Pourvoi accueilli — Aucune règle n'empêchait que la règle de la préclusion s'applique aux procédures disciplinaires de la police — Toutefois, une mesure de réparation peut être ordonnée malgré le principe de la préclusion lorsque les fins auxquelles servent les différentes instances impliquant les mêmes parties sont fondamentalement distinctes — En l'espèce, compte tenu des différentes normes de preuve et le fait que le demandeur ne pouvait obtenir aucune réparation dans le cadre des premières procédures,

il était raisonnable de ne pas appliquer le principe de la préclusion à l'encontre du demandeur, et le pourvoi a été accueilli en conséquence.

Organismes chargés de l'application de la loi --- Police — Obligations, droits et responsabilités des policiers — Exonération accordée par la loi aux policiers en matière de responsabilité civile — Prescription

Préclusion — Mêmes faits ont donné lieu à des procédures judiciaires et à des actions civiles — Demandeur avait été arrêté par les agents de police défendeurs et on a fait valoir que l'arrestation avait été abusive et que la force utilisée avait été excessive — Demandeur a déposé une action au civil et a également déposé une plainte devant la commission des services de police défenderesse — Commission a ordonné la tenue d'une audience afin de vérifier les allégations du demandeur, le premier juge a rejeté la plainte et, au terme de nombreuses étapes administratives et judiciaires, la conclusion selon laquelle les agents de police ne s'étaient pas méconduits a été confirmée par la Cour divisionnaire — Agents de police ont alors déposé une requête demandant le rejet de l'action en raison de la préclusion découlant des conclusions du premier juge — Requête a été accueillie, l'action a été rejetée, l'appel du demandeur a été rejeté et ce dernier a formé un pourvoi devant la Cour suprême du Canada — Pourvoi accueilli — Aucune règle n'empêchait que la règle de la préclusion s'applique aux procédures disciplinaires de la police — Toutefois, une mesure de réparation peut être ordonnée malgré le principe de la préclusion lorsque les fins auxquelles servent les différentes instances impliquant les mêmes parties sont fondamentalement distinctes — En l'espèce, compte tenu des différentes normes de preuve et le fait que le demandeur ne pouvait obtenir aucune réparation dans le cadre des premières procédures, il était raisonnable de ne pas appliquer le principe de la préclusion à l'encontre du demandeur, et le pourvoi a été accueilli en conséquence.

Droit administratif --- Procédure — Dans le cadre d'une action en dommages-intérêts découlant d'une décision administrative illégale

Préclusion — Mêmes faits ont donné lieu à des procédures judiciaires et à des actions civiles — Demandeur avait été arrêté par les agents de police défendeurs et on a fait valoir que l'arrestation avait été abusive et que la force utilisée avait été excessive — Demandeur a déposé une action au civil et a également déposé une plainte devant la commission des services de police défenderesse — Commission a ordonné la tenue d'une audience afin de vérifier les allégations du demandeur, le premier juge a rejeté la plainte et, au terme de nombreuses étapes administratives et judiciaires, la conclusion selon laquelle les agents de police ne s'étaient pas méconduits a été confirmée par la Cour divisionnaire — Agents de police ont alors déposé une requête demandant le rejet de l'action en raison de la préclusion découlant des conclusions du premier juge — Requête a été accueillie, l'action a été rejetée, l'appel du demandeur a été rejeté et ce dernier a formé un pourvoi devant la Cour suprême du Canada — Pourvoi accueilli — Aucune règle n'empêchait que la règle de la préclusion s'applique aux procédures disciplinaires de la police — Toutefois, une mesure de réparation peut être ordonnée malgré le principe de la préclusion lorsque les fins auxquelles servent les différentes instances impliquant les mêmes parties sont fondamentalement distinctes — En l'espèce, compte tenu des différentes normes de preuve et le fait que le demandeur ne pouvait obtenir aucune réparation dans le cadre des premières procédures, il était raisonnable de ne pas appliquer le principe de la préclusion à l'encontre du demandeur, et le pourvoi a été accueilli en conséquence.

The plaintiff was arrested by the defendant police officers after a disturbance at a court house. The plaintiff alleged that the arrest was unlawful and that the defendant officers employed excessive force in the course of the arrest. The plaintiff brought a private civil action for damages and also complained to the defendant police services board. The board directed a hearing into the plaintiff's allegations pursuant to the disciplinary provisions of the Police Services Act. The hearings officer found that there was no substance to the plaintiff's allegations and dismissed the complaint. The plaintiff's appeal to the Ontario Civilian Commission on Police Services was allowed and the officers brought an application for judicial review. The Divisional Court granted the application and restored the decision of the hearings officer.

The officers then brought a motion in the plaintiff's civil action for a declaration that the action was barred as issue estopped by the decision of the hearings officer as ultimately upheld by the Divisional Court. The motion was granted, the action was dismissed, the plaintiff's appeal to the Court of Appeal was dismissed and the plaintiff appealed, with leave, to the Supreme Court of Canada.

Held: The appeal was allowed.

Per Cromwell, Karakatsanis JJ. (McLachlin C.J.C., Fish J. concurring): Issue estoppel may lie by reason of findings made in the course of police disciplinary proceedings. There is no general rule of policy which should bar this. However, a discretion exists in superior courts to grant relief from the effect of issue estoppel. Obviously such discretion should be exercised where the first proceedings were actually unfair, but relief may be granted from issue estoppel in fair proceedings where a clear legislative distinction exists between the purposes of the first and second proceedings. What is relevant is the parties' reasonable expectations of the stakes of each proceeding.

In the present case, the purpose of the internal disciplinary proceedings and the present private civil action were very different. The disciplinary proceeding was conducted fairly from the perspective of the plaintiff, and the plaintiff's position was given a fair hearing. However, nowhere in the Police Services Act was it suggested that any finding made there could prejudice the plaintiff's civil action. Additionally, given the possible consequences to the officers, the disciplinary hearing had a more strenuous standard of proof than the civil standard of proof to a balance of probabilities, and significantly a disciplinary finding against the officers would not entitle the plaintiff to any private remedy. Accordingly, it was appropriate in the present case to relieve the plaintiff from issue estoppel. This was particularly so given that the hearings officer was appointed by the chief of the defendant police service, and accordingly to have the decision of that hearings officer effectively immunize the service from civil liability would breach the principle of natural justice *audi alteram partem*.

Per LeBel, Abella JJ. (dissenting) (Rothstein J. concurring): Issue estoppel exists to protect the finality of adversarial litigation and to bar a defendant from effectively being exposed to civil double jeopardy. The judgment of the Supreme Court of Canada in *British Columbia (Workers' Compensation Board) v. British Columbia (Human Rights Tribunal)* contains the appropriate test for the employment of issue estoppel where the first decision is made by an administrative tribunal. It states that where the correct decision-maker, being a body given the express statutory authority to make particular findings and resolve a dispute, makes those findings and resolves that dispute, courts should grant deference in order to advance the principle of finality and to bar relitigation of identical issues as between identical parties. In the present case, the Court should properly grant deference to the hearings officer, the "correct" decision-maker with authority delegated pursuant to the Police Services Act. The reasons of the majority return the state of issue estoppel from administrative tribunals in Canada to what it was prior to *British Columbia (Workers' Compensation Board) v. British Columbia (Human Rights Tribunal)*, and this is inappropriate.

Relief from the application of issue estoppel is properly granted where the first proceedings were unfair, but in the present case the administrative disciplinary proceedings were fair to the plaintiff. The appointment of the hearings officer by the chief of the defendant police service was not unfair, as similar sorts of appointments have been validated by courts in the past and security of tenure is not the only hallmark of quasi-judicial independence. The appeal should be dismissed.

Le demandeur a été arrêté par les agents de police défendeurs après un comportement perturbateur dans une salle d'audience. Le demandeur a fait valoir que l'arrestation était abusive et que les agents de police défendeurs avaient eu recours à une force excessive lors de l'arrestation. Le demandeur a déposé une action civile en dommages-intérêts ainsi qu'une plainte à la commission des services policiers. La commission a ordonné la tenue d'une audience visant à vérifier les allégations du demandeur, conformément aux dispositions de la Loi sur les services policiers en matière

disciplinaire. Le juge chargé de l'audience a conclu que les allégations du demandeur n'étaient pas fondées et a rejeté la plainte. L'appel du demandeur interjeté auprès de la Commission civile des services policiers de l'Ontario a été accueilli et les agents de police ont déposé une requête en contrôle judiciaire. La Cour divisionnaire a accueilli la requête et rétabli la décision du premier juge.

Les agents de police ont ensuite déposé une requête dans le cadre de l'action du demandeur visant à obtenir une déclaration que l'action devait être rejetée par l'application du principe de la préclusion découlant d'une question déjà tranchée par le premier juge et confirmée par la Cour divisionnaire. La requête a été accueillie, l'action rejetée, l'appel interjeté par le demandeur auprès de la Cour d'appel a été rejeté et ce dernier a formé un pourvoi, avec autorisation, devant la Cour suprême du Canada.

Arrêt: Le pourvoi a été accueilli.

Cromwell, Karakatsanis, JJ. (McLachlin, J.C.C., Fish, J., souscrivant à leur opinion) : Les conclusions tirées dans le cadre des procédures disciplinaires de la police peuvent constituer matière à préclusion. Il n'y a aucune règle de politique générale qui puisse faire obstacle à cela. Toutefois, les cours supérieures possèdent le pouvoir discrétionnaire d'ordonner une mesure de réparation visant à contrer les conséquences de la préclusion. De toute évidence, un tel pouvoir discrétionnaire devrait être exercé dans le cas où les premières procédures sont véritablement injustes, mais il est également possible d'ordonner une mesure de réparation en raison de la préclusion lorsque les premières procédures ont été équitables s'il y a une distinction statutaire claire entre les fins poursuivies par les premières procédures et celles poursuivies par les procédures subséquentes. Ce qui importait, c'étaient les attentes raisonnables des parties à l'égard des enjeux de chacune des procédures.

En l'espèce, les procédures disciplinaires internes et la présente action civile et privée servaient des fins très différentes. Les procédures disciplinaires ont été menées de manière équitable du point de vue du demandeur et ce dernier a pu faire valoir sa position dans le cadre d'une audience équitable. Toutefois, il n'y a rien dans la Loi sur les services policiers qui laissait croire que toute conclusion tirée aux termes de telles procédures pourrait mettre en péril l'action du demandeur. De plus, compte tenu des conséquences possibles auxquelles les agents de police étaient exposés, la norme de preuve dans le cadre des procédures disciplinaires était plus sévère que la norme de la prépondérance des probabilités applicable en matière civile et, plus important encore, une conclusion défavorable aux agents de police en matière disciplinaire ne donnerait pas au demandeur le droit d'obtenir une réparation privée. Aussi, il était raisonnable en l'espèce de ne pas appliquer le principe de la préclusion. Il devait tout particulièrement en être ainsi compte tenu du fait que le premier juge avait été nommé par le directeur du service de police défendeur et, ainsi, s'il fallait que la décision de ce juge mette effectivement le service à l'abri d'une responsabilité civile, cela contreviendrait à la règle de justice naturelle *audi alteram partem*.

LeBel, Abella, JJ. (dissidents) (Rothstein, J., souscrivant à leur opinion) : La préclusion a pour but de protéger la finalité d'une procédure contentieuse et d'éviter que le défendeur soit, dans les faits, tenu civilement responsable deux fois pour le même geste. La Cour suprême du Canada, dans l'arrêt *British Columbia (Workers' Compensation Board) v. British Columbia (Human Rights Tribunal)*, a établi le critère applicable en matière de préclusion lorsque la première décision est rendue par un tribunal administratif. Selon la Cour, lorsque le véritable décideur, celui à qui l'on a confié le pouvoir statutaire de tirer des conclusions particulières et de trancher un litige, tire ces conclusions et tranche ce litige, les tribunaux devraient faire preuve de déférence afin de respecter le principe de la finalité et d'éviter que des questions identiques opposant les mêmes parties ne fassent l'objet d'instances supplémentaires. En l'espèce, la Cour devrait faire preuve de déférence à l'égard du premier juge, le « véritable » décideur à qui la Loi sur les services policiers a confié le pouvoir de rendre la décision. Les juges majoritaires abordaient la question de la préclusion dans leurs motifs en appliquant aux tribunaux administratifs l'interprétation qui prévalait avant l'arrêt *British Columbia (Workers' Compensation Board) v. British Columbia (Human Rights Tribunal)*, et cela n'était pas raisonnable.

Lorsque les premières procédures sont inéquitables, il est approprié d'accorder réparation en application de la doctrine de la préclusion, mais, en l'espèce, le demandeur avait été traité de manière équitable dans le cadre des procédures disciplinaires. La nomination du premier juge par le directeur du service de police défendeur ne produisait pas d'effets inéquitables. Des nominations similaires ont été confirmées par les tribunaux par le passé et l'inamovibilité des juges n'était pas la seule caractéristique de l'indépendance du processus quasi-judiciaire. Le pourvoi devrait être rejeté.

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s. 64(1) — considered

s. 64(7) — considered

s. 64(8) — considered

s. 64(10) — considered

s. 68(1) — considered

s. 68(5) — considered

s. 69(3) — considered

s. 69(4) — considered

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s. 69(8) — considered

s. 69(9) — considered

s. 70(1) — considered

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s. 76 — considered

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APPEAL by plaintiff from judgment reported at *Penner v. Niagara Regional Police Services Board* (2010), [2010] O.J. No. 4046, 325 D.L.R. (4th) 488, 267 O.A.C. 259, 2010 ONCA 616, 2010 CarswellOnt 7164, 94 C.P.C. (6th) 262, (sub nom. *Penner c. Niagara (Commission des services policiers)*) 102 O.R. (3d) 700, (sub nom. *Penner v. Niagara (Police Services Board)*) 102 O.R. (3d) 688 (Ont. C.A.), dismissing plaintiff's appeal from judgment granting defendants' motion to dismiss action for damages in false imprisonment and battery as issue estopped by findings in prior administrative proceeding.

POURVOI formé par le demandeur à l'encontre d'une décision publiée à *Penner v. Niagara Regional Police Services Board* (2010), [2010] O.J. No. 4046, 325 D.L.R. (4th) 488, 267 O.A.C. 259, 2010 ONCA 616, 2010 CarswellOnt 7164, 94 C.P.C. (6th) 262, (sub nom. *Penner c. Niagara (Commission des services policiers)*) 102 O.R. (3d) 700, (sub nom. *Penner v. Niagara (Police Services Board)*) 102 O.R. (3d) 688 (Ont. C.A.), ayant rejeté l'appel interjeté par le demandeur à l'encontre d'un jugement ayant accueilli la requête des défendeurs visant à faire rejeter l'action en dommages-intérêts déposée dans le cadre d'une affaire de confinement illégal et d'actes de violence par l'application de la préclusion découlant d'une question déjà tranchée lors des procédures administratives.

Cromwell, Karakatsanis JJ.:

1 This appeal focuses on the discretionary application of issue estoppel. More particularly, the question is whether the Ontario courts erred by striking many of the claims in the appellant's civil action against the police on the basis that his complaint of police misconduct arising out of the same facts had been dismissed by a police disciplinary tribunal.

2 The appellant, Wayne Penner, was arrested for disruptive behaviour in an Ontario courtroom. He filed a complaint against two police officers under the *Police Services Act*, R.S.O. 1990, c. P.15 ("*PSA*"), alleging unlawful arrest and use of unnecessary force. He also started a civil action against the Court Security Officer, the two police officers, their Chief of Police, and the Regional Municipality of Niagara Regional Police Services Board (the "Police Services Board") in the Superior Court of Justice, claiming damages arising out of the same incident.

3 Mr. Penner's complaint under the *PSA* were referred by the Chief of Police to a disciplinary hearing presided over by a retired police superintendent. The police officers were found not guilty of misconduct. Mr. Penner was a party to the disciplinary hearing and the subsequent appeals to the Ontario Civilian Commission on Police Services (the "Commission") and the Divisional Court.

4 The respondents applied to have the civil action dismissed on the basis of issue estoppel because, in their view, the disciplinary hearing had finally resolved the key issues underpinning Mr. Penner's civil claims.

5 Many of Mr. Penner's civil claims were struck on the basis of issue estoppel. The Ontario Court of Appeal agreed with the motion judge, and determined that the application of issue estoppel would not work an injustice in this case.

6 On appeal to this Court, the appellant did not seriously challenge that the preconditions of issue estoppel had been met. The issue is whether the Court of Appeal erred in exercising its discretion to apply issue estoppel to bar Mr. Penner's civil claims. Mr. Penner contends that the application of issue estoppel in this context would work an injustice or unfairness because of the public interest in promoting police accountability. He submits that the courts, as guardians of the Constitution and of individual rights and freedoms, must oversee the exercise of police powers: the importance of this judicial oversight requires that issue estoppel not apply to a disciplinary hearing decision under the *PSA*.

7 The respondents reply that this case turns upon its own exceptional circumstances; that the civil suit represents a collateral attack on the final decision of the complaints process; and that the courts below were right to apply issue estoppel in order to preclude relitigation of the same issues finally decided in the disciplinary proceedings.

8 We conclude that there is not and should not be a rule of public policy precluding the applicability of issue estoppel to police disciplinary hearings based upon judicial oversight of police accountability. The flexible approach to issue

estoppel provides the court with the discretion to refuse to apply issue estoppel if it will work an injustice, even where the preconditions for its application have been met. However, in our respectful view, the Court of Appeal erred in its analysis of the significant differences between the purpose and scope of the two proceedings, and failed to consider the reasonable expectations of the parties about the impact of the proceedings on their broader legal rights. Further, it is unfair to use the decision of the Chief of Police's designate to exonerate the Chief in a subsequent civil action. In the circumstances of this case, it was unfair to the appellant to apply issue estoppel to bar his civil action. We would allow the appeal.

I. Background

9 In January 2003, Mr. Penner was sitting in a Provincial Offences Court while his wife was on trial for a traffic ticket issued by Constable Nathan Parker. It was alleged that Mr. Penner disrupted the proceedings, refused to stop interrupting and to leave when asked to do so, and resisted arrest by Constable Nathan Parker. Constables Parker and Koscinski used force to remove him from the courtroom. Once outside the courtroom, they again used force and handcuffed him. Handcuffed, Mr. Penner was then taken to the Niagara Regional Police station by Constable Parker, where he was strip-searched and put into a holding cell. He sustained a black eye, numerous scrapes, a bruised knee, and a sore wrist, elbow and sore ribs. Mr. Penner was escorted by police to a hospital where he was examined and treated for injuries he had sustained during the arrest. Mr. Penner was subsequently returned to the police station and charged with causing a disturbance, breach of probation and resisting arrest. All charges were withdrawn by the Crown some five months later, in June 2003.

10 After his arrest, Mr. Penner filed a public complaint under ss. 56 and 57 of the *PSA* against Constables Parker and Koscinski, alleging unlawful or unnecessary arrest, as well as use of unnecessary force. This led to a disciplinary hearing for both police officers. In addition, in July 2003, Mr. Penner filed a statement of claim in the Ontario Superior Court of Justice in relation to the same arrest, by which a civil action was commenced against the Police Services Board, Constables Parker and Koscinski, the Chief of Police and the Court Security Officer. Mr. Penner claimed damages for unlawful arrest, false imprisonment, use of unnecessary force during and after the arrest, an unnecessary strip-search, failure on the part of other officers to prevent his mistreatment, failure to provide timely medical assistance, improper use of handcuffs, malicious prosecution and failure to co-operate with the investigation of his allegations.

II. Summary of the Complaint Proceedings

A. Disciplinary Hearing Under the PSA (Decision of Superintendent R. J. Fitches, dated June 28, 2004; A.R. at pp. 99-116)

11 Under the *PSA*, a complaint is referred to the Chief of Police: s. 60(4). (All statutory references are to the legislation as it existed at the relevant time.) The Chief is obliged to have the complaint investigated (with some exceptions not relevant here) and, in light of the results, to order a hearing into the matter if he or she is of the opinion that the officer's conduct could constitute misconduct: ss. 64(1) and (7). If a hearing is ordered, it is conducted by the Chief or a designate on his or her behalf: ss. 64(7) and 76. The Chief also appoints the prosecutor: s. 64(8). The complainant is made a party by statute and has participatory rights (ss. 69(3) and (4); *Statutory Powers Procedure Act*, R.S.O. 1990, c. S.22, ss. 10 and 10.1), but no access to discovery or production of documents beyond what the prosecution relies on, and there is no right to compel the officer in question to testify: *PSA*, s. 69(7). The issue at the hearing is whether the alleged misconduct has been "proved on clear and convincing evidence" (s. 64(10)) and, if so, what penalty is to be imposed on the officer under ss. 68(1) and (5). No remedy or costs may be awarded to the complainant.

12 Here, disciplinary charges of unnecessary and unlawful arrest and use of unnecessary force were laid against two police officers: *General*, O. Reg. 123/98, Part V, *Code of Conduct*, Sch., s. 2(1)(g)(i) and (ii). The Chief appointed a retired police superintendent of the Ontario Provincial Police to conduct the hearing on his behalf. The hearing took place over the course of several days in 2004. Mr. Penner represented himself. As the complainant, he led evidence, cross-examined witnesses and made submissions. Several individuals who were present in the courtroom at the time of Mr. Penner's arrest gave evidence before the hearing officer at the disciplinary hearing: the Prosecutor, Clerk of the court, Court Security Officer, two lay people awaiting their own respective trials, Mr. Penner, his wife, and Constables Parker and Koscinski.

13 The hearing officer rejected much of the Penners' testimony. Instead, he relied primarily on the testimony of other witnesses regarding the events surrounding Mr. Penner's arrest and concluded that Constables Parker and Koscinski had reasonable grounds to arrest Mr. Penner for causing a disturbance in a public place. On the issue of whether the officers had the lawful authority to make an arrest in a courtroom under the *Provincial Offences Act*, R.S.O. 1990, c. P.33, while a Justice of the Peace was presiding, the hearing officer concluded that the prosecutor had failed to provide sufficient evidence to show, "in any clear and cogent way, that Mr. Penner's arrest was not authorized by statute" (p. 13; A.R., at p. 111). The hearing officer therefore dismissed the allegation of unlawful arrest and found the Constables not guilty of misconduct on this count.

14 Turning to the allegation of unnecessary use of force, the hearing officer found that the Constables used a level of force that was necessary to gain control over Mr. Penner. Relying upon his review of the video record at the police station, he found that there was "no clear, convincing, or cogent evidence whatsoever" of unnecessary force there either (p. 16; A.R., at p. 114).

B. Appeal Before the Commission (Decision dated April 22, 2005; A.R. at pp. 117-130)

15 As a party to the disciplinary hearing, Mr. Penner appealed the decision of the hearing officer to the Commission pursuant to s. 70(1) of the *PSA*. He took the position before the Commission that there were no legal grounds for his arrest.

16 The Commission concluded that the arrest in the courtroom was unlawful because the Justice of the Peace gave no direction to the Constables to arrest Mr. Penner. The Commission was satisfied that there was clear and convincing evidence that Constables Parker and Koscinski were guilty of misconduct due to an unlawful and unnecessary arrest, and thus any force used was unjustified and unnecessary.

C. Appeal Before the Ontario Superior Court of Justice — Divisional Court (*Parker v. Niagara Regional Police Service *(2008), 232 O.A.C. 317 (Ont. Div. Ct.)

17 On a further appeal by the Constables pursuant to s. 71(1) of the *PSA*, the Divisional Court held that the Commission unreasonably ignored findings of fact made by the hearing officer, and that the Commission was not justified in substituting their own findings. The Divisional Court concluded that the officers had legal authority to make the arrest and restored the hearing officer's finding that the Constables were not guilty of misconduct.

III. History of the Civil Action

18 Mr. Penner initiated a civil action in July 2003 based on the same events that formed the subject matter of the disciplinary hearing, alleging, among other things, unlawful arrest and use of excessive force. After the decision from the disciplinary hearing was reinstated by the Divisional Court in January 2008, the respondents filed a motion to dismiss the civil action on the basis of issue estoppel.

A. Ontario Superior Court of Justice (Fedak J.; 2009 CarswellOnt 9420 (Ont. S.C.J.)

19 The motion judge concluded that Mr. Penner was estopped from bringing these claims. Mr. Penner's civil action raised, among others, the same two questions that were already decided by the disciplinary hearing and restated by the Divisional Court: (1) was the arrest lawful; and (2) was unnecessary force used, either at the court or at the police station? The judge applied the test outlined in *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44, [2001] 2 S.C.R. 460 (S.C.C.), and concluded that the three preconditions for issue estoppel had been met.

20 First, the hearing officer's decision was judicial and the hearing fulfilled the requirements of procedural fairness because Mr. Penner made the complaint, appeared before the decision maker, led evidence, examined witnesses and made written submissions. Second, the decision was final. And third, the same parties to the civil action were also engaged in the disciplinary hearing.

21 As to the second part of the *Danyluk* test, the motion judge stated that there were no grounds to exercise his discretion to not apply issue estoppel.

22 We are assuming but not deciding that the decision of the hearing officer was admissible before the motion judge for the purpose of considering issue estoppel. This issue was not addressed in the decisions below. Given our disposition, it is not necessary to decide the issue.

B. Ontario Court of Appeal (Laskin J.A., Moldaver and Armstrong JJ.A. concurring; 2010 ONCA 616, 102 O.R. (3d) 688 (Ont. C.A.)

23 The Court of Appeal agreed with the motion judge that the three preconditions for issue estoppel had been met. However, the Court of Appeal found that the motion judge erred in failing to explain why there were no grounds to exercise his discretion to not apply issue estoppel. Accordingly, the Court of Appeal considered whether it would be unfair or unjust to apply issue estoppel despite the satisfaction of the three preconditions.

24 The Court of Appeal acknowledged that the different purposes of the disciplinary hearing and the civil action weighed against the application of issue estoppel. The Court of Appeal concluded that the legislature did not intend to preclude Mr. Penner's civil action simply because he filed a public complaint under the *PSA* (para. 42). Further, the Court of Appeal considered that Mr. Penner had no financial stake in the disciplinary hearing (as the statute does not provide for compensation to a public complainant affected by police misconduct), although the strength of that factor was diminished, in its view, by the potential benefit to Mr. Penner had there been a finding of misconduct. Despite these factors weighing against the application of issue estoppel, the Court of Appeal concluded that they were not determinative considerations in the discretionary analysis.

25 The Court of Appeal ultimately concluded that applying issue estoppel would not work an injustice and decided against exercising its discretion to not apply the doctrine based on the following factors:

- on issues of reasonable and probable grounds for arrest, as well as the use of excessive force during arrest, the hearing officer had as much expertise as a court (at para. 45);
- the disciplinary hearing had "all the hallmarks of an ordinary civil trial", and, in this case, the different standards of proof in police disciplinary hearings and in civil actions are immaterial (at paras. 48-51);
- Mr. Penner actively participated in the disciplinary hearing (at para. 52); and
- the *PSA* provides an aggrieved party with the right to appeal to the Commission, a right which Mr. Penner exercised (at para. 53).

26 Accordingly, the Court of Appeal dismissed the appeal.

IV. Standard of Review

27 A discretionary decision of a lower court will be reversible where that court misdirected itself or came to a decision that is so clearly wrong that it amounts to an injustice: *Elsom v. Elsom*, [1989] 1 S.C.R. 1367 (S.C.C.), at p. 1375. Reversing a lower court's discretionary decision is also appropriate where the lower court gives no or insufficient weight to relevant considerations: *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3 (S.C.C.), at pp. 76-77.

V. Analysis

A. Issue Estoppel: The Legal Framework

28 Relitigation of an issue wastes resources, makes it risky for parties to rely on the results of their prior litigation, unfairly exposes parties to additional costs, raises the spectre of inconsistent adjudicative determinations and, where the initial decision maker is in the administrative law field, may undermine the legislature's intent in setting up the administrative scheme. For these reasons, the law has adopted a number of doctrines to limit relitigation.

29 The one relevant on this appeal is the doctrine of issue estoppel. It balances judicial finality and economy and other considerations of fairness to the parties. It holds that a party may not relitigate an issue that was finally decided in prior judicial proceedings between the same parties or those who stand in their place. However, even if these elements are present, the court retains discretion to not apply issue estoppel when its application would work an injustice.

30 The principle underpinning this discretion is that "[a] judicial doctrine developed to serve the ends of justice should not be applied mechanically to work an injustice": *Danyluk*, at para. 1; see also *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63, [2003] 3 S.C.R. 77 (S.C.C.), at paras. 52-53.

31 Issue estoppel, with its residual discretion, applies to administrative tribunal decisions. The legal framework governing the exercise of this discretion is set out in *Danyluk*. In our view, this framework has not been overtaken by this Court's subsequent jurisprudence. The discretion requires the courts to take into account the range and diversity of structures, mandates and procedures of administrative decision makers however, the discretion must not be exercised so as to, in effect, sanction collateral attack, or to undermine the integrity of the administrative scheme. As highlighted in this Court's jurisprudence, particularly since *New Brunswick (Board of Management) v. Dunsmuir*, 2008 SCC 9, [2008] 1 S.C.R. 190 (S.C.C.), legislation establishing administrative tribunals reflects the policy choices of the legislators and administrative decision making must be treated with respect by the courts. However, as this Court said in *Danyluk*, at para. 67: "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."

B. No Public Policy Rule Precluding Issue Estoppel with Respect to Police Disciplinary Hearings

32 The Ontario Court of Appeal applied a conventional analysis of issue estoppel, analyzing the various factors identified in *Danyluk*. Mr. Penner and a number of interveners ask this Court, as a matter of public policy, to prohibit the application of issue estoppel to findings made in a police disciplinary hearing if it prevents a complainant from accessing the courts for damages on the same claims. They submit that the application of issue estoppel to police disciplinary hearings usurps the role of the courts as guardians of the Constitution and the rule of law, and that public policy requires that police accountability be subject to judicial oversight. These submissions were raised overtly for the first time before this Court.

33 Police oversight is a complex issue that attracts intense public attention and differing public policy responses. Over time, legislative frameworks have been revised with the stated goals of promoting efficient police services and increasing the transparency and accountability of the public complaints process. In a 2006 case, the Ontario Divisional Court concluded that the legislature allowed for "institutional bias" in the manner of appointing a hearing officer under s. 76(1) of the *PSA*: *Sharma v. Waterloo Regional Police Service* (2006), 213 O.A.C. 371 (Ont. Div. Ct.), at para. 27. The parties in this case do not contest that this is a legitimate exercise of the legislature's authority, and the Divisional Court in *Sharma*, at para. 28, concluded that the ability to appoint "retired police officers not associated with this force is capable of founding such independence as necessary". See also the Honourable Patrick J. Lesage, *Report on the Police Complaints System in Ontario* (2005), at pp. 77-78.

34 The public complaints process incorporates a number of features to enhance public participation and accountability. For instance, pursuant to Part II of the *PSA*, the Commission, as an agency comprised of civilian members, provides independent oversight of police services in Ontario to ensure fairness and accountability to the public. Part V sets out a comprehensive public complaints process by which members of the public can file official complaints against policies

or services. Judicial oversight of disciplinary hearings under the *PSA* is available by statutory right of appeal to the Commission and then to the Divisional Court: see ss. 70(1) and 71(1).

35 We are not persuaded that it is either necessary or desirable to create a rule of public policy excluding police disciplinary hearings from the application of issue estoppel. The doctrine of issue estoppel allows for the exercise of discretion to ensure that no injustice results; it calls for a case-by-case review of the circumstances to determine whether its application would be unfair or unjust.

C. Discretionary Application of Issue Estoppel

(1) Approach to the Exercise of Discretion

36 We agree with the decisions of the courts below that all three preconditions for issue estoppel are established in this case. Thus, this case turns upon the Court of Appeal's exercise of discretion in determining whether it would be unjust to apply the doctrine of issue estoppel in this case.

37 This Court in *Danyluk*, at paras. 68-80, recognized several factors identified by Laskin J.A. in *Minott v. O'Shanter Development Co.* (1999), 42 O.R. (3d) 321 (Ont. C.A.), that are relevant to the discretionary analysis in the context of a prior administrative tribunal proceeding.

38 The list of factors in *Danyluk* merely indicates some circumstances that may be relevant in a particular case to determine whether, on the whole, it is fair to apply issue estoppel. The list is not exhaustive. It is neither a checklist nor an invitation to engage in a mechanical analysis.

39 Broadly speaking, the factors identified in the jurisprudence illustrate that unfairness may arise in two main ways which overlap and are not mutually exclusive. First, the unfairness of applying issue estoppel may arise from the unfairness of the prior proceedings. Second, even where the prior proceedings were conducted fairly and properly having regard to their purposes, it may nonetheless be unfair to use the results of that process to preclude the subsequent claim.

(a) Fairness of the Prior Proceedings

40 If the prior proceedings were unfair to a party, it will likely compound the unfairness to hold that party to its results for the purposes of a subsequent proceeding. For example, in *Danyluk*, the prior administrative decision resulted from a process in which Ms. Danyluk had not received notice of the other party's allegations or been given a chance to respond to them.

41 Many of the factors identified in the jurisprudence, including the procedural safeguards, the availability of an appeal, and the expertise of the decision maker, speak to the opportunity to participate in and the fairness of the administrative proceeding. These considerations are important because they address the question of whether there was a fair opportunity for the parties to put forward their position, a fair opportunity to adjudicate the issues in the prior proceedings and a means to have the decision reviewed. If there was not, it may well be unfair to hold the parties to the results of that adjudication for the purposes of different proceedings.

(b) The Fairness of Using the Results of the Prior Proceedings to Bar Subsequent Proceedings

42 The second way in which the operation of issue estoppel may be unfair is not so much concerned with the fairness of the prior proceedings but with the fairness of *using their results* to preclude the subsequent proceedings. Fairness, in this second sense, is a much more nuanced enquiry. On the one hand, a party is expected to raise all appropriate issues and is not permitted multiple opportunities to obtain a favourable judicial determination. Finality is important both to the parties and to the judicial system. However, even if the prior proceeding was conducted fairly and properly having regard to its purpose, injustice may arise from using the results to preclude the subsequent proceedings. This may occur, for example, where there is a significant difference between the purposes, processes or stakes involved in the two proceedings. We recognize that there will always be differences in purpose, process and stakes between administrative and court

proceedings. In order to establish unfairness in the second sense we have described, such differences must be significant and assessed in light of this Court's recognition that finality is an objective that is also important in the administrative law context. As Doherty and Feldman JJ.A. wrote in *Schweneke v. Ontario* (2000), 47 O.R. (3d) 97 (Ont. C.A.), at para. 39, if courts routinely declined to apply issue estoppel because the procedural protections in the administrative proceedings do not match those available in the courts, issue estoppel would become the exception rather than the rule.

43 Two factors discussed in *Danyluk* — the "wording of the statute from which the power to issue the administrative order derives" (paras. 68-70) and "the purpose of the legislation" (paras. 71-73), including the degree of financial stakes involved — are highly relevant here to the fairness analysis in this second sense. They take into account the intention of the legislature in creating the administrative proceedings and they shape the reasonable expectations of the parties about the scope and effect of the proceedings and their impact on the parties' broader legal rights: *Minott*, at pp. 341-42.

44 For example, in *British Columbia (Minister of Forests) v. Bugbusters Pest Management Inc.* (1998), 50 B.C.L.R. (3d) 1 (B.C. C.A.), a defendant in a civil action relied on the decision of a Deputy Chief Forester to preclude the Crown's civil action for damages caused by a forest fire. The Court of Appeal upheld the chambers judge's decision to exercise discretion against applying issue estoppel. As the statute did not contemplate that the Deputy Chief Forester's decision about the cause of a fire would be a final resolution of that issue, it followed that it "was not within the reasonable expectation of either party at the time of those proceedings" that it would be: *Bugbusters*, at para. 30.

45 Thus, where the purposes of the two proceedings diverge significantly, applying issue estoppel may be unfair even though the prior proceeding was conducted with scrupulous fairness, having regard to the purposes of the legislative scheme that governs the prior proceeding. For example, where little is at stake for a litigant in the prior proceeding, there may be little incentive to participate in it with full vigour: *Toronto (City)*, at para. 53.

46 There is also a general policy concern linked to the purpose of the legislative scheme which governs the prior proceeding. To apply issue estoppel based on a proceeding in which a party reasonably expected that little was at stake risks inducing future litigants to either avoid the proceeding altogether or to participate more actively and vigorously than would otherwise make sense. This could undermine the expeditiousness and efficiency of administrative regimes and therefore undermine the purpose of creating the tribunal: *Burchill v. Yukon Territory (Commissioner)*, 2002 YKCA 4, [2002] Y.J. No. 19 (Y.T. C.A.), at para. 28; *Minott*, at p. 341; and *Danyluk*, at para. 73. In the context of this appeal, it might discourage citizens from filing complaints about police misconduct.

47 Thus, the text and purpose of the legislative scheme shape the parties' reasonable expectations in relation to the scope and effect of the administrative proceedings. They guide how and to what extent the parties participate in the process. Where the legislative scheme contemplates multiple proceedings and the purposes of those proceedings are widely divergent, the application of the doctrine in such circumstances might not only upset the parties' legitimate and reasonable expectations but may also undermine the efficacy and policy goals of the administrative proceedings by either encouraging more formality and protraction or even discouraging access to the administrative proceedings altogether.

48 These considerations are also relevant to weighing another factor identified in *Danyluk*: the procedural safeguards available to the parties in the prior administrative process. The consideration of a party's decision whether to take advantage of procedural protections available in the prior proceeding cannot be divorced from the consideration of the party's reasonable expectations about what is at stake in those proceedings or the fundamentally different purposes of the two proceedings. The connections between the relevant considerations must be viewed as a whole.

(2) Fairness of Using the Disciplinary Finding to Preclude a Civil Action in this Case

49 In our respectful view, the Court of Appeal failed to focus on fairness in the second sense we have just described. We do not quarrel with the finding of the Court of Appeal that the disciplinary hearing was itself fair and that Mr. Penner participated in a meaningful way. However, while the court thoroughly assessed the fairness of the disciplinary proceeding itself, it failed to fully analyze the fairness of using the results of that process to preclude the appellant's civil

claims, having regard to the nature and scope of those earlier proceedings and the parties' reasonable expectations in relation to them.

(a) The Legislation Establishing the Disciplinary Hearing

50 As the Court of Appeal pointed out, "the legislature did not intend to foreclose [Mr. Penner's] civil action simply because he filed a complaint under the [*PSA*]" (para. 42). The *PSA* features statutory privilege provisions, three of which are noteworthy here. Documents generated during the complaint process are inadmissible in civil proceedings: s. 69(9). Persons who carry out duties in the complaint process cannot be forced to testify in civil proceedings about information obtained in the course of their duties: s. 69(8). Finally, persons engaged in the administration of the complaints process are obligated to keep information obtained during the process confidential, subject to certain exceptions: s. 80. These provisions specifically contemplate parallel proceedings in relation to the same subject matter.

51 Here, as recognized by the Court of Appeal, the legislation does not intend to foreclose parallel proceedings when a member of the public files a complaint. This would shape the reasonable expectations of the parties and the nature and extent of their participation in the process.

52 Nothing in the legislative text, therefore, could give rise to a reasonable expectation that the disciplinary hearing would be conclusive of Mr. Penner's legal rights against the Constables, the Chief of Police or the Police Services Board in his civil action.

(b) Reasonable Expectations of the Parties: Different Purposes of the Proceedings and Other Considerations

53 The Court of Appeal recognized that the purposes of a police disciplinary proceeding and a civil action were different and that this weighed against the application of issue estoppel.

54 The police disciplinary hearing is part of the process through which the officers' employer decides whether to impose employment-related discipline on them. By making the complainant a party, the *PSA* promotes transparency and public accountability. However, this process provides no remedy or costs for the complainant. A civil action, on the other hand, provides a forum in which a party that has suffered a wrong may obtain compensation for that wrong.

55 In addition to the legislative text, several other facts point to the same conclusion about the parties' reasonable expectations about the impact of the disciplinary hearing on the civil action.

56 First, Mr. Penner's civil action was filed in July 2003; almost a year *before* the hearing officer released his decision on June 28, 2004. In *Danyluk*, the civil proceedings had commenced before the administrative proceedings concluded. Binnie J. reasoned that this weighed against applying issue estoppel because "the respondents were well aware, in law and in fact, that they were expected to respond to parallel and to some extent overlapping proceedings" (para. 70).

57 Second, Hermiston J., in the most pertinent Ontario case on the question of issue estoppel in the police disciplinary hearing context at the time, *Porter v. York Regional Police*, [2001] O.J. No. 5970 (Ont. S.C.J.), stated that an acquittal of an officer at a disciplinary hearing *did not* give rise to issue estoppel in relation to the same issues in a subsequent civil action.

58 Third, a person in Mr. Penner's position might well think it unlikely that a proceeding in which he or she had no personal or financial stake could preclude a claim for significant damages in his or her civil action.

(c) Financial Stake in the Disciplinary Hearing

59 The Court of Appeal noted that the lack of a financial stake in the administrative proceeding, on its own, does not ordinarily resolve how the court should exercise its discretion in applying issue estoppel in a civil action. However, the Court of Appeal went further. With respect to the absence of a financial stake in the outcome of the disciplinary hearing, the court said, at para. 43:

> This is an important consideration weighing against applying issue estoppel, but its strength is diminished by the potential indirect benefit to Mr. Penner from the disciplinary proceedings. If, for example, the hearing officer had found that the two police officers did not have reasonable and probable grounds to arrest Mr. Penner or used excessive force on him, those findings would likely have estopped the officers from asserting otherwise in Mr. Penner's civil action. In other words, issue estoppel works both ways.

60 In our view, this analysis is flawed. It cannot necessarily be said that issue estoppel "works both ways" here. As the Court of Appeal recognized, because the *PSA* requires that misconduct by a police officer be "proved on clear and convincing evidence" (s. 64(10)), it follows that such a conclusion might, depending upon the nature of the factual findings, properly preclude relitigation of the issue of liability in a civil action where the balance of probabilities — a lower standard of proof — would apply. However, this cannot be said in the case of an acquittal. The prosecutor's failure to prove the charges by "clear and convincing evidence" does not necessarily mean that those same allegations could not be established on a balance of probabilities. Given the different standards of proof, there would have been no reason for a complainant to expect that issue estoppel would apply if the officers were acquitted. Indeed, in *Porter*, at para. 11, the court refused to apply issue estoppel following an acquittal in a police disciplinary hearing because the hearing officer's decision "was determined by a high standard of proof and might have been different if it had been decided based on the lower civil standard". Thus, the parties could not reasonably have contemplated that the acquittal of the officers at the disciplinary hearing would be determinative of the outcome of Mr. Penner's civil action.

61 By assuming that issue estoppel "works both ways", the Court of Appeal attached too little weight to the fact that Mr. Penner had no financial stake in the disciplinary hearing and wrongly concluded that he had more at stake than he could reasonably have thought at the time.

