TAB 4

Danyluk *v.* Ainsworth Technologies Inc., [2001] 2 S.C.R. 460, 2001 SCC 44

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*

Indexed as: Danyluk *v.* Ainsworth Technologies Inc.

Neutral citation: 2001 SCC 44.

File No.: 27118.

2000: October 31; 2001: July 12.

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

on appeal from the court of appeal for ontario

Administrative law – Issue estoppel – Employee filing complaint against employer under Employment Standards Act seeking unpaid wages and commissions – Employee subsequently commencing court action against employer for wrongful dismissal and unpaid wages and commissions – Employment standards officer dismissing employee's complaint – Employer arguing that employee's claim for

unpaid wages and commissions before court barred by issue estoppel – Whether officer's failure to observe procedural fairness in deciding employee's complaint preventing application of issue estoppel – Whether preconditions to application of issue estoppel satisfied – If so, whether this Court should exercise its discretion and refuse to apply issue estoppel.

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

Held: The appeal should be allowed.

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

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

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

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

cannot form the basis of an estoppel. Where an administrative officer or tribunal initially possessed the jurisdiction to make a decision in a judicial manner but erred in the exercise of that jurisdiction, the resulting decision is nevertheless capable of forming the basis of an estoppel. Alleged errors in carrying out the mandate are matters to be considered by the court in the exercise of its discretion. This result makes the principle governing estoppel consistent with the law governing judicial review in *Harelkin* and collateral attack in *Maybrun.*

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

Cases Cited

Considered: *Angle v. Minister of National Revenue*, [1975] 2 S.C.R. 248; **disapproved in part:** *Rasanen v. Rosemount Instruments Ltd.* (1994), 17 O.R. (3d) 267; **referred to:** *Re Downing and Graydon* (1978), 21 O.R. (2d) 292; *Farwell v. The Queen* (1894), 22 S.C.R. 553; *Wilson v. The Queen*, [1983] 2 S.C.R. 594; *R. v. Litchfield*, [1993] 4 S.C.R. 333; *R. v. Sarson*, [1996] 2 S.C.R. 223; *Robinson v. McQuaid* (1854), 1 P.E.I.R. 103; *Bell v. Miller* (1862), 9 Gr. 385; *Raison v. Fenwick* (1981), 120 D.L.R. (3d) 622; *Wong v. Shell Canada Ltd.* (1995), 15 C.C.E.L. (2d) 182; *Machin v. Tomlinson* (2000), 194 D.L.R. (4th) 326; *Hamelin v. Davis* (1996), 18 B.C.L.R. (3d) 112; *Thrasyvoulou v. Environment Secretary*, [1990] 2 A.C. 273; *R. v. Consolidated Maybrun Mines Ltd.*, [1998] 1 S.C.R. 706; *McIntosh v. Parent*, [1924] 4 D.L.R. 420; *British Columbia (Minister of Forests) v. Bugbusters Pest Management Inc.* (1998), 50 B.C.L.R. (3d) 1; *Schweneke v. Ontario* (2000), 47 O.R. (3d) 97; *Braithwaite v. Nova Scotia Public Service Long Term Disability Plan Trust Fund* (1999), 176 N.S.R. (2d) 173; *Guay v. Lafleur*, [1965] S.C.R. 12; *Thoday v. Thoday*, [1964] P. 181; *Machado v. Pratt & Whitney Canada Inc.* (1995), 12 C.C.E.L. (2d) 132; *Randhawa v. Everest & Jennings Canadian Ltd.* (1996), 22 C.C.E.L. (2d) 19; *Heynen v. Frito-Lay Canada Ltd.* (1997), 32 C.C.E.L. (2d) 183; *Perez v. GE Capital Technology Management Services Canada Inc.* (1999), 47 C.C.E.L. (2d) 145; *Munyal v. Sears Canada Inc.* (1997), 29 C.C.E.L. (2d) 58; *Alderman v. North Shore Studio Management Ltd.*, [1997] 5 W.W.R. 535; *R. v. Nat Bell Liquors Ltd.*, [1922] 2 A.C. 128; *Harelkin v. University of Regina*, [1979] 2 S.C.R. 561; *Poucher v. Wilkins* (1915), 33 O.L.R. 125; *Minott v. O'Shanter Development Co.* (1999), 42 O.R. (3d) 321; *Saskatoon Credit Union Ltd. v. Central Park Ent. Ltd.* (1988), 22 B.C.L.R. (2d) 89; *General Motors of Canada Ltd. v. Naken*, [1983] 1 S.C.R. 72; *Arnold v. National Westminster Bank plc*, [1991] 3 All E.R. 41; *Susan Shoe Industries Ltd. v. Ricciardi*

(1994), 18 O.R. (3d) 660; *Iron v. Saskatchewan (Minister of the Environment & Public Safety)*, [1993] 6 W.W.R. 1.

Statutes and Regulations Cited

Courts of Justice Act, R.S.O. 1990, c. C.43, s. 23(1).

Employment Standards Act, R.S.O. 1990, c. E.14, ss. 1 "wages", 2(2), 6, 65(1)(a), (b), (c) [rep. & sub. 1991, c. 16 (Supp.), s. 9(1)], (7) [ad. *idem*, s. 9(2)] 67(1) [am. *idem*, s. 10(1)], (2) [rep. & sub. *idem*, s. 10(2)], (3) [ad. *idem*], (5) [*idem*], (7) [*idem*], 68(1) [am. *idem*, s. 11(1); am. 1991, c. 5, s. 16; am. 1993, c. 27, sch.], (3) [rep. & sub. 1991, c. 16 (Supp.), s. 11(2)], (7).

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

Howard A. Levitt and *J. Michael Mulroy*, for the appellant.

John E. Brooks and *Rita M. Samson*, for the respondents.

The judgment of the Court was delivered by

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

I. Facts

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

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

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

5 On March 21, 1994, more than six months after filing her claim under the Act, but as yet without an ESA decision, the appellant, through Mr. Levitt, commenced a court action in which she claimed 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 $300,000.00 commission as claimed by you". The letter went on to explain that the appellant could apply to the Director of Employment Standards for a review of this decision. Ms. Burke repeated this advice in a subsequent telephone conversation with the appellant. The appellant did not apply to the Director for a review of Ms. Burke's decision; instead, she decided to carry on with her wrongful dismissal action in the civil courts.

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

II. Judgments

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

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

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

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

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

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

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

13 Lastly, Rosenberg J.A. addressed the issue of whether failure by the ESA officer to observe procedural fairness affected the application of the doctrine of issue estoppel in this case. He agreed that the ESA officer had in fact failed to observe

procedural fairness in deciding upon the appellant's complaint. Nevertheless, this failure did not prevent the operation of issue estoppel (at p. 252):

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

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

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

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

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

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

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 a review under section 68 and is final and binding on the parties.

68. – (1) An employer who considers themself aggrieved by an order made under section 45, 48, 51, 56.2, 58.22 or 65, upon paying the wages ordered to be paid and the penalty thereon, if any, may, within a period of fifteen days after the date of delivery or service of the order, or such longer period as the Director may for special reasons allow and provided that the wages have not been paid out under subsection 72 (2), apply for a review of the order by way of a hearing.

. . .

(3) The Director shall select a referee from the panel of referees to hear the review.

. . .

(7) A decision of the referee under this section is final and binding upon the parties thereto and such other parties as the referee may specify.

IV. Analysis

18 The law rightly seeks a finality to litigation. To advance that objective, it requires litigants to put their best foot forward to establish the truth of their allegations when first called upon to do so. A litigant, to use the vernacular, is only entitled to one bite at the cherry. The appellant chose the ESA as her forum. She lost. An issue, once decided, should not generally be re-litigated to the benefit of the losing party and the harassment of the winner. A person should only be vexed once in the same cause. Duplicative litigation, potential inconsistent results, undue costs, and inconclusive proceedings are to be avoided.

19 Finality is thus a compelling consideration and judicial decisions should generally be conclusive of the issues decided unless and until reversed on appeal. However, estoppel is a doctrine of public policy that is designed to advance the interests of justice. Where as here, its application bars the courthouse door against the appellant's $300,000 claim because of an administrative decision taken in a manner which was manifestly improper and unfair (as found by the Court of Appeal itself), a re-examination of some basic principles is warranted.

