COURT REFERENCES TO THE BOOK

The following decisions refer to the three editions of the treatise, *The Doctrine of Res Judicata in Canada* by Donald J. Lange, B.A., LL.B., Ph.D. (Cantab.).

SUPREME COURT OF CANADA
ALBERTA COURT OF APPEAL
BRITISH COLUMBIA COURT OF APPEAL
FEDERAL COURT OF APPEAL
MANITOBA COURT OF APPEAL
NEW BRUNSWICK COURT OF APPEAL
NEWFOUNDLAND COURT OF APPEAL
NOVA SCOTIA COURT OF APPEAL
ONTARIO COURT OF APPEAL
PRINCE EDWARD ISLAND COURT OF APPEAL
QUEBEC COURT OF APPEAL
SASKATCHEWAN COURT OF APPEAL
ALBERTA COURT OF QUEEN'S BENCH
BRITISH COLUMBIA SUPREME COURT
FEDERAL COURT OF CANADA (TRIAL DIVISION)
MANITOBA COURT OF QUEEN'S BENCH
NEW BRUNSWICK COURT OF QUEEN'S BENCH
NEWFOUNDLAND SUPREME COURT
NOVA SCOTIA SUPREME COURT
ONTARIO SUPERIOR COURT OF JUSTICE
SASKATCHEWAN COURT OF QUEEN'S BENCH
TAX COURT OF CANADA
ALBERTA PROVINCIAL COURT
BRITISH COLUMBIA PROVINCIAL COURT
TRIBUNALS

SUPREME COURT OF CANADA

Penner v. Niagara (Regional Police Services Board), [2013] S.C.J. No. 19 at par. 88, 89, 91, 114 per Cromwell and Karakatsanis JJ. for the majority:

> [88] The doctrine of issue estoppel seeks to protect the finality of litigation by precluding the relitigation of issues that have been conclusively determined in a prior proceeding. It arose as a doctrinal response to the "twin principles ... that there should be an end to litigation and ... that the same party shall not be harassed twice for the same cause" (*Carl Zeiss Stiftung*, at p. 946; K. R. Handley, *Spencer Bower and Handley: Res Judicata* (4th ed. 2009), at p. 4; Donald J. Lange, *The Doctrine of Res Judicata in Canada (*3rd ed. 2010), at pp. 4-7).
>
> [89] These twin principles are often expressed in terms of the public interest in ensuring the finality of litigation, whether it is civil, criminal or administrative,

> and the individual interests of protecting the parties against the unfairness of repeated suits and prosecutions (see *EnerNorth Industries Inc., Re*, 2009 ONCA 536, 96 O.R. (3d) 1, at para. 53; Handley, at p. 4; Lange, at p. 7).
>
> [91] As a species of *res judicata*, issue estoppel is conceptually related to the doctrines of cause of action estoppel, collateral attack, and abuse of process (Lange, at pp. 1-4).
>
> [114] . . .As Lange observes, where legislatures intend issue estoppel not to apply to an administrative decision, there should be clear language in the statute to foreclose this possibility (p. 122).

Rick v. Brandsema, [2009] S.C.J. No. 10 at par. 64 per Abella J. for the court:

> [64] This makes it unnecessary to deal with the effect of the consent order since, as Osborne J.A. observed in *McCowan v. McCowan* (1995), 14 R.F.L. (4th) 325 (Ont. C.A.), at para. 19, "... it is well established that a consent judgment may be set aside on the same grounds as the agreement giving rise to the judgment". This approach was explained by James G. McLeod as follows:
>
>> This rule reflects the reality that a consent judgment is not a judicial determination on the merits of a case but only an agreement elevated to an order on consent. The basis for the order is the parties' agreement, not a judge's determination of what is fair and reasonable in the circumstances.
>>
>> (Annotation to *Thomsett v. Thomsett*, 2001 BCSC 546, 16 R.F.L. (5th) 427, at pp. 428-29.)
>
> (See also *Shackleton v. Shackleton*, 1999 BCCA 704, 1 R.F.L. (5th) 459, at para. 12; *Schlenker v. Schlenker* (1999), 1 R.F.L. (5th) 436 (B.C.S.C.), at para. 21; *McGregor v. Van Tilborg*, 2003 BCSC 918, [2003] B.C.J. No. 1427 (QL), at para. 16; *T.(L.A.T.) v. T.(W.W.)*, at para. 18; *Huddersfield Banking Co. v. Henry Lister & Son Ltd.*, [1895] 2 Ch. 273 (C.A.), at p. 280; *Monarch Construction Ltd. v. Buildevco Ltd.* (1988), 26 C.P.C. (2d) 164 (Ont. C.A.), at pp. 165-66; **Donald J. Lange, *The Doctrine of Res Judicata in Canada*, (2nd ed. 2004), at p. 329**; *R.L.S. v. D.C.M.*, 2002 BCSC 1794, [2002] B.C.J. No. 2890 (QL), at para. 43; and Fraser, Horn and Griffin, *The Conduct of Civil Litigation in British Columbia* (loose-leaf), vol. 2 at p. 32-11.) [highlighted added]

R. v. Mahalingan, [2008] S.C.J. No. 64 at par. 108, 113 per Charron J. for the minority:

> [108] The importance of the doctrine of *res judicata* to the administration of justice is unquestionable. It has been variably described as lying "at the heart of the administration of justice" (*Toronto (City) v. C.U.P.E., Local 79*, [2003] 3 S.C.R. 77, 2003 SCC 63, at para. 15); as a "fundamental principle of our system of justice" (*R. v. Van Rassel*, [1990] 1 S.C.R. 225, at p. 238); and as "a cornerstone of the justice system in Canada" (D.J. Lange, *The Doctrine of Res Judicata in Canada* (2nd ed. 2004), at p. 4).
>
> [113] Identifying the elements of issue estoppel is deceptively simple, but applying the concept can prove rather complex, as evidenced by the considerable

> body of jurisprudence it has generated: see Lange for a useful discussion of the relevant jurisprudence. I will examine each element of issue estoppel in turn and discuss its application in the criminal context, starting with the requirement of mutuality. As we shall see, this requirement is so unsuited to the criminal context that it has never made its way into Canadian criminal law.

Garland v. Consumers' Gas Co., [2004] S.C.J. No. 21 at par. 71 per Iacobucci J. for the court:

> [71] In addition, McMurtry C.J.O. is correct in holding that this action does not constitute an impermissible collateral attack on the OEB's order. The doctrine of collateral attack prevents a party from undermining previous orders issued by a court or administrative tribunal (see *Toronto (City) v. C.U.P.E., Local 79*, [2003] 3 S.C.R. 77, 2003 SCC 63; D. J. Lange, *The Doctrine of Res Judicata in Canada* (2000), at pp. 369-70).

Toronto (City) v. Canadian Union of Public Employees, Local 79, [2003] S.C.J. No. 64 at par. 25, 38 per Arbour J., for the court, LeBeland and Deschamps JJ. concurring:

> [25] There has been much academic criticism of the mutuality requirement of the doctrine of issue estoppel. In his article, Prof. Watson, *supra*, argues that explicitly abolishing the mutuality requirement, as has been done in the United States, would both reduce confusion in the law and remove the possibility that a strict application of issue estoppel may work an injustice. The arguments made by him and others (see also D. J. Lange, *The Doctrine of Res Judicata in Canada* (2000)), urging Canadian courts to abandon the mutuality requirement have been helpful in articulating a principled approach to the bar against relitigation. In my view, however, appropriate guidance is available in our law without the modification to the mutuality requirement that this case would necessitate.
>
> [38] It is true that the doctrine of abuse of process has been extended beyond the strict parameters of *res judicata* while borrowing much of its rationales and some of its constraints. It is said to be more of an adjunct doctrine, defined in reaction to the settled rules of issue estoppel and cause of action estoppel, than an independent one (Lange, *supra*, at p. 344). The policy grounds supporting abuse of process by relitigation are the same as the essential policy grounds supporting issue estoppel (Lange, *supra*, at pp. 347-48):
>
>> The two policy grounds, namely, that there be an end to litigation and that no one should be twice vexed by the same cause, have been cited as policies in the application of abuse of process by relitigation. Other policy grounds have also been cited, namely, to preserve the courts' and the litigants' resources, to uphold the integrity of the legal system in order to avoid inconsistent results, and to protect the principle of finality so crucial to the proper administration of justice.

Danyluk v. Ainsworth Technologies Inc., [2001] S.C.J. No. 46 at par. 22 per Binnie J. for the court:

> [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.