(d) Issue Estoppel May Work to Undermine the Purpose of Administrative Proceedings

62 Another important policy consideration referred to earlier arises in this case: the risk of adding to the complexity and length of administrative proceedings by attaching undue weight to their results through applying issue estoppel. It is true that Mr. Penner could have participated even more fully in the proceedings by hiring counsel in an attempt to obtain a finding of misconduct so as to assist his civil action. But accepting this line of argument too readily may lead to unintended and undesirable results. It risks turning the administrative process into a proxy for Mr. Penner's civil action. If it is before the hearing officer, and not the court, that an action for damages is to be won or lost, litigants in Mr. Penner's position will have every incentive to mount a full-scale case, which would tend to defeat the expeditious operation of the disciplinary hearing.

63 In the context of this appeal, it would also mean that the officers, who have much at stake in the hearing, would effectively be forced to face two prosecutors rather than one, given the presence of counsel for the complainant. We doubt that this would enhance either the efficacy of or the fairness to the officers in the disciplinary hearing. Finally, a further significant risk is that potential complainants will simply not come forward with public complaints in order to avoid prejudicing their civil actions.

(e) The Role of the Chief of Police

64 Under the public complaints process of the *PSA* at the relevant time, the Chief of Police investigated and determined whether a hearing was required following the submission of a public complaint. The Chief of Police appointed the investigator, the prosecutor and the hearing officer.

65 It has been recognized that these arrangements are not objectionable for the purposes of a disciplinary hearing (as in *Sharma*). However, in our view, the fact that this decision was made by the designate of the Chief of Police should be taken into account is assessing the fairness of using the results of the disciplinary process to preclude Mr. Penner's civil claims. While this point was not clearly placed before the Court of Appeal, we think it is an important one.

66 Applying issue estoppel against the complainant here had the effect of permitting the Chief of Police to become the judge of his own case, with the result that his designate's decision had the effect of exonerating the Chief and his police service from civil liability. In our view, applying issue estoppel here is a serious affront to basic principles of fairness.

67 We emphasize that this unfairness does not reside in the Chief of Police carrying out his statutory duties. The parties accept that, given the statutory framework, there is no objection on fairness grounds to the role of the Chief and there is certainly no suggestion that he failed in any way to carry out his statutory duties. Further, no obvious unfairness arises if the disciplinary decision finds police misconduct, as this is a decision against the interests of the Chief or the Police Services Board. The unfairness that concerns us only arises at the point that the Chief's (or his designate's) decision that there was no police misconduct in a disciplinary context is used for the quite different purpose of exonerating him, by means of issue estoppel, from civil liability relating to the same matter.

68 Had the Court of Appeal been given the opportunity to fully consider the importance of these points, our view is that it would have seen that applying issue estoppel against the appellant in the circumstances of this case was fundamentally unfair.

VI. Conclusion

69 Issue estoppel is about balancing judicial economy and finality and other considerations of fairness to the parties. It is a flexible doctrine that permits the court to respond to the equities of a particular case. We see no reason to depart from that approach and create a rule of public policy to preclude the application of issue estoppel in the context of public complaints against the police.

70 Given the legislative scheme and the widely divergent purposes and financial stakes in the two proceedings, the parties could not reasonably have contemplated that the acquittal of the officers at the disciplinary hearing would determine the outcome of Mr. Penner's civil action. These are important considerations and the Court of Appeal did not take them into account in assessing the weight of other factors, such as Mr. Penner's status as a party and the procedural protections afforded by the administrative process. Further, the application of issue estoppel had the effect of using the decision of the Chief of Police's designate to exonerate the Chief in the civil claim.

71 Applying issue estoppel against Mr. Penner to preclude his civil claim for damages in the circumstances of this case was fundamentally unfair.

VII. Disposition

72 We would allow the appeal with costs to the appellant throughout.

***LeBel, Abella JJ.* (dissenting):**

73 Litigation must come to an end, in the interests of the litigants themselves, the justice system and of our society. The finality of litigation is a fundamental principle assuring the fairness and efficacy of the justice system in Canada. The doctrine of issue estoppel advances this principle. It seeks to protect the reasonable expectation of litigants that they are able to rely on the outcome of a decision made by an authoritative adjudicator, regardless of whether that decision was made in the context of a court or an administrative proceeding. The purposes of proceedings may vary like the governing procedures, but the principle of finality of litigation should be maintained.

74 This appeal concerns the proper approach to the discretionary application of issue estoppel in the context of prior administrative proceedings dealing with police conduct.

75 The applicable approach to issue estoppel was most recently articulated by this Court in 2011 in *British Columbia (Workers' Compensation Board) v. British Columbia (Human Rights Tribunal)*, 2011 SCC 52, [2011] 3 S.C.R. 422 (S.C.C.) [hereinafter Figliola]. This is the precedent, therefore, that governs the application of the doctrine in this case.

TAB 14

2001 SCC 44, 2001 CSC 44
Supreme Court of Canada

Danyluk v. Ainsworth Technologies Inc.

2001 CarswellOnt 2434, 2001 CarswellOnt 2435, 2001 SCC 44, 2001 CSC 44, [2001] 2 S.C.R. 460, [2001] S.C.J. No. 46, 106 A.C.W.S. (3d) 460, 10 C.C.E.L. (3d) 1, 149 O.A.C. 1, 2001 C.L.L.C. 210-033, 201 D.L.R. (4th) 193, 272 N.R. 1, 34 Admin. L.R. (3d) 163, 54 O.R. (3d) 214 (headnote only), 7 C.P.C. (5th) 199, J.E. 2001-1439, REJB 2001-25003

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

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

Heard: October 31, 2000
Judgment: July 12, 2001
Docket: 27118

Proceedings: reversing (1998), 41 C.C.E.L. (2d) 19 (Ont. C.A.)

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

Subject: Employment; Public; Insolvency; Family; Civil Practice and Procedure

Headnote

Practice --- Judgments and orders — Res judicata and issue estoppel — Issue estoppel — General principles

Denial of natural justice by employment standards officer did not deprive her decision of its judicial character — Errors made by standards officer rendered decision voidable, but not void — Decision of employee not to apply for review by director was not fatal to her action for $300,000 of unpaid wages and commissions — Employee was entitled to appropriate consideration of factors relevant to whether court should exercise its discretion — By failing to ensure that employee had received adequate notice and responded to case laid out against her, standards officer prevented claim from being properly considered or adjudicated — Invoking issue estoppel could result in significant injustice — Employment Standards Act, R.S.O. 1990, c. E.14.

Employment law --- Wages and benefits — Statutory enforcement of payment of wages — Procedure for recovery under statute — Appeal and judicial review

Denial of natural justice by employment standards officer did not deprive her decision of its judicial character — Errors made by standards officer rendered decision voidable, but not void — Decision of employee not to apply for review by director was not fatal to her action for $300,000 of unpaid wages and commissions — Employee was entitled to appropriate consideration of factors relevant to whether court should exercise its discretion — By failing

to ensure that employee had received adequate notice and failing to give her opportunity to respond to case laid out against her, standards officer prevented claim from being properly considered or adjudicated — Invoking issue estoppel could result in significant injustice — Employment Standards Act, R.S.O. 1990, c. E.14.

Employment law --- Wages and benefits — Statutory enforcement of payment of wages — Procedure for recovery under statute — Relation to other remedies

Remedy available pursuant to s. 67 of Employment Standards Act did not give employee right of appeal — Director had discretion to deny application for review or to appoint adjudicator to conduct hearing — Decision of employee not to apply for review by director was not fatal to her action for $300,000 of unpaid wages and commissions — By failing to ensure that employee had received adequate notice and failing to give her opportunity to respond to case laid out against her, employment standards officer prevented claim from being properly considered or adjudicated — Invoking issue estoppel could result in significant injustice — Employment Standards Act, R.S.O. 1990, c. E.14, s. 67.

Administrative law --- Requirements of natural justice — Right to hearing — Procedural rights at hearing — Opportunity to respond and make submissions

Remedy available pursuant to s. 67 of Employment Standards Act did not give employee right of appeal — Director had discretion to deny application for review or to appoint adjudicator to conduct hearing — Decision of employee not to apply for review by director was not fatal to her action for $300,000 of unpaid wages and commissions — By failing to ensure that employee had received adequate notice and failing to give her opportunity to respond to case laid out against her, employment standards officer prevented claim from being properly considered or adjudicated — Invoking issue estoppel could result in significant injustice — Employment Standards Act, R.S.O. 1990, c. E.14, s. 67.

Procédure --- Jugements et ordonnances — Chose jugée et préclusion — Préclusion découlant d'une question déjà tranchée — Principes généraux

Manquement à la justice naturelle de l'agente des normes d'emploi n'a pas fait perdre à sa décision son caractère judiciaire — Erreurs faites par l'agente des normes d'emploi avaient pour effet de rendre sa décision annulable, mais non nulle — Décision de l'employée de ne pas demander de révision au directeur n'a pas porté un coup fatal à son action réclamant 300,000 $ à tigre de salaire et de commissions impayés — Employée avait droit à ce qu'il soit donné une considération appropriée aux facteurs pertinents à la question de savoir si le tribunal devait exercer son pouvoir discrétionnaire ou non — En ne s'assurant pas que l'employée reçoive un préavis adéquat et que celle-ci réponde à la preuve devant elle, l'agente des normes d'emploi a empêché la réclamation de l'employée d'être examinée ou jugée de façon appropriée — Invoquer la préclusion découlant d'une question déjà tranchée pourrait avoir comme effet une importante injustice — Loi sur les normes d'emploi, L.R.O. 1990, c. E.14.

Droit du travail individuels --- Salaires et avantages sociaux — Coercition légale au paiement du salaire — Procédure pour recouvrer en vertu de la loi — Appel et révision judiciaire

Manquement à la justice naturelle de l'agente des normes d'emploi n'a pas fait perdre à sa décision son caractère judiciaire — Erreurs faites par l'agente des normes d'emploi avaient pour effet de rendre sa décision annulable, mais non nulle — Décision de l'employée de ne pas demander de révision au directeur n'a pas porté un coup fatal à son action réclamant 300,000 $ à titre de salaire et de commissions impayés — Employée avait le droit à ce qu'il soit donné une considération appropriée aux facteurs pertinents à la question de savoir si le tribunal devait exercer son pouvoir discrétionnaire ou non — En ne s'assurant pas que l'employée reçoive un préavis adéquat et que celle-ci réponde à la preuve devant elle, l'agente des normes d'emploi a empêché la réclamation de l'employée d'être examinée ou jugée de façon appropriée — Invoquer la préclusion découlant d'une question déjà tranchée pourrait avoir comme effet une importante injustice — Loi sur les normes d'emploi, L.R.O. 1990, c. E.14.

Droit du travail (rapports individuels) --- Salaire et avantages sociaux — Coercition légale au paiement du salaire — Procédure pour recouvrer en vertu de la loi — Relation avec les autres recours

Recours disponible en vertu de l'art. 67 de la Loi sur les normes d'emploi ne fournissait aucun droit d'appel à l'employée — Directeur avait le pouvoir discrétionnaire de décider de rejeter ou non la demande de révision ou de nommer un décideur et de présider l'audience — Décision de l'employée de ne pas demander de révision au directeur n'a pas porté un coup fatal à son action réclamant 300,000 $ à titre de salaire et de commissions impayés — En ne s'assurant pas que l'employée reçoive un préavis adéquat et que celle-ci réponde à la preuve devant elle, l'agente des normes d'emploi a empêché la réclamation de l'employée d'être examinée ou jugée de façon appropriée — Invoquer la préclusion découlant d'une question déjà tranchée pourrait avoir comme effet une importante injustice — Loi sur les normes d'emploi, L.R.O. 1990, c. E.14, art. 67.

Droit administratif --- Exigences de la justice naturelle — Droit d'être entendu — Droits procéduraux lors de l'audience — Opportunité de répondre et de faire des représentations

Recours disponible en vertu de l'art. 67 de la Loi sur les normes d'emploi ne fournissait aucun droit d'appel à l'employée — Directeur avait le pouvoir discrétionnaire de décider de rejeter ou non la demande de révision, de nommer un décideur et de présider l'audience — Décision de l'employée de ne pas demander de révision au directeur n'a pas porté un coup fatal à son action réclamant le paiement de salaire et de commissions impayés — En ne s'assurant pas que l'employée reçoive un préavis adéquat et que celle-ci réponde à la preuve devant elle, l'agente des normes d'emploi a empêché la réclamation de l'employé de 300 000 $ d'être examinée ou jugée de façon appropriée — Invoquer la préclusion découlant d'une question déjà tranchée pourrait avoir comme effet une importance injustice — Loi sur les normes d'emploi, L.R.O. 1990, c. E.14, art. 67.

The employee claimed that she was owed $300,000 in unpaid wages and commissions by the employer. She filed a complaint under the *Employment Standards Act* (Ont.) for unpaid wages and commissions. The employer denied the claim, alleging that the employee had resigned from her position. The employment standards officer investigated the complaint. The employer responded to the complaint through the standards officer. The standards officer did not inform the employee of the employer's response and did not give her an opportunity to respond. The employee commenced an action against the employer, seeking unpaid wages, commissions, and damages for wrongful dismissal. The standards officer denied the employee's claim for commissions. The standards officer found that the employee was entitled to two weeks' pay in lieu of notice for termination. Rather than applying to the director for a review of the standards officer's decision, the employee chose to pursue a civil action.

The employer's motion to strike out the action was granted, barring the action on the ground of issue estoppel. The motions judge found that the standards officer's decision was final and that the criteria for issue estoppel had been met. The employee appealed unsuccessfully. The Ontario Court of Appeal concluded that the standards officer's decision was final on the ground that neither party had exercised its right of internal appeal. The Court of Appeal confirmed that the standards officer's decision was judicial for the purpose of issue estoppel. The standards officer's failure to observe procedural fairness did not prevent the operation of issue estoppel. Although the standards officer denied the employee natural justice, the employee forfeited her right to judicial review by not applying to the director for a review of the decision. The employee appealed.

Held: The appeal was allowed.

Although it is compelling not to duplicate litigation, the general principles of the estoppel doctrine need re-examination when a claim for $300,000 is barred by a manifestly improper and unfair administrative decision. Issue estoppel is a doctrine of public policy, and the court maintains discretion to relieve against the harsh consequences of estoppel even if the preconditions of issue estoppel are present.

The redress procedures under the *Employment Standards Act* are incapable of dealing with complex questions of law and fact. An oral hearing, at which both parties are in attendance, is not required. Standards officers are not required to have legal training. No monetary limit is placed on the cases that fall within the standards officer's jurisdiction. Procedural defects can be rectified on review to the director. The request for review can, however, be denied. The director has discretion whether to appoint an adjudicator and, consequently, whether to conduct a hearing. Essentially, a right of appeal does not exist.

Because the employee was allowed to bring an action, the employer was not entitled as of right to an imposition of estoppel. Standards officers are required to exercise adjudicative functions in a judicial manner. The adjudication of the employee's claim was of a judicial nature. Denial of natural justice by the standards officer did not deprive her decision of its judicial character. The decision remained judicial, as distinct from administrative or legislative decisions. Errors made by the standards officer rendered the decision voidable, but not void. The employee's decision to pursue the civil action rather than applying for review was not fatal to the action. The denial of natural justice by the standards officer was important to the exercise of the court's discretion.

The three preconditions to issue estoppel were established. The employee was entitled to the appropriate consideration of factors relevant to whether the court should exercise its discretion. The legislature did not intend for the statutory proceedings to be the exclusive forum for employment complaints. Because the employee's action was commenced before the standards officer released her decision, the employer knew that it was expected to respond to parallel proceedings. The purpose of the Act is to provide inexpensive and expedited resolutions of employment disputes. By placing excess weight on the statutory decision in terms of issue estoppel, the purpose of the legislation could be undermined. Although the employee had no right of appeal from the standards officer's decision, the employee failed to exercise the opportunity provided to apply for a review of the decision. Few safeguards existed for the parties in the statutory process. The standards officer was ill-equipped to decide complex issues of law. When the employee invoked the statutory process, she was personally vulnerable and facing dismissal. It is likely that the legislature did not intend for the process to become a barrier for claims involving large sums. The standards officer's decision prevented the employee from receiving adequate notice and from responding to the case laid out against her. As such, the employee's claim had not been properly considered or adjudicated. Invoking issue estoppel could result in a significant injustice. Given the cumulative effect of the relevant factors, the court should exercise its discretion and refuse to apply issue estoppel.

L'employée prétendait que son employeur lui devait 300 000 $ à titre de salaire et de commissions impayés. Elle a déposé une plainte, en vertu de la *Loi sur les normes d'emploi*, dans laquelle elle réclamait le salaire et les commissions impayés. L'employeur a nié lui devoir de l'argent et a prétendu que l'employée avait démissionné de ses fonctions. Une agente des normes d'emploi a enquêté sur la plainte. L'employeur a donné une réponse à la plainte de l'employée à l'agente des normes d'emploi. Cette dernière n'en a pas informé l'employée et ne lui a pas donné l'opportunité d'y répondre. L'employée a intenté une action contre l'employeur dans laquelle elle réclamait le salaire et les commissions impayés ainsi que des dommages-intérêts pour congédiement injustifié. L'agente a rejeté la réclamation de l'employée pour les commissions. Elle a conclu que l'employée avait droit à deux semaines de salaire à titre d'indemnité de préavis. Plutôt que de demander au directeur une révision de la décision rendue par l'agente, l'employée a choisi de continuer son action.

La requête en irrecevabilité de l'employeur a été accordée, ce qui a mis un terme à l'action au motif de préclusion découlant d'une question déjà tranchée. Le juge saisi de la requête a conclu que la décision de l'agente des normes d'emploi était définitive et qu'on avait satisfait aux critères de la préclusion. Le pourvoi de l'employée a été rejeté. La Cour d'appel a conclu que la décision de l'agente des normes d'emploi était définitive au motif qu'aucune des deux parties n'avait utilisé le droit d'appel interne. La Cour d'appel a confirmé que la décision de l'agente était judiciaire en ce qui avait trait à la préclusion. Le défaut de l'agente d'avoir respecté l'équité procédurale n'avait pas empêché que la préclusion ait lieu. Même si l'agente des normes d'emploi avait nié à l'employée l'application de la justice

naturelle, cette dernière avait renoncé à son droit à la révision judiciaire lorsqu'elle n'avait pas demandé au directeur de réviser la décision. L'employée a interjeté appel.

Arrêt: Le pourvoi a été accueilli.

Même s'il est important qu'il n'y ait pas de poursuites en double, les principes généraux de la doctrine de la préclusion doivent être réexaminés lorsqu'ils ont pour effet de permettre à une décision administrative manifestement inappropriée et inéquitable d'empêcher une réclamation de 300 000 $. La préclusion est une doctrine d'ordre public et le tribunal conserve le pouvoir discrétionnaire de remédier aux dures conséquences de celle-ci, mêmes si ses conditions préalables sont présentes.

Les mesures de redressement prévues à la loi ne pouvaient se préoccuper de questions de droit et de fait complexes. On n'exigeait pas la tenue d'une audience verbale à laquelle seraient présentes les deux parties. Les agents des normes d'emploi n'étaient pas tenus d'avoir une formation juridique. La loi ne prévoyait aucune limite pécuniaire aux affaires qui pouvaient relever de la compétence de l'agent. Les défaux procéduraux pouvaient être rectifiés en demandant une révision au directeur. La demande de révision pouvait cependant être refusée. Le directeur avait le pouvoir discrétionnaire lui permettant de nommer un décideur, et donc de présider une audience. Il n'existait, essentiellement, aucun droit d'appel.

Puisqu'on a permis à l'employée d'intenter une action, l'employeur n'avait pas le droit d'obtenir de plein droit la préclusion. Les agents de normes d'emploi devaient exercer des fonctions de décideurs de manière judiciaire. La décision relative à la réclamation de l'employée avait une nature judiciaire. Le manquement à la justice naturelle de l'agente des normes d'emploi n'a pas enlevé à la décision rendue par celle-ci son caractère judiciaire. Les erreurs qu'elle a faites ne rendaient pas sa décision nulle, mais plutôt annulable. La décision prise par l'employée de continuer son action, plutôt que de demander une révision de la décision, n'a pas porté un coup fatal à son action. Le manquement à la justice naturelle avait de l'importance relativement à l'exercice par le tribunal de son pouvoir discrétionnaire.

Les trois conditions préalables à la préclusion ont été établies. L'employée avait droit à ce que les facteurs pertinents à la question de savoir si le tribunal devait exercer son pouvoir discrétionnaire soient examinés de façon appropriée. Le législateur ne peut avoir eu l'intention que les procédures prévues par la loi soient le seul forum existant pour les plaintes des employés. Puisque l'action de l'employée a été intentée avant que l'agente des normes d'emploi ne rende sa décision, l'employeur savait qu'il aurait à répondre à des procédures parallèlles. L'objet de la loi était de fournir des moyens peu dispendieux et rapides pour résoudre des litiges relatifs à l'emploi. En accordant un poids excessif à la décision prise en vertu de la loi, dans le contexte de la préclusion découlant d'une question déjà tranchée, l'objet de la loi pourrait être compromis. Même si l'employée n'avait pas de droit d'appel à l'encontre de la décision de l'agente des normes d'emploi, elle a quand même fait défaut d'utiliser la possibilité qui lui était fournie, soit celle qui lui permettait de demander la révision de la décision. La procédure prévue par la loi fournissait peu de garanties pour les parties. L'agente n'avait pas les outils lui permettant de décider de questions de droit complexes. Au moment où l'employée s'est prévalue de la procédure prévue par la loi, elle était vulnérable et faisait face à un congédiement. Le législateur n'avait probablement pas l'intention que ce processus empêche les réclamations portant sur de larges sommes d'argent. En tant que telle, la réclamation de l'employée n'avait pas été évaluée ou décidée de façon appropriée. Invoquer la préclusion découlant d'une question déjà tranchée pourrait avoir comme résultat une grave injustice. Compte tenu de l'effet cumulatif de tous les facteurs pertinents, le tribunal devrait exercer son pouvoir discrétionnaire et refuser d'appliquer la préclusion.

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Guay v. Lafleur (1964), [1965] S.C.R. 12, [1964] C.T.C. 350, 64 D.T.C. 5218, 47 D.L.R. (2d) 226 (S.C.C.) — referred to

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R. v. Sarson, 197 N.R. 125, 107 C.C.C. (3d) 21, 135 D.L.R. (4th) 402, 36 C.R.R. (2d) 1, 91 O.A.C. 124, 49 C.R. (4th) 75, [1996] 2 S.C.R. 223 (S.C.C.) — referred to

R. v. Wilson, [1983] 2 S.C.R. 594, 4 D.L.R. (4th) 577, 51 N.R. 321, [1984] 1 W.W.R. 481, 26 Man. R. (2d) 194, 9 C.C.C. (3d) 97, 37 C.R. (3d) 97 (S.C.C.) — referred to

Raison v. Fenwick (1981), 120 D.L.R. (3d) 622 (B.C. C.A.) — referred to

Randhawa v. Everest & Jennings Canadian Ltd. (1996), 22 C.C.E.L. (2d) 19, 1 C.P.C. (4th) 49, 7 O.T.C. 28 (Ont. Gen. Div.) — referred to

Rasanen v. Rosemount Instruments Ltd. (1994), 1 C.C.E.L. (2d) 161, 94 C.L.L.C. 14,024, 17 O.R. (3d) 267, 112 D.L.R. (4th) 683, 68 O.A.C. 284 (Ont. C.A.) — not followed

Robinson v. McQuaid (1854), 1 P.E.I. 103 (P.E.I. S.C.) — referred to

Saskatoon Credit Union Ltd. v. Central Park Enterprises Ltd. (1988), 22 B.C.L.R. (2d) 89, 47 D.L.R. (4th) 431 (B.C. S.C.) — referred to

Schweneke v. Ontario (2000), 47 O.R. (3d) 97, 48 C.C.E.L. (2d) 306, (sub nom. *Schweneke v. Ontario (Minister of Education)*) 130 O.A.C. 93, 41 C.P.C. (4th) 237 (Ont. C.A.) — considered

Susan Shoe Industries Ltd. v. Ontario (Employment Standards Officer) (1994), 3 C.C.E.L. (2d) 153, (sub nom. *Susan Shoe Industries Ltd. v. Ricciardi*) 18 O.R. (3d) 660, (sub nom. *Susan Shoe Industries Ltd. v. Ontario (Minister of Labour)*) 70 O.A.C. 347 (Ont. C.A.) — referred to

Thoday v. Thoday (1963), [1964] 1 All E.R. 341, [1964] P. 181 (Eng. C.A.) — referred to

Thrasyvoulou v. Environment Secretary (1989), [1990] 2 A.C. 273 (U.K. H.L.) — referred to

Wong v. Shell Canada Ltd. (1995), 35 Alta. L.R. (3d) 1, 15 C.C.E.L. (2d) 182, 174 A.R. 287, 102 W.A.C. 287 (Alta. C.A.) — considered

Statutes considered/Législation citée:

Courts of Justice Act/Tribunaux judiciaires, Loi sur les, R.S.O./L.R.O. 1990, c. C.43
s. 23(1) — referred to

Employment Standards Act/Normes d'emploi, Loi sur les, R.S.O./L.R.O. 1990, c. E.14
Generally/en général — considered

s. 1 "wages" — considered

s. 2(2) — considered

s. 6 — considered

s. 6(1) — considered

s. 65 [am./mod. 1991, c. 16, s. 9] — considered

s. 65(1) [rep. & sub./abr. et rempl. 1996, c. 23, s. 19(1)] — considered

s. 65(1)(c) [rep. & sub./abr. et rempl. 1991, c. 16, s. 9(1)] — considered

s. 65(7) [en./ad. 1991, c. 16, s. 9(2)] — considered

s. 67(1) [am./mod. 1991, c. 16, s. 10(1)] — considered

s. 67(2) [rep. & sub./abr. et rempl. 1991, c. 16, s. 10(2)] — considered

s. 67(3) [en./ad. 1991, c. 16, s. 10(2)] — considered

s. 67(5) [en./ad. 1991, c. 16, s. 10(2)] — considered

s. 67(7) [en./ad. 1991, c. 16, s. 10(2)] — considered

s. 68 [am./mod. 1991, c. 5, s. 16; am./mod. 1991, c. 16, s. 11; am./mod. 1993, c. 27 (Sched.)] — considered

s. 68(1) [am./mod. 1991, c. 5, s. 16; am./mod. 1991, c. 16, s. 11(1); am./mod. 1993, c. 27 (Sched.)] — considered

s. 68(3) [rep. & sub./abr. et rempl. 1991, c. 16, s. 11(2)] — considered

s. 68(7) — considered

Forest Act, R.S.B.C. 1979, c. 140
Generally — referred to

Regulations considered/Règlements cités:

Courts of Justice Act, R.S.O./L.R.O. 1990, c. C.43

Small Claims Court Jurisdiction, O. Reg. 626/00

s. 1(1)

APPEAL by employee from judgment reported 167 D.L.R. (4th) 385, 99 C.L.L.C. 210-016, 116 O.A.C. 225, 41 C.C.E.L. (2d) 19, 42 O.R. (3d) 235, 27 C.P.C. (4th) 91, 12 Admin. L.R. (3d) 1, 1998 CarswellOnt 4679, [1998] O.J. No. 5047 (Ont. C.A.), upholding motion to bar employee's action for unpaid wages and commissions on grounds of issue estoppel.

POURVOI de l'employée à l'encontre du jugement publié à 167 D.L.R. (4th) 385, 99 C.L.L.C. 210-016, 116 O.A.C. 225, 41 C.C.E.L. (2d) 19, 42 O.R. (3d) 235, 27 C.P.C. (4th) 91, 12 Admin. L.R. (3d) 1, 1998 CarswellOnt 4679, [1998] O.J. No. 5047 (C.A. Ont.), qui a maintenu la requête en irrecevabilité de l'action de l'employée pour salaire et commissions impayés au motif de préclusion découlant d'une question déjà tranchée.

The judgment of the court was delivered by *Binnie J.*:

1 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 the "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 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 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 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 ordered 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 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 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 (Ont. 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 (Ont. C.A.)

10 After reviewing the facts of the case, Rosenberg J.A., for the court, identified, at pp. 239-240, 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 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 *Downing v. Graydon* (1978), 21 O.R. (2d) 292 (Ont. C.A.), to be "determinative of this issue."

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:

> 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 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:

> 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.

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 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.

. . . . .

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

68.-(1) An employer who considers themself aggrieved with 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 of 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 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: *R. v. Farwell* (1894), 22 S.C.R. 553 (S.C.C.), at p. 558, *Angle v. Minister of National Revenue* (1974), [1975] 2 S.C.R. 248 (S.C.C.), at pp. 267-268. 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* (looseleaf updated 2000, release 3), vol. 3 Supp. (Toronto: Carswell, 1984), at 21§17 *et seq.* Another aspect of the judicial policy favouring finality is the rule against collateral attack, i.e., that a judicial order pronounced by a court of competent jurisdiction should not be brought into question in subsequent proceedings except those provided by law for the express purpose of attacking it: *R. v. Wilson*, [1983] 2 S.C.R. 594 (S.C.C.), *R. v. Litchfield*, [1993] 4 S.C.R. 333 (S.C.C.), *R. v. Sarson*, [1996] 2 S.C.R. 223 (S.C.C.).

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 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* (Markham, Ont.: Butterworths, 2000), at p. 94 *et seq.*, including *Robinson v. McQuaid* (1854), 1 P.E.I. 103 (P.E.I. S.C.), at pp. 104-105, 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) 85 (B.C. C.A.). See also *Thrasyvoulou v. Environment Secretary* (1989), [1990] 2 A.C. 273 (U.K. 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 (S.C.C.), 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 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 (Ont. C.A.), 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. 267-268. 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 of *Angle*, *supra*, at p. 255, subscribed to the more stringent definition for purpose of issue estoppel. "It will not suffice" he said, "if the question arose collaterally or incidentally in the earlier proceedings or is one which must be inferred by argument from the judgment." The question out of which the estoppel is said to arise must have been "fundamental to the decision arrived at" in the earlier proceeding. In other words, as discussed below, the estoppel extends to the material facts and the conclusions of law or of mixed fact and law ("the questions") that were necessarily (even if not explicitly) determined in the earlier proceedings.

25 The preconditions to the operation of issue estoppel were set out by Dickson J. in *Angle*, *supra*, at p. 254:

> . . . (1) that the same question has been decided; (2) that the judicial decision which is said to create the estoppel was final; and, (3) that the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised or their privies . . . .

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 *Employment Standards Act* 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 *Employment Standards Act* 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 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 rapidly than could realistically be expected in the courts. There 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 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*") 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.

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 (B.C. C.A.), at para. 32; *Schweneke v. Ontario* (2000), 47 O.R. (3d) 97 (Ont. 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 (N.S. 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.S. Bower, A.K. Turner and K.R. Handley, *The Doctrine of Res Judicata*, 3rd ed. (London: Butterworths, 1996), pp. 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.

(*The Doctrine of Res Judicata*, 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 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: *Downing v. 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 s. 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 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* (1964), [1965] S.C.R. 12 (S.C.C.), at pp. 17-18. The inapplicability of issue estoppel to investigations is noted by Diplock L.J. in *Thoday v. Thoday* (1963), [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* (Toronto: Canvasback, 1998) (looseleaf updated 2001, release 2), vol. 1, para. 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* Abella J.A., at p. 280:

> *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. Gen. Div.), *Randhawa v. Everest & Jennings Canadian Ltd.* (1996), 22 C.C.E.L. (2d) 19 (Ont. Gen. Div.), *Heynen v. Frito-Lay Canada Ltd.* (1997), 32 C.C.E.L. (2d) 183 (Ont. 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. 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. [In Chambers]).

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 (Canada P.C.), 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 (S.C.C.), at pp. 584-585. 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 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 *Consolidated Maybrun Mines Ltd.*, *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 *Consolidated Maybrun Mines Ltd.*, on which forum 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 governing judicial review in *Harelkin*, *supra*, and collateral attack in *Consolidated Maybrun Mines Ltd.*, *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 (Ont. 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 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 decision must nevertheless be treated as final for present purposes.

(c) 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 (Ont. C.A.), *per* Laskin J.A., at pp. 339-340. 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 Enterprises Ltd.* (1988), 22 B.C.L.R. (2d) 89 (B.C. S.C.), at p. 96, and has been substantially modified in many jurisdictions in the United States: see Holmested and Watson, at 21§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, A.W. Bryant in *The Law of Evidence in Canada*, 2nd ed. (Toronto: Butterworths, 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.

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 *Naken v. General Motors of Canada Ltd.*, [1983] 1 S.C.R. 72 (S.C.C.), 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 p. 11:

> It must always be remembered that although the three requirements for issue estoppel must be satisfied before it can apply, the fact that they may be satisfied does not automatically give rise to its application. Issue estoppel is an equitable doctrine, and as can be seen from the cases, is closely related to abuse of process. The doctrine of issue estoppel is designed as an implement of justice, and a protection against injustice. It inevitably calls upon the exercise of a judicial discretion to achieve fairness according to the circumstances of each case.

Apart from noting parenthetically that estoppel *per rem judicatem* is generally considered a common law doctrine (unlike promissory estoppel which is clearly equitable in origin), I think this is a correct statement of the law. Finch J.A.'s *dictum* was adopted and applied by the Ontario Court of Appeal in *Schweneke*, *supra*, at paras. 38 and 43:

> The discretion to refuse to give effect to issue estoppel becomes relevant only where the three prerequisites to the operation of the doctrine exist. . . . The exercise of the discretion is necessarily case specific and depends on the entirety of the circumstances. In exercising the discretion the court must ask - is there something in the circumstances of this case such that the usual operation of the doctrine of issue estoppel would work an injustice?
>
> . . . . .
>
> . . . The discretion must respond to the realities of each case and not to abstract concerns that arise in virtually every case where the finding relied on to support the doctrine was made by a tribunal and not a court.

See also *Braithwaite*, *supra*, at p. 188.

64 Courts elsewhere in the Commonwealth apply similar principles. In *Arnold v. National Westminster Bank plc*, [1991] 3 All E.R. 41 (U.K. H.L.), 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 para. 40 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 para. 69:

> 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 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 *Consolidated Maybrun Mines Ltd.* 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.)

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 p. 11, 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 [reimbursements] 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 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) (St. Paul, Minn.: American Law Institute Publishers, 1982), 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. . . . [Factum, para. 71.]

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 must be counted against her: *Susan Shoe Industries Ltd. v. Ontario (Employment Standards Officer)* (1994), 18 O.R. (3d) 660 (Ont. 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. 341-342.

(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:

> . . . 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. (*Maybrun*, *supra*, para. 50.)

(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. 341-342:

> . . . 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 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.

Appeal allowed.

Pourvoi accueilli.

TAB 15

2001 CarswellOnt 25
Ontario Court of Appeal

Banque Nationale de Paris (Canada) v. Canadian Imperial Bank of Commerce

2001 CarswellOnt 25, [2001] O.J. No. 53, 102 A.C.W.S. (3d) 302, 145
O.A.C. 349, 195 D.L.R. (4th) 308, 2 C.P.C. (5th) 1, 52 O.R. (3d) 161

Banque Nationale de Paris (Canada) and The Great Atlantic & Pacific Company of Canada Limited (Plaintiffs/Appellants/Defendants by Counterclaim) and Canadian Imperial Bank of Commerce and Zittrer, Siblin & Associates (Defendants/Respondents/Plaintiffs by Counterclaim)

Weiler, Rosenberg, MacPherson JJ.A.

Heard: November 15, 2000
Judgment: January 12, 2001
Docket: CA C33739

Proceedings: reversing in part *Banque Nationale de Paris (Canada) v. Canadian Imperial Bank of Commerce* (January 24, 2000), 85-CQ-8405 (Ont. S.C.J.); additional reasons at (February 18, 2000), Doc. 85-CQ-8405 (Ont. S.C.J.)

Counsel: *David S. Wilson*, for Appellants
Patrick O'Kelly, *Craig Martin*, for Respondents

Subject: Insolvency; Civil Practice and Procedure

Headnote

Practice --- Pleadings — Amendment — Grounds for amendment — To raise new cause of action or defence — General

Plaintiffs and defendant bank were creditors of company — Company's proposal was rejected and defendant bank appointed defendant receiver — Plaintiffs brought action seeking declaratory relief, damages for product disposed of and recovery of occupation rent — Bank counterclaimed for certain declaratory relief — Bank and plaintiffs were also involved in bankruptcy proceedings of company which were ongoing in Quebec court — Bank and plaintiffs reached agreement to stay this action until Quebec proceeding was determined — Although only interveners in Quebec litigation, plaintiffs had formed agreement with Quebec plaintiff as to proceeds and costs — Plaintiffs' cross-motion seeking to amend statement of claim to add claim for accounting of all assets of company disposed of in period of soft receivership and for damages resulting from alleged improvident disposition of assets of company was granted in part — Motions judge held principle of issue estoppel failed with respect to claim dealing with period of soft receivership — Motions judge found Quebec proceeding did not determine this issue but made clear finding that there was no improvident realization of assets of company so this could not be relitigated — Motion to amend statement of claim was adjourned — Plaintiffs appealed disallowance of amendment concerning improvident realization — Bank cross-appealed allowance by motions judge of amendment dealing with informal liquidation — Appeal dismissed — Cross-appeal allowed — Motion to amend statement of claim dismissed — Plaintiffs had privity of interest with plaintiff in Quebec proceedings and were bound by Quebec determination of informal liquidation and improvident realization issues — Issue estoppel applied to prevent plaintiffs from relitigating issues.

Bankruptcy --- Effect of bankruptcy on other proceedings — Miscellaneous issues

Plaintiffs and defendant bank were creditors of company — Company's proposal was rejected and defendant bank appointed defendant receiver — Plaintiffs brought action seeking declaratory relief, damages for product disposed of and recovery of occupation rent — Bank counterclaimed for certain declaratory relief — Bank and plaintiffs were

also involved in bankruptcy proceedings of company which were ongoing in Quebec court — Bank and plaintiffs reached agreement to stay this action until Quebec proceeding was determined — Although only interveners in Quebec litigation, plaintiffs had formed agreement with Quebec plaintiff as to proceeds and costs — Plaintiffs' cross-motion seeking to amend statement of claim to add claim for accounting of all assets of company disposed of in period of soft receivership and for damages resulting from alleged improvident disposition of assets of company was granted in part — Motions judge held principle of issue estoppel failed with respect to claim dealing with period of soft receivership — Motions judge found Quebec proceeding did not determine this issue but made clear finding that there was no improvident realization of assets of company so this could not be relitigated — Motion to amend statement of claim was adjourned — Plaintiffs appealed disallowance of amendment concerning improvident realization — Bank cross-appealed allowance by motions judge of amendment dealing with informal liquidation — Appeal dismissed — Cross-appeal allowed — Motion to amend statement of claim dismissed — Plaintiffs had privity of interest with plaintiff in Quebec proceedings and were bound by Quebec determination of informal liquidation and improvident realization issues — Issue estoppel applied to prevent plaintiffs from re-litigating issues.

Table of Authorities

Cases considered by *Rosenberg J.A.*:

Angle v. Minister of National Revenue (1974), [1975] 2 S.C.R. 248, 47 D.L.R. (3d) 544, 2 N.R. 397, 28 D.T.C. 6278 (S.C.C.) — considered

Bank of Montreal v. Mitchell (1997), 143 D.L.R. (4th) 697, 25 O.T.C. 344 (Ont. Gen. Div. [Commercial List]) — considered

Bank of Montreal v. Mitchell (1997), 151 D.L.R. (4th) 574 (Ont. C.A.) — considered

Carl-Zeiss-Stiftung v. Rayner & Keeler Ltd. (No. 2) (1966), [1967] 1 A.C. 853, [1967] R.P.C. 497, [1966] 2 All E.R. 536 (U.K. H.L.) — applied

Gleeson v. J. Wippell & Co., [1977] 3 All E.R. 54, [1977] 1 W.L.R. 510, 121 Sol. Jo. 157 (Eng. Ch. Div.) — applied

House of Spring Gardens Ltd. v. Waite (1990), [1991] 1 Q.B. 241, [1990] 2 All E.R. 990, [1990] 3 W.L.R. 347 (Eng. C.A.) — considered

Minott v. O'Shanter Development Co. (1999), 99 C.L.L.C. 210-013, 40 C.C.E.L. (2d) 1, 168 D.L.R. (4th) 270, 117 O.A.C. 1, 42 O.R. (3d) 321 (Ont. C.A.) — applied

Saskatoon Credit Union Ltd. v. Central Park Enterprises Ltd. (1988), 22 B.C.L.R. (2d) 89, 47 D.L.R. (4th) 431 (B.C. S.C.) — considered

Statutes considered:

Bank Act, S.C. 1980-81-82-83, c. 40, Pt. I
s. 178 — considered

Bankruptcy Act, R.S.C. 1952, c. 14
s. 20 — referred to

Business Corporations Act, R.S.O. 1990, c. B.16
Generally — referred to

Personal Property Security Act, R.S.O. 1990, c. P.10
Generally — referred to

APPEAL by plaintiff from judgment decided at (January 24, 2000), Doc. 85-CQ-8405 (Ont. S.C.J.), dismissing in part motion to amend statement of claim; CROSS-APPEAL by defendants of order allowing amendment in part.

The judgment of the court was delivered by *Rosenberg J.A.*:

1 In April 1984, Arctic Gardens Inc. was deemed to have made an assignment in bankruptcy after its bankruptcy proposal was rejected at a meeting of creditors. Arctic had granted security over its inventory and other assets to a number of different persons including the two appellants (respondents by cross-appeal) Banque Nationale de Paris (Canada) ("BNP") and The Great Atlantic & Pacific Company of Canada, Limited ("A&P") and the respondent Canadian Imperial Bank of Commerce. Some of that security applied to the same assets. CIBC appointed the respondent Zittrer, Siblin & Associates ("ZSA") as its agent to realize on the security. Lawsuits followed, first in Ontario, launched by these appellants, and then in Quebec, by an unsecured creditor, to determine the validity of CIBC's security, priorities and whether CIBC should pay damages for the actions of its agent ZSA while it was consulting to Arctic prior to its bankruptcy and then after the bankruptcy when it realized on the security. The Quebec action was tried first.

2 Following a 42-day trial in the Quebec Superior Court, the creditors other than CIBC, and hence these appellants, achieved substantial success. Certain of CIBC's security was held to be invalid, the appellants' security was held to rank prior to the interests of the other creditors, and CIBC was ordered to pay over $4 million to the creditors. CIBC appealed to the Quebec Court of Appeal, which reduced the award payable by CIBC to $501,000. The appellants now seek to litigate in Ontario some of the same issues determined in the Quebec courts. The respondents say that at least two of these issues are *res judicata* and that issue estoppel applies to prevent the appellants from relitigating them. Nordheimer J. agreed in part. He refused to permit an amendment to the statement of claim adding an allegation of improvident realization but allowed an amendment adding an allegation of informal liquidation. The appellants and the respondents appeal from that decision. For the reasons that follow, I would dismiss the appeal, allow the cross-appeal and dismiss the motion to amend the statement of claim.