20 The law has developed a number of techniques to prevent abuse of the decision-making process. One of the oldest is the doctrine estoppel *per rem judicatem* with its roots in Roman law, the idea that a dispute once judged with finality is not subject to relitigation: *Farwell v. The Queen* (1894), 22 S.C.R. 553, at p. 558; *Angle v. Minister of National Revenue*, [1975] 2 S.C.R. 248, at pp. 267-68. The bar extends both to the cause of action thus adjudicated (variously referred to as claim or cause of action or action estoppel), as well as precluding relitigation of the constituent issues or material facts necessarily embraced therein (usually called issue estoppel): G. S. Holmested and G. D. Watson, *Ontario Civil Procedure* (loose-leaf), vol. 3 Supp., at 21§17 *et seq*. Another aspect of the judicial policy favouring finality is the rule against collateral attack, i.e., that a judicial order pronounced by a court of competent jurisdiction should not be brought into question in subsequent proceedings except those provided by law for the express purpose of attacking it: *Wilson v. The Queen*, [1983] 2 S.C.R. 594; *R. v. Litchfield*, [1993] 4 S.C.R. 333; *R. v. Sarson*, [1996] 2 S.C.R. 223.

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

23 In this appeal the parties have not argued "cause of action" estoppel, apparently taking the view that the statutory framework of the ESA claim sufficiently distinguishes it from the common law framework of the court case. I therefore say no

more about it. They have however, joined issue on the application of issue estoppel and the relevance of the rule against collateral attack.

24 Issue estoppel was more particularly defined by Middleton J.A. of the Ontario Court of Appeal in *McIntosh v. Parent*, [1924] 4 D.L.R. 420, at p. 422:

> When a question is litigated, the judgment of the Court is a final determination as between the parties and their privies. Any right, question, or fact distinctly put in issue and directly determined by a Court of competent jurisdiction as a ground of recovery, or as an answer to a claim set up, cannot be re-tried in a subsequent suit between the same parties or their privies, though for a different cause of action. The right, question, or fact, once determined, must, as between them, be taken to be conclusively established so long as the judgment remains. [Emphasis added.]

This statement was adopted by Laskin J. (later C.J.), dissenting in *Angle*, *supra*, at pp. 267-68. This description of the issues subject to estoppel ("[a]ny right, question or fact distinctly put in issue and directly determined") is more stringent than the formulation in some of the older cases for cause of action estoppel (e.g., "all matters which were, or might properly have been, brought into litigation", *Farwell*, *supra*, at p. 558). Dickson J. (later C.J.), speaking for the majority in *Angle*, *supra*, at p. 255, subscribed to the more stringent definition for the purpose of issue estoppel. "It will not suffice" he said, "if the question arose collaterally or incidentally in the earlier proceedings or is one which must be inferred by argument from the judgment." The question out of which the estoppel is said to arise must have been "fundamental to the decision arrived at" in the earlier proceeding. In other words, as discussed below, the estoppel extends to the material facts and the conclusions of law or of mixed fact and law ("the questions") that were necessarily (even if not explicitly) determined in the earlier proceedings.

25 The preconditions to the operation of issue estoppel were set out by Dickson J. in *Angle*, *supra*, at p. 254:

> (1) that the same question has been decided;
>
> (2) that the judicial decision which is said to create the estoppel was final; and,
>
> (3) that the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised or their privies.

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

A. *The Statutory Scheme*

1. The Employment Standards Officer

27 The ESA applies to "every contract of employment, oral or written, express or implied" in Ontario (s. 2(2)) subject to certain exceptions under the regulations, and establishes a number of minimum 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*" (emphasis added)) puts the matter beyond doubt. The Ontario legislature intended the Director to have a discretion to decline to refer a matter to an adjudicator which, in his or her opinion, is simply not justified. Even the adjudicators hearing a review under s. 67(3) of the Act are not by statute required to be legally trained. It was likely considered undesirable by the Ontario legislature to give each and every dissatisfied employee a review as of right, particularly where the amounts in issue are often relatively modest. The discretion must be exercised according to proper principles, of course, but a discretion it remains.

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

B. *The Applicability of Issue Estoppel*

1. Issue Estoppel: A Two-Step Analysis

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

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

2. The Judicial Nature of the Decision

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

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

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

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

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

(a) *The Institutional Framework*

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

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

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

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

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

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

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

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

(c) *Particulars of the Decision in Question*

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

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

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

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

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

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

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

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

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

on which forum 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 *Maybrun*, *supra*.

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

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

3. Issue Estoppel: Applying the Tests

(a) *That the Same Question Has Been Decided*

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

mixed fact and law 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) *That the Parties to the Judicial Decision or Their Privies Were the Same Persons as the Parties to the Proceedings in Which the Estoppel Is Raised or Their Privies*

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

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

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

4. The Exercise of the Discretion

62 The appellant submitted that the Court should nevertheless refuse to apply estoppel as a matter of discretion. There is no doubt that such a discretion exists. In *General Motors of Canada Ltd. v. Naken*, [1983] 1 S.C.R. 72, Estey J. noted, at p. 101, that in the context of court proceedings "such a discretion must be very limited in application". In my view the discretion is necessarily broader in relation to the prior decisions of administrative tribunals because of the enormous range and diversity of the structures, mandates and procedures of administrative decision makers.

63 In *Bugbusters*, *supra*, Finch J.A. (now C.J.B.C.) observed, at para. 32:

> It must always be remembered that although the three requirements for issue estoppel must be satisfied before it can apply, the fact that they may be satisfied does not automatically give rise to its application. Issue estoppel is an equitable doctrine, and as can be seen from the cases, is closely related to abuse of process. The doctrine of issue estoppel is designed as an implement of justice, and a protection against injustice. It inevitably calls upon the exercise of a judicial discretion to achieve fairness according to the circumstances of each case.

Apart from noting parenthetically that estoppel *per rem judicatem* is generally considered a common law doctrine (unlike promissory estoppel which is clearly equitable in origin), I think this is a correct statement of the law. Finch J.A.'s *dictum* was adopted and applied by the Ontario Court of Appeal in *Schweneke*, *supra*, at paras. 38 and 43:

> The discretion to refuse to give effect to issue estoppel becomes relevant only where the three prerequisites to the operation of the doctrine exist. . . . The exercise of the discretion is necessarily case specific and depends on the entirety of the circumstances. In exercising the discretion the court must ask – is there something in the circumstances of this case such that the usual operation of the doctrine of issue estoppel would work an injustice?
>
> . . .
>
> . . . The discretion must respond to the realities of each case and not to abstract concerns that arise in virtually every case where the finding relied on to support the doctrine was made by a tribunal and not a court.

See also *Braithwaite*, *supra*, at para. 56.

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

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

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

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

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

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

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

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

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

69 This provision suggests that at the time the Ontario legislature did not intend ESA proceedings to become an exclusive forum. (Recent amendments to the Act now require an employee to elect either the ESA procedure or the court. Even prior to the new amendments, however, a court could properly conclude that relitigation of an

issue would be an abuse: *Rasanen, supra, per* Morden A.C.J.O., at p. 293, Carthy J.A., at p. 288.)

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

(b) *The Purpose of the Legislation*

71 The focus of an earlier administrative proceeding might be entirely different from that of the subsequent litigation, even though one or more of the same issues might be implicated. In *Bugbusters, supra*, a forestry company was compulsorily recruited to help fight a forest fire in British Columbia. It subsequently sought reimbursement for its expenses under the B.C. *Forest Act*, R.S.B.C. 1979, c. 140. The expense claim was allowed *despite* an allegation that the fire had been started by a Bugbusters employee who carelessly discarded his cigarette. (This, if proved, would have disentitled Bugbusters to reimbursement.) The Crown later started a $5 million negligence claim against Bugbusters, for losses occasioned by the forest fire. Bugbusters invoked issue estoppel. The court, in the exercise of its discretion, denied relief. One reason, *per* Finch J.A., at para. 30, was that

> a final decision on the Crown's right to recover its losses was not within the reasonable expectation of either party at the time of those [reimbursement] proceedings [under the *Forest Act*].

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

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

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

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

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

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

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

operation of the ESA scheme as a whole. This would undermine fulfilment of the purpose of the legislation.