ALBERTA COURT OF APPEAL

Ernst and Young Inc. v. Central Guaranty Trust Co., [2006] A.J. No. 1413 (C.A.) at par. 29, 37-38, 42 per the court:

> [29] The doctrine of *res judicata* has two branches: issue estoppel and cause of action estoppel. Issue estoppel precludes the litigation of an issue previously decided in another court proceeding, and cause of action estoppel precludes the litigation of a cause of action which was adjudged in a previous court proceeding: Donald J. Lange, *The Doctrine of Res Judicata in Canada,* 2d ed. (Ontario: LexisNexis Canada Inc., 2004) at 1 [*Res Judicata*]. We need not consider the applicability of cause of action estoppel because issue estoppel precludes Central Guaranty from attacking the validity of the trusts in this litigation.
>
> [37] The second precondition for issue estoppel is met if a decision is final in the sense that it determines the question between the parties conclusively. A decision is final if the court that made it "has no further jurisdiction to rehear the question or to vary or rescind the finding": *Res Judicata, supra* at 85-86.
> . . . .
>
> [38] A decision need not determine the entire subject matter of the relevant litigation in order to meet the second precondition. Rather, the precondition is met where a decision finally disposes of a substantive right between the parties. Consequentially, "a final disposition in an interlocutory proceeding may give rise to issue estoppel in a different proceeding:" *Res Judicata, supra* at 86 and 182.
> . . . .
>
> [42] The special circumstances exception bars the application of issue estoppel in a second proceeding. In order to demonstrate special circumstances, a party must show that he or she exercised reasonable diligence in the first proceeding. The standard of reasonable diligence is an objective standard: *Res Judicata, supra* at 232-234.

Anderson v. Airsprint Inc., [2005] A.J. No. 1294 (C.A.) at par. 7 per the court:

> [7] As stated by Lange, *The Doctrine of Res Judicata in Canada* at p. [187]:
>
>> In regard to striking an action, if the first action is struck out because it discloses no cause of action, a second action is not estopped if it discloses a cause of action.
>
> One of the cases cited by Lange in support of the above statement is Bank of Nova Scotia v. Guenette (1986), 75 A.R. 361 wherein Master Funduk makes the following pointed observation . . .

Peters v. Remington, 2004 ABCA 5 at par. 12, 17 per Wittmann J.A. for the court:

> [12] Determining if *res judicata* applies is a question of law: Donald J. Lange, *The Doctrine of Res Judicata in Canada* (Toronto: Butterworths, 2000) at 12; *Gibson Mining Co. v. Hartin*, [1940] 2 D.L.R. 605 at 607 (B.C.C.A.). As a result, this Court must review the trial judge's decision on a standard of correctness.
>
> [17] In evaluating what was decided for the purpose of *res judicata*, the court may look to documentation beyond the formal judgment itself: Lange, *The Doctrine of Res Judicata in Canada*; *Maynard v. Maynard*, [1951] S.C.R. 346, [1951] 1 D.L.R. 241 at 251-52, leave to appeal to Privy Council denied, [1952] 1 S.C.R. vii; and *Smode v. Deveaux* (1996), 216 A.R. 20 at para. 3 (C.A.).

574095 Alberta Ltd. v. Hamilton Brothers Exploration Company, 2003 ABCA 34 at par. 36-38, 44, 50-52, 59 per Wittmann J.A. for the court:

> [36] In Lange, *The Doctrine of Res Judicata in Canada* (2000, Butterworths, Toronto, ON) the author notes at p.344 that "to seek to litigate an issue that is barred by cause of action estoppel or issue estoppel is an abuse of process". See also Ho-A-Shoo v. Canada (Attorney General) (2000) 47 O. R. (3d) 115 (O.S.C.J.) at 125. The notice of motion brought by the appellants arguably contained two separate, though inter-related, grounds for ending the litigation.
>
> [37] The first basis was that the common law principle of res judicata applied to prevent the law suit from proceeding because of the public policy ground that it is in the public interest that an end be put to litigation after a final decision has been rendered (Lange at p. 4). If the legal tests for either of the two branches, issue estoppel or cause of action estoppel, are met, then res judicata arises unless the court exercises a discretion to allow the matter to continue in the interest of justice and fairness: Lange p. 32; Danyluk v. Ainsworth Technologies Ltd. [2001] 2 S.C.R. 460. On this basis, no discretion was applied in the present case since the chambers judge ruled that the tests for issue estoppel or cause of action estoppel were not made out. If the chambers judge applied the wrong legal test in coming to his conclusion that issue estoppel or cause of action estoppel did not apply then he made an error of law. The standard of review for an error of law is correctness.
>
> [38] The second basis was that the litigation was a more general "abuse of process" and the amended statement of claim should be struck out pursuant to ARC 129(1)(d). This is far more of an exercise of discretion by the court since there are no clear legal tests, although if it can be shown that issue estoppel or cause of action estoppel apply then it is considered an abuse of process. For example, a court may rule that an abuse of process exists even when the legal tests for issue estoppel and cause of action estoppel are not made out. The standard of review for an exercise of discretion is reasonableness. Further, Lange notes at p. 346:
>
>> … Whether the doctrine of abuse of process by relitigation is applied with or without estoppel support, its invocation sounds a death knell to a

> successful appeal. Because the application of abuse of process by relitigation is an exercise in discretion, unlike the prevailing view of issue estoppel and cause of action estoppel, it gives little room for an appellant to argue any ground of appeal other than that of an egregious error in the exercise of discretion.

Consequently, it is a very high standard to meet.

. . . .

[44] This is clearly broader than the McIntosh concept that only those questions distinctly put into issue and directly answered in the earlier proceeding could form the basis of res judicata by issue estoppel. Dickson, J., for the majority in Angle, allowed that facts and conclusions of law that were not directly or explicitly put into issue could still have been necessarily determined if they were fundamental to the earlier decision. In a more recent analysis of res judicata, Lange stated at p. 42-43 that:

> [For the same question test] the nature of the question includes what was "directly in question" and what was "necessarily presumed," or to use the wording of Sutherland, J. from Re Agil Holdings Ltd. (1985) 32 A.C.W.S. (2d) 259 (Ont H.C.) at 61, what has been decided "expressly or by necessary implication."
>
> What comprises the subject matter fundamental to the question is, therefore, a twofold investigation to determine the nature of the question. Firstly, it comprises the express question that was actually decided.... Secondly, it comprises the latent structure support in the express question by virtue of an implied, inferred, or assumed recognition of that structure.

. . . .

> [50] Determining if a question has been necessarily answered by previous litigation is not simple since there is confusion over Dickson, J.'s prohibition in Angle of "inference by argument from the previous judgment". As Lange notes at p.45:
>
>> The meaning of "inference by argument" has not been defined in Canada. It may be difficult to distinguish between "inference by argument," which is not part of the same question test, and phrases such as "necessarily inferred," "by necessary logical consequence," and "by necessary implication," which are part of the same question test.
>
> [51] However, Angle at p.555 has given some guidance as to when an issue is necessarily determined in the previous litigation by the requirement that the question or issue must have been so fundamental to the previous decision that the substantive previous decision could not be made but for the determination of the question or issue.
>
> [52] Whether an issue is fundamental to the prior decision may not only prevent an answer to a question that was directly answered but collateral

> or incidental to the decision from being the basis of res judicata by issue estoppel but also provides guidance when a question not directly asked may form the basis of res judicata: Lange at p. 40. A question or issue would only be fundamental to, and necessarily determined by, a prior decision if that decision could not stand unless the question or issue was decided in a particular way. As Binnie, J. stated in Danyluk at para. [54]:
>
> > A cause of action has traditionally been defined as comprising every fact which it would be necessary for the plaintiff to prove, if disputed, in order to support his or her right to the judgment of the court: Poucher v. Wilkins (1915), 33 O.L.R. 125 (C.A.). Establishing each such fact (sometimes referred to as material facts) constitutes a precondition to success. It is apparent that different causes of action may have one or more material facts in common. In this case, for example, the existence of an employment contract is a material fact common to both the ESA proceeding and to the appellant's wrongful dismissal claim in court. Issue estoppel simply means that once a material fact such as a valid employment contract is found to exist (or not to exist) by a court or tribunal of competent jurisdiction, whether on the basis of evidence or admissions, the same issue cannot be relitigated in subsequent proceedings between the same parties. The estoppel, in other words, extends to the issues of fact, law, and mixed fact and law [page490] that are necessarily bound up with the determination of that "issue" in the prior proceeding.
> > . . . .
>
> [59] The chambers judge correctly stated in the context of cause of action estoppel that "while a party may be required to put forth all of its defences, it is not required to join, by way of counterclaim, a separate and distinct cause of action - see Hall v. Hall (1958), 15 D.L.R. (2d) 633 (Alta. C.A.) and Greymac Properties Inc. v. Feldman (1990) 1 O.R. (3d) 686." Lange states at p. 49 that "[a]n issue which was not raised in the first action as a defence is not barred in the second action when the second action is based upon a separate and distinct cause of action - Wentworth (County) v. Hamilton Radial Electric Railway (1917) 41 D.L.R. 199 (Ont. C.A.) at 204-206."