THE FACTS

Events leading up to the bankruptcy

3 This appeal arises out of the affairs of Arctic Gardens Inc., a company incorporated under the *Ontario Business Corporations Act*, R.S.O., in the business of processing and selling frozen vegetables. The appellants are secured creditors of Arctic. In August 1983, Arctic was having cash-flow problems and the respondent CIBC agreed to provide a line of credit of $1 million. CIBC took security over, *inter alia*, the inventory of Arctic under s. 178 of the *Bank Act*, S.C., 1980-81-82-83, c. 40, and pursuant to a general security agreement registered under the *Personal Property Security Act*, R.S.O. 1990, c. P.10. The appellants agreed to subordinate their pre-existing security to CIBC.

4 Arctic continued to suffer cash-flow problems and on February 20, 1984 CIBC appointed the respondent ZSA as a consultant to assist in supervising the operations of Arctic. On March 22, 1984, Arctic lodged a bankruptcy proposal in Montreal. On April 24, at a meeting of creditors, this proposal was rejected and Arctic was deemed to have made an assignment in bankruptcy as at March 22, 1984. The period of February 20 to April 24, 1984 is variously referred to as the soft liquidation, soft receivership or the informal liquidation. I shall use the term "informal liquidation." On April 25th, CIBC appointed ZSA to realize its security over Arctic.

The litigation up to the motion to amend

5 On December 24, 1985, the appellants commenced an action in Ontario against the respondents. In the statement of claim, the appellants sought, *inter alia*: a declaration that all inventory and totes and pallets of Arctic were subject to the security of BNP in priority to any interests of the respondents; a declaration that CIBC's s. 178 security was void as against the appellants; a declaration that the appellants were entitled to the proceeds of sale from the disposition of inventory and the totes and pallets by the respondents; occupation rent for the period that ZSA occupied certain of Arctic's premises; and damages equivalent to the value of the inventory and the totes and pallets of Arctic disposed of by the respondents.

6 In November 1988, the appellants examined representatives of the respondents for discovery. The respondents refused to answer any questions concerning the sale or disposition of Arctic's inventory during the period of the informal liquidation. They also refused to answer any questions concerning the value of the inventory of Arctic disposed of by the respondents from April 25 to September 1984, the period of the formal liquidation, and conditions affecting the value of such inventory. The refusals were apparently based on the theory that such questions were not relevant to any of the claims pleaded.

7 On June 22, 1990, the appellants moved to amend the statement of claim to include claims for the informal liquidation and for negligence and improvident realization of assets during the formal liquidation.

8 Meanwhile, on March 25, 1986, a creditor of Arctic, Blaiklock Inc., brought a motion before the Quebec Bankruptcy Court under s. 20 of the *Bankruptcy Act*, R.S.C. 1952, c. 14, for leave to commence action against CIBC. The motion was granted and Blaiklock delivered its petition in September 1988. When CIBC was unsuccessful in quashing the Quebec proceeding, it moved to add the appellants as mis-en-cause to the Quebec action. Over the objections of the appellants, Meyer J. granted the application in the following terms:

> ALLOWS petitioner CIBC to call BNP and A & P as mis-en-cause in the present file in order to allow the latter to take knowledge of the decision to be rendered by this Court on the validity of the security given to the CIBC and to them. [Emphasis added.]

9 CIBC then moved to stay the Ontario action because it was expected that the Quebec action would go to trial first and would *inter alia* settle the validity of CIBC's s. 178 security. The parties entered into a standstill agreement whereby the Ontario action was held in abeyance until a judgment was rendered by the Bankruptcy Court in Montreal. The appellants' motion to amend was therefore adjourned.

The Quebec decision at trial

10 The action by Blaiklock against the respondents commenced in 1992. The trial lasted 42 days and Trudeau J. rendered his decision on January 22, 1993. He held as follows:

> (1) The s. 178 security held by CIBC was void as against Blaiklock and any other creditor and the trustee of Arctic;
>
> (2) The taking of possession of Arctic by ZSA as agents for CIBC on February 20, 1984 [the informal liquidation] violated the contract between Arctic and CIBC;
>
> (3) CIBC and ZSA were ordered to pay $1,555,000 in damages to Blaiklock "for the loss of the business as a going concern";
>
> (4) CIBC and ZSA were ordered to pay Blaiklock $2,904,838 representing the value of the inventory;
>
> (5) A & P and BNP had priority over Blaiklock and the other unsecured creditors with respect to the sum of $2,904,838 (the value of the inventory);

(6) CIBC's cross-claim against A & P and BNP for the value of certain inventory held by their agents and its costs of realizing on the security was dismissed, on the ground that it was "*lis pendens*" in the Ontario action;

(7) The claim by A & P and BNP to pay directly to them the sum of $316,855, representing the proceeds of the realization of the inventory, was dismissed on the ground of "*lis pendens*."

11 CIBC appealed to the Quebec Court of Appeal as did A & P and BNP. The latter sought an order that the $2,904,838 be paid to them directly.

The decision of the Quebec Court of Appeal

12 Brossard J.A. delivered the reasons of the Quebec Court of Appeal. The results of the judgment so far as is necessary for this appeal may be summarized as follows:

(1) All the claims against ZSA, being founded in "delict" [tort], were barred by prescription [limitation period].

(2) The claims against CIBC founded in delict were also barred by prescription, the claims based in contract were not.

(3) Blaiklock had failed to prove that the precipitous actions by CIBC resulting in the informal liquidation caused any loss to Arctic and thus the trial judge should not have awarded any damages for the value of the firm "as a going concern." Specifically, Brossard J.A. held that:

> Both the judgment and the evidence as a whole lead me to conclude that the cause of the firm's failure was anything but CIBC's take-over.
>
> . . .
>
> We must therefore conclude that there is no evidence whatsoever of any causal link between the loss of Arctic Garden Inc.'s company and the action taken by CIBC on February 20, 1984, whatever fault there may have been in taking action without giving a notice of intention.

(4) CIBC's s. 178 security was invalid as against the other creditors because of a defect in registration.

(5) Accordingly, CIBC did not have the right to proceed unilaterally after the bankruptcy to enforce the security for its sole benefit and thus,

> the entire inventory in CIBC's possession and managed and administered by CIBC in the course of Arctic Garden Inc.'s affairs, over which it had had control since February 20, 1984, should have been returned to the trustee and realized under the sole authority and jurisdiction of the trustee.

(6) The trial judge erred in holding that CIBC was liable for the book value of the inventory it took from Arctic.

(7) There was no evidence of improvident sale or negligence by CIBC.

(8) In enforcing its security without authority, CIBC received a preferential payment of $501,000 which it was liable to the trustee, for the benefit of all the creditors.

(9) A & P and BNP have priority over Blaiklock.

(10) The Quebec court could not determine the rights of CIBC and A & P and BNP that depend upon the provisions of the Ontario *Personal Property Security Act*. The court dismissed the cross-appeal by A & P and BNP to have CIBC reimburse them directly. Brossard J.A. held that,

> In short, I am of the opinion that all the problems and issues between BNP and A & P on one hand and CIBC on the other, all of which are based on facts and managerial and administrative actions in Ontario, must be settled by the Ontario suit still pending, which was filed before this case, and in which the same problems and questions were raised.

Thus the formal order of the Court of Appeal contains the following clause:

> **RESERVES** for the Canadian Imperial Bank of Commerce and for the Banque Nationale de Paris (Canada) and The Great Atlantic and Pacific Company of Canada Limited all their rights, other than those regarding the validity of the security of Canadian Imperial Bank of Commerce under section 178 of the *Bank Act*, in the suit pending between them before the courts of the Province of Ontario.

13 An application for leave to appeal to the Supreme Court of Canada was dismissed in 1996. The appellants then renewed their motion to amend the statement of claim in the Ontario Action. Nordheimer J. heard that motion in January 2000 and he released his reasons on January 24, 2000.

The Reasons of the motions judge

14 There were two motions before Nordheimer J. One motion was brought by the respondents to stay the proceedings because there were ongoing proceedings in the Quebec courts. The motions judge dismissed that motion and it is not an issue on this appeal. The appellants brought a cross-motion to amend the statement of claim to add the allegations concerning the informal liquidation and improvident disposition of the assets of Arctic. The respondents resisted the motion to amend on the basis that the issues sought to be raised by the amendments were *res judicata*. Alternatively, they argued that the applicable limitation period had intervened and therefore the amendments should not be allowed to add these claims.

15 The motions judge did not give effect to the respondents' limitation period argument. As to *res judicata*, he held that there was a clear finding by the Quebec Court of Appeal that there was no improvident realization. Thus, issue estoppel applied and that amendment could not be permitted. However, with respect to the informal liquidation, the motions judge held that there was "nothing in the Quebec proceeding" dealing with that issue and therefore that amendment must be permitted. The appellants appeal from the disposition concerning the improvident realization amendment. The respondents cross-appeal against the disposition concerning the informal liquidation. They rely upon the limitation period and issue estoppel arguments. Because of my conclusion on the latter argument, I need not deal with the limitation period issue.

ANALYSIS

16 The requirements for issue estoppel were set out by the House of Lords in *Carl-Zeiss-Stiftung v. Rayner & Keeler Ltd. (No. 2)*, [1966] 2 All E.R. 536 (U.K. H.L.), at 565 and for the purposes of this appeal may be summarized as follows:

(1) the same question has been decided;

(2) the judicial decision said to create the estoppel was final;

(3) the parties to the earlier decision or their privies were the same persons as the parties to the present proceedings.

17 Notwithstanding the finding by the motions judge, it became apparent in the course of argument that the only real dispute between the parties is with the third condition. I need only therefore deal briefly with the other two conditions.

The same question has been decided

18 In my view, the Quebec Court of Appeal has decided both questions sought to be raised by the proposed amendments to the statement of claim. There is no dispute that the Court of Appeal held that there had been no improvident realization and that CIBC was liable only for the amount of $501,000. CIBC has paid this amount to the trustee in accordance with the judgment of the Court of Appeal. There is, of course, a dispute as to who is entitled to that amount, but that issue is not directly relevant to this appeal.

19 As to the informal liquidation, in my view the Quebec Court of Appeal did deal with that issue and counsel for the appellant appeared to concede as much in oral argument. I have already set out the relevant findings from the reasons of Brossard J.A. He held that even if there was an informal liquidation it did not cause any loss.

20 Further, these two issues did not arise merely collaterally or incidentally in the earlier proceedings. See *Angle v. Minister of National Revenue* (1974), 47 D.L.R. (3d) 544 (S.C.C.) at 555. Both were fundamental to the final judgment arrived at by the Quebec Court of Appeal.

Final decision

21 The parties agree that the final decision requirement was met. An application for leave to appeal to the Supreme Court of Canada was dismissed and thus the judgment of the Court of Appeal was final.

Same parties or their privies

22 Thus, the real contest between the parties concerned whether the same parties or their privies were involved in the Quebec action. The appellants submit that their compelled intervention in the Quebec proceedings was limited to the validity of the s. 178 security. They accept, of course, that the finding of invalidity was binding upon them. They also seem prepared to accept the finding, in their favour, that they rank ahead of Blaiklock and the other unsecured creditors. They argue, however, that they are not bound by any of the other determinations because of the limitation on their intervention imposed by the order of Meyer J. The motions judge dealt with this question, in relation to the improvident realization, as follows:

> In my view, that is a finding that is binding on these parties, all of whom were before the Quebec courts in that proceeding. It was asserted by the plaintiffs that they had a limited role in the Quebec proceeding and therefore it would be unfair to bind them to the determination of an issue in which they did not actively participate. I do not agree. The plaintiffs here were actively involved in the Quebec proceeding. Further, there is evidence that they provided assistance to Blaiklock in its prosecution of that proceeding such that they would be considered "privies" to Blaiklock — see Sopinka, Lederman, Bryant, *The Law of Evidence in Canada*, 2nd ed. Toronto: Butterworths, 1999 at pp. 1087-1090.

23 I agree with the conclusion reached by the motions judge, although I prefer to rest my decision solely on the basis that the appellants were privies to Blaiklock. As the motions judge noted, the appellants were actively involved in the Quebec action and provided assistance to Blaiklock. They closely identified their interests with that of Blaiklock, to the point where they entered into agreements with Blaiklock. Thus, in a letter dated July 21, 1986, Blaiklock confirmed that,

> BNP and A & P have a first claim on all proceeds with respect to the business and all assets of Arctic, or to any monies to be awarded or received pursuant to the Section 20 contemplated action, or recovered in any claim by any creditor, including yourselves and ourselves, to the extent of the outstanding indebtedness of Arctic to you.

24 The letter went on to discuss the outstanding Ontario action and included the following:

> Based on the foregoing, we suggest it is to our mutual advantage to ensure that neither your Ontario Action, nor our contemplated Section 20 action, or any other claim or action arising from, relating to, or in any way connected

> with Arctic or any of its business or assets (collectively the Creditor Claim), proceed in a manner likely to benefit CIBC and ZSA.

25 Blaiklock and the appellant later entered into a formal agreement confirming the priority of the appellants. In turn, the appellants acknowledged *inter alia* that Blaiklock's costs in the Quebec litigation up to $300,000 "will have priority, after payment to the [appellants] of the sum of $555,439.77 plus interest . . . on Judgment proceeds which may be payable by the Defendants in this litigation."

26 In *Carl-Zeiss-Stiftung* at p. 550, Lord Reid held that the requisite privity for the purposes of the rule can be a privity of either blood, of title or of interest. The relevant one in this case is privity of interest. In *Gleeson v. J. Wippell & Co.*, [1977] 3 All E.R. 54 (Eng. Ch. Div.), at 60, Megarry V-C suggested this test for privity of interest:

> . . . but it does seem to me that, having due regard to the subject matter of the dispute, there must be a sufficient degree of identification between the two to make it just to hold that the decision to which one was party should be binding in proceedings to which the other is party.

27 In *House of Spring Gardens Ltd. v. Waite*, [1990] 2 All E.R. 990 (Eng. C.A.), at 999, Stuart-Smith L.J. applied that test in the following manner:

> Mr. Macleod was well aware of those proceedings. He could have applied to be joined in them, and no one could have opposed his application. He chose not to do so and he has vouchsafed no explanation as to why he did not. Counsel for Mr. Macleod says he was not obliged to do so; he was not obliged to go to a foreign jurisdiction; he could wait until he was sued here. He speaks as if Mr. Macleod was required to go half way round the world to some primitive system of justice. That is not so. He had to go to Dublin whose courts, as the judge said, are perfectly competent to deal with this matter. . . . Instead, he was content to sit back and leave others to fight his battle, at no expense to himself. In my judgment, that is sufficient to make him privy to the estoppel; it is just to hold that he is bound by the decision of Egan J. [Emphasis added.]

28 Farley J. reached a similar conclusion in *Bank of Montreal v. Mitchell* (1997), 143 D.L.R. (4th) 697 (Ont. Gen. Div. [Commercial List]), at 739 (affirmed (1997), 151 D.L.R. (4th) 574 (Ont. C.A.)):

> For privity of interest to exist there must be a sufficient degree of connection or identification between the two parties for it to be just and common sense to hold that a court decision involving the party litigant that it should be binding in a subsequent proceeding upon the non-litigant party in the original proceeding, as discussed above, where that non-litigant party has sufficient interest in those original proceedings to intervene but instead chooses to stand by and have the battle in which he has a practical and legal concern fought by someone else, it is appropriate to have the non-litigant abide by that previous decision . . . [Emphasis added.]

29 In my view, these appellants were properly found to have a privity of interest. Their interests were so much the same as the plaintiff in the Quebec litigation that they entered into a formal agreement for disposing of the proceeds. The appellants were interveners in the Quebec proceedings to a limited extent and could have applied to broaden the scope of their intervention. Instead, in the words of Farley J., they chose to "stand by and have the battle in which [they had] a practical and legal concern fought by someone else." Justice and common sense compel the conclusion that they abide by the previous decision. Issue estoppel has been applied in similar circumstances in *Saskatoon Credit Union Ltd. v. Central Park Enterprises Ltd.* (1988), 47 D.L.R. (4th) 431 (B.C. S.C.), at 439.

30 Thus, even if because of the limited nature of their intervener status, the appellants were not parties to the Quebec litigation on issues other than the validity of the s. 178 security, since they were privies to Blaiklock, they are bound by the determination of the informal liquidation and improvident realization questions in that litigation.

31 Finally, I see no policy basis for not holding that the appellants are bound by the determinations in the Quebec proceedings. In *Minott v. O'Shanter Development Co.* (1999), 42 O.R. (3d) 321 (Ont. C.A.) at p. 340, Laskin J.A. held that,

> Judicial discretion is required to achieve practical justice without undermining the principles on which issue estoppel is founded. Issue estoppel should be applied flexibly where an unyielding application of it would be unfair to a party who is precluded from relitigating an issue. [Emphasis added.]

32 There is no unfairness in holding that the appellants are bound by the decision in the Quebec courts. I agree with the motions judge when he said that it would be "fundamentally inappropriate to permit parties that are connected to one proceeding in which a finding is made to re-litigate that issue in another proceeding dealing with the same events just because there may be different evidence available to the party on the issue." Although the appellants' formal intervention in the Quebec proceedings was limited, they were active in their support of Blaiklock because of the obvious advantage to them if it succeeded. They were then quite prepared to assert priority over Blaiklock and take the benefit of the trial judgment. I also agree with the motions judge that although the Quebec Court of Appeal reserved all of the issues between the appellants and CIBC, that did not prevent the operation of issue estoppel in the Ontario litigation. The impact of issue estoppel on the Ontario litigation, by reason of the Quebec litigation, was an issue for the Ontario courts.

DISPOSITION

33 Accordingly, I would dismiss the appeal with costs and allow the cross-appeal with costs and dismiss the motion to amend the statement of claim.

Appeal dismissed; cross-appeal allowed.

TAB 16

1987 CarswellMan 193
Manitoba Court of Queen's Bench

Bjarnarson v. Manitoba,

1987 CarswellMan 193, [1987] 4 W.W.R. 645, [1987] M.J. No. 277, 21 C.P.C. (2d) 302, 38 D.L.R. (4th) 32, 48 Man. R. (2d) 149, 6 A.C.W.S. (3d) 20

BJARNARSON and BJARNARSON v. GOVERNMENT OF MANITOBA

Hewak C.J.Q.B.

Judgment: May 28, 1987
Docket: No. 82/78

Counsel: *D.H. Ringstrom*, for plaintiffs.
A.D. MacInnes, Q.C., for defendant.

Subject: Civil Practice and Procedure

Headnote

Practice --- Pleadings — General requirements — Where constituting abuse of process

Practice --- Judgments and orders — Res judicata and issue estoppel — Issue estoppel — Persons subject to

Estoppel — Res judicata — Nature and application — Issue estoppel — Plaintiffs commencing negligence action against defendant for flood damage to land — Defendant having already been found liable in negligence in action based on identical facts brought by plaintiffs' neighbours — Negligence issue raised and decided in previous action — Defendant having had fair and full opportunity to meet case against it — Doctrine of issue estoppel applying even though same parties not involved in both actions — Defendant estopped from denying negligence.

The plaintiffs' farm land was damaged by flooding. In an earlier action on identical facts, the owners of land adjacent to that of the plaintiffs obtained a judgment against the defendant based on a finding that it was negligent in the construction of drainage. The plaintiffs commenced an action claiming that their damages were the result of the same negligence and sought an order striking those portions of the statement of defence denying liability.

Held:

Application allowed.

The doctrine of issue estoppel is not restricted to situations where the parties to an action are the same as in an earlier action. Rather, if an issue has been raised and decided against a party in circumstances in which that party has had a full and fair opportunity of dealing with the whole case, that issue must be taken as being finally and conclusively decided against him unless the circumstances are such as to make it fair and just that the issue should

be reopened. Where there are multiple litigants with the same cause of action against the same defendant, and a determination of a common issue impacts equally upon those litigants, a fair and sensible legal doctrine is required to bring finality to at least a portion of the litigation and to protect the litigants from the additional costs they would otherwise incur if required to relitigate issues already decided. Here, the defendant had already been found negligent for the very same conduct that resulted in flooding of the plaintiffs' land. In the earlier action the defendant had a full and fair opportunity to present evidence and to examine and cross-examine all the witnesses, and it was not an answer for the defendant to now say that it would call other or additional evidence when it could and should have done so earlier. Accordingly, a final decision had been reached on the issue of negligence and the defendant was estopped from denying negligence in this case.

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Cases considered:

Angle v. M.N.R., [1975] 2 S.C.R. 248, 47 D.L.R. (3d) 544, 74 D.T.C. 6278, 2 N.R. 397 — *considered*

Bernhard v. Bank of Amer. Nat. Trust & Savings Assn., 19 Cal. 2d 807, 122 P. 2d 892 (1942) — *referred to*

Bjarnarson v. Man. (1984), 31 Man. R. (2d) 161, affirmed 37 Man. R. (2d) 97 (C.A.) — *applied*

Blonder-Tongue Laboratories, Inc. v. Univ. of Illinois Foundation, 402 U.S. 313, 91 S. Ct. 1434, 28 L. Ed. 2d 788 [on remand 334 F. Supp. 47, affirmed 465 F. 2d 380, certiorari denied 93 S. Ct. 559] (1971)*applied*

Carl Zeiss Stiftung v. Rayner & Keeler, Ltd. (No. 2), [1967] 1 A.C. 853, [1966] 3 W.L.R. 125, [1966] 2 All E.R. 536 (H.L.) — *considered*

Fidelitas Shipping Co. v. VIO Exportchleb, [1966] 1 Q.B. 630, [1965] 2 W.L.R. 1059, [1965] 2 All E.R. 4 (C.A.) — *considered*

Good Health Dairy Corp. of Rochester v. Emery, 275 N.Y. 14, 9 N.E. 2d 758 (1937) — *applied*

Grandview v. Doering, [1976] 2 S.C.R. 621, [1976] 1 W.W.R. 388, 61 D.L.R. (3d) 455, 7 N.R. 299 — *considered*

Hollington v. Hewthorn & Co., [1943] 1 K.B. 587, [1943] 2 All E.R. 35 (C.A.) — *not followed*

McIlkenny v. Chief Constable of West Midlands, [1980] Q.B. 283, [1980] 2 W.L.R. 689, [1980] 2 All E.R. 227 [leave to appeal to H.L. granted [1980] 1 W.L.R. 898] — *considered*

Parklane Hosiery Co. v. Shore, 439 U.S. 322, 99 S. Ct. 645, 58 L. Ed. 2d 552 (1979) — *applied*

Tebbutt v. Haynes, [1981] 2 All E.R. 238 (C.A.) — *applied*

Thoday v. Thoday, [1964] P. 181, [1964] 2 W.L.R. 371, [1964] 1 All E.R. 341 (C.A.) — *considered*

Triplett v. Lowell, 297 U.S. 638, 56 S. Ct. 645, 80 L. Ed. 949 [rehearing denied 298 U.S. 691, 56 S. Ct. 745, 80 L. Ed. 1409] (1936) — *not followed*

Authorities considered:

Restatement of The Law of Judgments (1942), (American Law Institute), para. 93.

Application for order striking out portions of defendant's statement of defence denying negligence, on ground of issue estoppel.

Hewak C.J.Q.B.:

1 The plaintiffs move for an order that those portions of the defendant's statement of defence, that deny liability, be struck.

2 Their position is that following the trial of *Bjarnarson v. Man. (Govt.)* (suit No. 413/77) (1984), 31 Man. R. (2d) 161, affirmed 37 Man. R. (2d) 97 (C.A.), Leonard Bjarnarson (the brother of the male plaintiff in this case) was successful in his claim for the damages he sustained as a result of flooding of his farm land caused by the negligence of the government of Manitoba in the construction of drainage in the Whitemud Watershed District. The plaintiffs own and reside on land adjacent to Leonard Bjarnarson. They claim that they also sustained flooding to their land and suffered damage as a result of that same negligence.

3 The defendant, on the same facts and relying on the same defences that it raised in the previous *Bjarnarson* trial, disputes the claim of negligence alleged by these plaintiffs. It also takes the position that since the plaintiffs in this case were not parties or privy to the parties in the previous litigation, it should not be estopped from denying liability.

4 The plaintiffs point out that those defences and issues were considered by this court and the Manitoba Court of Appeal, and both courts made findings of negligence against the defendant. The plaintiffs readily acknowledge that there remains an issue to be resolved, i.e., they would still be obliged to prove the quantum of their damages. However, they stipulate that the triable issue should be confined specifically to that matter and that issue estoppel should apply to preclude the denial of negligence by the defendant.

5 The common law has long recognized a principle known as res judicata which is applied to prevent relitigation of legal claims or liabilities that previously had been decided. The intent is to avoid "vexing persons twice for the same cause of action", to avoid multiplicity of litigation, and to bring a finality to judicial proceedings. Initially that principle was applied through the doctrine known as cause of action estoppel.

6 The Supreme Court of Canada in the case of *Grandview v. Doering*, [1976] 2 S.C.R. 621, [1976] 1 W.W.R. 388, 61 D.L.R. (3d) 455, 7 N.R 299, identified four criteria that must be present before the doctrine of cause of action estoppel would apply:

1. There must be a final decision of a court of competent jurisdiction in the prior action;

2. The parties to the subsequent litigation must have been parties to or in privy with the parties to the prior action (*mutuality*);

3. The cause of action in 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.

7 The doctrine of issue estoppel, on the other hand, as it developed, was used to prevent relitigation of issues which had already been decided by the courts in a prior action, even though other issues might remain to be tried.

8 In the case of *Thoday v. Thoday*, [1964] P. 181, [1964] 2 W.L.R. 371, [1964] 1 All E.R. 341 at 352 (C.A.), Lord Diplock explained the doctrine of issue estoppel in these terms:

> The second species, [of res judicata] which I will call "issue estoppel", is an extension of the same rule of public public policy [that a person should not be vexed twice for the same cause of action]. There are many causes of action which can only be established by proving that two or more different conditions are fulfilled. Such causes of action involve as many separate issues between the parties as there are conditions to be fulfilled by the plaintiff in order to establish his cause of action; and there may be cases where the fulfilment of an identical condition is a requirement common to two or more different causes of action. If in litigation on one such cause of action any of such separate issues whether a particular condition has been fulfilled is determined by a court of competent jurisdiction, either on evidence or on admission by a party to the litigation, *neither party can, in subsequent litigation between them* on any cause of action which depends on the fulfilment of the identical condition, *assert that the condition was fulfilled if the court has in the first litigation determined that it was not, or deny that it was fulfilled if the court in the first litigation determined that it was.* [emphasis mine]

9 Lord Denning M.R., in *Fidelitas Shipping Co. v. V/O Exportchleb*, [1966] 1 Q.B. 630, [1965] 2 W.L.R. 1059, [1965] 2 All E.R. 4 at 8-9 (C.A.), described that doctrine in this way:

> 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 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 mine]

10 Later, Lord Guest in the case of *Carl Zeiss Stiftung v. Rayner & Keeler, Ltd. (No. 2)*, [1967] 1 A.C. 853, [1966] 3 W.L.R. 125, [1966] 2 All E.R. 536 (H.L.), used these terms in his definition of issue estoppel, at pp. 933-34 A.C., 564-65 All E.R.:

> ... it may be convenient to describe res judicata in its true and original form as "cause of action estoppel" ... Within recent years the principle has developed so as to extend to what is now described as "issue estoppel", that is to say where in a judicial decision between the same parties some issue which was in controversy between the parties and was incidental to the main decision has been decided, then that may create an estoppel ...

11 Lord Guest went on to identify three components which must be present for issue estoppel to apply (at p. 565, All E.R.):

> (i) that the same question has been decided [in this case negligence]; (ii) that the judicial decision which is said to create the estoppel was final [in this case a decision of the Manitoba Court of Appeal confirming the negligence of the defendant], and (iii) *that the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised or their privies* [mutuality]. [emphasis mine]

12 The majority of the court in the *Stiftung* case held the view that issue estoppel would not apply in circumstances *where the applying party* was not a party or a privy of the party to the prior proceeding. So that just as with cause of action estoppel, there was the requirement of mutuality.

13 The components enunciated by Lord Guest in *Stiftung* were reviewed, accepted, but supplemented with an additional requirement by the Supreme Court of Canada in *Angle v. Minister of National Revenue*, [1975] 2 S.C.R. 248, 47 D.L.R. (3d) 544, 74 D.T.C. 6278, 2 N.R. 397. Dickson J. (as he then was), writing for the majority of the court, articulated this additional component as follows, at p. 255 (S.C.R.):

> 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 ... The question out of which the estoppel is said to arise must have been "fundamental to the decision arrived at" in the earlier proceedings ...

14 In the *Bjarnarson* case, fundamental to the final decision of the courts was a finding of negligence against the defendant.

15 Clearly the defendant was a party to suit No. 413/77. In that case the issue of responsibility for the flooding and the finding of negligence against the defendant were based on facts that are identical to those here, including the specific years of flooding. So that while one of the parties to this lawsuit is not the same, the other party against whom estoppel is advanced is, and the facts upon which the issue of negligence is based are also the same.

16 Applying then those four criteria to the present case, the only remaining component requiring compliance in order that issue estoppel succeeds is the requirement of mutuality, i.e., that the parties to the previous judicial decision or their privies be the same in this case.

17 In my view, an important question surfaces: If the facts and legal issues are identical in both pieces of litigation, should it be a necessary prerequisite that for issue estoppel to apply, the parties or their privies also be the same, i.e., should mutuality necessarily be present?

18 There are both English and Canadian authorities that seem to favour the view that they should.

19 In a series of cases heard and decided by American courts, including the United States Supreme Court, jurisprudence developed which provided their courts with a discretion in deciding how and when to apply the principle of "issue" estoppel (known there as collateral estoppel). They considered the question in this way: For "issue" estoppel to apply, is it necessary that the parties to the previous judicial decision or their privies be the same as the parties to the proceedings in which the estoppel is raised? I refer to some of these decisions not only as a matter of interest but also as an example of clear, progressive thinking.

20 The case of *Triplett v. Lowell*, 297 U.S. 638, 56 S. Ct. 645, 80 L. Ed. 949, was decided in 1936. There, the United States Supreme Court (consistent with the English authorities), endorsed and applied what they referred to as a judge-made doctrine of mutuality of estoppel, i.e., they decided that:

> ... unless both parties (or their privies) in a second action are bound by a judgment in a previous case, neither party (nor his privy) in the second action may use the prior judgment as determinative of an issue in the second action.

This doctrine was repeated in the Restatement of The Law of Judgments (1942) (American Law Institute), para. 93.

21 That doctrine of mutuality, almost from the time it was pronounced, was criticized by other courts and by legal scholars. The courts began to decide that mutuality should not be a requirement and only the party against whom estoppel was claimed had to have been a party or in privity with the party in the prior action. Their reasoning for this was, in part, that the party would have had the opportunity of presenting his claim or denial fully and fairly.

22 For example, in 1937, Judge Finch, writing for the New York Court of Appeals, in the case of *Good Health Dairy Prod. Corp. of Rochester v. Emery*, 275 N.Y. 14 at 19, 9 N.E. 2d 758 at 760, stated:

> It is true that [the owner of the automobile], not being a party to the earlier actions, and not having had a chance to litigate her rights and liabilities, is not bound by the judgments entered therein, but, on the other hand, *that is not a valid ground for allowing the plaintiffs to litigate anew the precise questions which were decided against them in a case in which they were parties.* [emphasis mine]

23 Delivering the judgment of the Supreme Court of the United States, Justice White in *Blonder-Tongue Laboratories, Inc. v. Univ. of Illinois Foundation*, 402 U.S. 313, 91 S. Ct. 1434 at 1440, 28 L. Ed. 2d 788 (1971), *quoted with approval* a decision of the California Supreme Court in *Bernhard v. Bank of Amer. Nat. Trust & Savings Assn.*, 19 Cal. 2d 807 at 812, 122 P. 2d 892 at 894 (1942):

> ... the California Supreme Court, in Bernhard [supra] unanimously rejected the doctrine of mutuality, stating that there was "no compelling reason ... for requiring that the party asserting the plea of res judicata [issue estoppel] must have been a party, or in privity with a party, to the earlier litigation."

He expanded that position yet another way, at p. 1441:

> In reality the argument ... is merely that the application of res judicata in this case makes the law asymmetrical. But the achievement of substantial justice rather than symmetry is the measure of the fairness of the rules of res judicata.

That court concluded, at p. 1443:

> In any lawsuit where a defendant [and I expect the same reasoning would apply to any litigant], because of the mutuality principle, is forced to present a complete defense on the merits to a claim which the plaintiff has fully litigated and lost in a prior action, there is an arguable misallocation of resources ... *Permitting repeated litigation of the same issue* as long as the supply of unrelated defendants holds out *reflects either the aura of the gaming table or "a lack of discipline and of disinterestedness on the part of the lower courts,* hardly a worthy or wise basis for fashioning rules of procedures." [emphasis mine]

24 Obviously, in the United States, the mutuality requirement was slowly vanishing and the courts seemed to lean more heavily toward the view that a litigant should not be permitted more than "one full and fair opportunity for judicial resolution of the same issue".

25 In 1979 the Supreme Court of the United States, in the case of *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 99 S. Ct. 645, 58 L. Ed. 2d 552, rejected the requirement of mutuality. In doing so, the court decided that issue estoppel was not an automatic remedy, but rather a procedure that should be followed by the court, in its discretion, only in those cases where the court was satisfied that the *party against whom the estoppel is directed has had a full and fair opportunity to litigate that same position in an earlier proceeding.*

26 American authorities appear to have reacted relatively quickly to the court decisions which approved of the requirement of mutuality.

27 In England, with some exceptions, courts have consistently held to the view that:

> ... it would be unjust to bind any person who could not be admitted to make a defence, or to examine witnesses, or to appeal from a judgment that he might think erroneous ...
>
> ... if given between the same parties they are conclusive, but not against anyone who was not a party. [*Hollington v. Hewthorn & Co.*, [1943] 1 K.B. 587 at 596, [1943] 2 All E.R. 35 at 40-41 (C.A.).]

28 The *Hollington* decision was criticized often, and finally, Lord Denning M.R., in *Tebbutt v. Haynes*, [1981] 2 All E.R. 238 (C.A.), after referring to his earlier decision in *McIlkenny v. Chief Constable of West Midlands*, [1980] Q.B. 283, [1980] 2 W.L.R. 689, [1980] 2 All E.R. 227 (C.A.), articulated the issue estoppel doctrine as follows, at p. 242:

> I ventured to suggest this principle: if there has been an issue raised and decided *against* a party *in circumstances in which he has had a full and fair opportunity of dealing with the whole case, then that issue must be taken as being finally and conclusively decided against him.* He is not at liberty to reopen it unless the circumstances are such as to make it fair and just that it should be reopened. [emphasis mine]

29 The *McIlkenny* decision was appealed to the House of Lords [leave to appeal granted [1980] 1 W.L.R. 898]. While dismissing the appeal, they felt constrained to decide that, in that case, the applicable doctrine was not issue estoppel, but rather abuse of process.

30 In Canada, it appears that insofar as the development of the doctrine of issue estoppel is concerned, courts have moved rather slowly toward adopting the logic and reasoning of Lord Denning, or of the United States Supreme Court. At best, they appear to have relied on the principle of abuse of process although they have on occasion accepted, subject to rebuttal, prior determinations as prima facie evidence of a fact.

31 I, for one, agree with both the direction and reasoning found in the decisions of Lord Denning and the United States Supreme Court, and the principles there applied. In my view, the law should be sensitive to current situations and alive to the exigencies of today. While it must always strive to be certain and clear, at the same time it should be flexible enough to encompass contemporary needs. In these times of aviation or common carrier disasters, chemical waste spills, or pharmaceutical accidents, when it is tragically quite common to have multiple litigants with the same cause of action against the same defendant, and where a determination of a common issue impacts equally upon those litigants, the law as well as the litigants would be well served by such a fair and sensible legal doctrine; a doctrine that would not only tend to bring a finality to at least a portion of the litigation, but also would assist in protecting litigants from the additional costs they otherwise would incur if they were required to relitigate issues already decided when the only real issue remaining would be quantum of damage.

32 In my view, this is such a case.

33 The defendant has already been found negligent once before for the very same conduct that resulted in the flooding of the plaintiffs' land. The defendant was a party to the previous action and, while denying liability, had a full and fair opportunity to examine and cross-examine all the witnesses on the evidence and to present evidence. It is not an answer for the defendant to say that it would now call other or additional evidence to support its defence. That could have and should have been done in the earlier proceedings.

34 The motion of the applicants is allowed, as in the notice filed.

35 Costs will be spoken to at the trial of this action.

Application allowed.

TAB 17

1985 CarswellOnt 3839, [1985] O.J. No. 881, 32 A.C.W.S. (2d) 259

1985 CarswellOnt 3839
Ontario Supreme Court, High Court of Justice

Scherer v. Price Waterhouse Ltd.

1985 CarswellOnt 3839, [1985] O.J. No. 881, 32 A.C.W.S. (2d) 259

BETWEEN: BERNARD SCHERER Applicant - and PRICE WATERHOUSE LIMITED Trustee - and NATHAN TESSIS A Creditor

Sutherland J

Judgment: August 16, 1985
Docket: None given.

Counsel: B.H Kellock Q. C. and Linda D. Robinson for the Applicant
R.J. Morris for the Trustee
Igor Ellyn for Nathan Tessis

Subject: Civil Practice and Procedure; Property; Estates and Trusts

SUTHERLAND J.:

1 This is an application under the *Bankruptcy Act*, R.S.C. 1970, c.B-3, for an order declaring that Nathan Tessis is a secured creditor of the bankrupt, Agil Holdings Limited (hereinafter sometimes referred to as "Agil"), or in the alternative is the beneficiary of certain monies held in trust by Price Waterhouse Limited, the trustee of the bankruptcy estate of Agil. (Price Waterhouse Limited is hereinafter sometimes referred to as the "trustee"). The application, which also seeks appropriate directions, is brought on behalf of Bernard Scherer, who acted as solicitor for Nathan. Tessis with respect to a purported realty mortgage loan made by the latter to Agil.

2 Bernard Scherer (hereinafter sometimes referred to as "Scherer" and sometimes as "the applicant") was recognized by me as having standing to bring this application under the provisions of s.19 of the *Bankruptcy Act*, which section states as follows:

> 19. Where the bankrupt or any of the creditors or any other person is aggrieved by any act or decision of the trustee, he may apply to the court and the court may confirm, reverse or modify the act or decision complained of and make such order in the premises as it thinks just.

3 In 1977 Scherer acted for Nathan Tessis when the latter loaned $635,000 to Agil pursuant to a loan agreement (the "loan agreement") dated September 28, 1977, which called for Agil to collaterally secure the loan by a realty mortgage of premises known municipally as 1305-1309 Dundas Street West in Toronto, and which provided for the guarantee of the mortgage by Manuel Rodrigues, the president and principal shareholder of Agil. A mortgage document, containing such a guarantee, was executed and delivered and was registered against the title to the property on October 17, 1977, as Instrument CT259616 for the Registry Division of Toronto (No.63). The mortgage went into default and Scherer was instructed to commnce proceedings to enforce it.

4 It became apparent that, contrary to the statement made by Manuel Rodrigues in an affidavit attached to the mortgage to the effect that Agil did not own any abutting lands, Agil did in fact own abutting lands. Other counsel commenced to act for Tessis in seeking to enforce the mortgage. An action for possession and for judgment on the covenant to pay in the mortgage came on before Parker A.C.J.H.C., resulting in a judgment on the covenant, on consent, for $1,051,722.11, and in the dismissal of the claim for possession. In his oral reasons for judgment, delivered on September 15, 1981, Parker A.C.J.H.C., after noting the existence of the abutting lands and the absence of a consent under the *Planning Act* (now R.S.O. 1980, c.379) to the mortgage in favour of Tessis, stated that "no legal interest in the lands passed to the mortgagee". The subsections of the *Planning Act* there referred to were s-ss. (4) and (7) of s.29, R.S.O. 1970, c.349, as amended, (now s-ss.29(5) and 29(18) of the *Planning Act*, R.S.O. 1980, c.379). The mortgage itself was found to contravene s.-s 29(4) (now s.-s.29(5) of the *Planning Act*, which provides that no person shall convey, mortgage or charge any part of any block of land if he retains the fee or equity of redemption in any abutting land unless a consent to the conveyance, mortgage or charge has been given by the committee of adjustment or other body or person authorized to give such consent. Subsection 29(7) (now s-s.29(18)) states as follows:

> An agreement, conveyance or mortgage or charge made, or a power of appointment granted, assigned or exercised in contravention of this section or a predecessor thereof does not create or convey any interest in land, but this section does not affect an agreement entered into subject to the express condition contained therein that such agreement is to be effective only if the provisions of this section are complied with.

5 Subsequent to the trial Scerer was added as a party defendant to enable him to appeal the decision. On November 19, 1981, i.e. before the appeal came on for hearing, Agil made an assignment in bankruptcy, and the guarantor also became bankrupt. The trustee of the bankrupt estate of Agil was added as a party defendant and was represented by counsel on the appeal.

6 The following succinct statement of the background facts is taken from the judgment of MacKinnon A.C.J.O. for the Court of Appeal, reported at (1982) 39 O.R. (2d) 149, commencing at p.150:

> There is no dispute on the facts and a recital of the history of events will be helpful. On February 1, 1973, Agil Holdings Ltd. became the registered owner of a commercial property known municipally as 1305-1309 Dundas Street West in Toronto. The registration was pursuant to the provisions of the *Registry Act*, R.S.O. 1970, c.409 [now R.S.O. 1980, c.445].
>
> On March 5th of the same year Agil became the owner of the commercial property immediately adjacent or abutting to the west of 1305-1309, known municipally as 1315-1317 Dundas Street West. The registration of these lands was pursuant to the provisions of the *Land Titles Act*, R.S.O. 1970, 234 [now R.S.O. 1980, c:230]. From this time to the date of trial Agil was the registered owner of both properties save for a brief period in 1975 which is of no moment to the issues in this appeal.
>
> On October 17, 1977, Agil granted a first mortgage over 1305-1309 Dundas Street West to the plaintiff Tessis. The mortgage was guaranteed by Rodrigues, the mortgage being collateral to a promissory note between Agil and Rodrigues on the one hand and Tessis on the other.
>
> The search of title made by the appellant Scherer did not include a search of the adjoining lands registered in the land titles registry. Rodrigues as President of Agil, had sworn an affidavit to the mortgage in issue, stating as follows:
>
> > I am the President and Director of Agil Holdings Limited; the mortgagor and this crporation does not own any adjoining or abutting lands to that being mortgaged herein.
>
> This statement was, of course, false.

The appellant's position is that he searched the title to the land being mortgaged but relied on Rodrigues' affidavit we have just quoted, and had no knowledge of Agil's interest in the abutting lands nor was he advised of any such interest by the solicitor acting for Agil and Rodrigues.

It appears from the title that earlier mortgages or charges (four in all) had been granted by Agil on each of its respective properties which mortgages did not cover the adjoining lands owned by it.