(c) *The Availability of an Appeal*

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

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

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

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

(e) *The Expertise of the Administrative Decision Maker*

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

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

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

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

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

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

(g) *The Potential Injustice*

80 As a final and most important factor, the Court should stand back and, taking into account the entirety of the circumstances, consider whether application of issue estoppel in the particular case would work an injustice. Rosenberg J.A. concluded that the appellant had received neither notice of the respondent's allegation nor an opportunity to respond. He was thus confronted with the 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 with costs.

Solicitors for the appellant: Lang Michener, Toronto.

Solicitors for the respondents: Heenan Blaikie, Toronto.

TAB 5

In the Matter of EnerNorth Industries Inc. [Indexed as: EnerNorth Industries Inc., Re]

96 O.R. (3d) 1

Court of Appeal for Ontario,

Simmons, Blair and Juriansz JJ.A.

July 3, 2009

Bankruptcy and insolvency -- Proof of claim -- Creditor not having unqualified right on application pursuant to s. 135(5) of Bankruptcy and Insolvency Act to challenge validity of judgment debt based on decision of court of competent jurisdiction if court considered merits of claim in granting judgment -- Creditors of bankrupt moving for order under s. 135(5) challenging proof of claim filed by judgment debtor based on Singapore judgment -- Issues of mitigation and set-off raised by creditors having been finally determined in Singapore proceedings -- Creditors being privies of bankrupt -- Doctrine of res judicata applying -- Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, s. 135(5).

EnerNorth and Oakwell were parties to a joint venture agreement concerning the construction and operation of two power plants in India. They incorporated the Project Company to finance, construct and operate the Project. Disputes arose between EnerNorth and Oakwell which were ultimately resolved by way of a Settlement Agreement in which EnerNorth agreed to buy out Oakwell's interest in the Project Company. They agreed that any disputes would be governed by Singapore law and subject to the non-exclusive jurisdiction of the Singapore courts. EnerNorth did not make the required payments under the Settlement Agreement. It sold its interest in the Project Company to VBC. Oakwell entered into negotiations with VBC directly, resulting in a Licence Agreement pursuant to which the Project Company was to pay Oakwell certain "technical fees". Oakwell sued EnerNorth in Singapore to recover the outstanding amounts under the Settlement Agreement. EnerNorth counterclaimed. The action was successful and the counterclaim was dismissed. The Singapore Court of Appeal dismissed EnerNorth's appeal. EnerNorth did not pay the Singapore judgment. Oakwell commenced enforcement proceedings in Ontario. Those proceedings were successful, and EnerNorth filed an assignment in bankruptcy. Oakwell made a claim in that bankruptcy which was based entirely upon the Singapore judgment. Other creditors of EnerNorth (the "appellants") moved before the Bankruptcy Court for an order pursuant to s. 135(5) of the Bankruptcy and Insolvency Act ("BIA") challenging the proof of claim filed by Oakwell. Oakwell brought a cross-motion to dismiss that motion on the ground that the issue raised by the appellants, i.e., whether the Licence Agreement payments had to be set-off against any payments made to Oakwell under the Settlement Agreement, had been finally determined in the Singapore proceedings. The cross-motion was granted. The appellants appealed.

Held, the appeal should be dismissed. [page2]

While the court's power to expunge or reduce a proof of claim on an application under s. 135(5) of the BIA is wide, there is no basis for holding that an applicant pursuant to s. 135 should have an unqualified right to challenge the validity of a judgment debt that is based on a decision of a court of competent jurisdiction on the merits of the claim or that res judicata should not apply, where appropriate, in such

circumstances. In the absence of fraud, collusion or some legitimate concern that there has been a genuine miscarriage of justice, a judgment of a court of competent jurisdiction should almost invariably satisfy a trustee or a court regarding the legitimacy of a claim under s. 135 if, in awarding the judgment, the court has considered the merits of the claim.

The doctrine of res judicata applies in bankruptcy proceedings. The appellants were precluded by res judicata from advancing their contention that Oakwell's proof of claim had to be expunged or reduced by reason of the mitigation/set-off issue. Two of the appellants were the president and chairman of EnerNorth, respectively, at the time of the Singapore proceedings. For the purposes of the bankruptcy proceedings, the trustee stood in the shoes of EnerNorth, and for the purposes of the proposed s. 135(5) hearing, the creditors in effect stood in the shoes of the trustee because they sought to have the court do what the trustee had declined to do. They were identified with EnerNorth for purposes of comparison between the Singapore proceedings and the proposed s. 135(5) hearing, and there was a community or privity of interest between them in that regard. The appellants were privies of EnerNorth for the purpose of the res judicata analysis in the s. 135(5) context. The mitigation/set-off argument was considered and rejected by the trial judge in the Singapore proceedings. The appellants were barred from re-litigating that issue in their efforts under s. 135(5) of the BIA to accomplish what EnerNorth failed to do in the Singapore courts and the Ontario courts.

Cases referred to

Fraser (Re); Ex parte Central Bank of London, [1892] 2 Q.B. 633 (C.A.); Van Laun (Re); Ex parte Chatterton, [1907] 2 K.B. 23 (C.A.), affg [1907] 1 K.B. 155 (K.B. Div.), consd

Other cases referred to

A Debtor (Re) (1915), 113 L.T. 704 (K.B.); Angle v. Canada (M.N.R.), [1975] 2 S.C.R. 248, [1974] S.C.J. No. 95, 47 D.L.R. (3d) 544, 2 N.R. 397, 74 D.T.C. 6278; Arnco Business Services Ltd. (Re), [1983] O.J. No. 973, 38 C.P.C. 226, 23 A.C.W.S. (2d) 91 (H.C.J.); Bank of Montreal v. Maple City Ford Sales (1986) Ltd. (2001), 51 O.R. (3d) 523, [2000] O.J. No. 5701 (S.C.J.); Banque Nationale de Paris (Canada) v. Canadian Imperial Bank of Commerce (2001), 52 O.R. (3d) 161, [2001] O.J. No. 53, 195 D.L.R. (4th) 308, 145 O.A.C. 349, 2 C.P.C. (5th) 1, 102 A.C.W.S. (3d) 302 (C.A.); Canada Asian Centre Developments Inc. (Re), [2003] B.C.J. No. 34, 2003 BCSC 41, 10 B.C.L.R. (4th) 161, 39 C.B.R. (4th) 35, 119 A.C.W.S. (3d) 8; Carl Zeiss Stiftung v. Rayner & Keeler Ltd. (No. 2), [1967] A.C. 853, [1966] 2 All E.R. 536, [1966] 3 W.L.R. 125, [1967] R.P.C. 497 (H.L.); Chaban v. Chaban (Trustee of), [1999] S.J. No. 112, 172 D.L.R. (4th) 312, [1999] 6 W.W.R. 174, 177 Sask. R. 139, 9 C.B.R. (4th) 5, 87 A.C.W.S. (3d) 222 (C.A.); Danyluk v. Ainsworth Technologies Inc., [2001] 2 S.C.R. 460, [2001] S.C.J. No. 46, 2001 SCC 44, 201 D.L.R. (4th) 193, 272 N.R. 1, J.E. 2001-1439, 149 O.A.C. 1, 34 Admin. L.R. (3d) 163, 10 C.C.E.L. (3d) 1, [2001] CLLC Â210-033, 7 C.P.C. (5th) 199, 106 A.C.W.S. (3d) 460; Fallis v. United Fuel Investments Ltd., [1962] S.C.R. 771, [1962] S.C.J. No. 63, 34 D.L.R. (2d) 175, 4 C.B.R. (N.S.) 209; Flatau (Re); Ex parte Scotch Whisky Distillers, Ltd. (1888), 22 Q.B.D. 83 (C.A.); Gibson Mining Co. v. Hartin, [1940] B.C.J. No. 21, [1940] 2 D.L.R. 605, [1940] 2 W.W.R. 155, 55 B.C.R. 196, 21 C.B.R. 403 (C.A.); Grossman (Re), [1998] A.J. No. 498, 1998 ABQB 381, 222 A.R. 139, 3 C.B.R. (4th) 267, [1998] 4 C.T.C. 197, 79 A.C.W.S. (3d) 449; [page3][cf2]Las Vegas Strip Ltd. v. Toronto (City) (1997), 32 O.R. (3d) 651, [1997] O.J. No. 1033, 99 O.A.C. 67, 70 A.C.W.S. (3d) 153 (C.A.), affg (1996), 30 O.R. (3d) 286, [1996] O.J. No. 3210, 13 O.T.C. 308, 38 C.R.R. (2d) 129, 34 M.P.L.R. (2d) 233, 65 A.C.W.S. (3d) 851 (Gen. Div.); Oakwell Engineering Ltd. v. Energy Power Systems Ltd. (April 27, 2004), CA129/2003/Y (Sing. C.A.), affg [2003] SGHC 241; Oakwell Engineering Ltd. v. Enernorth Industries Inc. (2006), 81 O.R. (3d) 288, [2006] O.J. No. 2289, 211 O.A.C. 262, 19 B.L.R. (4th) 11, 30 C.P.C. (6th) 253, 148 A.C.W.S. (3d) 897 (C.A.), affg (2005), 76 O.R. (3d) 528, [2005] O.J. No. 2652, [2005] O.T.C. 534, 7 B.L.R. (4th) 256, 140 A.C.W.S. (3d) 70, 141