Wolch v. Wilder, 2001 ABCA 310 at par. 14, per Berger J.A., Fruman and Cote J.A. concurring, at par. 21:

> [14] It follows that *res judicata* requires a prior adjudication to that now being sought, but it is the timing of the decision, not the timing of the commencement of the action, that is dispositive. See also *ATL Industries Inc.* v. *Han Eol Ind. Co.* (1995), 36 C.P.C. (3d) 288 (Ont. Gen. Div.). D.J. Lange, in his textbook *The Doctrine of Res Judicata in Canada* (Toronto: Butterworths, 2000) at 72-73, listed factors that are to be considered to determine if a legal entity is a privy:
>
> - having knowledge of the previous proceeding
> - a clear interest in the proceeding

- the ability to intervene as a participant but choosing to stand-by and watch
- active participation in the previous proceedings by giving evidence, and being part of the litigation team
- different parties who act together to circumvent a previous decision
- having the non-party's counsel present at the earlier proceedings
- being affected by the issue determined in the previous proceedings

410675 Alberta Ltd. v. Trail South Developments Inc., 2001 ABCA 274 at par. 14 per curiam:

> [14] 410675 also relies on this court's decisions in *Pocklington Foods v. Provincial Treasurer* (1995), 165 A.R. 155 (C.A.), and *International Datashare Corporation v. Q.C. Data Petroleum Services Ltd.* , [2000] A.J. No. 166 (C.A.), online: Q.L. (A.J.). Those cases do not deal with *res judicata*. They address the court's power to prevent successive interlocutory applications, when the same or substantially the same relief has previously been sought and refused. This has been described as the power of the court to prevent abuse of its process by relitigation of interlocutory matters. *The Doctrine of Res Judicata in Canada, supra*, at 363. The application before Gallant J. was not the relitigation of the same issue decided in the first action.

BRITISH COLUMBIA COURT OF APPEAL

Erschbamer v. Wallster, [2013] B.C.J. No. 263 (C.A.) at par. 16 per Tysoe J.A., for the court:

> [16]Although it is referred to as cause of action estoppel, the principle applies to defences as well as claims. This is explained in Donald J. Lange, *The Doctrine of Res Judicata in Canada*, 3d ed. (Markham, Ontario: LexisNexis, 2010) at 137-38:
>
>> While the plaintiff may not split a cause of action or pursue litigation by instalments, the defendant may not split the defence by turning around and, as the plaintiff in a subsequent action, sue on an issue which, if successful, would challenge the integrity of the previous judgment. This is what was attempted in *Henderson*.
>>
>> * * *
>>
>> In other words, a cause of action in a second action which could have been a defence in the first action, but was not raised, is barred ... The cloak of cause of action estoppel is woven the same for both the plaintiff and the defendant in subsequent proceedings.
>>
>> [Footnotes omitted.]

Cliffs Over Maple Bay Investments Ltd. (Re), [2011] B.C.J. No. 677 (C.A.) at par. 27, 33 per Newbury J.A., for the court:

> [27] *Res judicata* takes two forms in modern practice, cause of action estoppel (still sometimes called *res judicata*) and issue estoppel. Lange summarizes them as follows:
>
>> In their simplest definitions, issue estoppel means that a litigant is estopped because the issue has clearly been decided in the previous proceeding, and cause of action estoppel means that a litigant is estopped because the cause has passed into a matter adjudged in the previous proceeding. [At 1.]
>
> [33] Lange (see 58-65 and the cases cited therein) suggests that an "extended form" of issue estoppel has been adopted in some provinces such that any question that could have been decided or could have been raised at the first proceeding, will be barred in the second. However, this approach has not received appellate approval in this province, and when it has been used, seems not to have led to a different result than the traditional approach. (See the discussion in *Re Agil Holdings, supra*, and in Lange at 62-3.) Neither party relied on the extended form of issue estoppel in the case at bar.

R. v. Punko, [2011] B.C.J. No. 199 (C.A.) at par. 71 per Kirkpatrick J.A., for the court:

> [71] In contrast, Donald Lange, in *The Doctrine of Res Judicata in Canada*, 3d ed. (Markham: LexisNexis Canada, 2010) at 374, states:
>
>> Unlike the special pleas of *autrefois acquit* and *autrefois convict*, there is no plea of issue estoppel. It is a defence. It is part of the general plea of not guilty and the common law defences protected by the *Criminal Code*. In other words, issue estoppel may not be raised in a criminal proceeding until a plea of not guilty has been entered.
>> [Footnotes omitted.]

Susan Heyes Inc. (c.o.b. Hazel & Co.) v. Vancouver (City), [2010] B.C.J. No. 391 (C.A.) at par. 10 per Newbury J.A., for the court:

> [10] There is no doubt that many of the same issues of fact and law will arise in *Guatam* as arose in *Heyes.* But *res judicata*, on either of its branches, applies only where the same issues arise in a previous proceeding as have been decided between the same parties or their privies. Thus Donald J. Lange in *The Doctrine of Res Judicat in Canada* (2nd. ed., 2004) offers this quotation from *McIntosh v. Parent* (1924) 55 O.L.R. 552 (C.A.), *per* Middleton J.A., as the classic definition of the doctrine:
>
>> 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 retried in a subsequent suit between the same parties or their privies, though for a different cause of action. The right, question, or fact, once determined, must, as between them, be taken to be

> conclusively established so long as the judgment remains. [At 26-7; emphasis added.]

Azeri v. Esmati-Seifabad, [2009] B.C.J. No. 574 (C.A.) at par. 51 per Finch C.J.B.C., for the court:

> [51] As well, it should be noted that, since the limitation period in relation to Mrs. Azeri's children has not expired, and *res judicata* does not apply to a dismissal for want of prosecution, they are in a position to commence a new action in respect of their claims under the *Family Compensation Act*: see Lange, *The Doctrine of Res Judicata in Canada* (Toronto: Butterworths, 2000) at 187.

MacKinnon v. National Money Mart Co., [2009] B.C.J. No. 468 (C.A.) at par. 78, 80 per Newbury J.A., for the court:

> [78] To similar effect, Donald J. Lange writes in *The Doctrine of Res Judicata in Canada* (2nd ed., 2004) that the test of finality for issue estoppel should not be confused with finality for the purpose of cause of action estoppel. He continues:
>
> > The test for issue estoppel is a <u>substantive issue test where the decision affects substantive rights of the parties in respect of a matter bearing upon the merits of the cause of action, as distinct from some collateral matter</u>. This can be readily seen in decisions in interlocutory proceedings. A decision is final in nature because it finally disposes of a substantive right raised between the parties which may or may not be determinative of the entire action. [At 86; emphasis added.]
>
> Lange also notes that although there is no estoppel where a court of appeal grants a new trial of an entire case without restriction, the same is not true where a court of appeal in granting a new trial decides a substantive question in the litigation. That question, he writes, is taken to have been conclusively determined between the parties for purposes of the litigation. (At 99; see also *Western Canada Power Co. v. Bergklint* <u>(1916) 54 S.C.R. 285</u>, at 299, *per* Duff J., as he then was.)
>
> [80] Given, then, that the criteria for issue estoppel are met, the remaining question is whether this court should exercise its jurisdiction in the interests of justice to make an exception on the basis of "special circumstances". This exception is used sparingly, but recognizes that estoppel is intended to serve the ends of justice, not defeat them: see *Arnold v. National Westminster Bank Plc* [1991] 2 A.C. 93 (H.L.) at 109-111, *per* Lord Keith, quoted in *Hockin v. Bank of British Columbia* (1995) 123 D.L.R. (4th) 538 (B.C.C.A.) at 550. The onus lies on the party seeking the exercise of this discretion: see Lange, *supra*, at 234.

Roeder v. Lang Michener Lawrence & Shaw, [2007] B.C.J. No. 501 (C.A.) at par. 21 per Newbury J.A., for the court:

> [21] Had counsel for Mr. Roeder <u>not</u> made the concession he did and continued to assert that there was a causal nexus between the allegedly improper disclosure of information to the Commission and its 1995 order, I would also have concluded that the appeal must be dismissed - on the basis of abuse of process by relitigation. This principle is a wider one than the rule against collateral attack,

> and is not subject to the complexities of that rule, or of *res judicata* or issue estoppel, although all four principles involve many of the same policies: see Donald J. Lange, *The Doctrine of Res Judicata* (2000), at 343-52.

Dhillon v. Dhillon., [2006] B.C.J. No. 3008 (C.A.) at par. 7-8, 22, 30 per Thackray J.A., Finch C.J.B.C. concurring, Southin J.A. partially dissenting on other grounds:

> [7] The appellants did not raise the form of the action in the case at bar, either in the trial court, or in this Court. However, the form in which the action was taken, that is an action referred to as "civil fraud", caused problems at the trial and complicates this appeal. It might be expected that Mr. Dhillon would have brought an action specifically addressing the earlier judgment. Donald J. Lange, in *The Doctrine of Res Judicata in Canada*, second edition, 2004, at page 250, states: "the common procedure to address the fraud of the first proceeding, and the estoppel effect of the judgment, is to set aside the [earlier] judgment itself." If that had been done it would have been submitted that the default judgment was in error in that Mr. Dhillon had not been served with the process. Further, that the powers of attorney were forgeries and that the defendants were guilty of fraudulent acts.
>
> . . . .
>
> [8] However, what Lange suggests would be the common procedure to address the fraud of the first proceeding did not anticipate a situation such as in the case at bar. In the instant case the earlier judgment was not only 14 years earlier, but it was in favour of innocent plaintiffs.
>
> . . . .
>
> [22] Lange states, in *The Doctrine of Res Judicata in Canada*:
>
>> Pleading *r*es judicata permits a litigant to argue that the earlier determination is conclusive evidence rather than merely *prima facie* evidence when not pleaded (at page 11).
>> The plea of *res judicata* must set out fully the facts which create the plea, not simply plead the first proceeding and the order. It must distinctly plead facts sufficient to show that the question raised in the second proceeding was absolutely adjudicated upon in the first proceeding (at page 12) [footnotes omitted].
>
> The author notes that Gwynne J., for the majority of the Supreme Court of Canada in *McMillan v. Davies* (1892), reported in Edward Robert Cameron, *Canada: Supreme Court Cases* (Toronto: Canada Law Book, 1905) 306 at 317, stated this requirement to be as follows:
>
>> ... it would be necessary that the plea [of estoppel] should contain suitable averments of what was the precise matter in contestation in such interpleader issue and of what is the precise matter in contestation in the present action so as to raise for adjudication the question of estoppel relied upon by the defendant.
>
> [30] Further, Lange states, in *The Doctrine of Res Judicata in Canada*, at page 250 that: "[p]roving fraud in the first proceeding has always deprived a litigant of