The mortgage to Tessis went into default and on May 9, 1979, Tessis commenced the action for payment and for possession of the mortgaged premises.

On August 29, 1979, the committee of adjustment for the City of Toronto granted the application of Agil for a consent to permit the separate conveyance or mortgaging of 1305-1309 Dundas Street West and 1315-1317 Dundas Street West on condition that prior to the consent being issued the applicant was to file with the committee a letter from the commissioner of public works certifying that all requirements with respect to municipal services have been satisfied. Agil was unable to deliver the required letter from the commissioner of public works as it was involved in the present litigation and had not proceeded with the construction referred to in its application documents.

Agil made a further application and by decision dated July 2, 1980, the committee of adjustment granted a consent to allow 1315-1317 Dundas Street West to be mortgaged separately from 1305-1309 Dundas Street West. Finally, on July 3, 1980, Tessis gave notice of his intention to exercise his power of sale under the mortgage unless the principal, interest and costs payable under it, as calculated, were paid by August 11, 1980.

The learned trial judge held that because of the failure to secure the required consent under the *Plannig Act* no legal interest in the lands passed to the mortgagee. Accordingly, while giving judgment, on consent, on the promissory note, he refused to grant an order of possession of the mortgaged lands to Tessis.

7 The Court of Appeal upheld the refusal of Parker A.C.J.H.C. to make an order for possession under the mortgage, and rejected the alternative argument that, even if the mortgage did not convey any interest in land, the provisions of the mortgage purporting to give the mortgagee a power of sale should be regarded as intact and as entitling the mortgagee to cause the sale of the property after the appropriate *Planning Act* consents to such sale had been obtained. MacKinnon A.C.J.O. held that the Act was breached when the mortgage was given without the required *Planning Act* consent and, in effect, that it was not open to the mortgagee to go to the committee of adjustment after the event to seek a consent that, if granted, would permit a sale that would result in the lands being acquired by a third party.

8 In his oral reasons Parker A.C.J.H.C. stated that under the purported mortgage "no *legal* interest in the lands passed to the mortgagee". (Emphasis added)

9 Before this application was made the Trustee had sold to a single buyer both the lands purported to have been mortgaged to Tessis and the abutting lands, for an aggregate price of $740,000, of which $560,000 was attributed to the lands purported to have been mortgaged to Tessis. Also before this application, Tessis filed a proof of claim in the Agil bankruptcy, as an unsecured creditor. It should also be noted that before the application came on Tessis had commenced an action against Scherer and against the solicitor for Agil, claiming damages against Scherer for breach of contract and for negligence in the performance of his duties as solicitor for Tessis, and damages in tort against the solicitors for Agil.

10 In the statement of fact and law submitted on behalf of Scherer this appliation was stated to raise two issues, therein described as follows:

(a) Whether Tessis is a secured creditor of Agil. It is the position of the Applicant that Tessis is the holder of an equitable mortgage or lien upon the mortgaged lands giving rise to a secured interest in the proceeds of sale of the mortgaged property now held by the Trustee.

(b) Whether Tessis is the beneficiary of a trust. It is the position of the Applicant that in the circumstances Agil, and now the Trustee in its place, holds the funds advanced by Tessis to Agil upon a constructive trust for Tessis.

11 As argued, the application involves difficult questions with respect to *res judicata* or, more properly, issue estoppel, predicated upon the difference between an action and a cause of action. The applicant contends that the action commenced by Tessis was for judgment on the covenant to pay set forth in the mortgage document, and for possession under the mortgage, and that the resulting judgment and the decision on the appeal therefrom were similarly confined and did not deal with the equitable claims now put forward based not on the mortgage but on the loan agreement. According to the applicant the claims put forward on this application constitute a different cause of action and so, even though the parties or their privies are the same as on appeal, there is no *res judicata* in the sense of cause of action estoppel, and there is no issue estoppel, because the issues on this application that are fundamental to it are different from any issues decided in the mortgage action that were fundamental to the decision in that action.

12 For the respondent it is submitted that it has been decided *in rem* and as between these parties that the mortgage passes or creates no interest in land, and it is further submitted that under the extended meaning given to *res judicata* in the landmark decision in *Henderson v. Henderson*, 3 Hare 100at p.103 where it was stated by Wigam V.C. that:

> 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 same time ....

Scherer is estopped from raising the question of whether the debt of Agil to Tessis is secured upon any basis. It was also submitted by the respondent that the loan agreement was before the Court on the appeal, where Scherer was a party, and that arguments based upon the loan agreement therefore could and should have been made at that time, and that the applicant therefore cannot raise such arguments in these proceedings. Counsel for Tessis supports these contentions of the respondent. The latter argument raises the difficult question of the extent to which the extended meaning of *res judicata*, clearly applicable to cases cause of action estoppel, is or ought to be applicable to issue estoppel. Although there are strong policy reasons favouring an end to litigation, it was noted by Morden J.A. in *Hennig v. Northern Heights (Sault) Ltd. et al.* (1980), 30 O.R. (2d) 346, at p.355, that *Cross on Evidence*, 5th Ed. (1979), questions Lord Denning's suggestion (in *Fidelitas Shipping Co. Ltd. v. V/O Exportchleb*, [1965] 2 All E.R. 4) that the extended form of *res judicata* (as in *Henderson*, *supra*,) may apply to issue estoppel. Thus, at p.333 of the last-mentioned work, the following statement appears:

> The second kind of estoppel by record *inter parties* is often called "issue stoppel". may be regarded as an extension of the first for, to quote Lord DENNING, M.R.: "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 rased and distinctly determined between the parties, then, as a general rule, neither party can be allowed to fight that issue all over again." Although Lord DENNING went on to use words suggesting that the principle mentioned by WIGRAM, V.C., in connection with cause of action estoppel might apply to issue estoppel, it may be better to regard the latter as restricted to issues actually determined in the former litigation for there may be many reasons why a litigant did not raise a particular issue, and it would be unjust to prevent him from raising it in later proceedings.

With respect to the last sentence in the above quotation, there is a footnote reference to the reasons for judgment of Lords Reid and Upjohn in *Carl Zeiss Stiftung v. Rayne and Keeler, Ltd.*, [1966] 2 All E.R.

13 Although I shall have to return to issue estoppel and I recognize that a finding in that regard in favour of the respondent would make my remarks about the merits of certain claims *obiter*, I find it more convenient to continue by dealing upon their merits with the arguments of the applicant with respect to the first question, i.e. whether Tessis is a secured creditor in the bankruptcy.

Mortgage

14 As stated, Parker A.C.J.H.C. held that no legal interest in the lands passed to the mortgagee. Lest there be any suggestion that the mortgage itself may have passed an equitable, if not a legal, interest in the lands, I note that on the appeal MacKinnon A.C.J.O. states in *Tessis v. Scherer et al., supra*, that:

> The *Planning Act* is clear that if the Act is breached *no* interest in the land is transferred by the mortgage.
>
> [Emphasis added]

The above quoted s-s.29(7) (now s-s.29(18) of the *Planning Act*) states that a mortgage made in contravention of that Act "does not create or convey *any* interest in land". (Emphasis added). In my opinion it is quite clear that by virtue of that subsectionthe mortgage does not create any legal or equitable interest in the land.

Loan Agreement

15 There is dispute as to whether the loan agreement comes within the requirements of s-s.29(7) (now s-s.29(18)) as:

> ... an agreement entered into subject to the express condition contained therein, that such agreement is to be effective only if the provisions of this section are complied with.

It was provided in the loan agreement that it was a condition to the obligation of Tessis to make the loan thereunder:

> 6. That all municipal and provincial by-laws, acts, statutes and regulations have been complied with and without limiting the generality of the foregoing this shall include building, zoning, health, fire, air pollution, plumbing and development;
>
> [Emphasis added]

16 The applicant argues that that provision amounts to an "express condition" as referred to in s-s.19(7) of the *Planning Act*. The respondent, not surprisingly, argues that it is not such an express condition. It was held in *Re Davmark Developments and Tripp* (1974), 5 O.R. (2d) 17, 49 D.L.R. (3d) 331, that to qualify as an "express condition", the wording in the agreement need not be identical to that contained in the *Planning Act* but must be such as to be satisfied only if there has been full compliance with s.29 of that Act. In *Small v. Van der Wee* r (1977), 17 O.R. (2d) 480, 80 D.L.R. (3d) 704, a condition that "vendor will comply with the provisions of the *Planning Act*" was held to be clearly acceptable although it made no specific reference to s.29 of the Act. The respondent cites the decision of Haines J. in *Rogers v. Leonard* (1973), 1 O.R. (3d) 57, 39 D.L.R. (3d) 349, holding that a mere statement of intent in an informal agreement, made between laymen with regard to the purchase and sale of a summer cottage, that all official papers required were to be drawn up and that all formalities were to be complie with, did not constitute an "express condition" within the meaning of s-s.29(7). In the last-mentioned case there was no ground for a belief that the parties to the agreement were even aware of the prohibitions of s.29 of the Act. By contrast, in the present case it may be inferred that the parties or at least their lawyers were aware of the existence of the *Planning Act*, and aware of the prohibitions of selling part of abutting lands without the required consent. In my opinion the above-quoted condition of the loan agreement is an "express condition" within the meaning of the subsection being sufficiently clear in its references to "zoning" and "development" to bring itself within the reasoning in *Davmark and Small, supra*. It is therefore unnecessary to consider the submissions made by the applicant as to rectification of the loan agreement to make it more clearly reflect the intent of Tessis that the agreement be subject to such an "express condition".

17 What then are or were the effects of that provision of the loan agreement? Firstly, as between the parties to the loan agreement, it meant that Tessis was not obligated to make the loan unless the condition had been satisfied. Tessis could not have been sued for damages if he had refused to make the loan when any consent required under s.29 of the *Planning Act* had not been obtained. Secondly, if the required *Planning Act* consents (and any other requirements referred to in

condition 6 of the loan agreement) had been obtained or satisfied neither party would be prevented from enforcing the agreement, or from obtaining damages for its breach, by the fact that when the agreement was entered into the required *Planning Act* consents had not yet been obtained. In the case of an agreement of purchase and sale of lands abutting other lands of the vendor that are not covered by the agreement, the existence in the agreement of an "express condition" that the required consents be obtained under s.29 f the *Planning Act* would mean that when the consents were obtained the purchaser could, other things being equal, succeed in an action for specific performance, notwithstanding that at the time the conditional agreement was entered into the required consents had not yet been obtained. With respect to the last-mentioned effect, the situation is not quite so clear in the case of an agreement for a mortgage loan, because, of course, it is unlikely that such an agreement would be specifically enforceable, but even with regard to mortgage loan agreements the second effect of the exception would be to remove an impediment to an action for damages if the transaction was not proceeded with after the required consents were obtained.

18 But does the subsection protect the rights of parties who, having entered into an agreement containing the required "express condition" proceed to close their transaction without the required consents having been obtained? It was the position of the applicant that where the parties have entered into an agreement containing the required express condition the agreement survives and confers rights in the property or its proceeds, notwithstanding that a mortgage was purported to be granted where the required consents had not been obtained. On this approach, once the inclusion of the "express condition" in the agreement has shown the lender to be pure in heart, the subsequent illegal transaction, although passing no interest in the land, itself, would not prevent the intended mortgagee from asserting a property right, if not in the land then in its proceeds. On that theory the loan agreement, containing the required "express condition", is not spent or exhausted when that condition is not complied with before the closing. The assertion is made on behalf of the applicant that the applicable law is the law relating to innocent mistake (which in the circumstance would have to be a mistake of *fact*, because were it mistake of law it would undermine the assumption of knowldge of the law upon which the finding of the "express condition" was based).

19 One difficulty with the applicant's position in this regard is that we are not dealing with a criminal law or other penal provision; innocence has virtually nothing to do with the issue. We are dealing with a public policy that is so strongly put forward as to be enforced by making non-conforming transactions nullities. That is surely one of the most invasive procedures open to the Legislature. Where simple parties, innocent of the prohibitions of s.29, purport to convey land contrary to its provisions their purported transaction is a nullity, so, the argument runs, why should a person who started off on the right foot by including an "express condition" but then proceeded to close his transaction in a way that, if done without such an agreement, would have resulted in the transfer of no interest in land now be able to claim an interest in either the land or its proceeds? The applicant does not assert in these proceedings that the mortgage itself transfers any legal or equitable interest in the land. Rather, the applicant's argument is based upon the loan agreement and the fact that it contains an "express condition" which manifests the intent of the lender to comply with the *Planning Act* and, combined with reliance upon the false affidavit in the mortgage, means that the loan was advanced on the basis of a mistake of fact. The applicant asserts that Tessis is entitled to an equitable mortgage,. a subject I shall deal with below, and also asserts an equitable lien or charge upon the proceeds of the sale of the lands. It was held by the Court of Appeal, in the above-quoted judgment delivered by MacKinnon A.C.J.O., that the mortgage passed no interest, legal or equitable, in the lands. It was also specifically held that Tessis was not a *bona fide* purchaser for value and without notice. That finding may not be directly counter to submissions now being made on behalf of the applicant, but it is of relevance whre the equitable jurisdiction of the Court is sought to be invoked. The applicant contends, in effect, that the loan agreement is not spent, exhausted or merged when, by mistake, a loan is made and a purported mortgage is accepted in breach of the provisions of the *Planning Act*. Although the loan agreement formed part of the record before the Court of Appeal, it was not referred to in the judgment of MacKinnon A.C.J.O. for the Court. That judgment focused on the mortgage itself, and it was noted by MacKinnon A.C.J.O., *supra*, at p.152 that:

> There was of course no such condition, express or otherwise, in the mortgage document with which we are concerned.

That statement suggests that the loan agreement was not considered by the Court of Appeal in this connection. It also suggests that the matter was not argued, a matter to be considered below in relation to issue estoppel. I will proceed initially on the assumption that the applicant is not precluded by issue estoppel from making claims based upon the loan agreement where the purported mortgage was executed and delivered, and accepted, in purported compliance with the loan agreement, and will consider in turn substantive claims made by the applicant.

Equitable Mortgage

20 In one part of his submissions the applicant claimed to be an equitable mortgagee, citing, among other things, the following passage from *Fisher and Lightwood's Law of Mortgage*, 7th ed., at p.16:

> Equitable mortgages of the property of legal owners ... are created by some instrument or act which is insufficient to confer a legal estate, but which, being founded on valuable consideration, shows the intention of the parties to create a security; or in other words, evidences a contract to do so.

In *Falconbridge, Law of Mortgages*, 4th ed., at p.80, the following statement is made about equitable mortgages:

> An equitable mortgage therefore is a contract which creates in equity a chargeon property but does not pass the legal estate to the mortgagee. Its operation is that of an executory assurance, which, as between the parties, and so far as equitable rights and remedies are concerned, is equivalent to an actual assurance, and is enforceable under the equitable jurisdiction of the court.
>
> 5.2 *How an Equitable Mortgage is Created*
>
> The equitable nature of a mortgage may be due either (1) to the fact that the interest mortgaged is equitable or future, or (2) to the ?act the mortgagor has not executed an instrument sufficient to transfer the legal estate. In the first case the mortgage, be it never so formal, cannot be a legal mortgage; in the second case it is the informality of the mortgage which prevents it from being a legal mortgage. These alternatives will be discussed separately. (3) An equitable mortgage may also be created by deposit of title deeds.

It is clear that neither (1) nor (3) above have any application to the facts of this matter and that we need be concerned only with (2) above. In the same publication there appears, at p.83, under the heading "Mortgage by Instrument not Sufficient to Convey the Legal Estate", the following passage:

> (1) *Conveyance defective in form*
>
> If a document in the form of a legal mortgage is signed but not sealed, or for any other reason is not sufficient to transfer the legal estate, it is an equitable mortgage.
>
> An instrument intended to operate as a legal mortgage, which fails so to operate for want of some formality, is valid as an equitable charge and gives the mortgagee a right to a perfected assurance.
>
> (2) *Agreement to give a Mortgage*
>
> An agreement in writing duly signed to execute a legal mortgage is an equitable mortgage, operating as a present charge on the lands described in the agreement.

In this case there is no issue or question as to a want of formality with respect to the mortgage that was execued and delivered. It failed to pass an interest in the land not because of any defect in the form or execution, but because its execution and delivery contravened the *Planning Act* and accordingly by reason of express statutory provisions it passed no interest in the land. The many authorities cited by the applicant that dealt with want of formalities, or inadvertent omissions in documents, or refusals to carry out the terms of agreements to give deeds or mortgages are, therefore,

not applicable. When we leave the mortgage and consider the loan agreement as an agreement to give a mortgage we encounter first the difficulty that the intended mortgagor did not refuse or fail to give to the intended mortgagee a mortgage in the form expected by the mortgagee. The difficulty is the absence of consent under the *Planning Act*. Without such a consent no interest in the land may be created except that the former s-s.29(7) (now s-s.29(18)) provided that s.29:

> ... does not affect an agreement subject to the express condition contained therein that such agreement is to be effective only if the provisions of the section are complied with.

The provisions of the section were not complied with. By its own terms therefore the agreement is not effective. Furthermore, it would be a most anomalous result under the statute if an agreement that is excepted from the annulling effect of s-s.29(7) only because it contains an express condition that it is to be effective only if the provisions of the section (as to obtaining the required consents) are complied with were to be held to create an equitable interest in the land where the required consents had not been obtained before the agreement was purported to be carried out. The exception provided in s-s.29(7) (now s-s.29(18)) reasonably construed has the limited purposes discussed above and does not in my opinion create a situation in which the prospective mortgagee having proceeded without the required consents, to close the transaction can "try agin" on the basis of the loan agreement and, ignoring the mortgage, proceed to obtain the required consent before entering into, or being deemed to have entered into, a new mortgage, or with the result that the Court in the exercise of its equity jurisdiction (conferred or confirmed by s-s.153(1) of the *Bankruptcy Act*) will, in effect, deem an equitable mortgage to have come into existence *nunc pro tunc*.

21 In the decision of the Court of Appeal in *Tessis v. Scherer et al.*, *supra*, MacKinnon A.C.J.O., dealt with a submission that, although the mortgage did not pass an interest in the land, the power of sale in the mortgage should be regarded as subsisting so as to permit a sale by the mortgage and a further submission that s-s.29(4d) (now s-s.29(9)) of the *Planning Act* would permit such a sale, in either case after the required consent from the committee of adjustment had been obtained. Those submissions were rejected. With regard to the second submission MacKinnon A.C.J.O., at p.153, stated as follows:

> Whatever may be the purpose of the subsection it is not for the purpose of permitting a party, in the circumstances of this case, to go to the committee of adjustment long after the mortgage has been placed and the Act breached. Such a procedure would obviate so far as mortgages are concerned, the necessity for or effect of the first part of s.29(7) in the 1979 *Planning Act* which subsection covers mortgages.

And with respect to the first submission his Lordship further stated at p.153 as follows:

> A mortgage is given as security for debt. The Planning Act is clear that if the Act is breached no interest in the land is transferred by the mortgage. It would defeat the principle of the legislation and be a perversion of the statutory language if the Court were to hold that the power of sale stands independently of the mortgage and is a legal basis for granting possession of the lands to the mortgage. This is so despitethe argument that the mortgagee would then go to the committee of adjustment for the required consent to sever and sell. A procedure which, as we have said, in our view, is not contemplated by the Act.

22 I set forth those two passages because of their stress on the fact that a breach of the provisions of the Act had taken place, and because of the disfavour expressed with regard to a proposal that the committee of adjustment be approached long after the mortgage has been placed and the Act breached. It was argued before me that all the submissions dealt with by the Court of Appeal related to the mortgage itself, and not to the loan agreement, and were concerned with possession. It must be acknowledged that there is no reference to the loan agreement as such in the reasons of the Court of Appeal. However, the loan agreement was referred to in the statement of claim in the action and it was among the documents before the Court of Appeal. It is really most unlikely that the Court of Appeal was not aware of the loan agreement or believed that a loan of $635,000 on a commercial property would be made without there being a written loan agreement, however brief. The last-quoted passages reveal the attitude of the Court of Appeal to submissions that would involve the obtaining of the required planning or severance consents long after the mortgage had been given in

breach of the Act. No equitable mortgage could be obtained by Tessis without the required planning consent, and any consents so given would necessarily have to be given long after the execution and delivery of a mortgage found and acknowledged by the applicant to have been in contravention of the Act. Quite apart from issue estoppel the Court of Appeal appears to have laid it down as a matter of law that where there has been a mortgage in contravention of s.29 of the *Planning Act*, the Court will not undercut the objectives of the Act by making available an extraordinary remedy so that one of the parties to the breach, albeit the less culpableof the two, can try again.

23 An equitable mortgage is an equitable interest in land. The following statement, which I adopt, is taken from *Marriott and Dunn: Practice in Mortgage Actions in Ontario*, 4th ed., Carswell (Toronto) 1981, at p.18:

> An equitable title to a mortgage is just as good as a legal one: *Ex parte, Wright* (1812), 19 Ves. 255 at 257, and may be enforced by foreclosure, judicial sale or by the judicial appointment of a receiver: Waldock above, p.55.

A foreclosure would constitute, and a judicial sale would bring about, a change in ownership of the land without the required planning consent. That is contrary to s.29 of the *Planning Act*. The highest interest in the land that can have been conferred on Tessis by the loan agreement is the right to an equitable mortgage after the required planning consent had been obtained. In no true sense of the term can Tessis be said to have had an equitable mortgage before that consent was obtained. This is not a case of want of formalities in the mortgage document or a case of the refusal by the borrower to execute a mortgage. Although there undoubtedly was a mistake the usual equitable remedies are not available if to purport to make them available would be to contravene the statute. No equitable mortgage arises upon the entry into the loan agreement. To put the matter another way, in the absence of the required consent the loan agreement does not create an equitable mortgage any more than a legal mortgage document, correct in all its documentary formalities, creates a legal mortgage. At the material times, Tessis was not an equitable mortgagee.

Equitable Charge

24 For parallel reasons Tessis was not at the material times the holder of an equitable charge, quite apart from questions of issue estoppel. With respect to equitable charges or liens the following is stated in *Marriott and Dunn*, *supra*, at pp.18 and 19:

> It is sometimes diffiult to determine whether a security is an equitable mortgage or equitable charge; as to the distinction see Waldock *Law of Mortgages*, 2nd ed. (1950) pp.44-45. No debt is implied in the case of the latter but the property is expressly or constructively made liable or specially appropriated to the discharge of a burden, *and a right of realization by judicial sale is conferred.* Put another way, the right to foreclose depends upon a proprietary interest either legal or equitable: *Re Lloyd*, [1903] 1 Ch.385 (C.A.). Since a person holding an equitable charge (unless a legal mortgage is implied therein) or lien has no right to foreclose *but may realize his security by judicial sale*: *Tennant v. Trenchard* (1869), L.R. 4 Ch.537.
>
> [Emphasis added]

Here there clearly is a debt, and the loan agreement did call for a legal mortgage, and so it may well be that an equitable charge is not appropriate or available in any event. I do not decide that question. The holder of an equitable charge may not foreclose but may realize his security by judicial sale. He thus has an enforceable interest in the property. To put the matter in its brutal simplicity, Tessis cannot have been at the material times a holder of an equitable charge because an equitable charge is an interest, an equitable interest, in the land, and it is provided by s.29 of the *Planning Act* that in the case of abutting parcels owned by the same person the sale of one parcel without the other is not to take place, and *cannot* take place, without there having been first obtained the required consent under the Act.

25 For the applicant, Mr. Kellock also referred a floating charge but did not seem to me to press the argument that Tessis was entitled to one on the assets of Agil, which is just as well because the loan agreement makes no reference to a floating charge on the undertaking or any assets of Agil and, with respect to the only asset dealt with clearly, as argued on ehalf of the applicant in this very application, intended the creation of a valid and enforceable *specific* mortgage. But

if a floating charge had been sought to be created it would have run into essentially the same difficulties as the claimed equitable mortgage and the claimed fixed or specific (as opposed to floating) equitable charge: it would have constituted, from the time of its creation, a purported equitable interest in the land, carrying the right, after its crystallization, to a judicial sale and differing from the fixed or specific equitable charge (and so offending the *Planning Act* even more) because it would also carry a right to foreclose on the property that is subject to its specific lien when it is crystallized.

Charge on the Proceeds of the Sale of the Land?

26 In the foregoing I have more than once used the phrase "at the material times". I did that so as not to lose sight of the importance of the sequence of events. The applicant's submissions in support of the contention that Tessis is, or was, the beneficiary of an equitable mortgage or equitable charge, which contentions are based in part on mistake and might in the absence of s.29 of the *Planning Act* have had some success, were, I believe, seen to be not sustainable in the face of the annulling provisions of s-s.29(7) (now s-s.29(18)). Tessis, under the last-mentioned statutory provisions simply could not acquire any interest, legal or equitable, in the land until the required *Planning Act* consents had been obtained, excepting only the limited interest, described above, under a contract subject to an "express condition" as discussed above. As no *Planning Act* consent had been obtained by the effective date of the bankruptcy Tessis had no security interest in the land by that critical date and so was not a "secured creditor" as that term is defined in s.2 of the *Bankruptcy Act*, R.S.C. 1970, c.B-3. In so far as the claim of Tessis to the proceeds of he sale of the lands is based upon the assertion of an equitable interest in the lands themselves, it must fail. Tessis acquired no interest legal or equitable in the lands or, more accurately, no legal interest whatsoever and no equitable interest that survived the act of the purported creation of a legal mortgage. in so far as the claim of Tessis may be based upon the law of unjust enrichment it will be dealt with below after discussion of the other arguments in which the applicant asserted Tessis has the status of a secured creditor of Agil.

Equitable Execution

27 It is submitted on behalf of the applicant that Tessis, who advanced his loan under the loan agreement which clearly showed the intention of the parties that he was to be a secured creditor of Agil, and who subsequently obtained a judgment on the covenant against Agil, is entitled to obtain the proceeds of the sale of the lands by way of equitable execution. In my opinion those submissions cannot be maintained in the face of s-s.51(1) of the *Bankruptcy Act* which states as follows:

> 50(1) Every receiving order and every assignment made in pursuance of this Act takes precedence over all judicial or other attachments, garnishments, certificates having the effect of judgments, judgments, certificates of judgment, judgments operating as hypothecs, executions or other process against the property of a bankrupt, except such as have been completely executed by payment to the creditor or his agent, and except also the rights of a secured creditor.

28 The following statements are taken from *17 Halsbury* (4th ed.) under the general heading "Execution" in the subdivision entitled "Equitable Execution". In para.574, at p.358, are found the following statements:

> Equitable execution originated in the old practice of the Court of Chancery to assist in enforcing a judgment for the recovery of money of a court of ordinary jurisdiction by entertaining an application for the appointment of a recever of such interests in the judgment debtor's property as could not, owing to their nature, be taken under a common law writ of execution.
>
> Equitable execution is not, strictly speaking, execution at all, but is a mode of equitable relief.

And from para.576 (at p.359):

> Except in the case of land and interests in land, the former practice continues and equitable execution will only issue where there is no remedy by execution at law or such remedy is likely to be ineffective owing to the particular nature of the property which it is sought to make available. There must be some legal impediment to the issue of

> execution in the ordinary course of law, whether by means of fieri facias, or by means of garnishee proceedings or charging orders.
>
> ... as a general rule a receiver will not be appointed if a method of legal execution is available.

And from para.584 of the same volume of *Halsbury* (at p.365):

> The appointment of a receiver of personal estate does not interfere with the possession of the trustees or other persons in whom the property is vested; it simply puts the receiver in the place of the judgment debtor to receive the money. It does not create a charge on property, nor does notice of appointment confer any priority, but the order has the effect of an injunction and prevents the judgment debtor from receiving the property or from dealing with it to the prejudice of the judgment creditor.

29 The foregoing quotations from *Halsbury*, while hardly exhaustive of the law relating to equitable execution, do disclose enough about the nature of the remedy to establish beyond doubt that, even if the remedy were available in accordance with its own limitations, it would be among the "executions or other process against the property of the bankrupt" that are subordinated by the provisions of s-s.50(1) of the *Bankruptcy Act* to any receiving order or assignment made under that Act, except where the executions or other process n question "have been completely executed by payment to the creditor or his agent", and excepting also the rights of secured creditors. Subsection 50(1) removes any possibility that Tessis could avail himself of equitable execution in any form to collect his debt or any part thereof after the date of the bankruptcy. Equitable execution cannot arise before judgment, and unless his judgment is fully executed by payment to the judgment creditor before the bankruptcy his judgment creates no rights to preference over the ordinary creditors in the bankruptcy.

Conclusion on the Merits on the Issue of Whether Tessis is a Secured Creditor of Agil

30 It is my conclusion that, even on the basis that the loan agreement was made subject to an "express condition" as described in s-s.29(7), now s-s.29(18) of the *Planning Act*, and without regard to the defences of *res judicata* or issue estoppel, Tessis is not to be regarded as a secured creditor of Agil. The claims based on the assertion of an equitable mortgage or an the assertion of an equitable charge, fixed or floating, fail because they cannot prevail against the provisions of s.29 of the *Planning Act* prohibiting severances without consent and providing that purported severances without the required consents are without effect. Claims based on equitable execution are defeated by the provisions of s-s.50(1) of the *Bankruptcy Act*.

Issue Estoppel

31 The foregoing discussion and negative conclusions on the merits of the applicant's contention that Tessis is a secured creditor in the bankruptcy of Agil are *obiter dicta* if the applicants' various assertions in that regard are barred by the defence of issue estoppel. The question of issue estoppel was strenuously argued and, accordingly, I considered it prudent to set forth my conclusions on the merits and the reasons therefor. These matters were dealt with first because their discussion established the background facts rquired for the discussion of issue estoppel.

32 It is common ground that the question of whether the mortgage, as such, passed any legal interest in the land to Tessis has been decided adversely to Tessis and to the applicant and its *res judicata*. I also find that in *Tessis v. Scherer et al, supra*, the Court of Appeal clearly found that the mortgage itself passed no equitable interest in the lands to Tessis. However, in this application the claims of the applicant are based upon the loan agreement and not upon the mortgage itself.

33 The applicant argues that the prior action was an action upon the mortgage alone, for possession and for judgment on the covenant, and that Scherer, when granted status to prosecute the appeal from the judgment of Parker. A. C. J. H. C. was similarly circumscribed and confined to arguments based upon the mortgage itself. It is noted that the Honourable Mr. Justice Goodman of the Court of Appeal, (acting as an *ex officio* member of the High Court) in his unreported

reasons released February 9, 1982, with respect to his decision to allow Scherer to be added as a party defendant in the prior action so that he could prosecute the appeal, dealt with the matter as a question of whether the mortgage conferred upon Tessis an interest in the land and considered the judgment of Parker, A.C.J.H.C. to be a judgment *in rem*. There is nothing in the reasons of Goodman, J.A. to suggest that there was any mention before him of any claims equitable or otherwise, based upon the loan agreement as distinct from the mortgage. Of course, the real question is not whether such rights were in fact asserted and adjudicated upon, but whether the applicant is precluded from asserting them now because he could, and therefore should, have asserted them on the appeal. The matter is complicated by the fact that Scherer was added as a party on the appeal and not on the original trial, and so unless he could have obtained permission to supplement them he may well have been constrained by the pleadings in the action. Against that it must be noted that counsel for Scherer did make, and persuade the Court of Appeal to deal with, albeit unfavourably to him, arguments going beyond the simple question of whether the mortgage created any interest in the land. It is certainly arguable and indeed it is probable that the Court of Appeal would likewise have entertained an argument for an equitable interest in the land based on the provisions of the loan agreement.

34 The claims of the applicant to be a secured creditor are not really based upon the mortgage itself but upon the loan agreement which, because of the "express condition" is said to escape the annulling effects of s.29(7).

35 With regard to claims based upon the loan agreement and in the alternative as to a constructive trust the applicant submits that such claims are not barred by *res judicata* or by issue estoppel. The applicant stresses to difference between an action and a cause of action, pointing out that Rule 69 of the (former) Rules of Practice provided that a plaintiff could unite in one action several causes of action and stressing the narrowness of what the courts were called upon to decide in the prior action, namely, claims for possession, payment and interest founded upon the purported mortgage itself. The applicant submits that in the prior action no equitable cause of action of any kind was alleged and accordingly that *res judicata* does not now arise because the claims put forth in this application are all based on equity and so are necessarily different causes of action. The position of the applicant is predicated upon the traditional and formalistic view that the matter or subject of the prior litigation must be seen to consist of one or more causes of action expressly asserted as such. While there is abundant authority supporting such a formulation, there appear to be important unresolved difficulties with respect to the applicability of the inclusive rulearticulated in the well-known dictum of Wigram V.C. in *Henderson v. Henderson* to issue estoppel as opposed to what has traditionally been thought of as cause of action estoppel. These difficulties raise the question of whether Canadian law, although still using the cause of action as the formal criterion, has not been evolving in the direction of a more holistic view of the issues in dispute between the parties in the prior litigation i.e. toward a less formal view of what constituted the 'matter' or 'substance' of the prior litigation. I shall return to that question after discussing the submissions of the parties.

36 Three cases stressed by the applicant were relatively old and more concerned with *res judicata* in the sense of cause of action estoppel than with issue estoppel. Thus the applicant's first reference in this area was to *16 Halsbury*4th ed., para.1528, a paragraph devoted to setting out the essentials of *res judicata* (conceived as cause of action estoppel), as follows:

> In order that a defence of res judicata may succeed it is necessary to show not only that the cause of action was the same but also that the plaintiff has had the opportunity of recovering, and but for his own fault might have recovered in the first action that which he seeks to recover in the second. A plea of res judicata must either show actual merger, or that the same point has been actually decided between the parties. Where the former judgment has been for the defendant, the conditions necessary to conclude the plaintiff are not less stringent. It is not enough that the matter alleged might have been put in issue or that the relief sought might have been claimed. It is necessary to show that it actually was put in issue or claimed.

37 The applicant further asserts that no estoppel arises as to matters not in issue in the first action even if decided by implication. The authorities selected by the applicant from among those cited in *16 Halsbury* in relaton to the above statements were *Hadley v. Green* (1832), 2 Cr. & J. 374, *Bake v. French*, [1907] 1 cl. 478and *Saminathan v. Palaniappa*, 1914 A.C. 618.

38 In *Hadley v. Green*, *supra*, a landlord sued a tenant for rent and for money had and received. At trial the plaintiff recovered only for the rent. He later commenced a second action for damages against the defendant for quarrying and carrying away the stone the removal of which by the tenant had been the subject matter of the prior claim for money had and received. The second action was for the same amount as had been claimed as money had and received, and the particulars of claim in the second action were found to correspond verbatim with those delivered in the prior proceedings. It appears that, having pleaded it, the plaintiff decided not to proceed with the claim for money had and received, for it is clear from the report that one or two days before the first trial the declaration in the second action was delivered. The report is rather sketchy but it would appear that the defendant in the second action objected on the ground that the plaintiff, having not proceeded with its claim for money had and received, and having taken a general verdict, could not later pursue a second action for the same recovery. The court refused to strike out the second action, saying in effect that full compensation could not have been obtained by the count for money had and received and so the second action was for something additional and the situation could be distinguished from the cases in which a plaintiff having a right to full recovery and having pleaded the appropriate count elected not to proceed with that count and later sought to bring a second action seeking the same recovery. The term *res judicata* did not appear in the report, and needless to say there was no reference to issue estoppel. The decision appears to stand for the proposition that a plaintiff need not combine in one action all of his causs of action against a defendant and where he has pleaded a cause of action and not proceeded with it the plaintiff will not be precluded from bringing a second action with the same objective if it can be shown:

(i) that the first cause of action would at best have been only partially successful, and

(ii) that the second action was started before the first action went to trial.

The case was decided over one hundred and fifty years ago when the forms of action had not been reduced to ruling us from their graves and when the common law and equity jurisdictions had not been combined. Nothing was brought forward on this application on the question of whether or not, over one hundred and fifty years ago, difficulties in amending pleadings may have made it more practical to commence a second action and to do so before the prior action came to trial. Nor have I researched that question. Nor was there any material brought forth on this application, other than two footnote references in *Halsbury*, to show the application of *Hadley v. Green* in modern cases, let alone Canadian cases.

39 In *Bake v. French*, *supra*, Mrs. French was indebted to her solicitor, Bake, and had given him six charges secured on her interest in an estate. Bake sued and obtained judgment and an order for foreclosure nisi on five of those charges, having lost or forgotten about the sixth charge. He later brought an amended action on the six charges and was met with a defence of estoppel by *res judicata* based on the above-quoted by Wigram, V.C. in *Henderson v. Henderson* to the effect that the law requires a party to bring forth the whole of his case. The plaintiff did not in the second action ask for a declaration based on the sixth charge alone but for a declaration that he was entitled to a lien based on six charges including the five charges as to which he had received a declaration in the first action. The plaintiff was successful The Court held, not surprisingly, that the first action was about five charges and that in the second action the addition of the sixth charge meant that there was not the same subject of litigation or a "point which properly belonged to the subject of litigation in the first action".

40 The thing that I find the most outstanding about *Bake v. French* is the apparent foolishness of the defence. It is difficult to generate a strong precedent in a decision that had only to overcome such a weak case. In modern terms the plaintiff held something roughly equivalent to debentures issued in series and equally or proportionately entitled to the benefit of a charge on the same security. The relief sought was a declaration and foreclosure and the plaintiff had obtained an order for foreclosure nisi on the five charges. His attempt to amend the foreclosure proceedings to include the sixth charge was denied and so he brought the second action on all six charges and obtained an order for foreclosure nisi on all six charges, a resolution which doubtless had the advantage of making it more difficult for the debtor to redeem. At the least, the case stands for the proposition that the doctrine of *Henderson v. Henderson* does not mean that all causes of action have to be combined in the same action even where they represent claims on the same property if the claims are

based upon distinctive choses in action and are therefore not the same subject matter. It is important to remember that the sixth charge represented a sixth item of indebtedness i.e. more debt albeit secured on the same property. The reasons for judgment reflect that the plaintiff had sought unsuccessfully to amend his pleadings in the first action.

Saminathan v. Palaniappa, *supra*, is a decision of the Privy Council, reported in 1914 and involving the interpretation of a statute of Ceylon which was submitted to have codified a version of the law as to *res judicata*. In summary, the facts were that nder what may be regarded as a settlement agreement two promissory notes were issued by the defendant to the plaintiff and, probably by error, omitted to make any provision for interest. The notes were wrongfully altered to include a provision for interest. The defendant failed to pay on the due dates and the plaintiff began an action based on the notes. The action was dismissed because of the material alteration to the notes and the plaintiff then began a second action based upon the settlement agreement, for the consideration for which the notes had been issued. The trial judge accepted the defendant's argument that the action was barred by s.34 of the Ceylon Civil Procedure Code which stated as follows:

> Every action shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action: but a plaintiff may relinquish any portion of his claim to bring the action within the jurisdiction of any Court.
>
> If the plaintiff omits to sue in respect of the portion so omitted or relinquished. A person entitled to more than one remedy in respect of the same cause of action may sue for all or any of his remedies, but if he omits (except with the leave of the court obtained before the hearing) to sue for any such remedies, he shall not afterwards sue for the remedy so omitted.
>
> For the purposes of this section an obligation and a collateral security for its performance shall be deemed to constitute but one cause of action.

41 The Privy Council in reviewing the trial judge said of the above-quoted section that:

> It is directed to securing the exhaustion of the relief in respect of a cause of action and not to the inclusion in one and the same action of different causes of action, even although they come from the same transactions.

42 Their Lordships found the action on the notes and the action on the underlying agreement to be inconsistent and mutually exclusive causes of action and pointed out that so long as the notes were regarded a outstanding there was no right of action otherwise than upon the notes, and so it was impossible that the two claims constituted the same cause of action. Their Lordships also expressed the view that, but for the last paragraph of the section, an obligation and a collateral security for its performance would constitute two independent causes of action.

43 Thus in *Hadley v. Green* the second action had been commenced (in the days before the commencement of an action was accomplished by a simple writ of summons) before the relevant count in the prior action had been abandoned; and in *Bake v. French* a further evidence of indebtedness and charge, not before the court in the first action, was the basis for the second action, and so it is hardly surprising that neither action was said to involve *res judicata*. *Hadley v. Green* was decided before *Henderson v. Henderson*, and it, like *Bake v. French* was a case of *res judicata*, not issue estoppel; *Saminathan v. Palaniappa* was concerned with the interpretation of a statutory provision in the laws of Ceylon. It also turned in part on the fact that under laws applicable to negotiable instruments the action on the agreement could not have been proceeded with while the action on the promissory notes had not been shown to be doomed to failure. *Saminathan* too was a case where the defence of *res judicata*, not issue estoppel was asserted.

44 The applicant also cited the well-known Ontario decision of *Utterson Lumber Co. v. H. W. Petrie Ltd.* (1908), 17 O.L.R. 570, where machinery was sold on a conditional agreement calling for payment of the purchase price in instalments and providing that title was to remain in the vendor until payment in full and that in the event of default in payment the vendor could seize and sell the machinery without thereby eliminating the vendor's right to recover any remaining balance from the purchaser. The conditional purchser installed the machinery in his mill, fell into default in his payments and then sold the mill and the machinery to a third party who resold to the plaintiff. The conditional vendor obtained a judgment against the conditional purchaser and then seized the machinery. The Divisional Court decided

in favour of the conditional vendor, noting that his position was protected from the negative effects of the Conditional Sales Act, R.S.O. 1897, c.49, by the affixing on the machinery of an appropriate name plate and holding,

> (i) that the original indebtedness was not merged in the judgment so far as the "security" was concerned and that the conditional vendor was entitled to retain title until he was paid in full, and
>
> (ii) that by suing for the balance of the price the conditional vendor had not elected to treat the transaction as an absolute sale, so as to waive his claim to title in the machinery. The applicant quoted the following statement of Mulock, C.J., found at p.574:
>
> > Recovery of judgment is not payment of indebtedness. Its simple contract character has disappeared and it has become a debt of record. To that extent only has there been merger, but the original indebtedness still exists and until payment the defendant is entitled to retain his collateral security.

45 A reading of the reasons for judgment makes it clear that on the question of election - the plaintiffs having argued that the conditional vendor could not take a judgment for the unpaid purchase price and at the same time assert a property interest in the machinery - the decision turned on the language of the contract, which expressly provided that the vendor could sue for his money without title passing until he was paid in full. The decision sets some limitations on the doctrine of merger and shows that the parties can contract out of what might otherwise be held to be mandatory election between one remedy and another. There is no specific reference to *res judicata* as such but th doctrine under which a cause of action is merged into a judgment and so disappears is really a form of *res judicata*.

46 Tessis having been awarded judgment on the covenant and the applicant striving to have Tessis treated as a secured creditor in the bankruptcy of Agil, the *Utterson Lumber* decision may be put forth as an authority for the proposition that the taking of judgment on the covenant in the mortgage has not precluded the assertion that under the loan agreement Tessis is entitled to security or alternatively to a constructive trust. To arrive at such conclusions would be to stretch unwarrantedly the meaning of the decision in *Utterson Lumber*, a decision that was expressly based upon the provisions of the agreement there in question.