A.C.W.S. (3d) 208 (S.C.J.) [Leave to appeal to S.C.C. refused [2006] S.C.C.A. No. 343]; Orpen v. Roberts, [1925] S.C.R. 364 at 367, [1925] S.C.J. No. 14, [1925] 1 D.L.R. 1101

Statutes referred to

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, ss. 135 [as am.], (1), (2), (3) [as am.], (4) [as am.], (5), 193

Authorities referred to

Houlden, Lloyd W., Geoffrey B. Morawetz and Janis P. Sarra, The 2009 Annotated Bankruptcy and Insolvency Act (Toronto: Thomson Carswell, 2008)

Lange, Donald J., The Doctrine of Res Judicata in Canada, 2nd ed. (Markham, Ont.: LexisNexis Canada Inc., 2004)

Spencer-Bower, George, and Alexander Kingcome Turner, The Doctrine of Res Judicata, 2nd ed. (London: Butterworths, 1969)

APPEAL from the order of C.L. Campbell J. (2009), 92 O.R. (3d) 392, [2008] O.J. No. 3137 (S.C.J.) granting a cross-motion to dismiss a motion for an order challenging a proof of claim.

Douglas G. Garbig, for appellants Fieldstone Traders Limited, Milton Klyman, Hagen Gocht, 1420041 Ontario Inc., Trigel Energy Inc., Reid Hill Enterprises Ltd., Richard Barrer, Hurricane Management Ltd. and Les's Mechanical Service Ltd.

Paul D. Guy, for appellants Sandra J. Hall and James C. Cassina.

Matthew I. Milne-Smith and Shelby Z. Austin, for respondent Oakwell Engineering Limited.

The judgment of the court was delivered by

BLAIR J.A.:--

I. Overview

[1] EnerNorth Industries Inc. is bankrupt. Its various creditors are squabbling amongst themselves over the amount owing to one of them, Oakwell Engineering Limited. To sort this out, the appellant creditors sought to obtain an order under s. 135(5) of the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3 (the "BIA"), entitling them to challenge and determine the validity of the proof of claim filed by Oakwell. That proof of claim is [page4]founded upon a judgment rendered in Singapore prior to EnerNorth's assignment in bankruptcy.

[2] Justice Colin Campbell dismissed the creditors' motion on res judicata and issue estoppel grounds, holding that the very issue they wished to have determined had already been decided in the proceedings before the courts in Singapore. In my view, he was correct in arriving at this conclusion, and I would dismiss the appeal for the reasons that follow.

II. Facts

The genesis of the problem

[3] EnerNorth and Oakwell were parties to a joint venture agreement concerning the construction and operation of two power plants in the State of Andhra Pradesh in India. They incorporated a company (the "Project Company") to finance, construct and operate the Project. EnerNorth held an 87.5 per cent interest, and Oakwell a 12.5 per cent interest, in the Project Company.

[4] The Project did not develop according to plan and various disputes arose between the parties. The disputes were ultimately resolved in December 1998, by way of a Settlement Agreement in which EnerNorth agreed to buy out Oakwell's interest in the Project Company. In exchange, EnerNorth was to pay Oakwell:

(1) 1.85 million EnerNorth shares, in lieu of payment of approximately US$3 million;
(2) US$2.79 million, payable within 30 days after successful financing of the Project ("Financial Closure"); and
(3) a royalty equivalent to 6.25 per cent of the actual cash flow of the Project Company for the first five years of its commercial operation, according to a formula set out in the Settlement Agreement.

[5] Under the Settlement Agreement, both parties agreed to do all things necessary to give effect to the agreement. They also agreed that any disputes would be governed by Singapore law and subject to the non-exclusive jurisdiction of the Singapore courts.

[6] EnerNorth did not achieve Financial Closure. Although it transferred the 1.85 million shares to Oakwell, it never paid Oakwell either the $2.79 million or the 6.25 per cent annual royalty.

[7] EnerNorth's inability to realize Financial Closure and to make the payments under the Settlement Agreement was [page5] attributable to the fact that EnerNorth -- perhaps in recognition of its inability to complete the Project -- sold its interest in the Project Company (including the newly acquired Oakwell portion) to another group of companies, known as The VBC Group, in August 2000. I will refer to the August 2000 agreement between EnerNorth and the VBC Group as the "VBC Agreement". Although Oakwell had been aware of VBC's interest in the Project, it was initially unaware of the VBC Agreement. When it discovered what had occurred, it protested to VBC and entered into negotiations with VBC directly, arguing that EnerNorth and VBC were not entitled to exclude it completely from the Project under Indian law because of its position as original promoter of the Project.

[8] These negotiations led to a series of agreements between Oakwell and the VBC Group (including the Project Company) on July 4, 2001. Principal amongst these was a Technology Transfer, Collaboration and Licence Agreement (the "Licence Agreement") pursuant to which the Project Company was to pay Oakwell "technical fees" totalling US$6 million "in acknowledgement of the technical services and know-how provided and to be provided by [Oakwell] since 1995" and for the granting of a certain licence. Of the $6 million, $2 million was to become payable on registration of the Licence Agreement with the Reserve Bank of India. The other $4 million was payable in respect of technical services in the event they were required after signing the Licence Agreement.

[9] It is the payments made, or to be made, under this Licence Agreement, and how they were treated before the Singapore courts, that provide the grist for the dispute on this appeal.

[10] In August 2002, Oakwell sued EnerNorth in Singapore to recover the outstanding amounts under the Settlement Agreement and other damages for the breach of the Settlement Agreement. EnerNorth defended the suit, arguing, in part, that the Licence Agreement was a sham and that payments made

under it were simply camouflaged substitutions for the very payments Oakwell was alleging EnerNorth owed it under the Settlement Agreement. They submitted, for example, that the $2 million payment paralleled the $2.79 million called for on Financial Closure under the Settlement Agreement, less credit for a payment of US$790,000 made by EnerNorth to the order of Oakwell in July 1999 to discharge certain debts owing by Oakwell to various third parties in India. The remaining $4 million was to satisfy the royalty obligation under the Settlement Agreement.

[11] Before this court, Oakwell insists that any payments received, or to be received, by it under the Licence Agreement are separate and apart from its claim against EnerNorth arising [page6]out of the Settlement Agreement and that this issue has already been determined in its favour in the Singapore proceedings. The appellants -- EnerNorth's creditors -- argue here that the Singapore proceedings are not dispositive. As EnerNorth did in the Singapore proceedings, they assert that any payments received by Oakwell as a result of the Licence Agreement are, in effect, a substitute for the Settlement Agreement payments and must therefore be deducted from any amounts owing by EnerNorth to Oakwell in relation to the Settlement Agreement; in the result, there would be more money to be distributed amongst the appellant creditors.

[12] Before returning to this debate, I turn briefly to a history of the legal proceedings between EnerNorth and Oakwell, and a history of the bankruptcy proceedings involving the appellant creditors.

The Singapore action

[13] Oakwell succeeded in the Singapore proceedings. On October 16, 2003, the Singapore High Court rendered judgment in its favour and dismissed EnerNorth's counterclaim.