the estoppel effect of an entered judgment." He goes on to say,that "[i]n Canada, fraud has been described as an exception [to *res judicata*] of special circumstances", citing *St. Denis v. North Himsworth (Township)*(1985), 50 O.R. (2d) 482 at 491 (Div. Ct.), *Johnston v. Barkley* (1905), 10 O.L.R. 724 at 728-729 (C.A.), and *Hamada v. Northguard Mortgage Corp.* (1985), 67 B.C.L.R. 115 at 121 (S.C.) in support. (Reservations about *Hamada* were voiced by Mr. Justice Hardinge, sitting as a Local Judge of the Supreme Court, in *Bank of B.C. v. Singh* (1987), 17 B.C.L.R. (2d) 256.). Lange continues as follows:

> A second proceeding, which relitigates the subject matter of the first proceeding founded on fraud, will be confronted with the estoppel effect of the first proceeding. To obviate this effect, the litigant may plead the special circumstances of fraud in order to relitigate the subject matter of the first proceeding.

FEDERAL COURT OF APPEAL

Genpharm Inc. v. Procter & Gamble Pharmaceuticals Canada Inc., 2003 FCA 467 at par. 46 per Rothstein J.A. for the court:

> [46] Third, this litigation has both public law and public interest aspects which require that consideration of the application of the issue estoppel doctrine not be limited to its impact on the private rights of the parties. There is some authority for the proposition that issue estoppel does not apply to public law litigation, notably by McKeown J. in *Del Zotto v. Canada*, [1994] 2 F.C. 640 at 644 (T.D). However, in my view, the public law nature of the litigation is simply one of the factors to be weighed in the exercise of the Court's discretion. For further discussion, see Lange, *The Doctrine of Res Judicata in Canada* (Toronto: Butterworths, 2000), at 248-254.

Apotex Inc. v. Merck & Co. Inc., 2002 FCA 210 at par. 27 per Malone J.A. for the court:

> [27] In the words of Moir J.A. in *Duhamel, supra*, adopted by Lamer C.J. on appeal, "this contemplates that the prior decision could not have been obtained without the point in issue being resolved in favour of the party urging the estoppel" (*Duhamel, supra,* at 278 (C.A.)). In essence, this statement is merely an affirmation of the principles articulated by Dickson J. in *Angle* in 1974. This does not necessarily imply, however, that the issue must have been the main point or *ratio decidendi* of the first decision, but rather that resolution of the issue is an essential element of the logic or reasoning behind it (*Iron v. Saskatchewan (Minister of Environment and Public Safety)*, [1993] 6 W.W.R. 1 at 11 (Sask. C.A.)). The decision which is said to give rise to the estoppel need not be a decision which determines the entire subject matter of the litigation. The test for issue estoppel is a substantive issue test where the decision affects substantive rights of the parties with respect to a matter bearing on the merits of the cause of action (see Lange, *The Doctrine of Res Judicata in Canada* (Toronto: Butterworths, 2000) at 78).

Nametco Holdings Ltd. v. Canada (Minister of National Revenue) 2002 FCA 474 at par. 8 per Strayer J.A. for the court:

> [8] With respect to the arguments based on estoppel or *res judicata*, these doctrines can have no application where the first decision-maker had absolutely no jurisdiction to determine the issue it purported to decide. (See *Angle v. MNR* [1975] 2 SCR 248-257, *Danyluk v. Ainsworth Technologies Inc.* [2001] 2 SCR 460 at para. 51). Further, where the initial process was without any validity it cannot form the basis for alleged abuse of process. (See *Rowett v. York Region Board of Education et al* (1988), 63 OR (2d) 767, where it was held that abuse of process involves raising in a subsequent proceeding an issue that has previously been decided by a tribunal which had the jurisdiction to so decide). See also Lange, *The Doctrine of Res Judicata in Canada* (Toronto: Butterworths, 2000) at 90, 109, 358.

Krishnapillai v. Canada, 2001 FCA 378 at par. 9 per Decary J.A. for the court:

> [9] For the doctrine of issue *estoppel* (as opposed to the doctrine of cause of action *estoppel*, which is not argued here) to apply, the same question must have been actually decided in the first proceeding. For the same question to have been actually decided in the first proceeding, it must be clear from the facts that the question has indeed been decided and the issue out of which the *estoppel* is said to arise must have been fundamental to the decision arrived at in the earlier proceeding. For the issue to have been fundamental to the earlier proceeding, there must be no doubt that the decision could not have been made without that issue being addressed and actually decided. There is no equivocal finding which can found issue *estoppel*. (See *Angle v. M.N.R.*, [1975] 2 S.C.R. 248; *The Doctrine of Res Judicata in Canada*, Donald J. Lange, Butterworths, 2000, at page 38 ff.)

MANITOBA COURT OF APPEAL

Anderson v. Manitoba, [2010] M.J. No. 375 (C.A.) at par. 51 per Hamilton J.A. for the court:

> [51] Donald J. Lange, *The Doctrine of Res Judicata in Canada*, 3d ed. (Markham: LexisNexis Canada Inc., 2010), makes this point succinctly (at p. 17): "The burden is on the party proving *res judicata* and determining it is a question of law.

Glenko Enterprises Ltd. v. Keller, [2008] M.J. No. 65 (C.A.) at par. 30, 31, 37, 38, 42, 50, 56 per Hamilton J.A. for the court:

> [30] *Res judicata* has two distinct forms: issue estoppel and cause of action estoppel. Donald J. Lange, in his leading text, *The Doctrine of Res Judicata in Canada*, 2d ed. (Markham: LexisNexis Canada Inc., 2004), explains the differences (at pp. 1-2):
>
> > ... issue estoppel means that a litigant is estopped because the issue has clearly been decided in the previous proceeding, and cause of action estoppel means that a litigant is estopped because the cause has passed into a matter adjudged in the previous proceeding.
> > ...

> ... The best early pronouncement of the meaning of *res judicata* by the Supreme Court of Canada is in the 1893 decision in *Farwell v. R.* [(1894), 22 S.C.R. 553 at 558]. King J. defined the general meaning, respectively, of both cause of action estoppel and issue estoppel, stating:
>
> > Where the parties (themselves or privies) are the same, and the cause of action is the same, the estoppel extends to all matters which were, or might properly have been, brought into litigation. Where the parties (themselves or privies) are the same, but the cause of action is different, the estoppel is as to matters which, having been brought in issue, the finding upon them was material to the former decision.

[31] Later, he explains that the policy rationales underlying the doctrine of *res judicata* are twofold (at p. 4):

> ... The foundation of the doctrine is traditionally grounded upon two policy considerations: firstly, the ground of public policy that it is in the interest of the public that an end be put to litigation, and secondly, the ground of individual right that no one should be twice vexed by the same cause. ...

[37] As just stated, cause of action estoppel demands a different analysis. In addition to the mutuality requirement, another fundamental principle is that a plaintiff should bring forward the subject matter of the whole case relating to the cause of action at one time. In other words, cause of action estoppel is somewhat similar to the doctrine of merger where, "... in the case of a former recovery, a second action is barred from seeking the relief which has previously granted" (see Lange, *op.cit.*, at 129).

[38] For cause of action estoppel to apply, four requirements must be satisfied.

> (1) there must be a final decision of a court of competent jurisdiction in the prior action;
>
> (2) the parties to the subsequent litigation must have been parties to or privies of the parties to the prior action (mutuality);
>
> (3) the cause of action in the prior action must not be separate and distinct; and
>
> (4) the basis of the cause of action and the subsequent action was argued or could have been argued in the prior action if the parties had exercised reasonable diligence.

See Lange at 125. See also *Grandview v. Doering*, [1976] 2 S.C.R. 621, and *Bjarnarson (H.R.) v. Manitoba* (1987), 48 Man.R. (2d) 149 (Q.B.), aff'd (1987), 50 Man.R. (2d) 178 (C.A.).