47 The only statement in the applicant's factum on the subject of issue estoppel, as distinct from traditional cause of action estoppel was taken from 16 *Halsbury* (4th ed.) para. 1530 which is set out in full below:

> *1530 Issue estoppel.* An estoppel which has come to be known as "issue estoppel" may arise where a plea of res judicata could not be established because the causes of action are not the same.
>
> A party is precluded from contending the contrary of any precise point which having once been distinctly put in issue, has been solemnly and with certainty determined against him. Even if 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, provided it is embodied in a judicial decision that is final, is conclusive in a second action between the same parties and their privies. This principle applies whether the point involved in the earlier decision, and as to which the parties are estopped, is one of fact or one of law, or one of mixed fact and law. The conditions for the application of the doctrine have been stated as being that (1) the same question was decided in both proeedings; (2) the judicial decision said to create the estoppel was final; and (3) 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. Where one party has raised an issue which his opponent alleges is barred by issue estoppel the opponent can either plead the estoppel and leave the matter to be dealt with at the trial, or he can attempt to have the offending plea struck out.
>
> To be distinguished, however, is the rule that where a plaintiff, having two inconsistent claims, elects to abandon one and pursues the other, he cannot afterwards choose to return to the former and sue on it.
>
> (Footnote references omitted]

48 With respect to the second paragraph of the foregoing I find that Tessis, in obtaining judgment on the covenant and in filing in the bankruptcy as an unsecured creditor, has not elected in such a way as to preclude Scherer from proceeding to assent that Tessis has a secured claim based upon the loan agreement or a claim based upon constructive trust. Whatever way be the impact of *Henderson v. Henderson*, *supra*, and the Canadian authorities that are said to have applied it with respect to issue estoppel, Scherer has not elected one course in such a way as to evidence an intention to abandon the other courses pursued by him on this application. See *Rosental v. Newman*, [1953] 2 All E.R. 885 at p.887.

49 The footnotes to the above-quoted para.1530 of 16 *Halsbury* (4th ed.) refer to many of the leading English and Privy Council decisions on issue estoppel and to the decision of the Supreme Court of Canada in *Angle v. Minister of National Revenue* (1974), 47 D.L.R. (3d) 544, at pp.555-6. Thus, reference was made to the *Duchess of Kingston*'s Case (1776), 2 Smith L.C. (13th ed.) 644 (sometimes said to be the fountainhead of the English law of issue estoppel) and to *R. v. Hartington Middle Quarter Inhabitant* (1855), 4 Ex B 780(which the learned editor of *Spencer Bower and Turner: Doctrine of Res Judicata* (2nd ed.) 1969 states, at p.152, is in point of lucidity and precision a preferable exposition and guide) and to *Re Koenigsberg, Public Trustee v. Koenisberg*, [1949] 1 All E.R. (C.A.), *Thoday v. Thoday*, [1964] All E.R. 341 at p.352 C.A. per Diplock L.J., *Spens v. I.R.C.*, [1970] 3 All E.R. 295 at p.301 (Megarry J.) and *Carl Zeiss Stifting v. Rayner and Keeler Ltd. (No. 2)*, [1967] 1 A.C. 853 at p.935; [1966] 2 All E.R. 536 (per Lord Guest).

50 I found it curious that in an application where so much stress was put on the question of issue estoppel there was no reference by any party to *Spencer Bower and Turner: Doctrine of Res Judicata* which is widely regarded as a leading work on the subject.

51 For his part, counsel for the respondent, supported at least initially by counsel for Tessis, took a position on issue estoppel that I believe with respect can be inelegantly but not entirely inaccurately summarized as "He (Scherer) had his chance and he cannot now raise the issues and assert claims that he did not raise in the prior action". The respondent relied upon the extended form of estoppel reflected in the above quotation from the judgment of Wigram V.C. in *Henderson v. Henderson* and also upon the decision of the Supreme Court of Canada in *Maynard v. Maynard*, [1951] S.C.R. 346. In the latter case on granting a decree nisi of divorce Schroeder J., after questioning the wisdom of the consent arrangement, included in his judgment an order for the payment of a modest lump sum to the petitioning wife in lieu of all alimony or maintenance for the wife and for a son until he attained the age of sixteen. Schroeder J. was assured by counsel for the both parties that they fully understood and both wanted that provision, and so he made the provision on consent. Somehow there were added to the formal udgment "or until this Court doth otherwise order". Those words had formed no part of the endorsement by Schroeder J. Prior to the decree absolute the wife commenced an action in the High Court, alleging that the agreement given effect to in the judgment of Schroeder J. had been induced by fraudulent misrepresentations, and consequently that no enquiry had been made as to the financial position of the respondent husband or as to his ability to pay alimony or maintenance, and claiming damages or in the alternative an order setting aside those provisions of the judgment giving effect to the alleged agreement to accept the lump sum payment in lieu of alimony. The action also included a claim for arrears of alimony payments provided for in the original written separation agreement or in the alternative such alimony as might be ordered by the court. That action came on before Mackay J. who dismissed it, finding against the allegation of fraud and misrepresentation and finding that the agreement as to the lump sum was entered into by the wife's solicitor with her understanding and authorization, and that the parties were *ad idem* that the lump sum was clearly agreed to be in full settlement. An appeal from the judgment of Mackay J. was dismissed with costs. In the meantime the motion under appeal was brought before Wells J. who ordered the trial of an issue. That order was appealed to the Court of Appeal, which concluded that the motion should have been dealt with by Wells J. but which agreed, on consent, to deal instead with that question itself. The point of law answered by the Court of Appeal was whether or not the Court had power to vary paragraph 3 of the judgment of Schroeder J. in view of the fact that the same was a consensual judgment for a lump sum settlement in full satisfaction of all claims for alimony and maintenance. The Court of Appeal answered that question in the negative, allowing the appeal and dismissing the motion. The appeal of that order came before the Supreme Court of Canada. In the riginal motion before Wells J. the applicant had sought an order rescinding or varying paragraph 3 of the order of Schroeder J. as to the lump

sum payment in lieu of, or in payment of, all claims for alimony or maintenance and had sought an order of monthly or annual payments of alimony or maintenance. Before the Supreme Court of Canada it was conceded, in what we may consider to be an acceptance of issue estoppel, that by virtue of the decision of Mackay J. on the question of fraud or misrepresentations as to the agreement for a lump sum payment, the appellant had to accept on that appeal that that agreement had been entered into voluntarily by the appellant. Notwithstanding that concession the appellant mounted an argument on the merits. It was countered by a defence of estoppel.

52 The estoppel defence was successful. Cartwright J. referred with approval to the following statement by Maugham J. in *Green v. Weatherall*, [1929] 2 Ch.213 at pp.221, 222:

> ...the plea of *res judicata* is not a technical doctrine, but a fundamental doctrine based on the view that there must be an end to litigation: ....

His Lordship also quoted the famous dictum of Wigram V.C. in *Henderson v. Henderson*, set forth far above, and proceeded to the well-known excerpt from the judgment of the Privy Council in *Hoystead v. Commissioner of Taxation*, *supra*, at p.165:

> Parties are not permitted to begin fresh litigations because of new views which 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 to be the legal result of the documents or the weight of certain circumstance.
>
> 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.

53 The above quotation from *Hoystead* would seem to be addressing cuse of action estoppel rather than issue estoppel. It is clearly saying, at the very least, that a question which has been decided cannot be relitigated on the ground that the party who was unsuccessful on the prior litigation has thought of a new argument. Many authorities, including *Maynard v. Maynard* itself, extend that prohibition to points that were fundamental to the prior decision, in the sense that the prior decision could not have been decided the way it was without also deciding explicitly or by necessary implication the point in question in the second proceedings. That Is the essence of issue estoppel and brings us close to the heart of the matter: the contest between what may be regarded as broad and narrow views of issue estoppel. The narrow view, as espoused by the applicant, employs a formal approach, stressing the cause of action, the pleadings and the record in the prior litigation, and confining the estoppel to what was actually decided and, by way of issue estoppel, to what was so fundamental to that decision that, whether expressly referred to or not, it must be taken to be a point settled between the parties or their privies.

54 The broader view espoused by the respondent does not expressly challenge the traditional role of the formal cause of action as the basic building block of *res judicata* but impliedly arrives at such a challenge by urging upon the Court dicta and decisions which may appear to accord with the views expressed by Lord Denning M.R. in *Fidelitas Shipping Co. Ltd. v. V/O. Exportchleb*, [1965] 2 All E.R. 4, to the effect that the doctrine of *Henderson v. Henderson* applies not only to cause of action estoppel, but also to issue estoppel. As I understand the respondent's submissions, issue estoppel is not confined to a precise issue that was fundamental to the decision in the prior action and was decided, expressly or by necessary implication, in that prior action, but extends to bar also, in the second action, not only argumentsthat could have been raised in respect of the issues in the prior action but also issues that could have been raised in the prior action to achieve a party's over-all objective yet were not raised. Thus the respondent's focus was not so much upon what had been decided, expressly or by necessary implication in the prior action, but upon what had been omitted to be pleaded and argued in the prior action apparently whether or not the alleged omissions would have constituted, technically speaking, different causes of action.

55 On the respondent's view of the matter Tessis would now be estopped not only from reopening a decided issue to present new arguments on that issue, and not only from contesting anew points fundamental and necessary to the

decision expressly made in the prior action, but also, it appears, from raising arguments such as that based upon the loan agreement as distinct from the mortgage and tending to show that Tessis was entitled to an equitable mortgage or charge. As argued, the reason for the estoppel would be that Tessis, or Scherer, could have asserted those equitable claims on the basis of materials that were part of the record, and so, in pursuance of the public policy favouring an end to litigation, he should be estopped from raising them later. Logically developed (which it was not) this approach would set little store by formal distinctions as to causes of action or as to the difference between law and equity, at least in circumstances where, as here, it was known before the argument of the appeal in the prior action that Agil was in bankruptcy, that there was a problem under the *Planning Act* and that the trustee had denied that Tessis was a secured creditor. Although it was not so expressed by the respondent the broader approach could be expressed by saying that, where the parties cannot deny awareness of the breadth of their dispute and confrontation (as here where neither Tessis nor Scherer can have been unaware of the trustee's contention that Tessis had no higher rihts than those of an unsecured creditor in the bankruptcy), an omission to initiate or advance a claim or cause of action that could impact upon that confrontation and that could have been advanced, even as an alternative claim on the material before the Court, would invite and justify the defence of issue estoppel, as much as the failure to make in the prior proceedings an available argument on the cause of action there expressly pursued is the basis for estoppel under the *Hoystead* line of cases. Such an approach relies heavily on the policy in favour of an end to litigation but would not be devoid of controls in addition to those implicit in the above quotation from *Green v. Weatherall*, and those expressed by Denning L.J. in *Fidelitas Shipping Co. Ltd. v. V/O. Exportchleb*, *supra*, where he said of the rule as to extended issue estoppel this is not an inflexible rule.

56 The traditional general rule as to issue estoppel is stated in *Spencer Bower and Turner*: *Doctrine of Res Judicata*, *supra*, (hereinafter referred to as " *Spencer Bower*") at p.167 as follows:

> And indeed, wherever a plaintiff has two separate causes of action (though they arise out of the same transaction) as distinct from several remedies for one cause of action, he is not generally under any duty to set up both in the first proceedings which he may institute. As will later be seen, if he sets up one cause of action only, and is successful, he is not thereby precluded by the operation of the doctrine of merger from proceeding subsequently on the other; and the same result will attend if he fails in his first proceedings he may thereafter, notwithstanding such failure, proceed independently on the separate and independent cause of action which has not yet been litigated. He is under no duty by which he is compelled to join all his available causes of action in the first proceedings.

However, in *Spencer Bower* there is noted at .167, and again at p.376, the decision of the Supreme Court of Canada in *Cahoon v. Franks* (1967), 63 D.L.R. (2d) 274, is referred to as a decision indicating that in Canada the law as to issue estoppel appeared to be different from that in England and other Commonwealth countries in that the Supreme Court of Canada there turned its back on the decision in *Brunsden v. Humphrey* (1884), 14 Q.B.D. 141 by holding that, in connection with a motor vehicle action where the two causes of action were a cause of action for property damage and a cause of action for personal injuries, both arising out of the same accident, that both such causes of action must be litigated in one action. In Cahoon v. Franks the plaintiff had begun an action for property damage within the twelve month limitation period provided for under the highway legislation of Alberta and, after the expiry of that twelve month period, had sought to amend his pleadings to include claims in respect of what had developed into really very serious personal injuries. It was asserted for the defence that such a claim was a new cause of action and was therefore statute barred by the special limitation period. Hall J., speaking for the Supreme Court of Canada, rejected that contention, holding that *Brunsden* was no longer good law in Canada and adopting the reasoning of Porter J.A. of the Appellate Division of the Alberta Supreme Court who had held that to perpetuate the effect of the *Brunsden* decision would be to revive the dominance of the forms of action, abolished by the *Judicature Act*. The reasons of Porter J.A. included the following (quoted at pp.277 and 278 of the said report of the Supreme Court of Canada decision):

> It is important to bear in mind that it was the "forms of action" that were abolished by the Judicature Act. To apply the *Brunsden v. Humphrey* case to the facts here would be to revive one of the very forms of action which the Act abolished. The cause of action or, to usethe expression of Diplock L.J. [the Letang case [infra]], "the factual situation" which entitles the plaintiff here to recover damages from the defendant is the tort of negligence, a breach

> by the defendant of the duty which he owed to the plaintiff at common law which resulted in damage to the plaintiff. The injury to the person and the injury to the goods, and perhaps the injury to the plaintiff's real property and the injury to such modern rights as the right to privacy flowing from negligence serve only as yardsticks useful in measuring the damages which the breach caused.

The "Letang case" referred to in the foregoing passage is *Letang v. Cooper*, [1969] 1 Q.B. 232. In the above passage Porter J.A. treated as heads of damages matters which used to be regarded as separate causes of action. Should the reasoning of that decision be applied beyond various tort claims arising from one and the same accident? The language quoted by Porter J.A. from the reasons of Diplock L.J., where the latter used the phrase "the factual situation" to describe what gave the plaintiff a right to sue, is inconsistent with a narrow "forms of action" approach that has been at the base of traditional *res judicata* and has been urged on behalf of the applicants in these proceedings.

57 The high courts have an inherent jurisdiction to control abuse of their process and, as pointed out in *Spencer Bower* at p.379, that jurisdiction has been invoked in cases where plaintiffs had multiplied costs and aggravation by bringing numerous suits in circumstances where under the laws then in force it could not be held that the latter actions were barred by estoppel. That inherent jurisdiction was invoked by Henry J. in *Re Heather's House of Fashion Inc. (No.2)* (1977), 24 C.B.R. 193, in addition to a finding of *res judicata*. In that case a trustee in bankruptcy had attacked a secured debenture issued by the bankrupt as being void because of a defect in its registration. The claim faled and in the course of the prior proceeding it was concluded that the debenture was given in good faith. Later the trustee brought an application to have the same debenture declared void as a fraudulent preference under s-s.73(1) of the *Bankruptcy Act*. In dismissing the application Henry J. noted that the Court of Appeal had determined that the debenture was not void against the trustee, and that in the prior proceeding it was common ground that the debenture was given in good faith and was not a fraudulent preference, and he held (i) that the trustee was estopped and, (ii) that it would be an abuse of the process of the Court to permit the trustee to raise on successive applications all the possible attacks on a security that are mandated under the *Bankruptcy Act*:

> ... when by the exercise of reasonable diligence the means could be found to assert them all and have them all disposed of at the same time.

58 The ground of abuse of process was held to be available to block the second application if needed, but it is clear from his reasons that the decision of Henry J. was primarily based on *res judicata*, the *res* being that the Court of Appeal had held that the debenture was not void against the trustee and that the trustee appeared to have admitted as much in the first proceeding. In his reasons Henry J. quoted from *Maynard v. Maynard*, including the famous passage from Wigram V.C. in *Henderson v. Henderson*, and he does state that the trustee could have asserted all his claims in the first application, those statements being indicative of a broad approach to estoppel, such as is urged on behalf of the respondent in these proceedings, and involve matters which, with respect, were not necessary to the decision. The actual decision need not depend on a consideration of what was omitted in the first proceedings; it turns on the express finding that the debenture had been expressly found not to be fraudulent or void against the trustee. Te approach of Henry J. is reminiscent of the broad approach of Porter J.A. as quoted in *Cahoon v. Franks*, *supra*, but on its facts what was actually decided fits easily within the traditional canons of issue estoppel. It is the reference to abuse of proceeds that I find to be of greatest general significance in the decision because there Henry J. is saying, in effect, that the trustee should have brought forward his whole case, without regard to how many causes of action that might entail.

59 As noted, in *Fidelitas Shipping Co. Ltd. v. V/O. Exportchleb*, *supra*, Lord Denning M.R. suggested that the principle stated by Wigram V.C. with regard to cause of action estoppel might also apply to issue estoppel. That initiative has been referred to with approval in a number of Canadian decisions but, as discussed below, has been seriously questioned by the House of Lords in *Carl Zeiss Stiftung*, *supra*.

60 It is my observation that many of the decisions that employ or quote language suggesting the extension of the *Henderson v. Henderson* reasoning to issue estoppel are in cases where the result would be the same without any

such extension, because they are cases that can be fitted into the narrower and traditional conception of issue estoppel. *Maynard v. Maynard* is itself such a case, as evidenced by the following statements of Cartwright J. at p.356:

> On comparing clauses (a) and (b) in the notice of motion in the present proceedings with paragraph 2 of the statement of claim in the former action, it appears to me that, although not expressed in identical words *they ask for the very same relief*.
>
> [Emphasis added]

The point is reiterated at p.358 as follows:

> It may be that some of the points of law argued before us were not thought of at the time. All this, however, would, it seems to me, be *nihil ad rem*. The issue now before us was, I think, expressly raised in the peadings in the earlier proceeding and was decided by the judgment of Mackay J. in dismissing that action. The appellant has submitted the same question as is now before us although perhaps not the same arguments) to the decision of a court of competent jurisdiction and he cannot now relitigate the matter.

What was actually decided in *Maynard* appears to fit within the description of *res judicata* in the sense of cause of action estoppel and not to involve issue estoppel, let alone to involve it in the extended sense referred to in *Fidelitas Shipping*, *supra*. Contrary to the reasons for which it was cited by the respondent, *Maynard* turned on a prior adjudication of the *same* question and not on some question or issue that could and ought to have been brought forth, under a party's obligations to present his whole case, but was not.

61 In *Spencer Bower*, at p.152, the following is offered as a compendious statement of the "rule" as to issue estoppel:

> Where the decision set up as a *res judicata* necessarily involves a judicial determination of some question of law or issue of fact, in the sense that the decision could not have been legitimately or rationally pronounced by the tribunal without at the same time, and in the same breath, so to speak, determining that question or issue in a particular way, such determination, even though not declared on the face of the recorded decision, is deemed to constitute an integral part of it as effectively as if it had been made so in express terms: but, beyond these limits, there can be no such thing as a *res judicata* by implication.

It will be noted that that formulation makes no reference to matters that might have been argued, or causes of action that might have been asserted, but were not. The emphasis is all the other way, i.e. upon matters that were decided expressly or impliedly in the course of the prior decision and that were integral to it.

62 A recent statement of the broader view is that found in *Greenhalgh v. Mallard*, [1947] 2 All E.R. 255, where Somervell L.J., at p.257, states:

> I think that on the authorities to which I will refer it would be accurate to say that res Judicata for this purpose is not confined to the issues which the court is actually asked to decide, but that it covers issues or facts which are so clearly art of the subject-matter of the litigation and so clearly could have been raised that it would be an abuse of the process of the court to allow a new proceeding to be started in respect of them.

That statement speaks of the "subject-matter of the litigation" and not of a cause of action. Does it mean what *ought* to have been the subject-matter of the litigation because it was integrally bound up with the claims actually made? This, of course, raises the question of what actually is the "subject-matter of the prior litigation". Our applicant has argued that it is, in effect, what the plaintiff or applicant chose it to be and acknowledges, following *Hoystead*, that all arguments in support of that subject-matter should have been put forth in the prior litigation. In one sense, what we have on this application is a dispute as to what is the "subject-matter of the litigation".

63 In *Angle v. M.N.R.*, [1974] 47 D.L.R. (3d) 544, a decision of the Supreme Court of Canada, the majority judgment was delivered by Dickson J. and turned on the determination that the question in the second proceeding was not the same

as was contested in the prior matter, with the result that there was no estoppel. In the course of his judgment Dickson J. cited with approval the definition of the. requirements of issue estoppel given by Lord Guest in *Carl Zeiss Stiftung*, *supra*, at p.935, as follows:

> (1) that the same question has been decided:
>
> (2) that the judicial decision which is said to create the estoppel was final;
>
> (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.

On this application there is no difficulty about meeting requirements (2) and (3) above. The question is the extent to which the same question has been decided and the subsidiary question is whether it is so to the extent that the other claims now made by the applicant could and ought to have been brought forward in the prior proceeding. There is no reference in *Angle v. M.N.R.* to that subsidiary question, nor was there any need for such a reference.

64 The dictum in *Fidelitas Shipping* that would make applicable to issue estoppel the doctrine of *Henderson v. Henderson* has been seriously questioned. In *Carl Zeiss Stiftung*, *supra*, Lord Reid stated at p.916:

> Indeed I think that some confusion has been introduced by applying to issue estoppel without modification rules which have been evolved to deal with cause of action estoppel, such as the oft-quoted passage from *Henderson v. Henderson*....

And at p.917:

> The difficulty which I see about issue estoppel is a practical one. Suppose the first case is one of trifling importance but it involves for one party proof of facts which would be expensive and troublesome; and that party can see the possibility that the same point may arise if his opponent later raises a much more important claim, what is he to do? The second case may never be brought. Must he go to great trouble and expense to forestall a possible plea of issue estoppel if the second case is brought? This does not arise in cause of action estoppel: if the cause of action is important, he will incur the expense: if it is not, he will take the chance of winning on some other point. It seems to me that there is room for a good deal more thought before we settle the limits of issue estoppel.

It is to be note that in the immediately preceding quotation it is to cause of action estoppel that issue estoppel is contrasted. Lord Upjohn expressed at p.947 of the report last referred to essentially the same views.

65 In *Spens v. Inland* Revenue Commrs., [19701 3 All E.R. 295, at p.301, Megarry J. approved a statement in *Spencer Bower* that one must enquire with unrelenting severity whether the determination in the prior action on which it is sought to base the estoppel is "so fundamental to the substantial decision that the latter cannot stand without the former. Nothing less than this will do".

66 My attention has been drawn to Ontario decisions stated by the respondent to stand for a broad interpretation of issue estoppel, of the sort disapproved in *Carl Zeiss Stiftung*. On examination those decisions, although some of them contain statements apparently supportive of the broader view, are seen to be either cases of cause of action estoppel or issue estoppel in the narrower, traditional, sense. Thus, I have already observed of the decision in *Heather's House of Fashion (No.2)* that it was, with respect to *res judicata*, a decision turning on the finding that the fundamental point in issue had been decided in prior litigation between the parties. That decision is more important from our point of view for what it said about abuse of process. *Henning v. Northern Heights (Sault) Ltd.* (1980), 30 O.R. (2d) 346 (C.A.), was expressly a case of *res judicata* or cause of action estoppel and not issue estoppel.

67 The decision of Callaghan J. in *Dominion Trust Co. v. Kay et al.* (1983), 33 C.P.C. 130, is important to this enquiry in its own right and because it sets forth a quotation from the unreported decision delivered by Arnup J.A. for the Court

of Appeal in *Peters v. Unacom Industrial Equipment*, released February 27, 1976. I shall refer first to the latter aspect. The quotation from the reasons of Arnup J.A. is as fllows:

> In our view the County Court Judge on the second application was right in holding that the matter was *res judicata*. A judgment or order finally settles between the parties all those matters which were actually raised as issues between the parties, and decided by the judgment but is also conclusive as to all other issues which could have been raised at the time of the hearing and were relevant to its determination. The leading authority in this province, which in turn is based upon a number of English cases, is the judgment of the Court of Appeal in *Re Knowles*, [1938] O.R. 369.

I am not aware of the facts in *Unacom* and I appreciate that the language of the above quotation could be consistent with the extended form of issue estoppel proposed in *Fidelitas Shipping*, *supra*. However, I am satisfied that that was not the burden of the decision of Arnup J.A., because he said he was applying law laid down in *Re Knowles*, [19381 O.R. 369 and I have read that decision. It relates to a will under which the residue of an estate was left to the Town of Dundas for paving a street and beautifying a park and some other municipal property. On an application for directions brought in 1933 by the executor it was held that the gift to the Town was valid. In 1937 a further application was brought, in effect contending that the gift was invalid because it was not charitable and was a perpetuity. The matter was held to be *res judicata*, pure and simple, because the applicant was seeking to relitigate the very same point, i.e. the validity of the gift to the Town. He was found to be introducing a new argument but no new facts and no different issue or issue not already decided. That decision is fully consistent with *Hoystead*, *supra*, and in no sense is it an application to issue estoppel of the *Henderson v. Henderson* doctrine. In so far as *Unacom* is based upon *Re Knowles* (and it is stted to be so) it is not an authority for the view contended for by the respondent.

68 The decision in *Dominion Trust Co. v. Kay et al.*, *supra*, is in my respectful opinion clearly correct as a disposition of the issue that came before Callaghan J. The plaintiff had sued in contract on an alleged oral agreement under which he was to be paid for services in relation to a sale of real estate. He was not at the material time registered under the *Real Estate and Business Brokers Act*, R.S.O. 1980, c.431, and so under that Act was prevented from bringing an action for such a commission or payment. The statement of claim in the first action was struck out as disclosing no cause of action. The plaintiff immediately brought an action in tort for deceit, claiming exactly the same amount. On a motion under Rule 126 of the *Rules of Practice* Callaghan J. found that on the merits that claim was equally barred by the Act and he struck out the statement of claim. He also found that the matter was *res judicata*, following *Fidelitas Shipping*, *supra*, *Unacom*, *supra*, and *Morgan Power Apparatus Ltd. v. Flanders Installations Ltd.* (1972), 27 D.L.R. (3d) 249 (B.C.C.A.). *Fidelitas Shipping* has been seriously questioned by the House of Lords in *Carl Zeiss Stiftung*, *supra*, and *Unacom*, as based on *Re Knowles*, *supra*, was not nearly as broad a decision as the quote from it might suggest to someone already accepting the doctrine of *Fidelitas Shipping*. With respect to the case before him and with respect to *Morgan Power Apparatus*, Callaghan J. made and quoted the following statements, at pp.138 and 139:

> In my view, the present action is simply an attempt to impose a different legal conception of the relationship between the parties upon the identical facts which were pleaded in the original action. In my view what has been done here is he same as was attempted in *Morgan Power Apparatus Ltd. v. Flanders Installations Ltd.* (1972), 27 D.L.R. (3d) 249 (B.C.C.A.). In that case the plaintiff commenced an action against the defendant alleging that the defendant owed it sums of money on an account stated for services rendered, or for breach of contract, or on an accounting. After some time, by agreement between the parties, the action was dismissed without costs. The plaintiff then commenced a second action against the defendant based upon allegations that by contracts between the plaintiff and the defendant, they were partners in a joint venture or, alternatively, that the defendant was an agent for the plaintiff and had breached its duty as a partner or its duty under the fiduciary relationship established by the contracts. In this second action the plaintiff sought a somewhat lesser sum of money than in the first. Davey C.J.B.C. said at p.251:
>
> > That being the case, it seems to me that the second action involves nothing more than a claim for the same sum of money and arising out of the same relationship and for the same services but based upon a different legal conception of the relationship between the parties. The first action was one of contract, for damages for breach of contract (leaving aside for a moment the moneys claimed under an account stated) and the second action is

dependent upon breach of a duty which the defendant assumed under the very same contracts, which would give the plaintiff in the second action the money it sought in the first action but under a different legal concept.

It seems to me that, that being so, the doctrine of *res judicata* applies.

69 As is probably apparent, I am unable to accept in full, with respect to issue estoppel, either the position put forward by the applicant or that put forward by the respondent. With respect to the latter, it is my opinion that the serious reservations expressed by Lords Reid and Upjohn in *Carl Zeiss Stiftung*, will have effectivly ended the influence of the doctrine in *Fidelitas Shipping Co.* and in *Thoday v. Thoday*, [1964] 1 All E.R. 341, which would have made the inclusive rule of *Henderson v. Henderson* applicable to issue estoppel. Furthermore, statements in Canadian decisions that seemed to support that sort of extension of *Henderson v. Henderson* have been seen to have been made in cases that were actually decided on more traditional grounds. *Maynard v. Maynard*, *Unacom*, *Re Knowles* and at least part of *Heather's House of Fashion (No.2)* are examples discussed above.

70 On the other hand, the position urged by the applicant, with its entire focus on the cause of action as the sole criterion for *res judicata* other than issue estoppel, seems to me to be excessively rigid and formal. It would leave the question of what constitutes *res judicata* (other than issue estoppel) for purposes of subsequent litigation between the parties or their privies to be determined entirely by what causes of action had been chosen to be put forward by the parties in their prior litigation, regardless of the range of the background confrontation between the parties or the comprehensive nature of the dispute between them. It seems to me that there is a broad evolution in the law, away from formalism, or perhaps, to state it more cautiously, away from formal distinctions from time to time found to be no longer relevant in the sense of representing meaningful and valuable differentiations or categories. It is surely time to question whether the distinction between legal remedies and equitable remedies, for disputes between the same parties arising out of the same factual situations or series of transactions, ought always to be determinative of whether or not the defence of *res judicata* is available. The fundamental concerns, operating in the background, are the public policy in favour of an end to litigation and the policy, in the interess of fairness between the parties, of not letting a party split his case. It appears to me that the law has been evolving in the direction of a revised set of criteria and control devices. The leading decision is *Cahoon v. Franks* where the Supreme Court of Canada treated as separate heads of damages claims which in the heyday of the analytical, parsing, fragmenting approach had long been categorized as separate causes of action. That decision seems to me to have been a significant departure, albeit that it was expressed in the traditional language of cause of action. Thus, it did not decide that the cause of action was no longer the touchstone. Rather it declared that what had hitherto been regarded as two causes of action would henceforth be regarded as two heads of damage in a single cause of action. The breakout having occurred, is it to stop there and be confined to a statement that where a party has suffered damages in a motor accident his cause of action is for all the damages he or she has suffered whether in the way of property damage or personal injuries, or anything else that is compensable? Or was the development more significant, signalling a move toward criteria and categories of more contemporary relevance than the traditional causes of action? I believe it was the latter and that the cause of action, narrowly conceived, is no longer always determinative. It is premature, and at this stage of the development inappropriate for judge of first instance to attempt to formulate the general criteria and the control devices that will come to supplement and sometimes displace the traditional ones stressed by the applicant. It is enough for these purposes to note that in *Cahoon v. Franks* the narrow version was broken away from. Moreover, the decision of Henry J. in *Heather's House of Fashion (No.2)*, where it dealt with abuse of process, was asserting the public interest in an end to litigation and referred to the whole series of transactions, claims and causes of action involed in the confrontation between the trustee in bankruptcy in that case and a creditor bank claiming to be a secured creditor on the basis of an impugned debenture. The remarks may have been *obiter*, as they dealt with an alternative argument where there was in effect a finding that the pre-empting defence of *res judicata* had been made out, but they are nevertheless important because they manifest an unwillingness to be confined to the criterion of the cause of action, narrowly conceived. Similarly, in *Dominion Trust Co. v. Kay et al.*, Callaghan J. looked to the reality of the underlying situation that gave rise to the claims in the two actions, to the illegality that affected both actions equally and to the facts that the dollar amount of the successive claims were the same and that the two claims arose out of the same transaction or series of transactions, differently characterized firstly as a contract claim and secondly as a tort claim.

71 As evidenced by the foregoing quotation therefrom, the decision of the British Columbia Court of Appeal in *Morgan Power Apparatus* was also one in which the court looked at the underlying realities of the relationship of the parties and did not base its decision on the technicality of whether the second action involved the same cause of action.

72 The four decisions last mentioned cannot properly be interpreted as applications of the doctrine of *Henderson v. Henderson* to the question of issue estoppel. Their focus is not on what was omitted to be argued in the prior action but upon what was in fact the issue, broadly and realistically stated, in the prior action. That, and not a narrow cause of action, was taken to be the *res*, or the 'matter' or 'substance' of the prior action. It was not confined to one or more formal causes of action. Regard was paid to the real scope of the confrontation in the prior action, including the whole of the relevant relationship between the parties, the transactions btween them and the objectives of the parties.

73 That certainly does not mean that parties should have to join in one action all causes of action that they may have against one another, or risk being met with the defence of *res judicata*. There are many situations, probably the majority of situations, where traditional criteria based upon the distinctness causes of action are quite appropriate as the basis for deciding whether a matter is *res Judicata*. Examples abound, including claims with respect to different motor accidents, or based on quite different contracts, or based on claims arising out of quite different transactions not part of a longer whole or related series of transactions. But where the prior litigation and the subsequent litigation arise out of the same transaction a claimant should not, particularly in a bankruptcy situation where there is an imperative about settling all claims because, for practical purposes, one of the parties may be going to disappear, be able after failing with a contract claim to bring, with no new evidence, a claim in tort to recover substantially the same amount in respect of the same transaction, or, having failed with a legal claim to bring in the same circumstances a claim based on equity, in each case attempting to rely on the fact that different causes of action are involved. In such circumstances the different cause of action should be treated as if it were no more than a different *argument* advanced to achieve essentially the same recovery, and the above-quoted dictum from *Hoystead v. Commissioner of Taxation* should be applied. That would be to treat the real confrontation and issues between the parties as the res or the substance or matter of the prior litigation and make it unnecessary to attempt to apply to issue estoppel the expanded scope of *res judicata* established in *Henderson v. Henderson*.

74 In *Tessis v. Scherer et al.*, *supra*, by the time the appeal was head the bankruptcy of Agil had taken place and the trustee in bankruptcy had been made a party to the action, the trial judgment had at the least raised a problem under the *Planning Act* and it was known that the trustee in bankruptcy was contending that Tessis had no rights vis-a-vis Agil or its property other than the rights of an unsecured creditor in the bankruptcy. Generally speaking, that was the scope of the confrontation between Scherer and the trustee as the main protagonists in the prior action. What then was the subject or matter of the defence of *res judicata*? In my opinion it properly included of all questions or causes of action, legal or equitable, impacting upon the question of whether or not Tessis was a secured creditor in the bankruptcy. As the loan agreement was before the Court of Appeal and was referred to in the pleadings at trial, rights assertable under it formed part of the res before the Court of Appeal. In my opinion the omission to make at that stage, arguments based on equity and the loan agreement, should not turn on the question of whether such arguments involved the assertion of a different, equitable, cause of action but should be regarded as the omission to make an argument available on the material before the Court, whether or not such arguments or claims would entail a different cause of action. The *res* in the prior action is the real confrontation between the parties and the finding of estoppel would be made on a basis complying with or analogous to, the decision in *Hoystead, supra*. Given the knowledge of the parties by the time of the appeal, the practical difficulties of concern to Lords Reid and Upjohn in *Carl Zeiss Stiftung* do not arise because neither Scherer nor the trustee would have decided to omit in the prior action any claim or argument on the ground that its importance would not justify the cost of putting it forward. Both knew what was actually at stake between them.

75 The result in my judgmen is that the applicant is estopped from asserting that Tessis is entitled to any interest in the real property in question, or to rank as a secured creditor in the bankruptcy of Agil.

76 The remaining issue with respect to the defence of *res judicata* or issue estoppel is whether the applicant is estopped from asserting a claim to the proceeds of the sale of the real property, not as a secured creditor but as the beneficiary of a constructive trust. Such a claim is based upon the same loan agreement which was before the court in the prior action. In one sense the assertion of entitlement to be the beneficiary of a constructive trust is merely another legal conception or argument to counter the trustee's position that Tessis is no more than an unsecured creditor in the bankruptcy and that the issue should have been raised on the appeal. The facts upon which the constructive trust argument was based were all known by the time of the argument of the appeal. Thus it was known that there was a loan agreement, that the expressed intention was that Tessis was to advance the money only if he obtained the mortgage and only if all zoning and similar regulatory requirements had been met, that the loan agreement provided that most of the proceeds of the loan were to be applied to paying off prior (purported) mortgages and to finance improvements to the building (meaning that as a factual matter all but a small fraction of the loan proceeds could be traced). All of the documentary and other factual elements available on this application as the basis for the submissions as to a constructive trust were available, or could readily have been made available, on the appeal in the prior action. The bankruptcy of Agil made it more urgent that all relevant causes of action be put forth. In *Heather's House of Fashion (No.2)*, *supra*, Henry J. stated that it would be an abuse of process for a trustee in bankruptcy to bring successive actions attacking the validity of the same debenture issued by the ankrupt, first because of alleged defects in its registration, next as a preference under the *Bankruptcy Act*, next as a fraudulent conveyance, and so forth. Although, based on the doctrine of *Re Condon; Ex parte* James, the duty on the trustee is probably higher than the duty on a person disputing the trustee's right to specific property, there is force to the contention that in a bankruptcy situation such a claimant should bring forth all his claims arising out of the transaction in question whether or not they involved different causes of action. On that basis the matter or substance of the prior litigation would include not only all issues impinging on the question of whether Tessis is a secured creditor in the Agil bankruptcy, but also all issues impinging on the broader question of whether Tessis is anything more than an unsecured creditor in the bankruptcy.

77 If Scherer had been a participant at the trial level and separately represented I would, on balance and not without difficulty, have held that he was estopped from putting forth in these proceedings a claim to be other than an unsecured creditor in the bankruptcy and therefore estopped from claiming to be the beneficiary of a constructive trust. However, the matter is complicated by the fact that Scherer became a party only at the appeal level and so might have encountered real difficulty, whether because of the pleadings or otherwise, in expanding the claims on behalf of Tessis to include the constructive trust claim. I conclude therefore that it would be unfair to hold Scherer to be estopped from asserting in these proceedings that Tessis should be dealt with as the beneficiary of a constructive trust. It is therefore necessary to consider the constructive trust claim on its merits.

Constructive Trust

78 The applicant's alternative submission is that Tessis should be regarded as the beneficiary of a constructive trust in accordance with which the trustee, as successor to Agil, holds s Trustee for Tessis the traceable proceeds of the funds advanced by Tessis.

79 It is submitted that Tessis advanced the $625,000 to Agil on the mistaken assumption, induced by the false representation of Agil, that Agil owned no abutting lands and therefore that the mortgage created a legal interest in the land. The loan agreement is cited as evidence of the intention of both Tessis and Agil that the loan be secured by a valid realty mortgage. It is therefore submitted that the proceeds of the loan were paid out by Tessis under a mistake, in effect that there was a fundamental mistake, and a material misrepresentation in the inducement, in that Tessis clearly would not have made the loan if he had known that it was not to be secured by a valid and enforceable legal mortgage. It was also strongly argued that, as between Tessis and Agil, Agil is more at fault, and that in all the circumstances, equity would not allow Agil to be unjustly enriched by keeping the loan proceeds without providing the security agreed to be given. The related assertion is that the trustee now stands in the shoes of Agil as representative of the unsecured creditors of Agil and that the same arguments should apply to prevent the unjust enrichment of such creditors.

80 I digress to deal with the question of whether an unsecured creditor in a bankruptcy can be said to be unjustly enriched where, even with the benefit of the disputed property, he would still be receiving less than one hundred cents in the dollar of his claim. Clearly the answer has to be in the affirmative. The focus of attention should be on the transaction or transactions in question and not on the totality of the financial position of the bankrupt estate. An unjust enrichment is no less an unjust enrichment where its receipt leaves the unsecured creditors receiving less than the amount of their respective claims.

81 Similarly, nothing should turn in these proceedings on the fact that it is Scherer and not Tessis who is arguing for the imposition of a constructive trust. Scherer having been given standing, he is fully entitled (subject to any applicable issue estoppel) to have the constructive trust question dealt with in these proceedings.

82 Another peripheral question arises from the oral submission by counsel for the applicant that the constructive trust claim is an alternative means of providing the security bargained for by Tessis. With respect, the assertion of a constructive trust is not a means of executing on the judgment or enforcing the alleged security of Tessis. It is an independent alternative claim which, if made out, does not require an interest in the land (such as would offend the *Planning Act*) and, at least arguably, is not affected by s-s.50(1) of the *Bankruptcy Act*. It is not to be seen as an assertion that Tessis is a secured creditor. Incidentally, if it were to be so regarded it would be met, successfully in my opinion, with the defence of issue estoppel. Furthermore, if the remedy of constructive trust based on unjust enrichment were to be regarded as some form of execution, it would be blocked by the provisions of s-s.50(1) of the *Bankruptcy Act*. In their written material and throughout most of their argument counsel for the applicant dealt with the constructive trust claim as a fully independent alternative claim, and that is how I propose to consider it.

83 Yet another peripheral question relates to the effect on this claim of claims Tessis may have against Scherer and indirectly against the latter's insurance. As acknowledged in the statement of fact and law filed on his behalf on this application, Scherer carried solicitor's liability insurance to which Tessis could look if he were successful in an action against Scherer. It is common ground that if Scherer is successful on this application that success will reduce his exposure and that of his insurer to the claims of Tessis against him. There arises the question of whether the existence of the claim against Scherer or of such insurance should have any bearing upon the decision as to the imposition of a constructive trust in favour of Tessis. It is clear that if the claims put forward on behalf of Tessis had been based upon an express trust the existence of such insurance would have made no difference whatsoever. If property were found to have been held by the bankrupt on an express trust for another the property would not be property of the bankrupt and so the trustee in bankruptcy would have no claim to it. This position is confirmed by s.47(a) of the *Bankruptcy Act* which states:

> 47. The property of a bankrupt divisible among his creditors shall not comprise
>
> (a) of property held by the bankrupt in trust for any other person,

84 The position would be the same with respect to the traditional forms of non-express trusts, such as implied trusts, resulting trusts and the older conception of the constructive trusts, all of which are sometimes, along with express trusts, referred to collectively as 'substantive trusts' to distinguish them from the openly remedial constructive trust which the courts do not purport to 'discover' or imply but frankly impose in order to do justice by preventing an unjust enrichment. When a remedial constructive trust is imposed the imposition necessarily reaches back in time to impose the trust upon property or its proceeds as of an earlier time. The imposition creates a property right. In effect, in a bankruptcy situation it would, if applicable, amount to a determination that the property in question was not property of the debtor and had not been so at the time of the bankruptcy. Once imposed the remedial constructive trust has the same effect as an ex press trust or other 'substantive' trust. The question is whether the existence of insurance that might indemnify a claimant for all or part of his losses is a factor that should be taken into account by the Court in deciding whether or not to impose a constructive trust. In my view it is not. Insurance is a contract of indemnity ad, whether by subrogation or otherwise, the insurer is entitled to see that all the insured's rights against third parties are enforced to the full. Although a remedial constructive trust is sometimes imposed where, the other required elements being present, it is expressly stated by the

Court (as in *Palachik v. Kiss, supra*), that the claimant has no other legal or equitable remedy, the primary meaning of such statements is that the claimant has no other remedies against the parties to the transactions. The existence or non-existence, of a claim against Scherer or of insurance not taken out pursuant to the agreement between the parties with respect to the transaction ought not in themselves, in my opinion, be factors affecting the Court's decision as to whether or not to impose a constructive trust. If the insurance had been taken out pursuant to an agreement relating to the transaction that would be a factor to be taken into account in relation to the question of the assignment of risks under the contract, but that is not our case. The question of the assignments of risks under the loan agreement will be dealt with below but on a basis quite independent of whether or not Scherer's liability to Tessis would be in whole or in part covered by insurance.