The trial proceedings

[14] In the Singapore proceedings, Oakwell alleged that EnerNorth had (i) breached its obligation under the Settlement Agreement to achieve Financial Closure, and (ii) repudiated the Settlement Agreement by entering into the VBC Agreement. It claimed damages of US$2.79 million, representing the sum due on Financial Closure (less credit for two offset amounts discussed below) and damages for loss of the 6.25 per cent annual royalty fees. These issues were all determined in Oakwell's favour: Oakwell Engineering Ltd. v. Energy Power Systems Ltd., [2003] SGHC 241 (Sing. H.C.).

[15] EnerNorth's defence -- as set out in its pleadings and in its opening and closing submissions at trial -- was to argue:

(a) that the Settlement Agreement had been frustrated as a result of a reduction in tariffs imposed by the Indian government and reducing the amounts payable to the Project Company, thus rendering Financial Closure impossible and the performance of the Project economically non-viable;
(b) if the Settlement Agreement had not been frustrated, that EnerNorth had not breached or repudiated it; and that,
(c) even if EnerNorth had breached or repudiated the Settlement Agreement, Oakwell had suffered no damages because [page7]Oakwell had mitigated its losses by entering into the Licence Agreement with VBC -- any past or future payments received from VBC under the Licence Agreement would have to be set-off against any payments payable by EnerNorth under the Settlement Agreement (the "mitigation/set-off issue").

[16] In addition, EnerNorth counterclaimed that Oakwell had breached the Settlement Agreement by entering into the Licence Agreement with VBC, in effect selling the same interest in the Project to VBC

that was to be relinquished to EnerNorth as part of the Settlement Agreement. Accordingly, EnerNorth sought an order requiring Oakwell to disgorge any and all "shares, monies or other benefits" received, or to be received in the future, under the Licence Agreement.

[17] With the exception of two voluntary credits offered by Oakwell, the Singapore trial judge rejected EnerNorth's defences in their entirety and dismissed its counterclaim. The first voluntary reduction consisted of the US$790,000 payment referred to above. The second -- which takes on some significance for the purposes of this appeal -- was a payment of US$350,000 made by VBC to Oakwell under the Licence Agreement prior to the commencement of the Singapore action. Oakwell conceded that both of these amounts should be credited to EnerNorth in the proceedings.

[18] The trial judge ordered that EnerNorth pay to Oakwell:

(1) US$2.79 million (less the sums of US$790,000 and US$350,000) in relation to the failure to achieve Financial Closure; and
(2) US$2,560,210 in damages in respect of the 6.25 per cent annual royalty under the Settlement Agreement.

[19] He also ordered that EnerNorth's counterclaim be dismissed.

The Singapore appeal

[20] EnerNorth unsuccessfully argued the same issues in its appeal before the Singapore Court of Appeal, including the mitigation/set-off issue. In its written appeal case brief, it contended that "If [EnerNorth] did repudiate the Settlement Agreement on or before 10 August 2000, Oakwell mitigated its losses". The appeal case argued:

> One of [the] ways that Oakwell agreed to receive the Royalty under . . . the Settlement Agreement was by entering into an agreement directly with the Project Company [i.e., the Licence Agreement with VBC] whereby the company would pay Oakwell "as technical or consultancy fees" an amount equal to the Royalty. One of the agreements Oakwell entered into on 4 July 2001 [page8]was an agreement with the Project Company whereby Oakwell would receive a lump sum as a "Technical Fee". Accordingly, Oakwell contracted directly with the Project Company for the very thing it had agreed to accept from the Project Company under the Settlement Agreement.
>
> Therefore, even if [EnerNorth] had breached the Settlement Agreement on 10 August 2000, in respect of the Royalty, Oakwell had fully mitigated its losses by directly entering into the very contract with the Project Company that under the Settlement Agreement it had agreed to accept as payment for the Royalty.
>
> . . . . .
>
> Oakwell, in other words, had a duty to mitigate its (claimed) losses arising out of [EnerNorth's] repudiation of the Settlement Agreement (if indeed that is what [EnerNorth] did) and Oakwell did in fact mitigate its losses by conveying the interests it had relinquished to [EnerNorth] under the Settlement Agreement to VBC for valuable consideration. Therefore, the Court erred by awarding damages to Oakwell in these circumstances and in effect gave Oakwell double recovery.

(Emphasis added)

[21] The appeal was dismissed, without reasons: Oakwell Engineering Ltd. v. Energy Power Systems Ltd. (April 27, 2004), CA129/2003/Y (Sing. C.A.).

The Ontario enforcement proceedings

[22] EnerNorth did not pay the Singapore judgment, and as a result, Oakwell commenced enforcement proceedings in Ontario. EnerNorth opposed enforcement principally on the basis that the Singapore proceedings were biased and unfair.

[23] One of the bases advanced in support of this argument was that the judgment permitted double recovery since Oakwell was allowed to retain the remaining US$1,650,000 of the $2 million to be paid to it by VBC under the Licence Agreement (after credit of $350,000) without having to deduct that amount from the damages awarded. As Mr. Cassina -- the then chairman of EnerNorth -- said in an affidavit, "Oakwell, in effect, got to have its cake and eat it too" at the expense of EnerNorth.

[24] Justice Day rejected EnerNorth's arguments and ordered that the Singapore judgment be enforced in full: Oakwell Engineering Ltd. v. Enernorth Industries Inc. (2005), 76 O.R. (3d) 528, [2005] O.J. No. 2652 (S.C.J.). His decision was upheld in this court: (2006), 81 O.R. (3d) 288, [2006] O.J. No. 2289 (C.A.). Leave to appeal to the Supreme Court of Canada was sought but denied on January 18, 2007, [2006] S.C.C.A. No. 343.

[25] On March 20, 2007, EnerNorth filed an assignment in bankruptcy. RSM Richter Inc. ("Richter") was appointed trustee in bankruptcy the following day. [page9]

The bankruptcy proceedings

[26] Oakwell's claim in the bankruptcy is for CDN$6,807,130.43. It is based entirely upon the Singapore judgment, plus interest and costs.

[27] The appellants, Ms. Hall and Mr. Cassina, are minor creditors of EnerNorth. They are its former president and chairman, respectively. Ms. Hall has filed a proof of claim in the amount of $20,142.38, for outstanding salary, vacation pay and directors' fees. Mr. Cassina's claim is for $73,222.06, for outstanding consulting and directors' fees.

[28] At the first meeting of creditors, Ms. Hall raised the issue of whether Oakwell's claim should be reduced by a further US$1,650,000, allegedly received from VBC under the Licence Agreement following the date of the Singapore judgment. The other unsecured creditors -- whom I shall call the appellant group of creditors -- took up the cause along with her. While Oakwell does not specifically concede that it has received the additional funds, it accepts that these proceedings should be decided on the basis that it has.

[29] Richter made enquiries about these allegations and concluded that it had not been provided with any confirmable information that would warrant reducing Oakwell's proof of claim. Accordingly, it proposed to admit Oakwell's proof of claim in full.

[30] Ms. Hall and Mr. Cassina moved before the Bankruptcy Court for an order pursuant to s. 135(5) of the BIA challenging the proof of claim filed by Oakwell. They were supported by a companion motion filed on behalf of the appellant group of creditors. Oakwell brought a cross-motion to dismiss these motions on the ground that the issue of whether the Licence Agreement payments had to be set-off against any payments made to Oakwell under the Settlement Agreement had already been finally determined in the Singapore proceedings.

[31] Justice Campbell granted the cross-motion and dismissed the appellants' motion. The appeal is from that order.

III. Analysis

The motion to quash

[32] Oakwell moved to quash the appeals on the ground that leave to appeal is required under s. 193 of the BIA and leave had not been sought.

[33] Section 193 states:

> 193. Unless otherwise expressly provided, an appeal lies to the Court of Appeal from any order or decision of a judge of the court in the following cases: [page10]
>
> (a) if the point at issue involves future rights;
> (b) if the order or decision is likely to affect other cases of a similar nature in the bankruptcy proceedings;
> (c) if the property involved in the appeal exceeds in value ten thousand dollars;
> (d) from the grant of or refusal to grant a discharge if the aggregate unpaid claims exceed five hundred dollars; and
> (e) in any other case by leave of a judge of the Court of Appeal.