[42] As already explained, the requirement of mutuality demands that the same parties, or their privies, must be involved in both actions. In his text, Lange explained that "[p]rivity requires parallel interest in the merits of the proceeding, not simply a financial interest in the result" (at p. 77):

> ... Before a person can be a privy of a party, there must be community or privity of interest between them, or a unity of interest between them. They cannot be different in substance. Privity can be one of blood, title, or interest. A person who is privy in interest to a party in an action and has notice of that action is equally bound by the findings in that action. A privy is a person who has a right to participate with a party in the proceeding or who has a participatory interest in its outcome. ... To determine whether a person has a participatory interest in the outcome of the proceeding is to determine whether the outcome could affect the liability of that person. Privity requires parallel interest in the merits of the proceeding, not simply a financial interest in the result.
> [emphasis added]

[50] Here, there has been no suggestion that Keller was personally liable for the conduct of Keller Ltd. in the first action. Therefore, in my view, I do not see how he can now be declared a privy of Keller Ltd. for the purposes of barring the second action. Going back to the words of Lange, Keller is not a privy because he did not have "... a right to participate with a party in the proceeding or [have] a participatory interest in its outcome" (at p. 77). Although the outcome affected his financial interest as a shareholder, it did not create personal liability. He only had a financial interest in the result, not a "parallel interest in the merits."

[56] Abuse of process is an extraordinary remedy. Lange wrote at 372:

> ... Like issue estoppel and cause of action estoppel, abuse of process by relitigation is an extraordinary remedy to be applied sparingly and only in the clearest and most obvious cases, but in recent times it is repeatedly applied, like issue estoppel and cause of action estoppel, without express reference to this conservative guideline. ...

NEW BRUNSWICK COURT OF APPEAL

Sackville (Town) v. Canadian Union of Public Employees, Local 1188, [2007] N.B.J. No. 97 (C.A.) at par. 33 per Drapeau C.J.N.B. for the court:

> [33] The principle - some label it a doctrine - of *res judicata* has two distinct forms: cause of action estoppel and issue estoppel. Generally speaking, cause of action estoppel - or action estoppel as it is sometimes called - is concerned with preventing the re-litigation of a suit that has been adjudicated, while issue estoppel is directed at precluding the rehashing of an issue that has been settled in the course of a previous adjudication. *Res judicata* has been described as a rule of evidence (see *Canadian Union of Public Employees, Local 1394 v. Extendicare Health Services Inc. et al.* (1993), 14 O.R. (3d) 65 (C.A.), [1993] O.J. No. 1545 (QL), per Doherty J.A.) and as a bar or defence to an action that must be specially pleaded (see *Cooper and Smith v. Molsons Bank* (1896), 26 S.C.R. 611 at 620, *Cox v. Cox and Canadian Imperial Bank of Commerce* (1987), 82 N.B.R. (2d) 379 (C.A.) at 382, [1987] N.B.J. No. 526 (QL) and Donald J. Lange, *The Doctrine of Res Judicata in Canada*, 2nd ed., (Markham, Ont.: LexisNexis Butterworths, 2004) at p. 11). In either case, neither cause of action estoppel nor issue estoppel operates to oust a judicial tribunal's

> jurisdiction over an action (see *McNichol v. Co-Operators General Insurance Co.* (2006), 298 N.B.R. (2d) 44 (C.A.), [2006] N.B.J. No. 194 (QL), 2006 NBCA 54, para. 23). Moreover, courts have reserved unto themselves a discretionary power to reject the application of *res judicata* in, admittedly, exceptional circumstances (see *McNichol*, at para. 23, and the cases cited therein, including *Danyluk v. Ainsworth Technologies Inc.*).
>
> [36] *Res judicata*, in either of those forms, is hardly a technicality. Indeed, it is commonly described as a "fundamental doctrine of the justice system" (see *The Doctrine of Res Judicata in Canada*, at p.8), one that is founded on considerations of justice and good sense (see *New Brunswick Rail. Co. v. British and French Trust Corporation, Ltd.*, [1939] A.C. 1, per Lord Maugham L.C. at pp. 19-20). . .

McNichol v. Co-operators General Insurance Co., [2006] N.B. No. 194 (C.A.) at par. 29 per Drapeau C.J.N.B. for the court:

> [29] Canadian law on the subject has not strayed from the beaten path. It is explained in Donald J. Lange, *The Doctrine of Res Judicata in Canada*, 2nd ed. (Toronto: LexisNexis Canada Inc., 2004) at 211-12:
>
>> An action may be discontinued without a motion, as of right, under rules of civil procedure provided this is done before the close of pleadings. Such a discontinuance does not bar a second action because there has been no adjudication on the merits. The plaintiff is in the same position as if no action had been commenced. Rules of civil procedure may explicitly provide for this although such a provision is not necessary. The discontinuance of an action is not to be confused with the dismissal of an action. The latter creates an estoppel; the former does not.
>>
>> Where a motion is required for leave to discontinue an action, an order granting leave without conditions will create no estoppel. A bare discontinuance is no bar, whereas a bare dismissal is a bar. Usually, the order for discontinuance will contain a condition that no further action may be taken. This condition bars a subsequent proceeding. In *Re Woodhouse*, 14 D.L.R. 285, the Ontario Court of Appeal reviewed the rules of civil procedure affecting discontinuance. Hodgins J.A., for the court, stated:
>>
>>> It is provided in Rule 430, clause 3, that a discontinuance under clause 1, i.e., before receipt of the statement of defence or after the receipt thereof and before any other proceeding in the action is taken by the plaintiff, shall not be a defence to any subsequent action. This means that by that sort of discontinuance there is not established any foundation for a plea of res judicata. But, where the plaintiff has to apply for leave, the Court or a Judge has power to direct that the order shall be a bar to any future action. This is exactly equivalent in effect to a judgment under such circumstances as entitle the defendant to allege that the matter in question has passed into judgment binding both parties. For if it is not a bar in that sense, it is no bar at all.

In *Schlund v. Foster*, [1908] O.J. No. 540, Riddell J. stated the principle from the defendant's perspective, addressing the question of terms to be imposed against the plaintiff seeking to discontinue the action at a late stage in the action. Riddell J. stated:

> [T]his action is carried on so far that the plaintiff is no longer dominus litis, but the defendant has acquired rights and is entitled to a judicial declaration as to merits between himself and the plaintiff; the plaintiff must submit to such a judicial declaration, unless he is released from such necessity by an order of the Court; he is now appealing to the Court to be released from such necessity and to be allowed to deprive the defendant of his right to such declarations; the defendant is not asking for any favours from the Court or from the plaintiff, but pursuing the regular course to have his rights determined.

Schlund was quoted with approval in *Blum v. Blum*. 47 D.L.R. (2d) 388, McLennan J.A., for the court, stated:

> The principles stated in that case and the other considerations mentioned are matters which should be considered from the defendant's standpoint by a Judge in exercising his discretion as to what are the "proper" terms, if any, to be imposed. Whether terms are imposed and what they are will depend upon the balancing of interests of the plaintiff in obtaining leave with the interests of the defendant.

New Brunswick (Executive Director of Assessment) v. Ganong Bros. Ltd., [2004] N.B.J. No. 219 (C.A.) at par. 49 per Roberston J.A. for the court:

> [49] We begin with the legal proposition that "estoppel" does not apply in the context of annual property assessments. The law is conveniently summarized in D.J. Lange's text, *The Doctrine of Res Judicata in Canada* (Toronto: Butterworths, 2000) at 325:
>
> > In matters of property assessment, where a new assessment is made each year, the law is settled that a decision with respect to one year's assessment does not estop an assessment made in the subsequent year. Each year is a new question. A new liability has arisen because it is a new year.
> > [Footnotes omitted.]

Cote v. Desjardins, 2000 NBCA 52, par. 34, 37, 40 per Ryan J.A.:

> [34] In Farwell v. R., [1893] 22 S.C.R. 553, at page 558, King, J., states:
>
> > [...] Lorsque les parties (elles-mêmes ou leurs ayants droit) sont les mêmes et que la cause d'action est la même, la préclusion s'étend à toute question qui a fait partie du litige ou aurait convenablement pu en faire partie. Lorsque les parties (elles-mêmes ou leurs ayants droit) sont les

> mêmes, mais que la cause d'action est différente, la préclusion porte sur les questions qui, ayant été soulevées, ont fait l'objet d'une conclusion substantielle quant à la décision antérieure. [...]

See also Donald J. Lange, *The Doctrine of Res Judicata in Canada* (Toronto and Vancouver: Butterworths, 2000), at pages 1-4, 29 and 343-67.
. . . .

[37] Below, excerpted from the affidavits filed before the Court of Queen's Bench in connection with the initial matter, are the evidentiary elements which trigger application of the principle of res judicata (see *The Doctrine of Res Judicata in Canada*, supra, at pages 12-19).
. . . .

[40] Furthermore, the evidence could support the argument that, in view of the nature of the matter heard in 1995, the admissions and the evidence, the resulting decision is in rem. See *The Doctrine of Res Judicata in Canada*, at pages 375-79.