85 To return to the main argument, the submissions of Ms. Robinson on behalf of the applicant were based upon the conception of the remedial constructive trust clearly made part of the common law (as distinct from civil law) of Canada by the decisions of the Supreme Court of Canada in *Rathwell v. Rathwell* (1978), 83 D.L.R. (3d) 289, *Pettkus v. Becker* (1981), 117 D.L.R. (3d) 257 and *Palachik v. Kiss*, 146 D.L.R. (3d) 385. The remedial constructive trust as applied in such decisions differs from the earlier English and Canadian conceptions of the constructive trust in that it does not depend upon the finding of a pre-existing fiduciary relationship.

86 The recent Canadian developments have been centre in matrimonial or family property cases, starting with the minority judgment of Laskin C.J. in *Murdoch v. Murdoch*, [1957] 1 S.C.R. 423. As noted by John L. Dewar in his, article "The Development of the Remedial Constructive Trust", (1982) 60 C.B.R. 265 at p.260:

> Even before *Pettkus v. Becker*, a number of Canadian judgments had explained the constructive trust in terms of the American model, though they do not appear to have made a significant impact on the development of the law until the judgment of Laskin J. (dissenting) in *Murdoch v. Murdoch*. Laskin J.'s views-were adopted by three members of the Supreme Court in *Rathwell v. Rathwell*, and finally prevailed in *Pettkus v. Becker*.
>
> [Footnote references omitted]

To those decisions of the Supreme Court of Canada there should be added the decision of Wilson J., speaking for the Court, in *Palachik v. Kiss, supra*, one part of which was decided on the basis of quasi-contract but another major part of which was based squarely on a remedial constructive trust on the American model as approved and applied in *Pettkus v. Becker*. In *Palachik v. Kiss* the constructive trust was applied to a fund of money.

87 Although it emerges from the lengthy judgment of Goulding J. in *Chase Manhattan Bank N.A. v. Israel British Bank (London) Ltd.* (1979), 3 All E.R. 1025 (Ch.D.) that the American law of unjust enrichment and the related constructive trust is not fully evolved or without fundamental disputes as to its nature, the following quotation from *Scott: The Law of Trusts* (3d.ed.) Vol.5, p.3215 may be taken as a very general description or outline of the American concept of the constructive trust:

> ... A constructive trust is imposed where a person holding title to a property is subject to an equitable duty to convey it to another on the ground that he would be unjustly enriched if he were permitted to retain it. The dutyto convey the property may arise because it was acquired through fraud, duress, undue influence or mistake, or through a breach of fiduciary duty, or through the wrongful disposition of another property. The basis of the constructive trust is the unjust enrichment which would result if the person having the property were permitted to retain it. Ordinarily a constructive trust arises without regard to the intention of the person who transferred the property.

In the same volume at pp.3427 and 3428, there appears the following statement which is of interest with relation to the factual background of the within application:

> *465. Transfer induced by mistake.* There are numerous cases in which a court of equity has decreed reformation or rescission where land is conveyed under a mutual mistake. Where under a mutual mistake the grantor conveys a piece of land which it was not intended by the parties should be conveyed, the title to the land passes to the grantee

in spite of the mistake, and it is within the power of the grantee to pass the title to a purchaser for value and without notice of the mistake. If the land has not been conveyed to a bona fide purchaser, the grantee can be compelled to reconvey it to the grantor, since he would be unjustly enriched if he were permitted to retain it. While the grantee holds title to the land, therefore, he holds it upon a constructive trust for the grantor. If the grantee sells the land to a bona fide purchaser, the grantor can enforce a constructive trust of the proceeds in the hands of the grantee, although he cannot reach the land itself in the hands of the purchaser.

Similarly where chattels are conveyed or money is paid by mistake, so that the person making the conveyance or payment is entitled to restitution, the transferee or payee holds the chattels or money upon a constructive trust. In such a case, it is true, the remedy at law for the value of the chattels or for the amount of money paid may be an adequate remedy, in which case court of equity will not ordinarily give specific restitution. If the chattels are of a unique character, however, *or if the person to whom the chattels art are conveyed or to whom the money is paid is insolvent*, the remedy at law Is not adequate and a court of equity will enforce the constructive trust by decreeing specific restitution. The beneficial interest remains in the person who conveyed the chattel or who paid the money, since the conveyance or payment was made under a mistake. ...

[Emphasis added and footnote references omitted]

88 In *Dewar: The Development of the Remedial Constructive Trust*, *supra*, the following is stated at p.275:

It should be noted that in American law the significant development which marked the transformation of the constructive trust into a generalized remedial device was the dispensing by the courts with any necessary connection with fiduciary relationship as a prerequisite to its imposition and to the granting of the tracing remedy.

[Footnote references omitted]

Counsel for the respondent has argued that a constructive trust should not be imposed where there is an obvious and acknowledged relationship of debtor and creditor. With respect, that contention would have much greater force if a constructive trust depended on the prior existence of a fiduciary relationship, for the relationship of debtor and creditor might then be inconsistent with the fiduciary relationship. The remedial constructive trust is not similarly barred by the existence of a debtor-creditor relationship.

89 Turning to the above-mentioned Canadian authorities one finds in the judgment of Dickson J. in *Rathwell v. Rathwell*, *supra*, at p.306, the following statement with respect to the constructive trust:

The constructive trust, as so envisaged, comprehends the imposition of trust machinery by the Court in order to achieve a result consonant with good conscience. As a matter of principle, the Curt will not allow any man unjustly to appropriate to himself the value earned by the labours of another. That principle is not defeated by the existence of a matrimonial relationship between the parties; *but for the principle to succeed the facts must display an enrichment, a corresponding deprivation and the absence of any juristic reason - such as a contract or disposition of law - for the enrichment*.

[Emphasis added]

90 Although the above-mentioned Supreme Court of Canada decisions expressly adopting the remedial constructive trust have been decisions relating to matrimonial relationships and family property, there is nothing in them to suggest that the principles there adopted are to be confined to cases of that type. The statement by Dickson J. that the principle upon which a constructive trust is based is not to be defeated by the existence of a matrimonial relationship is to quite the opposite effect.

91 In *Rathwell* the majority did not decide the case on the basis of constructive trust but rather on the basis of resulting trust. It was in *Pettkus v. Becker* that a clear majority decided on the basis of constructive trust and approved the

above-quoted excerpt from *Rathwell*. The principle was further reinforced by the Supreme Court's unanimous decision in *Palachik v. Kiss*.

92 The decision in *Pettkus*, by clearly eliminating the former requirement of a pre-existing fiduciary relationship, has changed the character and greatly broadened the availability of the constructive trust remedy, but the three requirements outlined by Dickson J. in *Rathwell* are very broad. By adopting those requirements *Pettkus* inevitably raises questions not only as to control devices but as to the relationship of constructive trust to remedies such as subrogation and equitable lien. In *Unjust Enrichment* (Butterworths, Toronto 1983), Professor G. B. Klippert asserts at p. 193 that although future decisions wll be needed to work out its implications the decision in Pettkus is the clearest indication to date that the Supreme Court of Canada intends, with respect to the law of unjust enrichment, a real fusion of common law and equitable principles. It is to be expected that such a development will not only increase the scope and flexibility of the remedies based on unjust enrichment but will also increase the application in constructive trust cases of control devices developed with respect to common law restitution action based on unjust enrichment. There is concern, such as that expressed by Maitland J. in *Pettkus*, that a broad principle of liability based on unjust enrichment would result in too broad a judicial discretion. In Chapter 2 of *Unjust Enrichment* Professor Klippert states that the history of the development of control devices in the law of negligence after *Donoghue v. Stevenson*, [1932] A.C. 562, introduced the broad principle of liability based on negligence is instructive in this regard. He suggests that a similar development is necessary with respect to unjust enrichment. Thus at p.36 he states:

> A restitutionary action is not resolved by reciting the general principle of unjust enrichment, and leaving it to each judge to decide what is fair. As in a negligence case, the decision-making process is more complex. The definition of unjust enrichment becomes the starting point, and not a substitute, for an analytical approach focusing on the elements of the unjust enrichment cause of action. These constituent elements provide the courts with a means to test the limits of liability. Without the recognition of specific elements based on the general principle, there is no mechanism to delimit the scope of legal protection. This point has been stressed in the area of negligence:

Professor Dewar then quotes the following paragaraph from Fleming, " *Duty and Remoteness: The Control Devices in Liability for Negligence*" (1953), 31 Can. Bar Rev. 471:

> The basic problem in connection with the 'tort of negligence is, therefore, that of limitation of liability. The mechanisms associated with liability for negligence, such as the duty and causation concepts, are nothing more or less than the control devices fashioned by the courts to achieve that purpose. Their function may be assessed both from this general point of view as a necessary feature conditioned by the otherwise unlimited scope of the action of negligence or more particularly as instruments designed to assist judicial control of the jury 'law'.

93 An example of a control device attaching to prevent recovery on a claim based on alleged unjust enrichment is afforded by decision of our Court of Appeal in *Nicholson v. St. Denis* (1976) 57 D.L.R. 699. There the plaintiff made improvements to a building at the request of a person who occupied the lands under an agreement of purchase and sale. The plaintiff did not know of the vendor's interest in the land and the vendor was unaware that the improvements were being made. When the purchaser fell into arrears under the agreement of purchase and sale the vendor retook possession of the land. The unpaid plaintiff obtained judgment at trial for the value of the improvements, the judgment purporting to be given to avoid unjust enrichment. The judgment was reversed on appeal. MacKinnon J.A., as he then was, explicitly rejected the trial judge's contention that with regard to such a claim the outcome was totally dependent on the individual judge's conscience as to whether he considered the circumstances such as to give rise to the remedy of unjust enrichment, stating, at p.701:

> If this were a true statement of the doctrine then the unruly house of public policy would be joined in the stable by a steed of even more unpredictable propensities.

MacKinnon J.A. went on to state that restitution would not follow every enrichment of one person and corresponding loss by another. He noted the absence of both knowledge of the alleged benfit on the part of the defendant and

any suggestion that there was an express or implied request by the defendant for the benefit. The defendant had no opportunity to refuse the alleged benefit. The plaintiff had not troubled to ascertain the state of the title. In the literature the absence of knowledge, request or acquiescence on the part of the defendant is sometimes referred to as the absence of the "volition factor" required for an unjust enrichment. From the point of view of the defendant a person with whom the defendant had no prior contact incurred expenses officiously making alleged improvements, which the defendant was under no duty, statutory or otherwise,' to make and in circumstances where the defendant cannot be said to have asked for the improvements and where he was afforded no opportunity to refuse them. The volition factor is not an issue in our case. Clearly Agil wanted Tessis' money. And furthermore money is always deemed to be a benefit. *Nicholson v. St. Denis* is cited not because of its particular facts but because it provides such a clear statement of an important control factor and such a clear answer to those who assume that the doctrine of unjust enrichment is merely a matter of the conscience of the individual judge. I believe that none of the intervening decisions on unjust enrichment would result in *Nicholson v. St. Denis* being decided differently today and furthermore that the same general approach is applicable to the remedial constructive trust.

94 The inability to trace the proceeds of money or property has traditionally been a control device with respect to restitutionary claims, more so at common law than in equity. The absence of a generalized unjust enrichment remedy sometimes lead to decisions in which the ability to trace seemed to serve as the basis for a cause of action. Especially where there is developed doctrine of unjust enrichment, the factual ability or inability to trace must be seen as a control device. The ability to trace does not itslf confer a cause of action. In our case the application by Agil of the bulk of the loan proceeds is known. Under the terms of the loan agreement most of the proceeds were applied to the discharge of (what were believed to be) prior mortgages and most of the balance was expended upon improvements to the building. The property has been sold and the proceeds are segregated. Had the prior mortgages been shown to be valid, tracing as against the respondent would thus have presented little problem on the application of a subrogation or constructive trust remedy.

95 The adoption of the remedial constructive trust, viewed as evidence of an intent by the Supreme Court to develop generalized liability based on unjust enrichment, subject to appropriate control devices, casts new light on the remedies of subrogation and equitable charge. But even under the older law of subrogation Tessis on the facts of the case might, if the prior mortgages had been valid, have had a subrogation claim and then, in equity, a right to trace the proceeds into their present form. In this regard see *Brown v. McLean* (1889) O.R. 533 where the plaintiffs made a mortgage loan the proceeds of which were used to pay off a prior mortgage registered against the same property. Unbeknownst to the plaintiff the defendant judgment creditor had a writ of execution in the hands of the sheriff and had directed him to sell. In the absence of subrogation the defendant had priority over the plaintiff's mortgage. The subrogation claim was allowed. The court noted that, if the plaintiff had been aware of the defendants' writ of execution he would have either refused to make the loan or he would have taken assignments of the prior mortgages. The court also stated, at p.536, that the defendant judgment creditor had "not been in any way prejudiced by what has happened, and that no injustice will be done by replacing him in his former position." The case has parallels with the present case. The mortgagee or his solicitors should, as a matter of ordinry prudence, have satisfied themselves as to the absence of writs of execution. It may be asked whether the plaintiff would have prevailed before the Court of Appeal that held in *Tessis v. Scherer et al.*, *supra*, that Tessis was not a *bona fide* purchaser for value and without notice because a search of the realty tax rolls for the adjoining properties would have disclosed that Agil owned abutting lands. Clearly a search for executions is as much a part of the obligation of the solicitor for a mortgagee as a search of tax rolls. There is nothing in the report of *Tessis v. Scherer et al.* to suggest that *Brown v. McLean* was brought to the attention of the court.

96 Subrogation itself is of no avail to Tessis on the facts of this case, because there is nothing to dispel the inference that the mortgages discharged with the proceeds of Tessis's loan were as invalid as Tessis' own mortgage, and for the same reason, contravention of the *Planning Act*. Thus, even if Tessis could claim the rights of the holders of the prior mortgages he would be no further ahead. On the facts, subrogation would avail Tessis nothing.

97 In *Brown v. McLean* the prior mortgage was not a nullity. *Brown v. McLean* remains of interest because of the statement that no injustice was done to the execution creditor by replacing him in his former position. It is clear that in *Brown v. McLean* a valid and prior ranking mortgage was in place before the judgment creditor commenced any steps to realize upon the property. The judgment creditor was deprived of a windfall gain by the granting of the subrogation remedy. If the prior mortgagees in this case had been valid, would the subrogation remedy have been granted to remove a windfall gain from the unsecured creditors in the bankruptcy? That question involves, but is not limited to, the question of whether *Brown v. McLean* would be decided the same way today. The strictures of the Court o Appeal in *Tessis v. Scherer et al* to the effect that Tessis was not in a position analogous to that of a *bona fide* purchaser for value suggest that it might not be decided the same way.

98 In the first part of these reasons, dealing with the several assertions by Scherer that Tessis was a secured creditor of Agil, I held that Tessis could not be regarded as the holder of an equitable lien because such a holder would have an interest in land, and such an interest would be contrary to express provisions of the *Planning Act*. Part of my reasoning was that if an equitable lien were found, its effective date would be the same as the date of the first advance of the loan under the invalid mortgage. It would have been contrary to the statute for the lien to have attached at that time. The equitable lien there considered was a substantive property right, found rather than imposed by the court. It had to arise, if at all, as a lien against land and the statute killed any possibility that the court would find such a lien. The question arises whether, in the context of unjust enrichment and imposed trust devices there could not be a species of equitable lien or charge that did not have to arise, if at all, at the time of the loan but might be imposed as of a later time, specifically when the land was sold and the lien or charge could attach to the proceeds without in any way constituting an infringement of the *Planning Act*. Such a lien might "spring" into existence as a remedial device when imposed by the court but only as of the earliest date upon which it would not offend the *Planning Act*. I believe that such an equitable lien could be imposed in a proper case, which I take to be a situation in which all of the main criteria for the imposition of a constructive trust had been satisfied but the imposition of the constructive trust would result in the trust beneficiary getting too high a proportion of the total property in question. An example would be where the roperty had been expensively improved by the innocent third party into whose hands it was wrongfully transferred by an intervening party. That is not our case. Here, the amount claimed by, or rather for, Tessis is substantially more than is available. The constructive trust remedy is more appropriate, and so no further consideration will be given to the possibility of imposing that sort of equitable lien to avoid unjust enrichment.

99 Although the applicant can correctly attest that Tessis would not have advanced his money unless he thought he was secured by a valid mortgage and can attest that, at least at the level of his solicitor there was reliance on misinformation provided by the governing mind of Agil, this is not a case of simple mistake such as gave rise to the riveting judgment of Goulding J. in *Chase Manhattan Bank N.A. v. Israel-British Bank (London) Ltd.*, [1979] 3 All E.R. 1025. In that case a New York bank by reason of a clerical error paid a second time a large amount of money through the New York clearing house system for the account of the defendant bank in London, which was insolvent. The New York bank sued for a declaration that the second payment was held in trust for it and so formed no part of the assets subject to the statutory trust on the winding up of the insolvent London bank. There was an important issue as to whether the law of England or the law of New York applied. After a lengthy trial Goulding J. found that for different reasons the result was the same under the laws of both jurisdictions, namely that the new York bank was entitled to a declaration that the defendant bank become a trustee for the New York bank as to the second payment. Goulding J. found the second payment was a "pure mistake" (at p.1028). Under English law he purported to find a fiduciary duty on the part of the receiving bank and a corresponding continuing propriety interest in the payor bank as a result of the court operating upon the conscience of the payee. As to the law of New York, GouldingJ. heard and dealt with extensive expert evidence and adopted as a proper statement of the law of New York the above-quoted passage from *Scott on Trusts*3rd ed. (1967), Volume 5 at p.3428. Summarizing the second paragraph of that passage to remove matters relating to different types of transactions, it could be stated as follows:

> ... that where money is paid by mistake so that the person making the payment is entitled to restitution, the payee holds the money upon a constructive trust; although it is true the remedy at law for the amount of the money may be an adequate remedy (with the result that a court of equity will not ordinarily grant specific resolution), where the person to whom the money is paid is insolvent, the remedy at law is not adequate and a court of equity will enforce the constructive trust by decreeing specific restitution.

Scott adds that the beneficial interest remains in the person who paid the money since the payment was made under a mistake. Under that description the constructive trust would appear to have been present in an inchoate way from the time the mistake was made, so that it is there to enforce if the remedy at law proves inadequate. Although it seems to have more of the character of a substantial legal institution than does the openly remedial constructive trust imposed in *Pettkus*, it is well to remember the opening words of Scott's statement, because they introduce the threshold criterion of an entitlement to restitution. It appears that the constructive trust is utilized so that a person already found to be entitled to restitution will not come up short because of the insolvency of the obligor. That is in one sense a narrower net than was set in *Pettkus* and so parts of the area covered by *Pettkus* may not qualify for the full reach of the back-up constructive trust remedy said by Scott to be available to keep a deserved restitutionary remedy from being cut down.

Re Clark (a bankrupt) exp. the Trustee v. Texaco Ltd., [1957] All E.R. 453 is a case that involved a claim by Texaco Ltd. for the price of motor fuel and oil supplied to a bankrupt petrol retailer after the effective date of the bankruptcy of the latter. Texaco was unaware of the bankruptcy when it made the deliveries and was not entitled to submit a proof of loss in the bankruptcy. The bankrupt had paid for certain of those deliveries and the bankruptcy trustee sued to recover those payments. It was held that the trustee could not recover. Although the trustee was clearly entitled under the term of applicable bankruptcy legislation to recover the money, it was decided by the court that in the circumstances it would be unfair for the trustee, as an officer of the court, to assert its legal rights and enrich the estate at the expense of Texaco by taking the whole benefit of the retail sales of the petrol and motor oil in question without paying its wholesale price. There being no constructive trust under the laws of England in the absence of a fiduciary relationship, the decision was founded in part on the rule in *Ex parte* James: Re Condon, [1874] 9 Ch., p.609 [874-80], All. E.R. Rep.388. That rule provides that where it would be unfair for a trustee or other officer of the court to take full advantage of his legal rights as such, the court will order him not to do so and indeed will order him to return monies which he may have collected. The rule imposes a higher standard on the trustee than would be imposed on an ordinary litigant not exercising statutory rights as an officer of the court. The decision in *Re Clark* was urged upon me with the argument that it would likewise be unfair to allow the trustee in bankruptcy to prevail over Tessis on our facts. However, it is my opinion important to note that in *Re Clark* Wolfan J. stated clearly the view that except in the most unusual cases the rule must not be applied where the claimant is in a position to submit an ordinary proof of claim in a bankruptcy. Tesis has submitted such a proof of claim and the trustee has not challenged it. At p.458 of the report Wolfan J. stated:

> The rule is not to be used merely to confer a preference on an otherwise unsecured creditor, but to provide relief for a person who would otherwise be without any.

In my opinion *Re Clark*, *supra*, is no help to the applicant and indeed, although not directly, runs counter to his claim by showing equity less willing to interfere where the claimant has *some* remedy.

The Waters: Law of Trusts in Canada (1974 edn.) a work published before Pettkus made it clear that the remedial constructive trust was firmly established in the law of common law Canada, the learned author speaking of the older formulation of constructive trust based upon a pre-existing fiduciary relationship, said at.p.363-4:

> In principle the constructive trust should be the expression of the right of the claimant to priority in the wrongdoers insolvency; the right to trace should enable that priority to be claimed in the insolvency of the wrongdoing third party who has the property. At this point bankruptcy legislation would intervene to mark off those so-called trustee and *cestui que trust* relationships which having escaped debtor and creditor relationships through the artifice of fiduciary status ought not in policy terms to confer a priority upon the *cestui que trust* in the insolvency of the trustee.

100 Speaking still of the substantive as opposed to the imposed remedial constructive trust, Waters states in footnote is on p.364:

> The question for the courts will be whether, like third parties, the general creditors of the insolvent holder of the property have an equity of their own against the claimant asserting equitable title. They stand in the shoes of the bankrupt, but the relative ease with which the claimant can establish a fiduciary relationship means that persons are able to trace whose inherent merits may e no greater than those of the general creditor.

101 In both the above passages Walters is clearly speaking of express trusts. An imposed, remedial constructive trust has nothing to do with "the artifice of fiduciary status" in the sense of something contrived by the beneficiary to give him an advantage over an ordinary creditor. It arises on being imposed by the court.

102 It is noteworthy that in *Rathwell, Pettkus* and in *Palachik v. Kiss* the claimant would have had no basis for recovery had it not been for the finding of a resulting trust or latterly, the imposition of a constructive trust. Similarly, in *Re Clark, supra*, it was stated that the *Re Condon: Ex parte* James rule would not be applicable, except in rare circumstances where the claimant had any other remedy.

103 Although I believe it to be likely that the impetus of the recent Supreme Court of Canada decisions culminating in *Pettkus* and *Palachik v. Kiss* will result in the remedial constructive trust being applied in certain bankruptcy situations to avoid unjust enrichment, I do not believe this to be an appropriate case for such a remedy.

104 It has been asserted that the monies paid by Tessis produced a windfall for Agil and therefore for the unsecured creditors. However, most of those monies went to pay off prior mortgages, inferred to be equally invalid, and so, on a dollar for dollar basis, the position of the unsecured creditor was not much changed, on the not unreasonable assumption that a well-informed trustee would have come to realize that the prior mortgages were themselves invalid. The parties who really received the windfall were the prior mortgagees whose invalid mortgages were paid off out of the proceeds of Tessis' loan. They are not before the court. That argument does not apply to the parts of the Tessis loan that can be traced into improvements to the property. To the extent of such improvements the unsecured credtors have received a windfall from the fact that Tessis has advanced monies that he would not have advanced had he known that his mortgage would pass no interest in the land. However, not every windfall gain is an unjust enrichment.

105 The applicant stresses the element of mistake and the misleading affidavit and asserts that Agil should not be allowed to keep money when it has not delivered the consideration therefor, i.e. a valid mortgage, and that the trustee can stand in no better position than Agil. But this is not pure mistake as in *Chase Manhattan Bank N.A., supra*. Tessis intended to pay over the money against Agil's promise to pay and the guarantee of Agil's president, and he did receive that consideration. He also expected to be a mortgagee under a valid mortgage and it must be acknowledged that he would not have made the loan if he had not believed that he was getting a good mortgage.

106 The difficulty with the mortgage, apart from the triggering fact that Agil could not keep up its payments, was that it was illegal in that it contravened the *Planning Act*. This was no mere matter of being hoisted by the "vagaries of the *Statute of Frauds*", to use the phrase employed by MacKinnon J.A. in *Nicholson v. St. Denis, supra*, to describe the claimant's difficulty in *Degelman v. Guaranty Trust Company of Canada*, [1954] 3 D.L.R. 785. The illegality was sufficiently serious to have been visited by the legislature with the dread remedy of nullity. Such a heavy legislative thrust should cause a court to be cautious about setting aside even its secondary effects. Clearly a court cannot thwart the primary legislative purpose by imposing any trust or other remedy that has the effect of conferring upon Tessis any interest in the land. It is not similarly impossible for the court to impose a trust upon the proceeds for that does not have the effect of creating an interest in the land. But even at that secondary level there is reasonfor caution: if the court imposed a trust upon the proceeds it would be weakening the sanction imposed by the legislature in pursuit of the legislative objective of preventing unauthorized subdivision of land. It is a factor to consider and, at some weight, it is always a factor against imposing a constructive trust. In a proper case a court may feel that other factors override it, but

it is not a factor not to be ignored. I believe it to be, on the above-mentioned tests in *Rathwell*, a juristic factor but not one that, alone, is necessarily determinative. I am not persuaded by the applicant's contention that this is merely a case of unjust enrichment occasioned by mistake based on misrepresentations.

107 A strong reason for not imposing a constructive trust in this case is the justice factor represented by the fact that the loan agreement, which governed and set out the relationship between Tessis and Agil assigned to Tessis the task and risk satisfying himself as to the title of Agil to the property in question and as to the validity of the mortgage. It was even provided that Agil was to pay the fees and disbursements of the solicitor for Tessis. As between Tessis and Agil, Tessis was not authorized to rely upon any affidavit as to non-ownership of abutting lands. Whether that statement was put into affidavit to comply with registration requirements or at the request of Tessis' solicitor, it could not reasonably have been intended to shift to Agil any part of Tessis' burden of satisfying himself as to the validity of the mortgage. Agil was required to pay for the necessary legal services and to allow Tessis to use a solicitor of his own choosing. This is not a simple case of monies paid under a mistake.

108 I appreciate that in unjust enrichment cases the focus is on the enrichment, in contrast to tort cases where the focus is on the damage and the liability. However, most of the proceeds of the Tessis loan went to enriching the holders of the invalid prior mortgages. The considerations dicussed above with respect to subrogation are relevant here. To the extent that unsecured debts were paid off out of the proceeds of what turned out to be another unsecured loan can Agil or its unsecured creditor be said to have been enriched? In my opinion they cannot. Although a constructive trust is imposed *nunc pro tunc* it is imposed, if at all, on the basis of contemporaneous scrutiny. Such scrutiny discloses here that, with respect to most of the Tessis loan, Agil simply exchanged unsecured creditors, so to that extent there was no enrichment of Agil let alone of its unsecured creditors and the test in *Rathwell* was not met. True, a smaller part of Tessis' funds were used to finance improvements of the building. Even although the low sale price of the property may call in question the objective value of the improvements, it must be assumed that they were worth something. We do not, however, know how much they contributed to the sale price. Clearly they would not of themselves justify the imposition of a constructive trust on the whole of the proceeds.

109 In my opinion, this is not a proper case for the imposition of a constructive trust.

110 Accordingly, the application is dismissed with costs, as to be assessed, against the applicant, those of the trustee on a solicitor and client basis and those of counsel to Tessis on a party and party basis.

"Signed"

TAB 18

Most Negative Treatment: Distinguished
Most Recent Distinguished: Sgrignuoli v. Sgrignuoli | 2015 ONSC 5537, 2015 CarswellOnt 13573, 258 A.C.W.S. (3d) 544, [2015] W.D.F.L. 5812 | (Ont. S.C.J., Sep 4, 2015)

1993 CarswellBC 264
Supreme Court of Canada

Young v. Young

1993 CarswellBC 1269, 1993 CarswellBC 264, [1993] 4 S.C.R. 3, [1993] 8 W.W.R. 513, [1993] R.D.F. 703, [1993] B.C.W.L.D. 2899, [1993] W.D.F.L. 1491, [1993] S.C.J. No. 112, 108 D.L.R. (4th) 193, 160 N.R. 1, 18 C.R.R. (2d) 41, 34 B.C.A.C. 161, 43 A.C.W.S. (3d) 410, 49 R.F.L. (3d) 117, 4 W.D.C.P. (2d) 559, 56 W.A.C. 161, 84 B.C.L.R. (2d) 1, J.E. 93-1766, EYB 1993-67111

Irene Helen Young, Appellant v. James Kam Chen Young, Respondent and W. Glen How, Respondent and Watch Tower Bible and Tract Society of Canada, Respondent and The Attorney General of Canada, the Attorney General for Ontario, the Attorney General of Quebec, the Attorney General of Manitoba, the Attorney General of British Columbia, the Law Society of British Columbia and the Seventh-day Adventist Church in Canada, Interveners

La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin and Iacobucci JJ.

Heard: January 25, 1993; January 26, 1993
Judgment: October 21, 1993
Docket: Doc. 22227

Proceedings: varied *Young v. Young* ((1990)), 1990 CarswellBC 223, [1990] B.C.J. No. 2254, 50 B.C.L.R. (2d) 1, 75 D.L.R. (4th) 46, 29 R.F.L. (3d) 113 ((B.C. C.A.))

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Shawn Greenberg, for Intervener Attorney General of Manitoba
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Subject: Family; Insolvency; Property; Civil Practice and Procedure

Headnote

Family Law --- Family property on marriage breakdown — Matrimonial home — Determination of share of ownership — General

Family Law --- Support — Spousal support under Divorce Act — Time-limited award — Spouse to become self-sufficient

Family Law --- Custody and access — Religion of parents — Effect on access

Family Law --- Custody and access — Practice and procedure — General

Family Law --- Custody and access

Practice --- Costs — Appeals as to costs — Leave to appeal

Family law — Children — Custody and access — Factors governing award of access — Welfare of child — Father converting to Jehovah's Witness religion and giving children religious instruction during access periods — Children disliking instruction to extent that relationship with father being damaged — Father being granted access subject to restriction that he not discuss religion or take children to meetings without mother's consent — Ultimate test being best interests of child, but where issue relating to quality of access, risk of harm to child being relevant consideration — Conflict between parents not being sufficient basis for assuming child's interests not being served — Expert evidence as to best interests of child not being required in all cases — Evidence not supporting view that best interests of children requiring curtailment of father's communication of religious views.

Civil liberties and human rights — Enforcement under Charter of Rights and Freedoms — Scope and interpretation of Charter — Limitations on guaranteed rights and freedoms — Best interests of child test for custody and access matters under Divorce Act not violating Charter — Order restricting father from discussing religion or taking children to religious meetings during access periods not necessarily violating freedom of religion — Prima facie case for protection under right of freedom of expression being made as conduct not falling within limits of guarantee — Associated rights under Charter to be interpreted in consistent and coherent manner, focusing on context of particular case — Broader limits of freedom of expression governing in context of religious instruction of children.

Civil liberties and human rights — Freedom of conscience and religion — Father converting to Jehovah's Witness religion and giving children religious instruction during access periods — Father being granted access subject to restrictions that he not discuss religion or take children to meetings without mother's consent — Best interests of child test not violating right to religious freedom — Guarantee not extending to religious activity which harms or interferes with parallel rights of others.

Civil liberties and human rights — Freedom of expression/opinion — Father converting to Jehovah's Witness religion and giving children religious instruction during access periods — Father being granted access subject to restrictions that he not discuss religion or take children to meetings without mother's consent — Best interests of child test not violating right to freedom of expression/opinion.

Family law — Matrimonial property — Factors governing division — Presumption of equal division — Trial judge awarding wife greater portion of matrimonial assets without referring to required factors for determination of unequal division under applicable legislation — Ample basis existing for order under legislation — Fact of judge's failure to specifically allude to factors being weighed against length and high cost of litigation — Best course for appeal court being endorsement of trial judge's result.

Family law — Matrimonial property — Assets subject to division — Debts and liabilities — No legal basis existing to require husband to pay debt incurred by wife to support herself and children before applying for maintenance — Debt serving as consideration supporting reduction of husband's interest in family property.

Costs — Orders as to costs — Solicitor-and-client basis — Solicitor-client costs being awarded only where reprehensible conduct existing on part of one party — Fact that application having little merit or fact that part of costs of litigant being paid by others not forming basis for award of solicitor-client costs.

Costs — Parties entitled to or liable for costs — Courts having power to award costs against one party's counsel only where counsel encouraging abuse and delay in bad faith — Courts being required to avoid placing counsel in situation where fear of adverse order of costs conflicting with fundamental duties of confidentiality of instructions and bringing forward even unpopular causes.

Costs — Parties entitled to or liable for costs — Non-parties — Religious society financially supporting litigation of member's divorce proceeding, involving freedom of religion and expression issues — Award of costs against society being equivalent to award for tort of maintenance — Society not intervening officiously or improperly — Society supporting litigation out of charity and religious sympathy — Member paying for considerable portion of costs personally and member's spouse instigating dispute in part — Evidence falling short of establishing society as unnamed party, despite its interest in constitutional issue.

Family law — Children — Custody and access — Factors governing award of access — Religious and cultural upbringing — Father converting to Jehovah's Witness religion and giving children religious instruction during access periods — Children disliking instruction to extent that relationship with father being damaged — Father being granted access subject to restriction that he not discuss religion or take children to meetings without mother's consent — Ultimate test being best interests of child, but where issue relating to quality of access, risk of harm to child being relevant consideration — Conflict between parents not being sufficient basis for assuming child's interests not being served — Expert evidence as to best interests of child not being required in all cases — Evidence not supporting view that best interests of children requiring curtailment of father's communication of religious views.

Torts — Maintenance and champerty — Religious society financially supporting litigation of member's divorce proceeding, involving freedom of religion and expression issues — Award of costs against society being equivalent to award for tort of maintenance — Society not intervening officiously or improperly — Society supporting litigation out of charity and religious sympathy — Member paying for considerable portion of costs personally and member's spouse instigating dispute in part — Evidence falling short of establishing society as unnamed party, despite its interest in constitutional issue.

The parties separated after 14 years of marriage, with the wife taking custody of the three children. The husband was a convert to the Jehovah's Witness religion and gave the children religious instruction during his access periods. The wife objected and the two older children disliked the instruction to the extent that it was damaging their relationship with their father. At the divorce trial, the husband was granted access on condition that he not discuss his religion with the children or take them to religious meetings or canvassing without the wife's consent. The husband had executed undertakings not to take the children to meetings or canvassing against their wishes. The trial judge ordered that the husband transfer his interest in the matrimonial home to the wife because any remaining interest in the house, after the husband paid what was already owing to the wife, was to be transferred as lump sum maintenance. The trial judge did not refer to the factors under s. 51 of the *Family Relations Act*. The husband was found liable for the debts incurred by the wife for the support of herself and the children pending maintenance and for a debt owed by a family corporation to a third party. Costs were awarded on a solicitor-client basis against the husband, his lawyer and a religious society not a party to the proceedings. The husband appealed, and the Court of Appeal set aside the restrictions on religious discussion and attendance. The Court of Appeal also altered the division of property and the awards of costs. The wife appealed further.

Held:

Appeal allowed in part.

Per MCLACHLIN J.: The ultimate test in matters of access is the best interests of the child. This test is a positive one, encompassing a wide variety of factors, one of which is the desirability of maximizing contact between the child and each parent. The custodial parent has no right to limit access. The risk of harm to the child may also be a factor to be considered, particularly where the issue involves what the access parent may say or do with the child. In such cases, it will generally be relevant to consider whether the conduct in question poses a risk of harm to the child which outweighs the benefits of allowing the child to get to know the access parent. The provision in s. 16(10) of the *Divorce Act* regarding the "best interests of the child" does not violate the *Charter* right to religious and expressive freedom. The guarantee of freedom of religion does not extend to religious activity which harms or interferes with the parallel rights of other people. Conduct which is not in the best interest of the child amounts to an "injury" or intrusion on the rights of others, even in cases where a risk of harm has not been established. To deprive a child of what a court has found to be in his or her best interests is to "injure," in the sense of not doing what is best for the child. The vulnerable situation of the child heightens the need for protection. The ambit of the right of freedom of expression is more broadly drawn than that of religious freedom, in that even harmful expression may be protected. The expression challenged in the present case did not fall within the recognized limitations on the freedom of expression, e.g., where violence or threatened violence is involved. A prima facie case for protection under the guarantee of freedom of expression was therefore made out. However, since virtually every form of religious practice is expressive, a broad interpretation of freedom of expression in the religious context would nullify the principle that freedom of religion does not protect conduct which injures others or conflicts with their parallel rights. A purposive approach to *Charter* interpretation requires that associated rights be interpreted in a consistent and coherent manner, focusing on the context of the particular case. Teaching religious beliefs to one's children, while having an expressive aspect, is predominantly religious. Reading the two guarantees together, the limits on the guarantee of freedom of expression should govern in the context of religious instruction of children.

A custodial parent may require the child to observe a faith until the age of discretion. But there is no "right" to limit the access parent's ability to share his or her religious views with the child, unless that is shown not to be in the child's best interests. Expert evidence on that issue is not required in all cases. The risk of harm need not be established in every case to justify limitations on access. Conflict between the parents is not a sufficient basis for assuming that the child's best interests will not be served. While the possible deterioration of the husband's relationship with his children was unfortunate, the alternative, which would be to prevent them from knowing him as he really was, was also undesirable. This was not a case where the best interests of the children required that the husband's religious expressions be curtailed further than he had already agreed to.

There was ample basis for an order under s. 51 of the Act reapportioning assets to the wife. Debts incurred during the considerable time that the husband provided little or no support could not, in law, be attributed to him, but they could serve as a consideration to support a reduction of his interest in the family property. The trial judge's failure to expressly refer to s. 51 might have justified a new trial in some circumstances, but that factor had to be weighed against the length and costs of the litigation to date. The best course would be to endorse the result achieved by the trial judge on the ground that the evidence was capable of supporting an order for reapportionment. There was no legal basis on which the husband could be said to be legally liable to repay money borrowed by the family corporation. The debt incurred by the wife to support herself and the children before she applied for maintenance was similarly unenforceable against the husband as a debt.

No order for costs should have been made against the husband's counsel. While courts have the power to order costs against a lawyer, the fault that might give rise to such an order did not characterize these proceedings. The order for costs against the religious society was apparently premised on the society's financial support of the litigation. The award was thus effectively an award for the tort of maintenance. The society's support in this case was out of charity and religious sympathy and did not constitute maintenance.

Per SOPINKA J.: The policy of promoting a meaningful relationship between parent and child is not disrupted unless the child is at substantial risk of "harm," i.e., a more than transitory effect upon his or her physical, psychological or moral well-being. Interpreted in this way, the statutory test in s. 16(10) of the *Divorce Act* does not constitute a limitation on the freedom of religious expression. The appeal should be disposed of as proposed by McLachlin J.

Per CORY and IACOBUCCI JJ.: A proper application of the best interests test did not support an order restricting the husband from discussing his religion. Curtailment of explanatory or discursive exchanges between a parent and child should be rarely ordered.

Per L'HEUREUX-DUBÉ J. (dissenting): Courts must be wary of expanding the traditional rights of the non-custodial parent. The fundamental principle is that the right to access is limited in scope and is conditioned and governed by the best interests of the child. In assessing all of the relevant considerations, courts must ensure that the ideals of parental sharing and equality do not overcome the reality of custody and access arrangements and that the child's needs and concerns are accommodated and not obscured by abstract claims of parental rights.

Nothing in the *Divorce Act* mandates or even suggests that real danger of significant harm to the child be the sole consideration in matters of custody and access, and there is no rationale for using the harm test to define the best interests of the child. "Best interests" is not simply the right to be free of demonstrable harm. It is the positive right to the best possible arrangements in the parties' circumstances. The primary goal of the legal system on divorce must be to minimize the adverse effects on children. This requires a vision of the best interests of the child that is more than neutral to the conditions under which custody and access occur. The harm test cannot meet this objective. Restrictions on access do not necessarily prevent children from coming to know their parents in meaningful ways. The restrictions in this case only affected the area of religious activities involving the children. The children were well aware of the significance of the husband's religious beliefs in his life. In any event, to interpret the goal of maximum contact in such a way as to require unrestricted access may be to defeat the very objective that the *Divorce Act* itself seeks to promote, if the pre-eminence of unlimited "knowledge" results in the ultimate destruction of the relationship. The mere fact that the state plays a role in custody and access decisions does not transform the essentially private character of parent-child interchanges into activity which should be subject to *Charter* scrutiny. No valid purpose is thereby served. Even if the *Charter* were to apply, no infringement of religious freedoms would occur where such orders are made in the best interests of the child. Where religion becomes a source of conflict between the parents or is the very cause of the marriage breakdown, it is generally not in the best interests of the child to be drawn into the controversy. In such circumstances, courts must secure the long-standing authority of the custodial parent to make decisions over religious activities. Both the best interests of the child and a respect for his or her rights might require restrictions on communication if only so that the larger interest, maintenance and development of the relationship between the access parent and child, is not frustrated by the means by which it was carried out. The restrictions here placed no limits on the husband's ability to engage in religious practices himself and the litigation could not be characterized as an attack on those beliefs. The evidence amply demonstrated the stress the children were under, much of it related to their resistance to becoming involved in their father's religious practices. There was also evidence that the husband would not respect the wishes of the children without an order to do so. The appeal should be allowed and the order at trial restored.

Per LA FOREST J. (GONTHIER J. concurring): The appeal should be allowed on the access issue on the grounds stated by L'Heureux-Dubé J. On the property and monetary issues, the appeal should be disposed of as proposed by McLachlin J.

the children before she applied for maintenance is similarly unenforceable against Mr. Young as a debt, although it can be taken into consideration in an order for reduction of his interest in the family assets, as suggested above. I agree with Southin J.A., at p. 39, that "[t]he court cannot make a spouse jointly liable to a creditor for a debt of the other spouse, no matter for what purpose it was incurred, or, in the absence of some contractual foundation, make one spouse liable to indemnify the other, either in whole or in part, for a liability of the latter." Accordingly, the paragraphs of the order making Mr. Young liable for one-half of these debts must be struck out.