[34] We dismissed the motion to quash after argument of the motion. Given the reach of the appellants' position that s. 135(5) applicants have an "unqualified right" to attack the validity of any judgment issued by a court of competent jurisdiction in a hearing under that section, the implications of the appeal are widespread and the order or decision is likely to affect other cases of a similar nature in the bankruptcy proceedings: s. 193(b). Even if that were not the case, however, we were satisfied that the property involved in the appeal exceeds $10,000 in value. The test for the value of property involved in the appeal is the amount of the loss or gain which the granting or refusal of the claimed right would entail: Orpen v. Roberts, [1925] S.C.R. 364, [1925] S.C.J. No. 14, at p. 367 S.C.R.; Fallis v. United Fuel Investments Ltd., [1962] S.C.R. 771, [1962] S.C.J. No. 63, at p. 774 S.C.R. Here, the loss or gain to Oakwell or to the creditors, in terms of the quantum of Oakwell's claim in the bankruptcy, is in the millions of dollars.

The issues on the appeal

[35] The appellants raise three issues on the appeal:

> (1) Do the appellants, as creditors, have "an unqualified right" under s. 135(5) of the BIA to challenge Oakwell's proof of claim?
> (2) Does the existence of a judgment granted against a bankrupt prior to bankruptcy displace the ability of creditors under s. 135(5) to challenge a proof of claim filed on the basis of that judgment?
> (3) If a s. 135(5) hearing could be denied on the basis of the doctrine of res judicata, does res judicata or issue estoppel apply in the circumstances of this case?

Issues 1 & 2: The right to challenge a proof of claim and go behind a valid judgment under s. 135(5) of the BIA is not "unqualified"

[36] I shall deal with the first and second issues together. [page11]

[37] Section 135 of the BIA deals with a trustee's examination, acceptance or disallowance of proofs of claim filed by creditors in bankruptcy proceedings. Subsection 135(1) provides that the trustee is to examine proofs of claim or of security and the grounds therefore and "may require further evidence in support of the claim or security". Subsection 135(2) deals with the right of the trustee to disallow a claim, and subsections 135(3) and (4) provide for notice of that determination and for finality and conclusiveness of that decision subject to an appeal from the trustee's decision. Subsection 135(5) states:

Expunge or reduce a proof

> 135(5) The court may expunge or reduce a proof of claim or a proof of security on the application of a creditor or of the debtor if the trustee declines to interfere in the matter.

[38] The appellants' argument that they have "an unqualified right" to challenge Oakwell's proof of claim under s. 135(5) is based on the unsupported theory that the only precondition to a creditor being entitled to a hearing under s. 135(5) is that the trustee must have declined to interfere in the matter. I do not read the provision in such a restricted manner. Their premise that the Singapore judgment cannot "displace" their "unqualified" right is founded on quite old English authority which -- if it ever stood for the proposition advanced -- should no longer be followed, in my view.

[39] In the first of these decisions, Fraser (Re); Ex parte Central Bank of London, [1892] 2 Q.B. 633 (C.A.), at pp. 635-37 Q.B., Lord Esher M.R. said:

> As a matter of law the judgment, therefore, stands as a good judgment against John Fraser, and it cannot be questioned by him in any Court, except the Court of Bankruptcy. . . . The mere fact that there is a judgment for the debt does not prevent the registrar from saying that there is no good petitioning creditor's debt. The Court of Bankruptcy can go behind the judgment, and can inquire whether, notwithstanding the judgment, there was a good debt. In so doing, the Court of Bankruptcy does not set aside the judgment. If I may use the expression, the Court goes round the judgment, and inquires into the subject-matter. . . . The existence of the judgment is no doubt prima facie evidence of a debt; but still the Court of Bankruptcy is entitled to inquire whether there really is a debt due to the petitioning creditor.
>
> [40] Lord Justice Kay concurred, at pp. 637-38 Q.B., saying:
>
> It is old law in bankruptcy that, neither upon an attempt to prove a debt, nor upon a petition for an adjudication of bankruptcy or a receiving order against a debtor, is a judgment against him for the debt conclusive. . . . Can this judgment be treated as conclusive in bankruptcy because the debtor has unsuccessfully attempted to set it aside? I think not, and I cannot see how the matter is any more res judicata because there has been an unsuccessful appeal to this Court. I agree in all that the Master of the Rolls has said on this point. [page12]

[41] Later, in Van Laun (Re); Ex parte Chatterton, [1907] 2 K.B. 23 (C.A.), Cozens-Hardy M.R. adopted a similar approach. At p. 29, he said:

> [I]f a judgment had been obtained upon the covenant, it is competent and it is the duty of the Court of Bankruptcy to go behind the judgment, to open the judgment and to say, "That is the judgment, but the creditor can only prove for the amount which is justly and truly due upon it."

[42] In language adopted by the Master of the Rolls, the trial judge in Van Laun (Re) had said, at [1907] 1 K.B. 155 (K.B. Div.), at pp. 162-63:

> The trustee's right and duty when examining a proof for the purpose of admitting or rejecting it is to require some satisfactory evidence that the debt on which the proof is founded is a real debt. No judgment recovered against the bankrupt, no covenant given by or account stated with him, can deprive the trustee of this right. He is entitled to go behind such forms to get at the truth, and the estoppel to which the bankrupt may have subjected himself will not prevail against him.

[43] While I accept the first statement of Cozens-Hardy M.R. cited above, with respect to those eminent jurists, I disagree with the balance of their sweeping statements. They cast the net of the trustee's ability to assess a proof of claim based upon the judgment of a court of competent jurisdiction, and the court's ability to expunge or reduce such a proof, too broadly.

[44] Lord Esher M.R., himself, suggested as much in an earlier decision, Flateau (Re); Ex parte Scotch Whisky Distillers, Ltd. (1888), 22 Q.B.D. 83 (C.A.), at p. 85. In that case, the bankruptcy was based upon a judgment debt which was under appeal. The registrar in bankruptcy refused to adjourn the bankruptcy petition pending the outcome of the appeal. His decision was affirmed by the Court of Appeal. On the issue of the right to re-try the issues in Bankruptcy Court, Lord Esher M.R. said, on that occasion (at p. 85):

> It is not necessary now to repeat that, when an issue has been determined in any other court, if evidence is brought before the Court of Bankruptcy of circumstances tending to show that there has been fraud, or collusion, or miscarriage of justice, the Court of Bankruptcy has power to go behind the judgment and to inquire into the validity of the debt. But that the Court of Bankruptcy is bound in every case as a matter of course to go behind a judgment is a preposterous proposition.

(Emphasis added)

[45] In the same decision, Lopes L.J. was equally succinct, at p. 87:

> It has been argued that the registrar was bound to hear evidence upon issues which had been already tried by a judge and jury, and that he had no discretion in the matter. In my opinion such a contention cannot be for a moment [page13]maintained. Proceedings in bankruptcy are already scandalously long; if this contention were well founded they would be almost interminable.

(Emphasis added)

[46] In other decisions, English authorities have distinguished Fraser (Re) and its progeny on the basis that it involved a default judgment where there had been no determination of the claim on the merits: see, e.g., A Debtor (Re) (1915), 113 L.T. 704 (K.B.), at p. 705. I note as well, that Van Laun (Re) involved a default judgment.

[47] In Canada Asian Centre Developments Inc. (Re), [2003] B.C.J. No. 34, 39 C.B.R. (4th) 35 (S.C.), at para. 26, Burnyeat J. drew the same distinction, noting that the comments of Cozens-Hardy M.R. in Van Laun (Re) were obiter. Lord Justice Fry made the point in Flateau (Re), at p. 86, as well:

> It is true that in some cases the Court of Bankruptcy has gone behind a judgment, when it

> has been obtained by fraud, collusion, or mistake. But this power has never, so far as I am aware, been extended to cases in which a judgment has been obtained after issues have been tried out before a Court.