NEWFOUNDLAND COURT OF APPEAL

John Doe (HGM #1) v. Roman Catholic Episcopal Corp. of St. John's, [2013] N.J. No. 361 (C.A.) at par. 42, 81, 88, 179 per Green C.J.N.L. for the majority and per Welsh, J.A. dissenting:

> [42] . . .If the facts relied on to support the cause of action in the prior proceeding constitute substantially the same facts supporting the cause of action in the current proceeding, the causes of action will be regarded as the same (i.e. not separate and distinct) for the purposes of cause of action estoppel, even though the actual relief sought in the two proceedings is not the same. See Donald J. Lange, *The Doctrine of Res Judicata in Canada*, 3d ed. (Markham, ON: LexisNexis, 2010), pp. 147-151 and cases there cited.
>
> [81] I do not accept that *Smith* can be carried so far. It was dealing with a different situation (subsequent change in the law) that was not traditionally regarded as an established exception to the application of *res judicata.* In fact, there is some dispute on the authorities as to the extent to which a change in the law is a factor that would even, in principle, warrant a court not to apply *res judicata*. (See Lange, *The Doctrine of Res Judicata in Canada*, pp. 257-265 and cases there cited.) The policy issues underlining whether this should be recognized as a potential exception are different.
>
> [88] With respect to the second criterion, there is some disagreement in the case law as to how the significance of the evidence is described. In *Doering*, the phrase "entirely changes the aspect of the case" was used. In *Varette v. Sainsbury,* a case involving new evidence as a justification for ordering a new trial, the test was expressed as being "practically conclusive" (p. 76) or such as would "conclusively establish" the case (p. 77). *Penford v. Taylor* and *Brophy v. Collins* have also enunciated a "practically conclusive" standard. In *Toronto*, Arbour J. described the standard as "conclusively impeaches the original results." The predominant descriptor of the test appears to be "practically conclusive." See, Lange, *The Doctrine of Res Judicata in Canada*, p. 287.

[179] In *The Doctrine of Res Judicata in Canada*, third edition (Markham, ON: LexisNexis, 2010), Donald Lange reviews the question of fresh evidence as a special circumstance in the context of *res judicata*. In addition to reference to the decision in *Town of Grandview* which adopted the language, "a fact which entirely changes the aspect of the case", the author points to Supreme Court of Canada authority using the "practically conclusive" test, at page 287:

> The practically conclusive test in *Varette* [*v. Sainsbury*, [1928] S.C.R. 72, at page 76] was quoted with approval by the Supreme Court of Canada in *Dormuth v. Untereiner* [[1964] S.C.R. 122]. Ritchie J. noted that the same test had been adopted by the Supreme Court of Canada in *Gootson v. R.* [[1948] 4 D.L.R. 33 (S.C.C.), at pages 34 to 35] from which a passage similar to *Varette* was quoted. In *Dormuth*, Ritchie J. further examined whether the word "conclusive" was "too strong a word to use in this context" and concluded that "the phrase 'practically conclusive' has been employed more than once in this court and I see no reason for departing from it." Thus the Supreme Court of Canada has firmly established that the test for new evidence is a practically conclusive test.

Leyson Holdings Inc. v. Newfoundland and Labrador (Department of Works, Services and Transportation (Accommodation and Realty Services Division)), [2008] N.J. No. 360 (C.A.) at par. 29 per Rowe J.A. for the court:

> [29] I would note the following passage from Gough v. Newfoundland and Labrador, 2006 NLCA 3; reported at (2006), 253 Nfld. & P.E.I.R., leave to appeal to the Supreme Court of Canada denied [2006] S.C.C.A. No. 71. In para. 49, Wells, C.J.N.L., for the Court, quoted with approval Donald J. Lange, *The Doctrine of Res Judicata in Canada* (Toronto, Butterworths, 2000) at p. 361:
>
>> Abuse of process by relitigation applies to proceedings which would normally be governed by cause of action estoppel and to proceedings which do not meet the technicalities of that doctrine. As with cause of action estoppel, abuse of process by relitigation has sometimes been described as a rule against litigation by installment, or the rule in *Henderson* [(1843), 3 Hare 100]. To breach the rule in *Henderson*, even though the parties are not the same, is an abuse of process. In applying abuse of process by relitigation, the courts have taken a stern view of raising in new proceedings issues that ought reasonably to have been raised in earlier proceedings. A party is not entitled to relitigate a case because counsel failed to raise an argument which the party wanted to raise or relitigate an issue indirectly by "a cleverly camouflaged effort".

Bussey v. Maher, [2006] N.J. No. 235 (C.A.) at par. 18 per Welsh, J.A. for the court:

> [18] The reason for requiring both parties to make all the arguments on which they intend to rely, including those to be made in the alternative, is to prevent a multiplicity of proceedings. It is not sufficient for a party responding to an appeal to make submissions only on the issue on which the trial judge decided the claim. Failure of a respondent to address all issues on which the appeal may be decided

> not only puts that party at risk of losing the appeal, but also forecloses future consideration of the alternative issues which were raised in the court below, but not argued on appeal. (See: Lubrizol Corp. v. Imperial Oil Ltd. (C.A.) (1996), 197 N.R. 241; [1996] 3 F.C. 40 (FCA), at paragraph 16; Lange, *The Doctrine of Res Judicata in Canada*, 2nd edition (Markham: Butterworths, 2004, at page 100.)

Gough v. Newfoundland and Labrador, [2006] N.J. No. 6 (C.A.) at par. 49 per Wells C.J.N.L. for the court:

> [49] Those principles are conveniently explained in a recent Canadian text [See Note 7 below] dealing with the subject. The author, Donald Lange, did an exhaustive review of Canadian decisions over the last hundred or so years. At pages 347-348, he explains the policy underlying the principle. He writes:
>
>> A statement on the doctrine of abuse of process found in Fieldbloom v. Olympic Sport Togs Ltd.[(1954), 14 W.W.R. 26 (Man. C.A.)] reflects the balancing policy grounds of the estoppel doctrines. Both abuse of process by relitigation and estoppel provide a means of achieving justice between the parties in an adversarial system but, at the same time, carry with them the seeds of injustice in relation to parties litigating. Coyne J.A. stated:
>>
>>> The court has an inherent power and duty to protect itself, and its processes and proceedings, in order to preserve and further the proper and due administration of justice, and that power and that duty is apart from and above any Rules made under The Queen's Bench Act. The power is not, however, to be exercised without careful consideration and remembering not only that injustice must not be done to the party applying nor abuse of the process of the court permitted, but also that injustice must not be done to the other party. The power is a discretionary one, to be exercised on legal principles.
>>
>> The policy supporting abuse of process by relitigation is the same as the essential policy grounds of issue estoppel and cause of action estoppel. The two policy grounds, namely, that there be an end to litigation and that no one should be twice vexed by the same cause, have been cited as policies in the application of abuse of process by relitigation. Other policy grounds have also been cited namely, to preserve the courts' and litigants' resources, to uphold the integrity of the legal system in order to avoid inconsistent results, and to protect the principle of finality so crucial to the proper administration of justice.
>
> And, at page 361, he comments:
>
>> Abuse of process by relitigation applies to proceedings which would normally be governed by cause of action estoppel and to proceedings which do not meet the technicalities of that doctrine. As with cause of action estoppel, abuse of process by relitigation has sometimes been described as a rule against litigation by instalment, or the rule in

> Henderson [(1843), 3 Hare 100]. To breach the rule in Henderson, even though the parties are not the same, is an abuse of process. In applying abuse of process by relitigation, the courts have taken a stern view of raising in new proceedings issues that ought reasonably to have been raised in earlier proceedings. A party is not entitled to relitigate a case because counsel failed to raise an argument which the party wanted to raise or relitigate an issue indirectly by "a cleverly camouflaged effort".

Note 7: Donald J. Lange, *The Doctrine of Res Judicata in Canada*, (Toronto: Butterworths, 2000), at 343 et seq.

Furlong v. Avalon Bookeeping Services Ltd., [2004] N.J. No. 276 (C.A.) at par. 1 per Roberts J.A. for the court:

> [1] This appeal [See Note 1 below] is all about the application of the doctrine of res judicata, described by Donald J. Lange in *The Doctrine of Res Judicata in Canada* as "a cornerstone of the justice system in Canada". [See Note 2 below] Both of the doctrine's two distinct forms, issue estoppel and cause of action estoppel, were applied by the chambers judge to allow the respondent Shannon Furlong (Ms. Furlong) to continue an action for the assessment of damages in the Supreme Court when the appellants' liability for the motor vehicle accident which caused those damages was determined by an earlier action in the Provincial Court.
>
> Note 1: Leave to appeal was required; however, at the beginning of the hearing it was conceded that the issues raised were significant ones and leave was immediately granted.
>
> Note 2: Donald J. Lange, *The Doctrine of Res Judicata in Canada*, (Toronto: Butterworths, 2000), at p. 4.

NOVA SCOTIA COURT OF APPEAL

Nova Scotia Public Service Long Term Disability Plan Trust Fund v. Wright, [2006] N.S.J. No. 336 (C.A.) at par. 42 per Cromwell J.A. for the court:

> [42] Turning to the second point first, I am not persuaded that the judge erred in considering the material he did in his attempt to determine what the appeal board had actually decided. In making that determination, " ... the court may look to the documentation behind the formal judgment to determine what was decided for the purpose of *res judicata*. It is the substance of the matter actually decided which should control whether *res judicata* applies, not the form of the judgment.": Donald J. Lange, *The Doctrine of Res Judicata in Canada*, 2nd ed., (Ontario: Butterworths, 2004) at pp. 14-15.