C. Costs

1. Costs Against the Respondent

258 The trial judge ordered solicitor-client costs against the respondent. This award was made on the basis that the custody claim had "little merit", that the respondent attempted to mislead the court, that the respondent was recalcitrant on matters of custody and maintenance and, finally, on the basis that unnecessary proceedings had resulted. The trial judge also referred to the fact that someone else was promoting and paying for the legal action and that repetitive and irrelevant evidence was tendered.

259 The Court of Appeal, per Cumming J.A., upheld the imposition of solicitor-client costs for four days of the trial and for four days of the interlocutory proceedings concerned with financial issues, on the basis of the husband's non-disclosure of financial information. Otherwise, costs against the respondent were reduced to party-and-party costs.

260 The Court of Appeal's order was based on the following principles, with which I agree. Solicitor-client costs are generally awarded only where there has been reprehensible, scandalous or outrageous conduct on the part of one of the parties. Accordingly, the fact that an application has little merit is no basis for awarding solicitor-client costs; nor is the fact that part of the cost of the litigation may have been paid for by others. The Court of Appeal meticulously considered all the proceedings in the light of these principles to arrive at its conclusion that only partial solicitor-client costs were justified.

261 Finding no error in the reasoning or conclusion of the Court of Appeal on this question, I conclude that its order for costs should remain, save to the extent different conclusions on the merits in this Court require that an adjustment be made. As I have made clear, the only respect in which I would vary the order of the Court of Appeal is that instead of ordering lump sum maintenance and a moratorium on the sale of the matrimonial home, I would restore the trial judge's order that the entire interest in the home be conferred on the wife. In my view, this difference does not warrant altering the award of costs against the respondent made below.

2. Costs Against the Respondent's Counsel

262 The trial judge ordered solicitor-client costs against counsel for the husband, Mr. How. For the reasons recited above in connection with costs against the respondent, she concluded that the proceedings had been unnecessarily lengthened. She also referred, at p. 216, to the fact that "[c]ounsel for the respondent had a forum and a cause to pursue. Unfortunately, what was in the best interests of the children, their welfare, was totally lost by the respondent and his counsel in these protracted proceedings.... The court was subjected to unwarranted abuse, criticism and insult." She made no finding, however, that Mr. How had been in contempt of court.

263 The Court of Appeal held that no order for costs should have been made against Mr. How. There is no need to repeat that entirely satisfactory analysis. The basic principle on which costs are awarded is as *compensation* for the successful party, not in order to punish a barrister. Any member of the legal profession might be subject to a compensatory order for costs if it is shown that repetitive and irrelevant material, and excessive motions and applications, characterized the proceedings in which they were involved, and that the lawyer acted in bad faith in encouraging this abuse and delay. It is clear that the courts possess jurisdiction to make such an award, often under statute and, in any event, as part of their inherent jurisdiction to control abuse of process and contempt of court. But the fault that might give rise to a costs award against Mr. How does not characterize these proceedings, despite their great length and acrimonious

progress. Moreover, courts must be extremely cautious in awarding costs personally against a lawyer, given the duties upon a lawyer to guard confidentiality of instructions and to bring forward with courage even unpopular causes. A lawyer should not be placed in a situation where his or her fear of an adverse order of costs may conflict with these fundamental duties of his or her calling.

264 The Court of Appeal found that the trial judge's criticism of Mr. How related to his conduct in bringing the action. Assuming that costs might, in certain circumstances, be imposed for contempt of court, none was found. Accordingly, no order for costs should have been made against Mr. How. I see no error in the conclusion of the Court of Appeal in this regard.

3. Costs Against Burnaby Unit (Watch Tower Bible and Tract Society)

265 Since the Watch Tower Bible and Tract Society (the Society) did not appear as a party, the costs awarded against it must be taken to have been premised on the fact that it supported the litigation financially. In effect, this was equivalent to an award for the tort of maintenance: see *Sturmer v. Beaverton (Town)* (1912), 2 D.L.R. 501 at p. 503 (Div. Ct.). To be liable for maintenance, a person must intervene "officiously or improperly": *Goodman v. R.*, [1939] S.C.R. 446. Provision of financial assistance to a litigant by a non-party will not always constitute maintenance. Funding by a relative or out of charity must be distinguished from cases where a person wilfully and improperly stirs up litigation and strife: *Newswander v. Giegerich* (1907), 39 S.C.R. 354.

266 In this case there was no evidence that the respondent had been induced to allow the Society to use his name in order that it might avoid liability for costs while advancing its own interests, that he would not have advanced his own interests in the absence of its help, that the Society's funding was for other than charitable motives, or that it controlled or directed the proceedings. Its support was "out of charity and religious sympathy" and did not constitute maintenance. The fact that the Society had a common interest with the respondent (as followers of the same religion) did not affect this.

267 Cumming J.A. so found, and then qualified his position at p. 85 by stating:

> I hasten to add that it does not follow that the resources of the Watch Tower Bible & Tract Society can be brought to bear in every dispute between a Jehovah's Witness parent and a non-Jehovah's Witness parent, Once an issue of constitutional law of the kind raised here is settled then, if further litigation of the point between other litigants is supported, another question might arise. It may be that the right to assist without facing an award of costs cannot itself be used by the rich and powerful, no matter how great their interest in the issue, as an instrument of the oppression of those who must fight their battles alone.

268 I find again that no error has been made in the Court of Appeal's reasoning or conclusion. The evidence established that the respondent paid for a considerable portion of the cost of the proceedings personally, that the dispute was instigated at least in part by the appellant, and that the Society could not be considered to have stirred up the litigation, much less to have done so wilfully or improperly.

269 One argument, however, was not touched on by the Court of Appeal. This is the argument that the Society was an unnamed party to the litigation and, as such, should properly bear its portion of the costs. I would not discount the possibility that a court might properly hold an unnamed party liable for costs. The rule is that a non-party who has put forward another person in whose name the proceedings are taken cannot escape liability for costs in putting forward another: *R. v. Sturmer and Town of Beaverton*, *supra*. However, it seems to me that the evidence here falls short of establishing that the society was a party in this sense. Even on the constitutional issue, it cannot be said that the Society put Mr. Young forward, in effect bringing its own action in his name. The constitutional issue was first raised by Mrs. Young's objection to Mr. Young's communicating his religious beliefs to the children and was validly pursued by Mr. Young in his own interest. The Society's interest in the constitutional issue is insufficient, as I see it, to distinguish it from interveners who appear on constitutional cases and who have never been liable for costs.

Disposition

270 I would affirm the order of the Court of Appeal, except in respect of the matrimonial home, which should be transferred to Mrs. Young. In the circumstances of this case, I would order that each party bear his or her own costs on this appeal.

271 I would answer the constitutional questions as follows:

1. Do ss. 16(8) and 17(5) of the *Divorce Act, 1985*, which provide that judicial decisions regarding custody and access be made "in the best interests of the child", deny the rights and freedoms guaranteed in s. 2(*a*), (*b*), and (d) of the *Canadian Charter of Rights and Freedoms*?

No.

2. If the answer to question 1 is affirmative, are ss. 16(8) and 17(5) of the *Divorce Act, 1985*, justified as reasonable limits by s. 1 of the *Canadian Charter of Rights and Freedoms* and therefore not inconsistent with the *Constitution Act, 1982*?

Given my answer to question 1, it is unnecessary that I answer this question.

3. Do ss. 16(8) and 17(5) of the *Divorce Act, 1985*, violate the guarantees to equality set out in s. 15 of the *Canadian Charter of Rights and Freedoms*?

No.

4. If the answer to question 3 is affirmative, are ss. 16(8) and 17(5) of the *Divorce Act, 1985*, justified as reasonable limits by s. 1 of the *Canadian Charter of Rights and Freedoms* and therefore not inconsistent with the *Constitution Act, 1982*?

Given my answer to question 3, it is unnecessary that I answer this question.

Appeal allowed in part.

TAB 19

Most Negative Treatment: Distinguished
Most Recent Distinguished: Hur v. 726913 Alberta Ltd. | 2013 ABQB 208, 2013 CarswellAlta 2963, [2014] A.W.L.D. 3241, [2014] A.W.L.D. 3243, [2014] A.W.L.D. 3246, 240 A.C.W.S. (3d) 334 | (Alta. Q.B., Apr 5, 2013)

1993 CarswellAlta 310
Alberta Court of Queen's Bench

Jackson v. Trimac Industries Ltd.

1993 CarswellAlta 310, [1993] 4 W.W.R. 670, [1993] A.J. No. 218, 138 A.R. 161, 39 A.C.W.S. (3d) 573, 8 Alta. L.R. (3d) 403

DONALD K. JACKSON and PARKVIEW HOLDINGS LTD. v. TRIMAC INDUSTRIES LIMITED and TRIMAC LIMITED

TRIMAC LIMITED AND TRIMAC INDUSTRIES LIMITED
v. DONALD K. JACKSON and PARKVIEW HOLDINGS LTD.

DONALD K. JACKSON and PARKVIEW HOLDINGS LTD. v. JOHN ROBERT McCAIG

Hutchinson J.

Judgment: March 17, 1993
Docket: Doc. Calgary 8901 16051

Counsel: *A.D. Hunter, Q.C.*, and *M.L. Sigurdson*, for plaintiffs.
D.R. Haigh, Q.C., V.M. May, Q.C., and *B.W. Conway*, for defendants.

Subject: Contracts; Corporate and Commercial; Civil Practice and Procedure; Employment; Public; Torts

Headnote

Contracts --- Formation of contract — Consensus ad idem — Certainty of terms — General

Contracts --- Discharge — Right to rescind after repudiation — Anticipatory breach

Contracts --- Discharge — Right to rescind after repudiation — Election to accept repudiation or to affirm contract

Corporations --- Directors and officers — Fiduciary duties — General

Corporations --- Shares

Damages --- Valuation of damages — Measure of damages

Employment Law --- Termination and dismissal — Termination of employment by employer — Constructive dismissal — Change in remuneration or benefits

Practice --- Costs — Particular orders as to costs — Costs on solicitor and own client basis

Practice --- Costs — Effect of success of proceedings — General

Torts --- Interference with contractual relations — General

Costs — Orders as to costs — Indemnity basis — Plaintiff successfully suing corporation and senior executive for damages for wrongful dismissal — Lengthy trial arising out of senior executive's refusal to recognize commitment made to plaintiff — Senior executive being guilty of positive misconduct in inducing corporation to breach contract with plaintiff — Plaintiff being entitled to complete indemnification for costs of litigation.

Costs — Factors affecting entitlement to or quantum of costs — Conduct of parties — Misconduct — Plaintiff successfully suing corporation and senior executive for damages for wrongful dismissal — Lengthy trial arising out of senior executive's refusal to recognize commitment made to plaintiff — Senior executive being guilty of positive misconduct in inducing corporation to breach contract with plaintiff — Plaintiff being entitled to complete indemnification for costs of litigation.

Costs — Orders as to costs — Solicitor-and-client basis — Plaintiff successfully suing corporation and senior executive for damages for wrongful dismissal — Lengthy trial arising out of senior executive's refusal to recognize commitment made to plaintiff — Senior executive being guilty of positive misconduct in inducing corporation to breach contract with plaintiff — Plaintiff being entitled to complete indemnification for costs of litigation.

Costs — Factors affecting entitlement to or quantum of costs — Outcome of litigation — Divided success — Apportionment of costs — Plaintiff successfully suing corporation and senior executive for damages for wrongful dismissal — Plaintiff unsuccessfully raising several issues and matters at trial — No rule existing in Alberta respecting apportionment of cost of unsuccessful issues or matters — None of unsuccessful issues or matters concerning real issues in dispute — No reason existing for apportioning costs or awarding costs on selective basis.

The plaintiff sued a corporation and one of its senior executives for damages for wrongful dismissal. The trial of the action took 56 days. The plaintiff raised a number of issues and procedural matters at trial on which he did not succeed, but he was successful overall in the action. The parties spoke to costs. The defendants estimated that the trial of the issues and matters on which the plaintiff had been unsuccessful had taken 9 1/2 days, and sought a reduction of the plaintiff's costs.

Held:

Solicitor and own client costs awarded to plaintiff.

Costs will be awarded on a solicitor-and-client basis only in rare and exceptional cases. It is the conduct of the action and not the conduct of the party that gives rise to the action that determines an award of solicitor-and-client costs. Punitive damages should not be confused with a costs award. However, where the conduct of the party which gives rise to the action is calculated to deliberately harm the other party, then despite the technically proper conduct of the legal proceedings, the very fact that the action must be brought by the injured party to gain what was rightfully his or hers in the face of an unreasonable denial is in itself positive misconduct deserving of indemnification whether punitive damages are awarded or not. Here the lengthy trial came about as the result of the refusal by a senior executive of the defendant to recognize a commitment which he had personally given to the plaintiff. The senior executive's conduct was calculated to force the plaintiff to exhaust legal proceedings to obtain that to which he was entitled. The senior executive was guilty of positive misconduct in inducing the corporation to breach its contract with the plaintiff. The plaintiff should be indemnified as to the costs essential to and arising within the four corners of the litigation. The contractual arrangement between the plaintiff and his solicitors would have to be established, and the time spent and hourly rate charged would have to be justified. There is no rule in Alberta respecting the

apportionment of the cost of certain unsuccessful issues or matters raised by the plaintiff. None of the issues or matters on which the plaintiff was unsuccessful concerned liability or the quantification of damages, which were the real issues in dispute. There was no good reason for apportioning costs or awarding costs on a selective basis.

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Canada Deposit Insurance Corp. v. Canadian Commercial Bank, 50 Alta. L.R. (2d) 1, [1987] 3 W.W.R. 160, 64 C.B.R. (N.S.) 9, 76 A.R. 271 (Q.B.) — *considered*

Canada Rice Mills Ltd. v. Morgan (1934), 49 B.C.R. 202 (S.C.) — *considered*

Davis v. Davis (1981), 9 Man. R. (2d) 236 (Q.B.) — *referred to*

Dusik v. Newton (1984), 51 B.C.L.R. 217 (S.C.) — *applied*

EMI Records Ltd. v. Ian Cameron Wallace Ltd., [1983] Ch. 59, [1982] 2 All E.R. 980 — *referred to*

Evaskow v. B.B.F. (1969), 71 W.W.R. 565, 9 D.L.R. (3d) 715 (Man. C.A.) — *considered*

Fleck v. Stewart (1991), 80 Alta. L.R. (2d) 334, 17 R.P.R. (2d) 132, 118 A.R. 345 (Q.B.) — *considered*

Forster v. Farquhar, [1893] 1 Q.B. 564 (C.A.) — *distinguished*

Foulis v. Robinson (1978), 21 O.R. (2d) 769, 8 C.P.C. 198, 92 D.L.R. (3d) 134 (C.A.) — *referred to*

Howell v. Dering, [1915] 1 K.B. 54, 84 L.J.K.B. 198 (C.A.) — *considered*

Ireton v. Heizer, [1971] 3 W.W.R. 77 (B.C.S.C.) — *considered*

Kepic v. Tecumseh Road Builders (1987), 18 C.C.E.L. 218, 23 O.A.C. 72 — *referred to*

Max Sonnenberg Inc. v. Stewart, Smith (Canada) Ltd., 48 Alta. L.R. (2d) 367, [1987] 2 W.W.R. 75 (Q.B.) [additional reasons (1986), 48 Alta. L.R. (2d) 367 at 374 (Q.B.)] — *applied*

McCarthy v. Calgary Roman Catholic Separate School District No. 1, [1980] 5 W.W.R. 524, 17 C.P.C. 115, 30 A.R. 208 (Q.B.) — *referred to*

Mobil Oil Canada Ltd. v. Canadian Superior Oil (1979), [1980] 1 W.W.R. 453, 20 A.R. 111, 14 C.P.C. 101, 105 D.L.R. (3d) 355 (Q.B.) — *considered*

Nathu v. Imbrook Properties Ltd., 4 Alta. L.R. (3d) 149, [1992] 6 W.W.R. 373, 96 D.L.R. (4th) 223, 45 C.P.R. (3d) 419, 131 A.R. 186 (C.A.)*considered*

Nova, An Alberta Corp. v. Guelph Engineering Co. (1988), 60 Alta. L.R. (2d) 366, 89 A.R. 363 (Q.B.) — *referred to*

Olson v. New Home Certification Program of Alberta (1986), 44 Alta. L.R. (2d) 207, 69 A.R. 356 (Q.B.) — *applied*

Petrogas Processing Ltd. v. Westcoast Transmission Co., 73 Alta. L.R. (2d) 246, [1990] 4 W.W.R. 461, 105 A.R. 384 (Q.B.) — *referred to*

Pharand Ski Corp. v. Alberta (1991), 81 Alta. L.R. (2d) 304, 37 C.P.R. (2d) 288 at 333, 122 A.R. 81, 122 A.R. 395, further additional reasons (1991), 83 Alta. L.R. (2d) 152, [1992] 1 W.W.R. 501, 37 C.P.R. (3d) 532, 122 A.R. 395 at 398 (Q.B.) — *considered*

Reese v. Alberta (1992), 5 Alta. L.R. (3d) 40, [1993] 1 W.W.R. 450, 9 C.E.L.R. (N.S.) 65, (sub nom. *Reese v. Alberta (Minister of Forestry, Lands & Wildlife)*) 133 A.R. 127 (Q.B.) — *considered*

Reid, Hewitt & Co. v. Joseph, [1918] A.C. 717 (H.L.) — *distinguished*

Seitz, Re (1974), 6 O.R. (2d) 460, 53 D.L.R. (3d) 223 (H.C.) — *referred to*

Sturrock v. Ancona Petroleums Ltd. (1990), 75 Alta. L.R. (2d) 216, 111 A.R. 86 (Q.B.) — *applied*

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R. 255*referred to*

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R. 601(1)*referred to*

R. 605*referred to*

Sched. C, col. 6*referred to*

British Columbia, Supreme Court Rules (1961)

O. 65, R. 2*considered*

Rules of the Supreme Court (Revision) 1917 (U.K.)

O. LXV, R. 1*referred to*

O. LXV, R. 2*referred to*

Application for costs in wrongful dismissal action. For previous proceedings, see 6 Alta. L.R. (3d) 225, [1993] 2 W.W.R. 209.

Hutchinson J.:

1 At the conclusion of my Reasons for Judgment in this action [6 Alta. L.R. (3d) 225, [1992] 2 W.W.R. 209], I stated that costs should be settled before entry of the judgment and may be spoken to. Counsel have now appeared before me and have spoken to costs. This was also an opportunity for counsel to clear up one matter that was left outstanding concerning the possibility of a set off of $250,000 from the $7,212,375 judgment awarded to Jackson. A draft in the amount of $250,000 was tendered by Jackson to Industries on December 16, 1987 in payment for 2,500 shares of Industries. In my judgment I speculated that Jackson may have regained the use of such money. The parties agree that Jackson did not obtain the use of such money free of any claim by Trimac. The $250,000 in question was dealt with pursuant to an agreement in writing between counsel for the parties dated April 8, 1988 (Ex. 1 — Document 2267) as follows:

> DKJ will deposit with Stikeman, Elliott, on *an entirely without prejudice basis*, the uncashed bank draft of $250,000 which was forwarded to Trimac Industries at the time DKJ exercised his option to purchase 2,500 Trimac Industries shares. The said funds will be held in our trust account, in an interest bearing form, pending either our mutual agreement in writing, or the determination of any legal proceedings which may be commenced concerning DKJ's rights, if any, with respect to the said option.

2 I have held that the option to purchase additional shares of Industries was properly exercised by Jackson and that he was accordingly entitled to purchase the 2,500 shares of Industries. Therefore the monies tendered by Jackson became the property of Industries which, together with the accumulated interest thereon, should now be paid to Industries. In the result there will be no off-set against the amount ordered to Jackson on the sale of his 13.5% interest in Industries to Trimac for fair market value which I found to amount to $7,212,375.

3 Turning to the issue of costs, I find that, broadly speaking, the main issue between the parties as to costs comes down to whether the plaintiffs should be awarded costs on an indemnity basis in the form of solicitor-client costs or on a party and party basis as provided in Sched. C of the *Rules of Court*. There the appropriate column would be col. 6 with a multiple to be selected given such factors as the length of the trial, the complexity and importance of the issues and the amounts involved. The question as to whether solicitor-client costs represent an indemnity will be discussed later.

4 Counsel for the plaintiff argued that his client should be indemnified on a solicitor-client basis or at the very least on a party-party basis at five times col. 6. In order to gain a perspective on the amounts involved, I requested counsel for the plaintiff to produce a draft Bill of Costs calculated on col. 6 of Sched. C which he has now supplied. It is understood that the draft Bill of Costs does not have the approval of counsel for the defendants who has had no opportunity to consider it. It is anticipated that many of the items will not present a problem. The draft Bill of Costs calculated on the basis of single col. 6 discloses total fees of $114,325 plus GST amounting to $6,038.20. Disbursements total $152,598.01. Five times col. 6 applied to fees would therefore amount to $571,625 plus GST at 7% bringing the total to $611,638.75 plus disbursements as may be agreed upon or allowed on taxation. Fees and disbursements requested by the plaintiff at five times col. 6 as an alternative to solicitor-client costs could therefore total in the neighbourhood of $750,000. Solicitor-client fees are normally considered to be higher than Sched. C costs. This, of course, depends upon the multiplier. I did not ask for disclosure of the plaintiffs' solicitor-client costs.

5 Counsel for the defendants argues for party and party costs with a multiple of 2 1/2 or possibly three times col. 6 as a proper award. In the event of an award of either solicitor-client or party-party costs, he says that a formal taxation

would follow if the parties were unable to agree on any of the specifics involved in calculating fees. The reasonableness of certain items of disbursements may also require further direction in the event that the parties are unable to agree. The disbursements which may be in dispute encompass such items as the $52,160.35 fee, including disbursements and GST, for the expert's report compiled by Mr. Scott of Ernst & Young on behalf of the plaintiffs calculating the losses claimed by the plaintiffs. The defendants say that Mr. Scott's report proceeded on a wrong assumption, namely that of a going concern scenario through 1986 and 1987 with a closing with CIL in March of 1987. The defendants say that Mr. Scott's report was not usable. Also open to question is the Stikeman and Elliott account totalling $24,034.08. The defendants question whether that account represents an appropriate expense of the cost of the trial.

6 Counsel for the defendants does not take issue with the inclusion of GST, second counsel fees, including attendance at examinations for discovery, daily transcript costs including computer diskettes or photocopying fees. The level of the fees, including rates and time spent on matters relating to the trial, remain of concern if solicitor-client costs were to be entertained.

7 Apart from the main issue, counsel for the defendants identified certain subsidiary concerns, that is, whether the Court should exercise its discretion to apportion the cost of certain "issues" or "matters" brought into play in the trial by the plaintiffs in the presentation of the plaintiffs' case. These concerns include the following; firstly the plaintiffs' opening where counsel for the plaintiffs argued that on the basis of the pleadings certain matters were the subject of issue estoppel or were an abuse of process or were res judicata having regard to the previous litigation between Trimac and CIL and also between CIL and Trimac, Laidlaw Transportation Limited and Jackson. Secondly, the plaintiffs request that certain documents be produced for discovery where solicitor-client privilege and without prejudice settlement privilege had been claimed by the defendants. Thirdly, the plaintiffs' attempt to introduce collateral facts in their cross-examination of McCaig and Bailey. The plaintiffs did not succeed on any of these three issues or matters raised on their behalf. Counsel for the defendants calculates that the first item occupied 2 1/4 days of trial time, item 2 occupied 6 days of trial time and item 3 occupied 1 1/4 days of trial time for a total of 9 1/2 days out of the 56 days taken up by this trial.

8 Other items of concern identified by counsel for the defendants were what level should costs be set assuming party-party costs and whether this case was a "rare and exceptional" case in which solicitor-client costs, however defined, should be awarded. These latter two issues are really folded into the main issue to which I have already referred.

9 Counsel for the plaintiffs submitted that if party-party costs are to be awarded, there should be an additional lump sum allowance made for written arguments that were prepared throughout the trial for which no allowance is made in Sched. C as well as an allowance for the preparation of computer assisted charts and chronologies relating to the evidence and documents. A lump sum of $20,000 was suggested in this regard.

10 Returning to the main issue there is no dearth of law on the subject of costs emanating from this Court and the Alberta Court of Appeal. I have been referred to the following cases:

Max Sonnenberg Inc. v. Stewart, Smith (Canada) Ltd., [1987] 2 W.W.R. 75 [48 Alta. L.R. (2d) 367], (Veit J.) Nov. 21, 1986

Sturrock v. Ancona Petroleums Ltd., 111 A.R. 86 [75 Alta. L.R. (2d) 216], (Lomas J.) Aug. 23, 1990

Pharand Ski Corp. v. Alberta, 122 A.R. 395 [81 Alta. L.R. (2d) 304, additional reasons 122 A.R. 395 at 398, 83 Alta. L.R. (2d) 152, [1992] 1 W.W.R. 501], (Mason J.) Oct. 2, 1991

Canada Deposit Insurance Corp. v. Canadian Commercial Bank, 50 Alta. L.R. (2d) 1 [[1987] 3 W.W.R. 160], (Wachowich J.) Feb. 6, 1987

Mobil Oil Canada Ltd. v. Canadian Superior Oil, [1980] 1 W.W.R. 453, (Kirby J.) Oct. 5, 1979

McCarthy v. Calgary Roman Catholic Separate School District No. 1, [1980] 5 W.W.R. 524, (Sinclair C.J.Q.B.) June 24, 1980

Wenden v. Trikha, 1 Alta. L.R. (3d) 283, (Murray J.) Mar. 6, 1992

Fleck v. Stewart, 80 Alta. L.R. (2d) 334, (McBain J.) May 15, 1991

Olson v. New Home Certification Program of Alberta, 44 Alta. L.R. (2d) 207, 209, (Lutz J.) Apr. 11, 1986

Calbar Securities Ltd. v. Toole Peet Co., 30 Alta. L.R. (2d) 286 (C.A.), (McGillivray C.J.A.) Mar. 5, 1984

Nathu v. Imbrook Properties Ltd., 4 Alta. L.R. (3d) 149 [[1992] 6 W.W.R. 373] (C.A.), Sept. 1, 1992

Petrogas Processing Ltd. v. Westcoast Transmission Co., 73 Alta. L.R. (2d) 246 [[1990] 4 W.W.R. 461], (O'Leary J.) Apr. 2, 1990

Reese v. Alberta, 5 Alta. L.R. (3d) 40 [[1993] 1 W.W.R. 450], (McDonald J.) Aug. 28, 1992

Nova, An Alberta Corp. v. Guelph Engineering Co., 60 Alta. L.R. (2d) 366, (Brennan J.) Jul. 20, 1988

11 Insofar as it is possible to distil general principles from the foregoing cases and also from the other Canadian and English cases referred to therein, and bearing in mind s. 19 of the *Court of Queen's Bench Act*, R.S.A. 1980, c. C-29, and the *Alberta Rules of Court*, R. 600, 601 and 605, there can be no doubt that a trial judge has a very wide discretion when awarding costs provided that such discretion is exercised judicially. The cases themselves exhibit a diversity in the exercise of the Court's discretion and are bound to be influenced by their own particular facts.

12 The general rule is that costs follow the event. The defendants do not dispute that the defendants are obliged to pay costs, it is the method of calculating such costs which is in issue. Another undisputed general principle is that "it must be a rare and most exceptional case in which costs will be awarded on a solicitor and client basis rather than on a party-party basis". This is a statement made by Freedman J.A. at p. 570 of *Evaskow v. B.B.F.* (1969), 71 W.W.R. 565 (Man. C.A.), quoted by Kirby J. in *Mobil Oil* (supra), at p. 456. In the same *Mobil Oil* case, Kirby J. quoted Keith J. in *Vanderclay Development Co. v. Inducon Engineering Ltd.*, [1969] 1 O.R. 41, 1 D.L.R. (3d) 337 (H.C.), at p. 344 [D.L.R.] as follows:

> Keith J., at p. 343, points out that while the court does have discretion to award solicitor-and-client costs, such discretion should be exercised most carefully. He continued, at p. 344:
>
> > ... one must be extremely cautious in departing from the general rule that costs awarded to a successful litigant are to be taxed as between party and party on the basis of an authoritative and well recognized tariff. If this principle were departed from, other than in exceptional cases, it is not difficult to visualize the indirect harm that could well be done by inhibiting prospective litigants from bringing to the attention of the Courts matters which they have every right to have put into litigation.

13 The general principles are also clearly stated by McDonald J. in *Reese* (supra) at pp. 44-45, paras. 7, 8 and 9, where he says:

> While the allocation of costs of a lawsuit is always in the discretion of the court, the exercise of that discretion must be consistent with established principles and practice. It is traditionally accepted in Canada's common law provinces that as a general rule the successful party recovers its costs from the unsuccessful party. However, such recovery is normally on a party-and-party basis. That is, the costs recoverable are those fees fixed for the steps in the proceeding by a schedule of fees (Sched. C in Alberta's *Rules of Court*), plus reasonable disbursements. It is not intended that the successful party receive full indemnification of those fees and disbursements which it would be charged by its counsel. In England the degree of indemnification appears to be considerably higher than is normal

in Canada. In almost all jurisdictions of the United States of America the rule is that no costs are recoverable by the successful party.

The Canadian practice reflects an attempt to balance two conflicting interests. On the one hand, it is argued that if a party is successful and *there are no circumstances constituting blameworthiness in the conduct of the litigation by that party*, it is unfair to require the successful party to bear any costs incurred by his counsel in prosecuting or defending the action. On the other hand, it is argued that if the unsuccessful party is required to bear all the costs of the successful party, citizens will be unduly hesitant to sue to assert their rights (even valid ones) or to defend their rights when sued. The partial indemnity practice as it exists in Canada is a compromise intended to give some scope in practice for each of the conflicting policy considerations.

When the case is of considerable magnitude and complexity, the practice in Alberta contemplates that the court may order the unsuccessful party to pay a multiple of the fees that are fixed by Sched. C. But even then it is not intended that there be full indemnity, except in extraordinary circumstances. (emphasis added)

14 In *Canada Deposit Insurance Corp. v. Canadian Commercial Bank* (supra), Wachowich J. (as he then was) discussed the options available to him in awarding costs following a lengthy application. At p. 4 he said:

Essentially, there are four options available to me.

1. I may disallow costs and order that the participants, although successful, are to pay their own costs.

2. I may award costs on a party-party basis.

3. I may award costs on a solicitor-client basis.

4. I may award a gross sum in lieu of, or in addition to, taxed costs (R. 601(1)(*a*)).

15 And at pp. 5 and 6, Wachowich J. set out the general principles when deciding whether costs should be awarded on a party-party basis or on a solicitor-client basis in the following words:

The next issue to be resolved is whether costs should be awarded on a party-party basis or a solicitor-client basis. The general rule is set out in *McCarthy v. Calgary R.C. Sep. Sch. Dist. No. 1 Bd. of Trustees*, [1980] 5 W.W.R. 524 at 525, 17 C.P.C. 115, 30 A.R. 208 (Q.B.):

> ... the general rule is that costs are awarded on a party-and-party basis against the unsuccessful litigant. An award of costs on this basis does not serve to completely indemnify the successful party but is viewed as a reasonable apportioning of the expense of the litigation between the parties.

The rationale behind this rule is explained by Dubin J.A. in *Foulis v. Robinson* (1979), 21 O.R. (2d) 769, 8 C.P.C. 198 at 207, 92 D.L.R. (3d) 134 (C.A.):

> The expense of litigation is a matter of concern for all those interested in the administration of justice, but one must have regard for the burden which such costs place on all parties. Generally speaking, an award of costs on a party-and-party scale to the successful party strikes a proper balance as to the burden of costs which should be borne by the winner without putting litigation beyond the reach of the loser. *There are, of course, cases in which justice can only be done by a complete indemnification for costs*, but, in my respectful opinion, this is not such a case.

(emphasis added)

16 In *Wenden* (supra), Murray J. discusses the plaintiff's proposal in that it be allowed a multiple of three of col. 6 plus fees for certain items listed in Sched. C.Costs on an indemnity basis were not being sought by any of the successful parties. At p. 307, Murray J. said:

> The position in Alberta is set out in the decision of O'Leary J. in the case of *Petrogas Processing Ltd. v. Westcoast Transmission Co.*, 73 Alta. L.R. (2d) 246, [1990] 4 W.W.R. 461, 105 A.R. 384 (Q.B.), and Wachowich J. in *Canada Deposit Insurance Corp. v. Canadian Commercial Bank*, 50 Alta. L.R. (2d) 1, [1987] 3 W.W.R. 160, 64 C.B.R. (N.S.) 9, 76 A.R. 271 (Q.B.). We do not indemnify successful parties for the expense incurred by them in prosecuting or defending an action. Rather, the fees prescribed by Sched. C represent what is considered to be a reasonable amount to be paid for each designated step or stage in the proceedings. These amounts are approved by the government, the present Sched. C items and amounts having come into effect on April 18, 1984. This court has the power by virtue of R. 601 to increase the amounts of these items in the proper case.

17 Madam Justice Veit makes the following observation in the *Sonnenberg* case (supra) after ruling that the plaintiff in that case was entitled to costs on an indemnity basis. She identifies the three scales of costs recognized by Sinclair C.J.Q.B., in *McCarthy* (supra), as party-party, solicitor-client and solicitor and his own client. She adopts the meaning of solicitor and his own client costs provided by Lerner J. in *Re Seitz* (1974), 6 O.R. (2d) 460 (H.C.), at p. 465 as the costs as would "provide complete indemnity to [the client] as to costs essential to, and ... 'arising within the four corners of litigation.' " At p. 79, Veit J. also agrees "with the suggestion made by Megarry V.C. in *EMI Records Ltd. v. Ian Cameron Wallace Ltd.*, [1983] Ch. 59 ... to the effect that when a judge wishes to indemnify a party in a costs award the phrase 'indemnity basis' should be preferred to 'solicitor and his own client'." Veit J. was of the view that R. 601(1) provides the authority to award costs to a successful party on an indemnity basis.

18 Madam Justice Veit identifies an important difference between solicitor-client costs and solicitor and his own client costs, the latter which she equates to an indemnity basis. At pp. 78 and 79, she explains:

> By identifying a scale of costs as "solicitor and his own client", courts have invested that scale with application in litigation other than between a solicitor and his own client. The effect of the award of the scale as between general parties means only that the scale to be used is the scale that might be used by a solicitor against his resisting client. This concept has added significance in Alberta, where lawyers are entitled to act on a contingency basis. Thus, where the scale is "solicitor and his own client", if the solicitor's contract with his own client is that he will be paid for his work at the rate of $300 per hour or on the basis of 35 per cent of the recovery, it is that fee which can be recovered against an unsuccessful defendant. All work requested to be done on a particular file and all work reasonably connected to the proceedings can be recovered on this scale.
>
> Because of the suggestion that the solicitor-client scale allows only the recovery of reasonable fees, and because of the possibility that in specific cases "reasonable" will not be equivalent to "contractual", I adopt, for the purposes of this decision, the meaning attributed by Lerner J. in *Re Seitz* to the term "solicitor and his own client".

19 At p. 80, Veit J. addresses the question as to whether costs on an indemnity basis should be awarded in the case before her. There she says:

> The third issue is, of course, whether such an award should be made in this case. Departure from the general rule of party-and-party costs requires extreme caution and should occur only in rare and exceptional cases: *Mobil Oil Can. Ltd. v. Can. Superior Oil Ltd.*, [1980] 1 W.W.R. 453, 14 C.P.C. 101, 105 D.L.R. (3d) 355, 20 A.R. 111 (Q.B., Kirby J.).
>
> Having adopted the *Mobil Oil* test, presumably for an award of solicitor-client costs, much more care and concern must be exercised before awarding solicitor and his own client costs.
>
> Costs and damages should not be confused. I subscribe to the views expressed in much jurisprudence, of which *Olson v. New Home Certification Program of Alta.* (1986), 44 Alta. L.R. (2d) 207, 69 A.R. 356 (Q.B., Lutz J.), is an

example, that costs deals with the conduct of the litigation and that damages deals with the conduct of the parties giving rise to the cause of action.

Even a successful litigant is normally left to pay a portion of the cost of taking an issue to court in recognition of the fact that there was objectively an issue of fact or law that had to be determined by the court.

In concluding that the plaintiff should not contribute at all to the cost of these proceedings, I have taken into account the evidence that the plaintiff did nothing to hinder, delay or confuse the litigation and that it was apparent to me at the end of the trial that there was no serious issue of fact or law which required these lengthy, expensive proceedings.

And at p. 81, she comes to grips with the question whether an award of punitive damages would exclude the imposition of costs on an indemnity basis. She has this to say:

I am bound to say, however, even though there appears to be authority for these positions, that positive misconduct itself is better considered in the context of punitive damages. *What is undoubtedly unarticulated in the jurisprudence is that findings of such positive misconduct are then taken into account one more time on the costs issue in determining whether the positively misconducting party was "contemptuous", to use the Vorvis expression, of the aggrieved party in forcing that aggrieved party to exhaust legal proceedings to obtain that which was obviously his.*

Different considerations apply on this issue in criminal and civil proceedings. In a criminal matter, no person, even if found guilty, should be punished more harshly because he insisted on a full trial. In a civil matter, where a party positively misconducts himself, and requires a full trial, there is no reason to ignore that litigation on the issue of costs. (emphasis added)

20 In the *Olson* case (supra), Lutz J. cites the *Mobil Oil* case (supra), decided by Kirby J., and says this at p. 229:

It is not necessary to repeat that which I detailed earlier respecting the distasteful conduct of the defendant's operations manager, Gordon Hoult. It is appropriate in the circumstances to exercise my discretion in favour of the plaintiff by awarding costs. That solicitor-client costs can be awarded is clear from the Court of Queen's Bench decision in *Mobil Oil Can. Ltd. v. Can. Superior Oil Ltd.*, [1980] 1 W.W.R. 453, 14 C.P.C. 101, 105 D.L.R. (3d) 355, 21 A.R. 111. It is clear from that decision that the plaintiff must establish that there was an attempt to deceive the court and defeat justice.

This is a case which I think justifies a departure from the general rule that restricts an award of costs to a party-party basis for there was in my view an attempt to delay, deceive and defeat justice: see *Fiege v. Cornwall Gen. Hosp.* (1980), 30 O.R. (2d) 691, 117 D.L.R. (3d) 152, 4 L. Med. Q. 124 (H.C.); and see *Fort Smith v. Berton* (1983), 54 A.R. 367 (N.W.T.S.C.).

The conduct of the defendant that this court found particularly abhorrent and which should not be tolerated was the requirement imposed upon the plaintiff to prove major structural defects and other facts that should have been admitted, thus prolonging the trial, unnecessary adjournments, concealing material documents from the plaintiff and failing to produce material documents in a timely fashion.

21 Lomas J. in *Sturrock* (supra) deals with costs at p. 114, para. 88 as follows:

The general rule is to award a party against his opponent only party-and-party costs (see Stevenson and Côté *Civil Procedure Guide* (1989), at p. 1204 and the cases referred to therein). But, as noted in Stevenson and Côté at pp. 1205 and 1206, there are numerous cases where the court has found sufficient grounds to give an opposite party solicitor-and-client costs. In *Drusick* [sic] *v. Newton* (1984), 51 B.C.L.R. 217 (S.C.), Meredith, J., awarded costs on a solicitor-and-client basis where the defendants were guilty of positive misconduct. His reasons were that others should be deterred from like conduct and the defendants should be penalized beyond the ordinary order for costs. In *Davis v. Davis* (1981), 9 Man. R. (2d) 236, Kraft, J., awarded solicitor-and-client costs against defendants found

> to be acting fraudulently and in breach of trust, although no damages were awarded. Orkin in *The Law of Trust* (2nd Edition) at pp. 2-65 notes that costs have been awarded on a solicitor-and-client basis where the defendant had committed a fraud. In *Kepic v. Tecumseh Road Builders et al.* (1987), 23 O.A.C. 72, 18 C.C.E.L. 218 (C.A.), the Ontario Court of Appeal increased an award of costs from a party-and-party basis to a solicitor-and-client basis in view of the defendants' fraudulent conduct in inducing a breach of conduct and in presenting a deceptive statement of accounts to the court at trial.

And at para. 89 Lomas J. said:

> In view of the fraudulent conduct of the defendants Ancona and Clare costs will be awarded against them on a solicitor-and-client basis.

22 In the case of *Dusik v. Newton* (1984), 51 B.C.L.R. 217 (S.C.), mentioned by Lomas J. in *Sturrock* (supra) and referred to in Stevenson and Côté's *Civil Procedure Guide*, Meredith J. held at p. 219:

> I hold Dusik entitled to costs against both defendants as between solicitor and client. In *Winnipeg Mtge. Holdings Ltd. v. Allard* (1980), 20 B.C.L.R. 179 (S.C.), I cited recent cases supporting the proposition that costs should be awarded on this basis where the defendants are guilty of positive misconduct. The reason is that others should be deterred from like conduct and that the defendants should be penalized beyond the ordinary order for costs. In this case the defendants are guilty of misconduct which, if they had succeeded, would have bilked Dusik of over $1 million. That money was rightfully his and the defendants knew it. Surely this is misconduct deserving of the solicitor-client cost order. Mr. McGivern points out that Mr. Gooderham's fault is that he simply tripped at the last minute. Be that as it may, the trip resulted from a serious conscious misstep which was calculated to have most serious detrimental consequences to Dusik. Gooderham implemented the intention of his client.

23 At pp. 355 and 356 of his judgment in *Fleck* (supra), McBain J. discusses costs as follows:

> A claim is made by the plaintiffs by counterclaim for solicitor-client costs on an indemnity basis.
>
> Solicitor-client costs may be awarded as this court has a general and discretionary jurisdiction to award costs to a successful party as between solicitor and client: see *McCarthy v. Calgary Roman Catholic Separate School District No. 1*, [1980] 5 W.W.R. 524, 17 C.P.C. 115, 30 A.R. 208 (Q.B.). An award of solicitor-client costs is to be made to express a court's disapproval of the conduct of the litigation by a party to it. The general rule is party-party costs, and departure from that general rule requires cogent justification.

24 McBain J. places emphasis on the conduct of the litigation at p. 358 where he mentions the fact that "Mr. Low in argument argues that a distinction must be made between punitive damages and an award of solicitor-client costs, the latter apparently going to the conduct of the action." McBain J. then said that "I am not satisfied that the particulars here justify an award of solicitor-client costs, and I shall make no such award." He did, however, award punitive damages.

25 In *Pharand* (supra), Mason J. awarded the successful plaintiff costs on a party and party basis rather than on an indemnity basis. At pp. 397-98 in para. 6 through to para. 7 he said:

> Further, although the action arose out of a confidence relationship which is a cousin of the trust relationship, it is far from the fiduciary relationship recognized by the case authorities necessary to justify the award of costs other than on the scale of party and party costs.
>
> The conduct of this litigation was straightforward. There was no attempt to delay or hinder the proceedings on the part of the defendant, nor was there any evidence whatsoever of an attempt to deceive or defeat justice. There was no issue of fraud or untrue or scandalous charges or any of the other recognized bases for an indemnity scale award of costs.