[48] I see no basis for holding that an applicant pursuant to s. 135(5) of the BIA should have "an unqualified" right to challenge the validity of a judgment debt that is based on a decision of a court of competent jurisdiction on the merits of the claim or that res judicata should not apply, where appropriate, in such circumstances. Take, for example, the case of a debtor with $10 million in assets and judgment debts spread amongst five creditors of $5 million each. Suppose that each $5 million judgment debt resulted from lengthy and costly litigation from trial, through intermediate appeal to the Supreme Court of Canada and that the debtor has failed at each stage. As EnerNorth did here, the debtor makes an assignment in bankruptcy following its last loss in the highest court. It surely contravenes every imaginable principle of judicial economy, finality and fairness to say that the Bankruptcy Court can now, indiscriminately, re-open each hotly contested dispute in order to satisfy itself, in its own mind, that "there really is a debt due to the . . . creditor" (Fraser (Re)) or that "the debt on which the proof is founded is a real debt" (Van Laun (Re)). I do not accept such a proposition.

[49] I agree that the trustee's power to allow or disallow a proof of claim, and the court's power to expunge or reduce it on an application under s. 135(5) of the BIA, is wide. However, to say that the attacking creditor or debtor has an "unqualified" right to challenge the proof of claim where the claim is based upon a valid and enforceable judgment that is no longer subject to appeal is going too far. The appellant's submission goes beyond the proposition that a judgment creditor is precluded from making a [page14]"double recovery", that is, that the Bankruptcy Court may examine whether the amount claimed in the proof of claim is the true amount remaining to be paid under the judgment. The Bankruptcy Court may make such an enquiry. But, in the absence of fraud, collusion or some legitimate concern that there has been a genuine miscarriage of justice, a judgment of a court of competent jurisdiction should almost invariably satisfy a trustee or a court regarding the legitimacy of a claim under s. 135 if, in awarding the judgment, the court has considered the merits of the claim: see Canada Asian Centre Developments Inc. (Re), as cited in Lloyd W. Houlden, Geoffrey B. Morawetz and Janis P. Sarra, The 2009 Annotated Bankruptcy and Insolvency Act (Toronto: Thomson Carswell, 2008), at G67.1.

Issue 3: The doctrine of res judicata applies in this case

[50] The central issue on this appeal is whether Ms. Hall, Mr. Cassina and the appellant group of creditors are precluded by the doctrine of res judicata from advancing their contention that Oakwell's proof of claim must be expunged or reduced by reason of the mitigation/set-off issue. Like the application judge, I have concluded that they are.

[51] As the application judge noted, the appellants' essential submission is that Oakwell's proof of claim, based on the Singapore judgment, represents an attempt by Oakwell to "double collect" to the extent of sums it has received under the Licence Agreement. Regardless of the validity of the judgment, double recovery is not permitted. However, that very issue has already been determined against the interests of EnerNorth in the Singapore proceedings, in my view.

The standard of review

[52] Whether res judicata applies is a question of law. What is determined in a legal proceeding and whether res judicata applies in the circumstances are essentially legal decisions, attracting little, if any, deference. The standard of review on this issue is, therefore, correctness.

The doctrine of res judicata and its application in bankruptcy proceedings

[53] The doctrine of res judicata is a common-law doctrine that prevents the re-litigation of issues already decided. It is founded on two central policy concerns: finality (it is in the interest of the public that an end be put to litigation); and fairness (no one should be twice vexed by the same cause). The [page15]doctrine is part of the general law of estoppel and is said to have two central branches, namely, "cause of action estoppel" and "issue estoppel".

[54] Cause of action estoppel refers to the determination of the cause or causes of action before the court. The applicable form of res judicata in this case, however, is issue estoppel. Issue estoppel prevents a litigant from re-litigating an issue that has been clearly decided by a court of competent jurisdiction in a previous proceeding between the same parties or their privies even if the new litigation involves a different cause of action. As the Supreme Court of Canada observed in Danyluk v. Ainsworth Technologies Inc., [2001] 2 S.C.R. 460, [2001] S.C.J. No. 46, at para. 18:

> 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.

[55] Canadian authorities confirm that res judicata may apply in bankruptcy proceedings, including those involving the establishment of a proof of claim. In Chaban v. Chaban (Trustee of), [1999] S.J. No. 112, 172 D.L.R. (4th) 312 (C.A.), the Saskatchewan Court of Appeal held that a trustee in bankruptcy was not permitted to resort to its power under s. 135(2) to disallow a claim (by the debtor's father/mortgagee) that had already been determined in the father's favour in previous proceedings. Speaking for the court, Chief Justice Bayda said, at para. 31:

> Section 135(2) is an empowering provision. But the power vested in the trustee is not absolute. . . . In my respectful view, the power cannot be invoked where to do so results in the reliance upon a procedure that conflicts with the procedure prescribed by a subsisting order of a superior court. Parliament did not intend s. 135(2) to be used by a trustee in those cases where to do so would amount to a collateral attack upon a subsisting order of a superior court or where it would amount to something akin to an abuse of process. . . .

(Emphasis added)

[56] A Bankruptcy Court, acting under s. 135(5), is in no different a position than a trustee in bankruptcy in such circumstances.

[57] Other Canadian decisions have also held that res judicata applies in bankruptcy proceedings. In Arnco Business Services Ltd. (Re), [1983] O.J. No. 973, 38 C.P.C. 226 (H.C.J.), for example, judgment creditors petitioned for a receiving order and the debtor defended on the basis that the judgment underlying the claim that he was bankrupt should be set aside. Gray J. refused, holding (amongst other things) that "the principle of res judicata can be raised as a bar to a subsequent bankruptcy proceeding" [page16](at p. 235 C.P.C.). If res judicata may be raised as a bar to the bankruptcy proceeding itself, it can be raised -- where appropriate -- in answer to a plea that a proof of claim should be disallowed, expunged or reduced: see, also, Gibson Mining Co. v. Hartin, [1940] B.C.J. No. 21, [1940] 2 D.L.R. 605 (C.A.); Grossman (Re), [1998] A.J. No. 498, 222 A.R. 139 (Q.B.).

The mitigation/set-off issue is res judicata

[58] Here, the question is whether res judicata applies to preclude the appellants from asserting in the bankruptcy proceedings that moneys received by Oakwell under the Licence Agreement, post-Singapore

judgment, are to be set-off against moneys owing by EnerNorth to Oakwell on the judgment awarding damages for breach of the Settlement Agreement, thus reducing or eliminating the Oakwell proof of claim in the bankruptcy. For that to be the case, the same issue must have been decided by a court of competent jurisdiction in a prior proceeding involving the same parties or their privies. The decision must have been final, fundamental in the sense that it was not collateral to the first proceeding, and made on the merits: see Carl Zeiss Stiftung v. Rayner & Keeler Ltd. (No. 2), [1967] A.C. 853, [1966] 2 All E.R. 536 (H.L.), at p. 935 A.C.; Angle v. Canada (M.N.R.), [1975] 2 S.C.R. 248, [1974] S.C.J. No. 95, at pp. 254-55 S.C.R.; Banque Nationale de Paris (Canada) v. Canadian Imperial Bank of Commerce (2001), 52 O.R. (3d) 161, [2001] O.J. No. 53 (C.A.), at para. 16.

[59] Two of these requirements call for consideration. First, did the Singapore proceedings involve the same parties (or their privies) as the proposed s. 135 proceedings? Secondly, was the mitigation/set-off issue determined in those earlier proceedings? The other criteria are not at issue on this appeal.

(i) Whether the Singapore proceedings involved the same parties or their privies

[60] For res judicata or issue estoppel to apply, the previous proceedings must have involved the same parties or their privies. Although Ms. Hall and Mr. Cassina were the president and chairman of EnerNorth, respectively, at the time of the Singapore proceedings -- indeed, Mr. Cassina was a witness for EnerNorth in the proceedings -- the appellant group of creditors argues that its members were in no way involved, nor could they have been. One of the criteria for the application of res judicata has accordingly not been met, they say.