Lienaux v. 230107 Nova Scotia Ltd., [2005] N.S.J. No. 247 (C.A.) at par. 15, 31 per Roscoe J.A.:

[15] More will be said about the applicability of the doctrine of res judicata to the amendments sought by the appellants in the following section of this decision. However, once more, in my view, a reasonably informed person would not suspect a judge of partiality on the basis of his application of an established legal doctrine, such as res judicata which has been referred to as "a cornerstone of the justice system" to the facts of this case. (see: *The Doctrine of Res Judicata in Canada*, Donald J. Lange, Butterworths, 2000, page 4) Here there is nothing remotely similar to the facts giving rise to the finding of bias in the Pinochet case. Whether the legal principle was properly applied is an arguable issue to raise on appeal, but it does not give rise to a reasonable apprehension of bias. This ground of appeal should be dismissed.

[32] Finality is discussed by Lange, supra, at page 77:

- The decision must be a final decision. A final decision for the purposes of issue estoppel is a decision which conclusively determines the question between the parties. ...
- The test for finality for issue estoppel, therefore, is that a decision is final when the decision-making forum pronouncing it has no further jurisdiction to rehear the question or to vary or rescind the finding.

[39] More specific to the Canadian approach to the issue of who is a privy to a party is the discussion in the Lange text, supra, at page 71:

> For the purpose of issue estoppel, a privy of a party has been variously defined. Before a person can be a privy of a party, there must be community or privity of interest between them, or a unity of interest between them. They cannot be different in substance. Privity can be one of blood, or title, or interest. A person who is privy in interest to a party in an action and has notice of that action is equally bound by the findings in that action. A privy is a person who has a right to participate with a party in the proceeding or who has a participatory interest in its outcome. To determine whether a person has a participatory interest in the outcome of the proceeding, is to determine whether the outcome could affect the liability of that person. A non-party in an earlier proceeding is a privy on the basis of being involved in the first proceeding by being present and by giving evidence. The term "parties" includes those who are named in the proceeding and those who have an opportunity to attend the proceeding.
>
> When there is a finding that a privy of a party is estopped by issue estoppel, the doctrine of estoppel by conduct or representation has, on occasion, also been applied to that person. Factors which have been considered in applying estoppel by conduct or representation are similar to factors which have been considered to establish a privy of a party, namely, having knowledge of the previous proceeding, a clear interest in the proceeding, the ability to intervene as a participant but choosing to stand-by and watch, active participation in the previous proceedings by giving evidence, and being part of the litigation team.
>
> . . . .

> The courts of Canada have made many findings of where a non-party is a privy of a party, and where a non-party is not a privy of a party for the purpose of issue estoppel. The following list comprises situations where a non-party is a privy of the party:
>
> - a director and officer of a company and the company (Ontario v. National Hard Chrome Plating Co., [1996] O.J. No. 93, (1995), 60 A.C.W.S. (3d) 289 (Ont. Gen. Div.) at 11.)
> - the individuals who own or control a company and the company (420093 B.C. Ltd. v. Bank of Montreal (1995), 34 Alta. L.R. (3d) 269 (C.A.) at 277-79; Stelmaschuk v. Dean, [1995] 9 W.W.R. 131 (N.W.T.S.C.) at 143; Veroli Investment Ltd. v. Liaukus, [1998] O.J. No. 2535, (1998), 80 A.C.W.S. (3d) 338 (Ont. Gen. Div.) at 8.)
> - a lawyer who is a director, officer, and solicitor for a company and the company (Guay v. Dennehy, [1994] 5 W.W.R. 738 (Man. Q.B.) at 747.)
> - a bank's solicitor and the bank (Beaulieu v. McLaughlin, (1986), 68 N.B.R. (2d) 444 (C..A.) at 446-47.)
> - a wife and a husband (Quiamco v. Gaspar (1985), 33 A.C.W.S. (2d) 442 (B.C.C.A.) at 15-16)
> - an assignee of a mortgage and the mortgagee (Income Trust Co. v. Thatcher, [1991] O.J. No. 1037, (1991), 27 A.C.W.S. (3d) 882 (Ont. Gen. Div.) at 16. ... reversed on appeal, [1995] O.J. No. 3571, (1994), 48 A.C.W.S. (3d) 1012) on the ground that the previous decision was not final ...)
> - a person conducting a defence on behalf of a defendant and the defendant (DeChamplain v. Maryland Casualty Co. (1982), 35 O.R. (2d) 428 aff'd (1982), 40 O.R. (2d) 480 (C.A.)

Copage v. Annapolis Valley Band, [2004] N.S.J. No. 480 (C.A.) (Q.L.) at par. 52 per Fischaud J.A. for the court:

> [52] ...I am of the view that the discretion should not be exercised to permit Mr. Toney to claim wrongful dismissal again in the Nova Scotia law suit. I would, however, add a condition to the order that, if the adjudicator's award is set aside on judicial review, then the stay of Mr. Toney's claim be lifted: Municipal Contracting Ltd. v. Nova Scotia (Attorney General) (2003), 212 N.S.R. (2d) 36 (C.A.) at paras. 13, 40; Lange, *The Doctrine of Res Judicata in Canada* (Butterworths, 2000) at p. 143.

Hache v. Lunenburg County District School Board, [2004] N.S.J. No. 120 (C.A.) at par. 51 per Cromwell J.A. for the court:

> [51] In determining that the doctrine of abuse of process was the preferred approach to improper relitigation, Arbour, J. also referred to *The Doctrine of Res Judicata in Canada*, Donald J. Lange, (Toronto: Butterworths, 2000) at pp. 347-48:

> The two policy grounds, namely, that there be an end to litigation and that no one should be twice vexed by the same cause, have been cited as policies in the application of abuse of process by relitigation. Other policy grounds have also been cited, namely, to preserve the courts' and the litigants' resources, to uphold the integrity of the legal system in order to avoid inconsistent results, and to protect the principle of finality so crucial to the proper administration of justice.

ONTARIO COURT OF APPEAL

EnderNorth Industries Inc. (Re), [2009] O.J. No. 2815 (C.A.) at par. 61 per Blair J.A. for the court:

> [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 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*, 2d 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 (S.C.). 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" (p. 525).

Niagara North Condominium Corp. No. 125 v. Waddintgon, [2007] O.J. No. 936 (C.A.) at par. 22 per Armstrong J.A. for the court:

> [22] Arbour J. in the *City of Toronto* also cited, with approval at para. 38, D.J. Lange, *The Doctrine of Res Judicata in Canada* (2000) at pp. 347-48 in support of the policy grounds which underlie abuse of process in these circumstances:
>
> > The two policy grounds, namely, that there be an end to litigation and that no one should be twice vexed by the same cause, have been cited as policies in the application of abuse of process by relitigation. Other policy grounds have also been cited, namely, to preserve the courts' and the litigants' resources, to uphold the integrity of the legal system in order to avoid inconsistent results, and to protect the principle of finality so crucial to the proper administration of justice.

Franco v. White, 2001 ONCA C34114 at par. 29, 40, 42 per Sharpe J.A. for the court:

> [29] Canadian law has tended to distinguish between the “offensive” and “defensive” use of criminal convictions. Where the conviction is used offensively by the plaintiff to establish the defendant’s liability, as in the present case, the conviction is treated as *prima facie* proof, subject to rebuttal. It is where the conviction is raised defensively to resist a claim by the convicted party, as in *Hunter* and *Demeter*, that the courts have exercised their discretion to invoke the abuse of process doctrine to preclude relitigation. The distinction between

offensive and defensive use of prior convictions has been mentioned frequently in the case law and is expressed as a "doctrine" by Lange *The Doctrine of Res Judicata in Canada* (Toronto: Butterworths, 2000) at 400.

. . . .

[40] The mutuality rule prevails in Canada: Lange *supra,* at pp. 58-63.

. . . .

[42] A similarly ambivalent approach is reflected by the manner in which the *prima facie* evidence standard is applied. As I will explain below, the effect given to convictions on motions for summary judgment borders on issue estoppel. Donald Lange, *supra* at p. 399, describes a kind of sliding scale approach to the weight attached to *prima facie* evidence:

> In Canada, the doctrine that applies to the admissibility of a conviction in a civil proceeding is that the conviction is *prima facie* evidence. *Prima facie* evidence is the starting-point. Behind the doctrine is the probative value, or weight, to be given to the *prima facie* evidence in the civil proceeding. In some circumstances, the *prima facie* evidence will be persuasive evidence of the criminal finding. In other circumstances, the *prima facie* evidence will be conclusive evidence of the criminal finding. As the *prima facie* evidence transforms itself into weighty probative evidence in a civil proceeding, the doctrine of *prima facie* evidence, in essence, transforms itself into an application of the doctrines of issue estoppel and cause of action estoppel.

City of Toronto v. Canadian Union of Public Employees, Local 79, 2001 ONCA C35112, at par. 48, 95 per Doherty J.A. for the court:

[48] I also do not agree that the rule against collateral attack on orders of superior courts provides a free-standing basis upon which to preclude relitigation. Not all collateral challenges are offensive: *R. v. Consolidated Mayburn Mines Ltd.* (1998), 123 C.C.C. (3d) 449 (S.C.C.); *Braithwaite v. Nova Scotia Public Service Long Term Disability Plan Trust Fund* (1999), 176 N.S.R. (2d) 173 (C.A.); and D. Lange, *The Doctrine of Res Judicata in Canada*, (Butterworths, 2000) at pp. 369-374.

. . . .