26 Mason J. then went on to discuss party-party costs at p. 399, para. 19 as follows:

Costs on a party and party scale can, in theory, totally indemnify the successful party. See *N.P.P. and M.E.P. v. Regional Children's Guardian (Calgary)* (1989), 98 A.R. 77, 68 Alta. L.R. (2d) 394 and 398. However, in principle, costs on a party and party scale are awarded on the basis of a reasonable apportioning of the litigation expenses incurred by the successful party, having regard to such factors as:

(a) the difficulty and complexity of the issues;

(b) the importance of the case between the parties and/or the community at large;

(c) the length of the trial;

(d) the position and relationship of the parties and their conduct prior to and during the course of the trial; and

(e) other factors which may affect the fairness of an award of costs.

27 Mason J. then awarded costs at three times col. 6 plus an additional unallocated gross sum of $75,000 for taxable fees with disbursements as requested by the plaintiff on the basis of certain difficulties faced by the plaintiff identified as follows:

While this was not a rare or unusual case in many respects, it arose under unusual circumstances and the relationship between the parties was materially affected by difficult political complications. Also, the basis of the action, breach of confidence, is a developing area of the law involving conflicting legal theories of characterization, application and remedy. A breach of confidence action is clearly a cousin to a breach of fiduciary obligation. Trust and confidence are involved in a breach of confidence action and both factors were present to a substantial degree in this case. Further, the action was prosecuted in effect by private citizens against Provincial Government on a *contingency fee basis* because the breach of confidence, proven at trial, virtually destroyed their modest asset base and the financial commitments promised for the success they should have achieved.

In addition, although not an appropriate measure of damages, the ultimate saving by the Provincial Government as a result of the confidential information obtained from the plaintiff saved many millions of dollars in capital costs. Finally, the Government dismissed the claims by the plaintiff for recognition and recompense without carefully examining its position and the record of its involvement with the plaintiff.

28 The plaintiffs are seeking indemnification from the defendants for the cost of the lawsuit initiated by them to recover monies which they claim were rightfully payable to them. Indemnification in this instance is equivalent to solicitor and his own client costs and not solicitor-client costs, adopting the meaning found by Veit J. in *Sonnenberg* (supra). In order for costs to be awarded on an indemnity basis or even on a solicitor-client basis, as opposed to a party-party basis, the court must conclude that the case fits within the parameters of a rare and exceptional or unusual case. Examples from the above cited cases resulting in the identification of a rare and exceptional case include:

29 1. circumstances constituting blameworthiness in the conduct of the litigation by that party (*Reese*);

30 2. cases in which justice can only be done by a complete indemnification for costs (*Foulis v. Robinson*);

31 3. where there is evidence that the plaintiff did something to hinder, delay or confuse the litigation, where there was no serious issue of fact or law which required these lengthy, expensive proceedings, where the positively misconducting party was "contemptuous" of the aggrieved party in forcing that aggrieved party to exhaust legal proceedings to obtain that which was obviously his (*Sonnenberg*);

32 4. an attempt to deceive the court and defeat justice, an attempt to delay, deceive and defeat justice, a requirement imposed on the plaintiff to prove facts that should have been admitted, thus prolonging the trial, unnecessary

adjournments, concealing material documents from the plaintiffs and failing to produce material documents in a timely fashion (*Olson*);

33 5. where the defendants were guilty of positive misconduct, where others should be deterred from like conduct and the defendants should be penalized beyond the ordinary order of costs (*Dusik v. Newton*);

34 6. defendants found to be acting fraudulently and in breach of trust (*Davis v. Davis*);

35 7. the defendants' fraudulent conduct in inducing a breach of contract and in presenting a deceptive statement of accounts to the court at trial (*Kepic v. Tecumseh Road Builder* et al.),

36 8. fraudulent conduct (*Sturrock*);

37 9. an attempt to delay or hinder proceedings, an attempt to deceive or defeat justice, fraud or untrue or scandalous charges (*Pharand*).

38 Mention of Stevenson J.A. and Côté J.A. unleashes a plethora of cases involving the application of R. 601(1) referred to in that work at pp. 1414 to 1417 inclusive (1992 edition). Approximately 100 examples are given where sufficient grounds exist or do not exist for awarding party and party costs on a solicitor and client basis. This demonstrates that a careful analysis has to be made of the facts in each case and also illustrates the wide discretion to be exercised by the trial judge who had the benefit of seeing and hearing the witnesses and distilling the essence of the lawsuit.

39 Two major propositions appear to mitigate against an award of solicitor-client costs. The first is that it is the conduct of the action and not the conduct of the party that gives rise to the action that determines an award of solicitor-client costs. Secondly, punitive damages or damages should not be confused with a costs award.

40 Madam Justice Veit appears to agree with the above propositions but goes on to decide that positive misconduct gives the court reason to take such conduct into account [p. 81] "one more time on the costs issue in determining whether the positively misconducting party was 'contemptuous' ... of the aggrieved party in forcing that aggrieved party to exhaust legal proceedings to obtain that which was obviously his."

41 Where the positive misconduct of the party which gives rise to the action is so blatant and is calculated to deliberately harm the other party, then despite the technically proper conduct of the legal proceedings, the very fact that the action must be brought by the injured party to gain what was rightfully his in the face of an unreasonable denial is in itself positive misconduct deserving of indemnification whether punitive damages are awarded or not. Such positive misconduct must be taken into account one more time on the costs issue to use the words of Madam Justice Veit in *Sonnenberg*.

42 In the present case, I have found that the plaintiffs were entitled to receive payment for their 13.5% interest in Industries valued at $7,212,375. To this amount interest is to be added, calculated in accordance with s. 2.6(d) of the Management agreement (Ex. 1, Document 969) at the Royal Bank of Canada prime rate commencing 30 days following Jackson's resignation from Industries on December 29, 1987. Accordingly interest has been accumulating for over 5 years and will represent a considerable sum by itself. The issue of punitive damages was never seriously argued by counsel for the plaintiffs and in view of the eventual size of the judgment based on the value of the Tricil shares which had escalated to $91 million by December 29, 1987, it seemed to me to be unnecessary to award punitive damages to the already sizeable judgment particularly where interest was payable. I do not view the issue of costs to have been determined by the fact that punitive damages were not awarded in this case. The issue of costs is still a live issue and is influenced by the reasons which gave rise to this lawsuit in the first instance.

43 I find that this lengthy trial came about as a result of the fault of one man within the Trimac organization, the man who held the ultimate power and who refused to recognize a commitment which he had personally given to the plaintiff Jackson. The commitment was documented and other executives within the organization recognized the commitment

and were working towards its fulfilment when it was derailed by J.R. McCaig (JR). Such was the authority of JR, as the dominant force behind the control block shareholders of Trimac, that no one within the Trimac organization was in a position to prevail against JR or dared to cross him when it came to a showdown between himself and Jackson. JR determined to deny Jackson the benefits accruing to him either to enhance the value of his own 15% interest in Trimac or, alternatively, JR simply did not wish to see Jackson reap the benefits of his entrepreneurial skills because of the unexpectedly high reward. Ironically, it was Jackson's skill and farsightedness which created the auction atmosphere between CIL and Laidlaw which in turn caused the value of Tricil to escalate. The enhanced value of Trimac's interest in Tricil was a major contributing force to the salvation of Trimac, then admittedly very low in the water as JR himself described it. Jackson's reward was to be denied the benefits previously promised to him by JR.

44 I find JR's conduct to have been calculated to force Jackson to exhaust the legal proceedings to obtain that which was obviously his. Jackson did indeed have to decide whether to accept JR's second unilateral revision to the Industries' proposal or sue and quit the Trimac organization. Jackson knew that he would be pitted against the significant resources of the Trimac organization and that the cost of a protracted lawsuit would be very expensive, drawing on his own experience in the CIL lawsuit. JR was contemptuous of Jackson's rights. In addition, I have found that JR's evidence given during the trial was unreliable. This is as charitable a view as I can place on JR's testimony. It affected the conduct of the action.

45 I find that JR was guilty of positive misconduct in inducing Industries to breach its contract with Jackson. This was done in the face of what JR had previously personally promised to Jackson and contrary to that which I have found to be reflected in the agreements.

46 I find that this is a proper case to award costs on an indemnity basis against the defendants adopting the meaning of that phrase attributed to Lerner J. in Veit J.'s decision in *Sonnenberg*. There that meaning is described as the costs as would "provide complete indemnity to [the client] as to costs essential to, and ... 'arising within the four corners of litigation' ". I do not take this to be a complete carte blanche so that a successful party can charge an unlimited amount. The contractual arrangement between the solicitor and client must be established and some check is necessary in order to justify the time spent and hourly rates which were presumably contracted for by Mr. Jackson. The key words are "essential to ... and 'arising within the four corners of litigation' ".

47 In this later connection the defendants have challenged the apportionment of the cost of certain "issues" or "matters" brought before the court in the presentation of the plaintiffs' case. The defendants say that these issues took up 9 1/2 days of trial time. The cases sometime refer to an award of "selective costs" where the plaintiff has failed to prove an issue.

48 In *Calbar Securities Ltd. v. Toole Peet Co.* (supra), McGillivray C.J.A. said at p. 288:

> We do not think that costs should be affected by the particular disposition of any issues that arise in the course of a trial. On the whole case, the court held that the plaintiff should not have been in court.

49 In *Nathu* (supra), the issue was whether it was a proper case to deny the respondent, who was largely unsuccessful on the appeal, her trial costs as they related to the calculation of damages. The damages awarded at trial of $465,000 were reduced on appeal to $233,000 as a result of the assessment of profit margins being substantially reduced. At p. 151, the Court said:

> While costs routinely follow the event, all costs are not dictated by the bottom line of recovery. Sensibly the expense of litigating unsuccessful issues may not be recoverable, or may even be awarded to the successful opponent, notwithstanding the fact that the plaintiff succeeds on other issues. It must and does lie within the court's discretion: the *Court of Queen's Bench Act*, R.S.A. 1980, c. C-29, s. 19; R. 601, *Rules of Court*.
>
> Within the case law, the award of selective costs was recognized as long ago as 1893: see *Forster v. Farquhar*, [1893] 1 Q.B. 564 (C.A.). It was recently affirmed in *Herman v. Miller*, [1988] 2 W.W.R. 72, 64 Sask. R. 71 (Q.B.), where Gerein J. ruled [p. 75 W.W.R.]:

> In short, the plaintiff put forth a serious and very substantial claim which is notoriously difficult to prove. The defendants of necessity had to resist and they did so successfully. It would be grossly unfair were the successful defendants still required to indemnify a party who had been unsuccessful in pursuing a claim and had expended large sums of money in such pursuit.
>
> As I see it, the plaintiff obtained a part of what he sought and having been successful in the broad sense he is entitled to taxable costs as I ordered in my judgment. However, in this instance he should not be permitted to include in those taxable costs any tariff items or disbursements which relate to witnesses tendered on behalf of a losing cause.

A similar result calls for similar relief here. The plaintiff-respondent, Mrs. Nathu, will recover the costs of the trial to be taxed under col. 6 of Sched. C with no restrictive rule to apply. That was the trial direction. But having failed, in the outcome, on damages, the plaintiff will not be allowed to tax as tariff items fees or disbursements pertaining to her witnesses on the calculation of damage issue.

50 At p. 152, the Court said:

> We are not forgetful that the respondent, Mrs. Nathu, was partially successful on the appeal (on the issue of liability), but the respondent will, at least, be adequately compensated overall in that we have not limited her counsel fees for the extended trial although it is obvious that a substantial portion of that time was occupied in the litigation of an issue in which she eventually failed.

51 I note that the restriction was only placed on tariff items relating to witness or disbursements in the calculation of damages which is far less than what the defendants are requesting here. The defendants ask that they be allowed to tax the costs of the unsuccessful "issues" raised by the plaintiffs during the trial against the plaintiffs as an off-set to the plaintiffs' taxable costs.

52 The cases of *Forster v. Farquhar* (supra) and *Reid, Hewitt & Co. v. Joseph*, [1918] A.C. 717 (H.L.), considered Order LXV, R. 1. This rule is explained by Viscount Haldane in *Reid, Hewitt* (supra) at pp. 738-39 as follows:

> The effect of the earlier part of the order is to repeal the old law and to put costs in the discretion of the Court or judge, but from this principle a departure is made by the proviso that "where any action, cause, matter, or issue, is tried with a jury," the costs are to follow the "event" unless the judge who tries the case, or the Court, shall for good cause otherwise order. This departure from the general principle is aggravated by r. 2 of the same order, which applies to all issues in law or fact, whether tried with a jury or not, and provides that the costs, unless otherwise ordered, shall follow the event. It goes on to say that an order giving a party costs, except so far as they have been occasioned or incurred by or relating to some particular issue or part of the proceedings, shall be read and construed as excluding only the amount by which the costs shall have been increased by such issue or proceedings; but the Court or judge, if the whole costs of the action are not intended to be given to the party, may, wherever practicable, by the order direct taxation of the whole costs and payment only of a proportion. *It might well, my Lords, have been better to have adhered to the simple principle of placing the whole of the costs in the discretion of the judge or Court, and to have left to them the duty of disposing of the whole of them by definite direction to be inserted in the judgment.* But that course has not been taken, and we have to interpret the application of the order as we find it. Now it is plain that, as the language stands, the bare result stated in the judgment is not to be taken as conclusive. If an issue is disposed of separately and has an "event" in some judgment in the action, the costs will automatically follow that "event," unless the judge for good cause provides by his order otherwise. (emphasis added)

53 In that case as well as in *Forster v. Farquhar* it became important to define the meaning of the words "event" and "issue". It was argued that the use of the word "event" got rid of all questions as to specific issues arising from the "event" as opposed to reading the word "event" distributively as applying to more than one issue. The latter interpretation found favour. At p. 741, Viscount Haldane said:

It is on the material extent to which by the verdict and judgment the plaintiff's claim was successfully met and cut down that I lay stress in the present case. I think that there has been an event following on the trial of an issue distinctly and separately raised by the defence.

54 At p. 742, Viscount Haldane defined the meaning of issue as follows:

For the reasons I have indicated I have arrived at the conclusion that an issue which has a direct and definite event in defeating the claim to judgment in whole or in part is within the meaning of the rule, and that in the case under consideration such an issue was raised by the pleadings and decided.

55 There is no similar rule to the English Order LXV, R. 1 and 2 to be found in the *Alberta Rules of Court* where the trial judge's discretion as to costs is unfettered. This might have pleased Viscount Haldane who had the task of deciding how the words "event" and "issue" arising from the English Order were to be applied in *Reid, Hewitt*. The defendants argue, however, that there is an analogy to be drawn in the present case where a judge "for good cause" should apportion costs between parties to an action where the defendant is successful in meeting or defeating an issue raised by the plaintiff.

56 A rule similar to the English rule is found in the British Columbia, *Supreme Court Rules*, O. 65, R. 2, quoted in part as follows:

2. When issues in fact and law are raised upon a claim or counterclaim, the costs of the several issues respectively, both in law and fact, shall follow the event, unless the Court or Judge shall for good cause otherwise order ...

57 The British Columbia rule was applied in the case of *Ireton v. Heizer*, [1971] 3 W.W.R. 77 (B.C.S.C.), decided by Seaton J. in Chambers on December 4, 1970. Seaton J. referred to Bowen L.J.'s decision in *Forster v. Farquhar* at p. 569 of that decision found at p. 79 of Seaton J.'s reasons for judgment:

Forster v. Farquhar, supra, dealt with a similar situation and I respectfully adopt the language of Bowen L.J. at p. 569:

> Serious expense, however, was occasioned at the trial by reason of the plaintiff having put forward a claim under a head of damage which he failed, in the opinion of the jury, to make good. The expert witnesses called by the defendants to rebut this untenable head of damage cost money and time ... But why should any burden in respect of this portion of the plaintiff's claim be cast upon the defendants? It is said by the plaintiff that the various items of damage claimed do not create separate issues in the pleader's sense, nor for purposes of taxation. That is perfectly true; but it is a mere technicality of pleading and of the taxing office, which has survived to us from the time when pleadings were more accurate and when the term 'issue' had a recognised meaning with respect to them. The real controversy in the present action was as to the damage suffered, and the question as to damage, though not an issue in the pleader's sense of the word, was a matter in controversy and one which could be split up into separate heads, each involving a different class of evidence. For all purposes of justice these separate heads of controversy were different issues, though not different issues, nor even issues at all, in the sense in which pleaders use the term. Why should the defendants, whose defence has succeeded on the most expensive and most important of these heads of controversy bear the cost of litigating it? If by making a special order as to costs the judge could apply distributively to these heads of controversy the maxim that he who loses pays, was it not fair and reasonable so to direct? It seems to us that it was. So far from thinking that Cave, J., had no good cause for making the order he did, what he has directed appears to us, on the contrary, to be an exact and admirable instance of the way in which, in the hands of a competent and accurate judge, the rule as to good cause can usefully be applied.

58 At p. 80, Seaton J. concluded that he had good cause within the rule and said:

> The appropriate order here, in view of the various competing factors, would be to allow the plaintiff to tax as though the trial had lasted one day, with the plaintiff and her general practitioner the only witnesses. She is thus not able to tax for three days of the trial, or with respect to a number of medical witnesses. The defendants should tax and recover the disbursements they incurred with respect to medical examinations and witnesses.

59 I note that this award was not an off-set award to the defendants but was a reduction in the plaintiff's taxable costs only.

60 The same British Columbia rule had previously been considered in *Canada Rice Mills Ltd. v. Morgan* (1934), 49 B.C.R. 202 (S.C.), decided by Murphy J. on November 9, 1934. There he adopted the meaning of "issue" as defined by Buckley L.J. in *Howell v. Dering* (1914), 84 L.J.K.B. 198 (C.A.), found at p. 203 of that report as follows:

> An issue is that which, if decided in favour of the plaintiff, would in itself give a right to relief, or but for some other consideration would in itself give a right to relief.

61 Murphy J. found that but for the language of the contract as to the effect of final payment, the plaintiff would have obtained judgment on the issue of the determination of the question of defective roof construction. He held that his finding on this issue in favour of the plaintiff to be an "event" and apportioned costs on a 60-40 basis, that is the defendant recovered 60% of the amount taxed as a whole as if no question of separate issues had arisen. In other words, Murphy J. found good cause for otherwise ordering that the costs should follow the event and relieved the plaintiff from paying 40% of the defendant's taxed costs.

62 The cases involving the interpretation of the English Order LXV, R. 1 and 2, and the British Columbia O. 65, R. 2, revolve around discussions of what constitutes a separate "issue" in an "event" where costs generally follow the event except where a judge can "for good cause" award costs against the party who unsuccessfully advances an "issue" which is found to be an "event". Our Court of Appeal in the recent case of *Nathu* applied the reasoning in *Forster v. Farquhar* (supra) where an award of "selective costs" was recognized 100 years ago. However, in *Forster v. Farquhar*, Order LXV, R. 1 and 2 authorized the departure from the general principle that costs are to follow the event. In Alberta no such rule has to be relied on or is indeed available having regard to the wide discretion as to costs which normally rests with the trial judge.

63 Counsel for the plaintiff in his opening address identified 30 or so paragraphs in the defendant's pleadings which he claimed ought not to be considered by the court on the grounds of issue estoppel, res judicata and abuse of process arising out of the previous CIL litigation where presumably these matters had been decided. If this was a motion to strike out a portion of the defendants' pleadings, I declined to intervene and directed that the trial proceed on the issues identified in the pleadings.

64 I cannot say that my decision gave the defendants a right to relief or that the matters which were raised on behalf of the plaintiffs were issues which had a direct and definite event in enabling the defendants to defeat the plaintiffs' claim to judgment in whole or in part. It was a part of the trial process just as the admissibility of certain documents had to be decided for which the defendants claimed privilege. I also had to rule on the scope of the cross-examination of certain witnesses who were being cross-examined by counsel for the plaintiffs. There I rule that certain questions were disallowed under R. 255 as being vexatious and not relevant to the matters pleaded by the plaintiff in the action. These were not severable issues which formed an event where costs would normally follow.

65 I decline to exercise my jurisdiction to apportion the costs between the plaintiffs and the defendants on the basis of the success or failure of the parties on the procedural matters raised during the trial as to the pleadings or the admissibility of the evidence or the propriety of questions being put to the witnesses on cross-examination by counsel. I do not believe that any of such matters went to the issues of liability or the quantification of damages which were the real issues in dispute in this lawsuit. To again use the analogy in the English and British Columbia cases mentioned above, I find no good cause for apportioning costs or awarding costs on a selective basis arising out of the determination of an event.

66 In my reasons for judgment, I stated that I found both the appraisals prepared by Mr. Scott for the plaintiffs and by Mr. Clark for the defendants to have been helpful. They both proceeded on assumptions given to them by their respective clients which I did not use in coming to my decision on damages. It would have been negligent for the plaintiffs not to have produced some basis for the plaintiffs' estimate of damages and it was difficult, if not impossible, to second guess the final determination by the Court. Both appraisals were useful counterpoints in identifying the issues and illustrating methods of computing the plaintiffs' losses.

67 In the result the plaintiffs are to be indemnified for their costs arising out of the lawsuit and there is to be no apportionment of the costs or award of selective costs.

68 The plaintiffs' costs are subject to taxation if required in order to justify the time spent and hourly rates contracted for or otherwise by Jackson which were essential to and arising within the four corners of this litigation. The plaintiffs are also entitled to tax against the defendants, their reasonable disbursements which will include those disbursements relating to Mr. Scott's report.

Order accordingly.

In the Court of Appeal of Alberta

Citation: Jackson v. Trimac Limited, 1994 ABCA 199

Date: 19940607
Docket: 14167, 14215, 14166 and 14214
Registry: Calgary

Between:

Donald K. Jackson and Parkview Holdings Ltd.

Appellants in Appeal No. 14167
Respondents in Appeal No. 14215
(Plaintiffs and Defendants
by Counterclaim)

- and -

Trimac Limited and Trimac Industries Limited

Respondents in Appeal No. 14167
Appellants in Appeal No. 14215
(Defendants and Plaintiffs
by Counterclaim)

Between:

Donald K. Jackson and Parkview Holdings Ltd.

Appellants in Appeal No. 14166
Respondents in Appeal No. 14214
(Plaintiffs)

- and -

John Robert McCaig

Respondent in Appeal No. 14166
Appellant in Appeal No. 14214
(Defendant)

The Court:

The Honourable Madam Justice Hetherington
The Honourable Mr. Justice Foisy
The Honourable Mr. Justice Côté

Memorandum of Judgment

COUNSEL:

A.D. Hunter, Q.C. and M.L. Sigurdson, for the Appellant

D.R. Haigh, Q.C. and P.J. McIntyre, for the Respondent

MEMORANDUM OF JUDGMENT

THE COURT;

[1] This judgment stems from a number of appeals from a trial judgment of Hutchinson J., whose reasons are reported at (1992) 134 A.R. 321 and (1993) 138 A.R. 161.

[2] The facts found at trial are voluminous, but they boil down to roughly the following. Jackson was a top executive of Trimac, who was being switched over to run a subsidiary company, Industries. He was to trade his shares in Trimac for shares in Industries. Industries would not have had much value as it stood. But it was agreed that Industries would help Trimac to sell Trimac's half interest in another company, Tricil. If the proceeds of the sale were over $45 million, the excess would be injected into Industries. Four written contracts embodied the various agreements among the parties.

[3] Trimac had a shotgun agreement with the co-owner of Tricil, and had a financial backing and share purchase agreement with another company. Trimac sent a notice to the co-owner under the shotgun agreement. Trimac and its president disagreed with Jackson as to whether, because of that notice, there had been a sale of Trimac's interest in Tricil so as to trigger the obligation to inject funds into Industries. Thereafter, Jackson exercised an option to buy more shares of Industries, but Trimac did not close that deal. Jackson resigned from all his offices, thereby triggering an obligation that Trimac buy his shares in Industries. He did not close the exchange of his Trimac shares for new Industries shares, and still has his Trimac shares.

[4] After an abortive suit by Industries and a suit in Ontario, the present litigation began in Alberta. Jackson sues for breach of some of the contracts, and he sues two companies and Trimac's president for inducing breach of contract and interfering with contractual relations. There are counterclaims. Jackson won at trial on the causes of action outlined here, and the

defendants appeal. Both sides also appeal as to the damage assessment, and the defendants appeal the award of solicitor-client costs to Jackson.

[5] The biggest issue is whether anything occurred to trigger the contractual obligation to inject funds into Industries. The precise words of the key clause are as follows:

> "On any sale of the Tricil Interest to a third party by Trimac on or before December 31, 1987 whereby funds or value are received by Trimac in excess of Forty Five Million Dollars ($45,000,000) cash, net after cash tax, Trimac will contribute such excess after tax to Industries."

[6] Before the end of 1986 Trimac sent the notice under the shotgun clause. The co-owner of Tricil which got the notice did not reply clearly, and there ensued some years of litigation as to whether that notice had triggered an obligation to buy or to sell those shares. If Trimac had to buy then, then Trimac was obligated to sell at once to its financial backer. Ultimately a different trial judge in that other suit held that there was to be a sale by the co-owner to Trimac, and hence a resale to the financial backer. That was appealed, but settled pending appeal. The settlement effected a sale to the financial backer at a higher price than that contemplated in the original agreement with the financial backer.

[7] First, was there a sale before the end of 1987, given the fact that the settlement took place late in 1989? The trial judge here held that there was, and we agree. The combination of the shotgun and the financial backer agreements gave that effect to the shotgun notice given before the end of 1986. It does not matter that various parties refused to acknowledge their rights or obligations under these various contracts. In our view there plainly was a sale by Trimac in late 1986, and it does not matter that it was only later that some court found that to be so. Facts exist when they arise, and courts find facts that support contractual obligations; they do not create them.

[8] Second, was that a sale whereby funds or value over $45 million were received by Trimac? We do not agree that there is any time limit for the receipt of funds, despite what the defendants argue.

[9] The defendants argue that a "sale" means a completed sale, not an agreement to sell. We do not agree that that need be so, particularly where the subject of the sale is privately held shares not available on any market, and so where specific performance would be available. The decision of the Supreme Court of Canada in ***Leading Investments*** [1986] 1 S.C.R. 70, 38 R.P.R. 201, was cited. That was a decision interpreting a very different

contract, one for real estate commission, and the issue there was whether there had been a sale. The issue here at the moment is when the sale occurred, not whether it did. So this Supreme Court decision is not on point. In any event, this is a simple letter agreement made as part of a package of four agreements, and its wording distinguishes date of sale from date of receipt of funds. Given the context, we are in total agreement with the interpretation of it by the trial judge.

[10] Another aspect of this issue ("whereby funds or value are received") is the fact that the funds ultimately received resulted from the settlement agreement which provided for a different price. We think that that does not break the chain. A contracts to sell to B but then refuses to perform his contract, and B sues. The judge holds that the contract is valid. A appeals, and then they compromise and agree to go ahead with the sale, but change the price. They close the deal. It seems to us fair to interpret these contracts by looking at substance, not form, and to say as a matter of business sense that the funds received were from the sale, and fall within the scope of a contract about funds received from the sale. Nor does it make any difference whether it is A or B who refuses to close the sale or sues or is sued or appeals or is appealed against.

[11] The defendants also argue that the funds agreement, from which we quoted above, is void for uncertainty. We need not worry about the phrase "net after cash tax", because the defendants admitted on discovery that no cash taxes were paid. On appeal they suggest oral arguments to the contrary, arguments not made in the factum or at trial. It would be unfair to raise such an issue at this late stage, giving the plaintiff no chance to meet them by argument, so we say no more about cash taxes. Instead we turn to another sentence said to introduce uncertainty:

> "It is understood that we will jointly review the most tax effective method for Trimac to dispose of its Tricil Interest using any existing Trimac tax losses in the most tax effective manner."

That sentence is in no sense a condition precedent to anything else, nor does it call for implementation of what is discussed. It is simply a covenant to consult. Viewed in that light, it is not uncertain at all. Furthermore, to interpret it that way makes business sense, and it is not a futile or useless provision. Since most of the proceeds of sale would go to Trimac, it would have at least as much interest as Jackson in minimizing its tax burden.

[12] The defendants argue that Jackson is not a party to the funds contract, and cannot enforce it. We disagree. It is plainly addressed to him and accepted by him. That it may also retain Industries to sell, in no way derogates from that.

[13] Next, the defendants argue that in procuring the four contracts in question, Jackson failed to disclose documents which he held. It is not disputed that he owed a fiduciary duty of disclosure because he was a director and top officer of some of these companies. The trial judge held that if there was such a duty, Jackson did not break it. He told the defendants many things about the worth of Tricil and its prospects for sale, but he did not pass on every piece of paper and every detail. The trial judge found that he told enough, and we agree. A duty to reveal every detail would be almost impossible to comply with in many situations. Nor is there a duty to pass on pieces of paper; the duty is to reveal information: it is a question of substance, not form. Furthermore, many of the pieces of paper not passed on were obtained or created after the four contracts which are the subject of this suit had been made. And most of the pieces of paper were speculative studies or calculations using known data, some merely relating to a non-owned company which it was hoped could be bought or amalgamated with. The judge's finding here is a great distance from palpable or overriding error.

[14] It will be recalled that much of these suits is for inducing breach of contract, and indeed one defendant is the president of Trimac, who is not a party to any of the contracts and can only be liable in tort, not contract. At all material times that president held high office as a director or officer of most of the companies concerned. Therefore, the defendants assert that he cannot be liable for inducing any such company to break one of its contracts. Assuming for the sake of argument that there is a general defence of acting as a director or a servant, we agree with the trial judge that that defence must have limits. The defendants argue strongly that motive is not one of the ingredients of the tort, and so should be irrelevant. That may be so when one defines the tort (a point which we do not have to decide here), but mapping the borders of the defence to the tort is a different question. A company may need to use directors and servants to carry out its legitimate aims. When they are trying to do that and no more, it may be just or even necessary that they incur no personal liability for certain torts. Companies might have trouble finding solvent directors or servants if it were otherwise. But no such rationale can extend to a servant who takes advantage of his employment to commit a tort for his own ends. That is substantially what the trial judge found here, and we are far

from willing to interfere with that fact finding, given all the evidence and the credibility findings made. One may debate whether such a tort is within or outside the scope of employment, i.e. whether the exception to the defence is for motive, or for scope of employment. But that is largely a matter of semantics in the present case, and can await another case some other day for resolution. Any defence of employment must have some exception for matters of this sort, and we cannot imagine an exception to the defence of employment which would not be triggered by the fact findings here.

[15] This is a good place to discuss the trial judge's findings about credibility. The defendants' factum addresses this topic, and questions the propriety of the findings against three top officials of the defendant companies, including the president of Trimac. Quite apart from the trial judge's observations of those witnesses as they testified, he had another good reason to find other evidence more credible than theirs. On a number of occasions, they gave evidence which was somewhat improbable in all the circumstances, and definitely against the tendency of the contemporary documents. After that happened often enough, it was perfectly proper for the trial judge to consider the probabilities and the personalities and conclude that the simplest and most probable hypothesis was that their evidence for one reason or another was not credible. We see no reason whatever to interfere with those credibility findings.

[16] The defendants also argue that the only breaches pleaded were anticipatory breaches, and that two things flow from that. We have some doubt that that is a correct characterization of the pleadings, given their amendments, but for the sake of argument we will assume that that is so. The first thing which the defendants say would flow from the breaches alleged being merely anticipatory is that they were honest differences of opinion. It is said that such differences cannot amount to repudiation. We have great doubts that that wide proposition of law is correct, or that taking the advice of counsel is a defence to a claim of repudiation. The cases cited appear to us to involve much smaller proposed breaches than those here. In any event, the trial judge found that the positions taken by the defendants here were the opposite of an honest difference of opinion, and were designed to keep Jackson from any benefit, and to starve him out. There appears to have been ample evidence to support that conclusion by the trial judge.

[17] The second thing which would flow from the allegations of breach being allegations of anticipatory breach (or repudiation) is election. It is suggested by the defendants that after the anticipatory breach, Jackson elected to affirm the contract or contracts, by attempting to

exercise his option to buy some more shares. We cannot agree, for several reasons. In the first place, that was an option which he expressly had the right to exercise up to 30 days after a termination of employment by either side for any reason. Had Industries fired him, he could have exercised it without losing other rights. That he should lose them as a result of what the trial judge found to be lesser conduct than firing him would be paradoxical. In other words, exercising the option was neutral, and was not an election to affirm the contract. Alternatively, it was an election to affirm only an irrelevant part of the interrelated set of contracts, a part not inconsistent with his complaint of breach of those contracts. Then again, this argument ill lies in the mouths of the defendants, for they in effect refused to honour the exercise of that option by Jackson.

[18] The defendants complain that Jackson himself is guilty of breach of contract. He was to trade his shares in Trimac for shares in Industries, and failed to tender on the due date. But there are several answers to that. In the first place, this was after the defendants' repudiation (anticipatory breach), and he was entitled to accept the repudiation and revert to damages, which he has done. This is the very acceptance of the repudiation which the defendants allege did not exist. In the second place, the management agreement, clause 2.3, expressly says that Jackson had to sell back any shares in Industries which he held, in the event that his employment ended for any reason. He resigned all his employment and offices with the Trimac companies and so under that management agreement, he had to sell back all his shares. Even if there were not an accepted repudiation, it would seem strange to interpret the contracts, read as a whole, to require a share purchase in Industries in order immediately to have a share sale back. In any event, we cannot see that any such breach by Jackson (even if we are wrong and there were a breach) would be a breach of a clause which is a condition precedent to anything which Jackson now sues for. At best it would lead to a relatively modest set-off of damages. Modest, because it could only be for the difference in value between the Trimac shares and the Industries shares at the time for closing, given all the obligations of the defendants, such as the duty to inject funds from the sale. The point cannot affect liability. We would not adjust quantum for that point, for the reasons given, and also because the uncertainties involved in valuation adjusted for all the effects of the torts and breaches of contract by the defendants do not permit one to find with enough probability any significant difference in value.

[19] The defendants complain that the trial judge on occasion cited the wrong one of the four contracts sued upon. If that is correct, it appears to us to be mere slips of the pen not affecting the substance of the matter. And it is a small sin, for the four agreements were originally two. The later two were schedules to one of the first two, which required that they be signed in substantially the same wording. They were signed a few days later, with only minor wording changes.

[20] That really covers all the issues relating to liability. We will deal with two aspects of costs under the heading of quantum.

[21] The biggest argument about quantum was raised by the Jackson. He contends that the trial judge was wrong to assess damages based on the sale price which was triggered by the exercise of the shotgun clause. He says that one should look at the later much larger price set by the out-of-court settlement. If there were no deadline, that might be an interesting argument. But there was a deadline; there had to be a sale before the end of 1987 whereby funds were received. The settlement was made in late 1989, so we cannot see how it is proper to use its sale price. The only sale before the end of 1987 was clearly for $91 million plus interest (from the shotgun agreement, the financial backer agreement, and the amendment to the financial backer agreement). So we conclude that the trial judge was right on that point. We will not increase that aspect of the damages.

[22] The question about any allowance for the supposed failure by Jackson to tender his shares in Trimac has been dealt with above.

[23] Jackson also contends that the trial judge omitted to give him damages for a second option to buy yet more shares. The defendants' answer is that Jackson this time did not formally attempt to exercise the option or tender the purchase price (though he had with the earlier option which the trial judge did allow). Jackson replies that in view of the refusal of the defendants to perform anything else, and Jackson's right to exercise options within 30 days of the end of employment, that does not matter. It seems to us that previous refusals by a defendant might excuse a plaintiff from tendering or trying to close a firm contract. But an option is not the same thing as a firm contract. In any event, the clause respecting termination of employment expressly says that within 30 days the option must be formally exercised, and this one never was. (Even if we were wrong on this point, the damages would not be the gross worth of the extra option shares, but only the difference between that and the purchase

price, possibly with some adjustment for time.) We would not add any more damages on that account.

[24] The trial judge awarded interest on the damages, beginning 30 days after the end of 1987, which is the time when the shares of Jackson should have been bought back. In principle that seems correct, or very nearly so. But there is a wrinkle overlooked. The funds contract did not require that the excess sale proceeds of the Tricil shares be injected until they were received, and the dispute with the co-owner over them started at once. At the time that Jackson ended his employment, it was easy to see that those funds would not be received at once. Even though they were to go to Industries and not to Jackson (whose shares were to be bought within about 30 days), it would be proper in valuing the Industries shares and the chances lost, to look at the value of the cash contribution to come when the sale proceeds of the Tricil shares were received. The trial judge properly did that. But that cash injection should have been looked on as coming in the future. It actually came almost two years later, and it seems to us that that delay was then foreseeable. So it should have been looked on, for share valuation purposes, as coming almost two years later, in late 1989. The trial judge awarded interest from early 1988. That would be proper if he discounted the worth of the shares for the almost two-year delay in the funds' injection. It is not proper if he did not. The defendants argue that he did not, and we cannot see any indication in paragraph 312 or 322 that he did. Therefore, on this point, we direct that the damages be reduced by two years' interest on the excess cash injection. In other words, follow these steps:

(a) calculate two years' interest on $46 million cash injection, using the same interest rates directed by paragraph 322;

(b) then calculate 13.5% of such interest;

(c) then deduct the resulting sum from the total damage award at trial;

(d) interest on damages will run in the way that the trial judge directed, but on the smaller sum after this deduction.

We sincerely hope that counsel can agree on these calculations, but if they cannot, that point alone will be sent back to the same trial judge to calculate.

[25] We understand that there were issues about house and car payments, and that the house loan has now been resolved between the parties, and that the car loan is almost

resolved. If the car loan is not resolved, the parties may address the point in writing within 30 days after the filing of this Memorandum.

[26] The defendants also complain that in valuing Jackson's shares in Industries, the trial judge ignored the dilution of his interest by an extra 50,000 shares on the second closing. Counsel for Jackson counters by saying that the meeting doing that lacked a quorum, and by then all value was stripped from the company. But assuming for the sake of argument that he is wrong, and that the trial judge was wrong to ignore the dilution because the termination of employment was before the second closing, there is another answer. The trial judge at the same time did not include in the value of the Industries shares the price for the additional 50,000 shares, $5 million (paragraph 312). One cannot look at only one side of that transaction. If it was achieved at anything close to fair value, it would be a wash and not affect the net worth of the shares of any shareholder. We were not referred to any evidence that that transaction significantly changed the worth of Industries. So we make no adjustment to the damages on that account.

[27] Now we turn to the costs questions. There was an independent claim quite separate from the damage claims described above. In the separate litigation with the co-owner of Tricil, Jackson was third-partied. He had a contractual and other right as an officer and director to indemnity for his legal fees, and ultimately all his interim legal bills were paid by an insurer of the defendants. However, the defendants refused to pay the last legal bill, which was for a much larger sum than would be produced by multiplying the last few lawyers' hours unpaid times the lawyers' usual hourly rate. It was argued here and at trial that the correspondence disclosed a contract either to charge only what the insurer would pay, or alternately to charge usual hourly rates and no more. We do not read the correspondence as saying that at all. It called for some information, but did not define how to calculate fees, or on what basis. The trial judge found that Jackson was entitled to solicitor-client costs for defending that third-party claim in the other litigation, and that the usual taxing officer should tax those costs. We agree. The taxing officer will proceed on the basis that the defendants are liable to Jackson for solicitor-client costs of the third-party proceedings, but that there is no other contract fixing their amount or the basis for computation. He will decide whether Jackson, or more accurately Jackson's lawyers, are entitled to no bonus beyond hourly rates, a small bonus, or a larger bonus. (No one suggested to us fees lower than normal hourly rates.)

[28] That brings us to costs of the present litigation. Jackson had by far the larger measure of victory at trial, and is obviously entitled to significant costs. The defendants objected to the amounts awarded. The trial was long and hard fought, but the defendants say that many days of it were spent on issues on which they won, and so that part of the trial was not their doing. However, the issues on which they won were procedural or evidentiary, not substantive. While trial judges sometimes do apportion results ("the event"), issue by issue, it is doubtful that a trial judge must do so. Rule 601 gives him a wide scope to decide. No procedural issue would have been necessary if it were not for the substantive issues, and Jackson won them resoundingly. The trial judge's reasons appear to consider and act on just that point. It is true that the trial judge did not accept the calculations of one of Jackson's experts, but the judge found the expert's evidence helpful. Therefore, we would not make any deduction in Queen's Bench costs for those days spent on procedural issues.

[29] The trial judge's second set of reasons, (1993) 138 A.R. 161, award Jackson costs of the action against the defendants on a solicitor-client basis, not the usual party-party basis. The trial judge was aware of the caution necessary in that regard, for he cited a large number of cases on the subject, and quoted from some. His fact findings in the first set of reasons, including the credibility findings and the dismissal of the claim and defence of breach of fiduciary duty (albeit with no allegation of conscious fraud), would give some support for this costs award. He also found that the litigation was not over an honest difference of opinion, but rather was a deliberate decision by the defendants to keep Jackson from the fruits of his bargain for as long as possible. We are not disposed to interfere with that finding, or the weight which the trial judge gave it. It does not display any error in principle, and in the right circumstances, that can be a proper ground for solicitor-client costs. We will not interfere with his decision as to costs in Queen's Bench.

[30] As for costs on appeal, by far the greater part of the argument, written and oral, was taken up with issues of liability rather than the damages or other quantum questions. A small amount was taken up with Jackson's unsuccessful attempt to boost his damages by using the later sale price of $120 million. The parties made no oral submissions about costs on appeal, doubtless because decision was reserved, though the course of argument left large clues about the likely result on most issues.

[31] We will express our tentative views on appellate costs, but in the event that either party wishes to make written submissions to the contrary, he or it may do so within 30 days of

the filing of this Memorandum. This is not a case where there was any obvious flaw in the trial judgment or reasons, unexpected new evidence, or other event which required either party to appeal. So far as we can discover, virtually all the arguments put to us had been put to the trial judge. There was even less room for honest difference of opinion than there had been before. Therefore, in principle we see no reason why the basis for appellate costs should differ from those in Queen's Bench. They should also be on a solicitor-client basis. The one adjustment necessary is that Jackson cross-appealed on damages, and lost. As noted, that only took up a fraction of the time on appeal. Rather than trying to divide up factums or authorities, or make minute-by-minute assessments from the Registrar's notes, and avoiding any attempt to separate the individual suits or appeals, we suggest that a percentage split is more appropriate. For about a tenth of the time on appeal, the defendants should not pay costs. They should receive costs, but not on a solicitor-client basis, for Jackson did nothing to justify a solicitor-client award against him. Offsetting the two allowances roughly, we propose that in the Court of Appeal, Jackson receive his proper disbursements (including all factums) plus 85 per cent of proper solicitor-client fees.

JUDGMENT DATED at CALGARY, Alberta,
this 7th day of June,
A.D. 1994