[61] I do not accept this argument. While there is little authority directly on point, I am satisfied that Ms. Hall, Mr. Cassina and the appellant group of creditors are all "privies" of EnerNorth for [page17] the purposes of the s. 135 hearing analysis. As officers of EnerNorth, Ms. Hall and Mr. Cassina were clearly aligned with its interests in the Singapore proceedings and, in the present context, continue to be so. It is clear that directors and officers may be considered the privies of their companies: see, for example, Donald J. Lange, The Doctrine of Res Judicata in Canada, 2nd ed. (Markham, Ont.: LexisNexis Canada Inc., 2004), at p. 79, citing Bank of Montreal v. Maple City Ford Sales (1986) Ltd. (2001), 51 O.R. (3d) 523, [2000] O.J. No. 5701 (S.C.J.). In the latter case, Gillese J. (as she then was) noted that to the extent that the former directors and a creditor of the bankrupt "come to this court to advance the claims of [the bankrupt] they are a privy" (at p. 525 O.R.).

[62] Gillese J. went on to observe, at p. 526 O.R., that:

> Privies within the context of the doctrine of res judicata means a situation where there is a sufficient degree of identification between two persons to make it just to hold that the decision to which one was a party should be binding in the proceedings to which the other is a party.[1]

[63] The appellant creditors as a class, fall within this description. For purposes of the bankruptcy proceedings, the trustee stands in the shoes of EnerNorth, and for purposes of the proposed s. 135(5) hearing, the creditors in effect stand in the shoes of the Trustee, because they seek to have the court do what the Trustee has declined to do. They are "identified" with EnerNorth for purposes of the comparison between the Singapore proceedings and the proposed s. 135(5) hearing, and there is a "community or privity of interest" between them in this regard: see George Spencer-Bower and Alexander Kingcome Turner, The Doctrine of Res Judicata, 2nd ed. (London: Butterworths, 1969), at p. 209. The appellants are only entitled to argue that Oakwell's proof of claim should be expunged or reduced if EnerNorth is entitled to make the mitigation/set-off claim. As creditors, therefore, they have

"a sufficient degree of identification" with EnerNorth's claim in the Singapore proceedings "to make it just to hold that the decision to which one was a party should be binding in proceedings to which the other is a party": Bank of Montreal v. Maple City Ford Sales (1986) Ltd. [at para. 12]

[64] I conclude, therefore, that Ms. Hall, Mr. Cassina and the appellant group of creditors are all "privies" of EnerNorth for purposes of the res judicata analysis in the s. 135(5) context. [page18]

(ii) Whether the mitigation/set-off issue was determined in the Singapore proceedings

[65] The application judge concluded, at para. 22, that the appellants "seek to litigate precisely the issue that was before the Singapore Court, namely, the entitlement of Oakwell to receive funds from VBC and at the same time pursue its entitlement under the Settlement Agreement against EnerNorth". In his view, "[t]he fact that the precise amount was not dealt with in the Singapore trial, apart from the concession in respect of $350,000, [did] not invalidate Oakwell's entitlement under the judgment against EnerNorth". To permit the s. 135 challenge to proceed would therefore violate the principles of res judicata.

[66] I agree.

[67] The appellants submit that the mitigation/set-off issue was not determined in the Singapore proceedings and, indeed, that the trial judge specifically indicated that the issue was "not a matter before [him]". Alternatively, to the extent the issue may have been determined, they say it was determined in EnerNorth's favour because the trial judge in fact deducted the $350,000 that had been received by Oakwell from VBC to that point. A review of the trial judge's reasons in their entirety does not bear out this analysis, however.

[68] There is no doubt the mitigation/set-off issue was squarely before the trial judge. It was raised in both the defence and counterclaim. It was the subject of evidence. It was argued in EnerNorth's written submissions at the opening and the close of trial. But was it decided? That question is somewhat more difficult to answer.

[69] It is true that the Singapore trial judge gave little direct consideration to the question of whether moneys received by Oakwell from VBC under the Licence Agreement had to be deducted from moneys received by Oakwell from EnerNorth under the Settlement Agreement, except simply to deduct the amount conceded by Oakwell. He made no specific finding one way or the other on that point. However, the appellants' submission that he said the mitigation/set-off issue was not before him is not accurate. What he said was that Oakwell's claim that VBC had breached the Licence Agreement by failing to pay the remaining amount of $1,650,000 under that Agreement was "not a matter before [him]". That issue is quite different than the mitigation/set-off issue as between EnerNorth and Oakwell.

[70] Read as a whole, the trial judge's reasons -- and, more importantly, the judgment he rendered -- reveal that he rejected the mitigation/set-off argument. The judgment rendered does [page19]not make sense unless premised on the rejection of EnerNorth's arguments by way of defence and counterclaim, in their entirety.

[71] For example, at para. 69, the trial judge stated that "[Oakwell's] claim against the VBC Group was to be settled by the payment of the sum of US$2 million in respect of past technical services and any ongoing technical services and advice, if required, which [Oakwell] rendered for the benefit of the Project Company since 1995". It necessarily follows that he accepted Oakwell's position that the Licence Agreement and the Settlement Agreement dealt with different matters -- that is to say, Oakwell had not mitigated its losses by entering into the Licence Agreement with VBC. This conclusion is reinforced by

the trial judge's rejection of EnerNorth's counterclaim that any moneys or benefits received by Oakwell from VBC under the Licence Agreement had to be disgorged to EnerNorth.

[72] Moreover, I cannot accept the appellants' contention, based on the $350,000 reduction in damages, that the mitigation/set-off argument was decided in their favour. If EnerNorth's mitigation/set-off argument had actually been accepted, the judgment would not have required EnerNorth to pay -- as it does -- damages "less the sums of US$790,000 and US$350,000". The judgment would have provided for payment of damages less any moneys or benefits received or to be received by Oakwell under the Licence Agreement. It did not. Viewed in this way, the judgment rendered is consistent only with the trial judge having rejected EnerNorth's submissions on the mitigation/set-off issue that were clearly put before him.

[73] I realize that the $350,000 deduction is at odds with the rejection of EnerNorth's position. However, I do not view it as either an acceptance of EnerNorth's mitigation/set-off position (for the reasons outlined above) or an indication that he was only dealing with payments already received by Oakwell from VBC and leaving the issue of what was to be done with future payments to a future determination.

[74] As I read the judgment, the trial judge simply reduced the amount of the award by the two conceded amounts because Oakwell had voluntarily agreed to those reductions. The trial judge made no finding that Oakwell was obliged to make the deduction or that any amounts received under the Licence Agreement should be set-off and, as I have explained, his judgment as a whole is incompatible with such a conclusion. His judgment is very full and thorough. In my view, it makes no sense for him to have rejected EnerNorth's defence and dismissed its counterclaim -- both of which he did -- without also rejecting the mitigation/set-off argument. I am not convinced that he left open to future proceedings the resolution of whether [page20]the bulk of the moneys that were the subject of the debate (the US$1,650,000 and US$4 million) were to be set-off against the Settlement Agreement damages and/or disgorged.

[75] In the end, I am satisfied that the mitigation/set-off issue was both fully argued and determined in the Singapore proceedings. EnerNorth's creditors are barred from re-litigating that very issue in their efforts under s. 135(5) of the BIA to accomplish what EnerNorth failed to do in the Singapore courts and the Ontario courts.

IV. Disposition

[76] For the foregoing reasons, I would dismiss the appeal.

[77] Oakwell is entitled to its costs of the appeal, payable jointly and severally by all appellants, and fixed in the amount of $13,500 inclusive of fees, disbursements and GST.

Appeal dismissed.

Notes

1 This statement, as she indicated, is adopted from Las Vegas Strip Ltd. v. Toronto (City) (1996), 30 O.R. (3d) 286, [1996] O.J. No. 3210 (Gen. Div.) (Sharpe J.), affd (1997), 32 O.R. (3d) 651, [1997] O.J. No. 1033 (C.A.).

IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C., 1985, c. C-36, AS AMENDED AND
IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF CANWEST PUBLISHING INC./PUBLICATIONS CANWEST INC., CANWEST BOOKS INC., AND CANWEST (CANADA) INC.

Court File No. CV-8533-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
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CaleyWray
Labour/Employment Lawyers
1600 - 65 Queen Street West
Toronto, Ontario
M5H 2M5

Douglas J. Wray (LSUC No. 18023C)
Tel: 416-775-4673
Fax: 416-366-3293
wrayd@caleywray.com

Jesse B. Kugler (LSUC No. 55269V)
Tel : 416-775-4677
Fax: 416-366-3293
kuglerj@caleywray.com

Lawyers for the Respondents