[95] The balancing of finality concerns with the individual litigant's claim to access to justice is best seen in recent *res judicata* jurisprudence. This court has held that the traditional criteria set out in the *res judicata* doctrine provide the starting point for an analysis of any claim that a prior determination precludes relitigation. If those criteria are met, relitigation will be foreclosed in the vast majority of cases. However, even where the criteria are met, a court or tribunal may refuse in exceptional circumstances to apply the doctrine and may permit relitigation where the circumstances dictate that finality interests should yield to the justice of the individual case: *Danyluk v. Ainsworth Technologies Inc., supra*, at paras. 62-67 (S.C.C.); *Minott, supra*; *Schweneke v. Ontario, supra*; *Ontario (Attorney General) v. Bear Island Foundation et al.* (1999), 126 O.A.C. 385 at 392-93 (C.A.); D.J. Lange, *The Doctrine of Res Judicata in Canada*, (Butterworths, 2000) at pp. 31-34.

PRINCE EDWARD ISLAND COURT OF APPEAL

D.L.J. v. D.L.J., [2009] P.E.I.J. No. 9 (C.A.) at par. 22 per Jenkins C.J. P.E.I., for the court:

> [22] I understand the appellant's concern that issue estoppel might operate to preclude him from raising the issue again in the same proceeding, on the basis that it is a matter that was finally decided on the motion, and should have been appealed within the appropriate time frame. See: Lange, Donald J., B.A., LL.B., Ph.D.: *The Doctrine of Res Judicata in Canada***,** 2nd Edition, (LexisNexis Butterworths 2004), at pp.83-84; *Diamond v. Western Realty Co.*, [1924] S.C.R. 308, at pp. 315-316; *Fidelitas Shipping Co. v. V/O Exportchleb*, [1925] 2 All E.R. 4 (C.A.). But in my opinion, issue estoppel would not apply in this situation. The proceeding was commenced by a statement of claim. The motions under consideration were always interim, both by definition and in nature. This is expressed in the respondent's Notice of Motion, and confirmed in the exchange between the motions judge and counsel following the reasons for judgment and in the heading in the Amended Order for Interim Relief. I accept counsel's submission that the interim nature of the relief could be clarified if the judgment expressed that the relief is not final, and is interim until trial, or that the ruling does not preclude the issue from trial or prejudge the trial of the issue, at which time a different order may be made.

QUEBEC COURT OF APPEAL

Ungava Mineral Exploration Inc. c. Mullan, [2008] J. Q. No. 160 (C.A.) at par. 92 per the court:

> [92] Sans qu'il y ait lieu de s'en remettre à la *common law* sur ce point, on notera que le développement jurisprudentiel consacré par l'arrêt *Srougi* s'apparente par certains aspects à la notion de "privity" propre à l'exception de *res judicata* dans les autres provinces canadiennes[65].
>
>> 65 Voir par exemple: Donald J. Lange, *The Doctrine of Res Judicata in Canada*, 2nd ed., Markham, Ont.: LexisNexis/Butterworths, 2004, p. 76-83.

SASKATCHEWAN COURT OF APPEAL

Dawgs Canada Distribution Ltd. v. Smith, [2013] S. J. No. 377 (C.A.) at par. 12 per Caldwell J.A. for the court:

> [12] The first precondition for the application of issue estoppel is the requirement that the issue in the respondent's first application be the same as in the second. In his seminal treatise, *The Doctrine of Res Judicata in Canada*, 3rd ed. (Toronto, Ont: Lexis Nexis, 2010), Dr. Donald J. Lange succinctly states (at p. 304): "Issue estoppel applies to foil an attempt to relitigate the same question in another motion in the same proceeding." In negative terms, if the issue or question currently before the court is different or distinguishable from that which was

previously before the court, the doctrine of issue estoppel does not apply. With respect to interlocutory or interim matters, Dr. Lange maintains (at p. 308):

> Issue estoppel applies to interlocutory decisions which finally determine an issue in the absence of an appeal, material change in circumstances, or new evidence which has been previously suppressed or unavailable *but the issue in the second motion must be the precise issue adjudicated upon in the first motion*". [Emphasis added.]

Gilewich v. Strand, [2007] S. J. No. 160 (C.A. in Chambers) at par. 7 per Hunter J.A.:

> [7] The doctrine of abuse of process is explained in *The Doctrine of Res Judicata in Canada* [See Note 5 below] by Donald Lange. In *Gough v. Newfoundland and Labrador [See Note 6 below]* the Court noted that the abuse of process by relitigation is sometimes described at p. 361 as:
>
> > ... a rule against litigation by instalment ... In applying abuse of process by relitigation, the courts have taken a stern view of raising in new proceedings issues that ought reasonably to have been raised in earlier proceedings. ...
>
> Note 5: Donald J. Lange, *The Doctrine of Res Judicata in Canada*, 2d ed. (Markham: Butterworths, 2004).

ALBERTA COURT OF QUEEN'S BENCH

Syncrude Canada Ltd. v. Highland Consulting Group Inc., [2013] A.J. No. 1105 (Q.B.) at par. 48 per Manderscheid J.:

> [48]The court recognizes two forms of *res judicata*: issue and cause of action estoppel. "In their simplest definitions, issue estoppel means that a litigant is estopped because the issue has clearly been decided in the previous proceeding, and cause of action estoppel means that a litigant is estopped because the cause has passed into a matter adjudged in the previous proceeding: "Donald J Lange, *The Doctrine of Res Judicata in Canada*, 3d ed. (Ontario: LexisNexis Canada Inc., 2010) [*Res Judicata*] at 1; see also ***Ernst & Young Inc v. Central Guaranty Trust Company,*** 2006 ABCA 337 at para 29, 397 AR 225.

Hazin (Re), [2011] A.J. No. 344 (Q.B.) at par. 33-34 per Gill J.:

> [33] In the text book *The Doctrine of Res Judicata in Canada*, 3d ed. (Markham, Ont: LexisNexis Canada Inc, 2010), Donald J. Lange deals with the various definitions of privity found in Canadian case law. He states at page 84:
>
> > A privy is a person who has a right to participate with a party in the proceeding or who has a participatory interest in its outcome. A person who has no right to participate as a party in a proceeding lacks a due process requirement to make a finding of privity of interest. To determine whether a person has a participatory interest in the outcome of the proceeding is to

> determine whether the outcome could affect the liability of that person.

[34] Further at page 85, Lange writes:

> For issue estoppel to apply, it must be shown that the "wait and see" party could easily have been involved in the prior proceeding.

Burcevski v. Ambrozic, [2010] A.J. No. 1021 (Q.B.) at par. 40 per Kent J.:

> [40] The doctrine of *res judicata* is fundamental to the judicial process. When the doctrine applies, a litigant is estopped from proceeding with a new action because the issue has been decided in previous proceedings. *Res judicata* is grounded upon public policy considerations that an end be put to litigation and that one should not be twice vexed by the same cause: *Re Smolak and Necula,* [1974] 1 W.W.R. 1, 39 D.L.R. (3d) 730 (Alta. S.C.A.D.); and Donald J. Lange, *The Doctrine of Res Judicata in Canada*, 2d ed. (Markham: LexisNexis, 2004) at p. 1-2 & 250 ("Lange").

Waap v. Alberta, [2008] A.J. No. 1014 (Q.B.) at par. 179 per Nation J.:

> [179] The fundamental question in determining whether or not there is a collateral attack is the legislature's intention in regard to the appropriate forum for resolving the matter in issue: Donald J. Lange, *The Doctrine of Res Judicata in Canada*, 2d ed. (Markham: Butterworths, 2004) at 406. In *R. v. Consolidated Maybrun Mines Ltd.*, [1998] 1 S.C.R. 706 the Supreme Court adopted five factors with one modification from the earlier decision of the Court of Appeal: 1) the wording of the statute from which the power to issue the order derives, 2) the purpose of the legislation, 3) the availability of an appeal, 4) the nature of the collateral attack in light of the appeal tribunal's expertise and raison d'etre, and 5) the penalty on a conviction for failing to comply with the order.

Lloyd v. Imperial Oil Ltd., [2008] A.J. No. 695 (Q.B.) at par. 49, 53 per Wittmann J.:

> [49] In Donald J. Lange, *The Doctrine of Res Judicata in Canada*, 2nd ed. (Toronto: Butterworths, 2004) the learned author surveys a number of decisions of Canadian courts and sets out, at p. 77, a number of definitions arising out of issue estoppel cases, including:
>
> - ... A person who is privy in interest to a party in an action and has notice of that action is equally bound by the findings in that action. A privy is a person who has a right to participate with a party in the proceeding or who has a participatory interest in its outcome ... To determine whether a person has a participatory interest in the outcome of the proceeding is to determine whether the outcome could affect the liability of that person.
>
> [53] In *The Doctrine of Res Judicata in Canada*, this element of the test is described, at p. 144:
>
> - Whether the cause of action in the first proceeding is the same as that sought to be enforced in the second proceeding does not depend upon

> technical considerations but upon matters of substance, that is, whether they are in substance identical.

Fisher v. Fisher, [2008] A.J. No. 284 (Q.B.) at par. 62 per McDonald J.:

> [62] Donald J. Lange in *The Doctrine of Res Judicata in Canada*, 2nd ed. (Toronto: Butterworths, 2004) writes at pages 404 and 405:
>
> - In regard to an attack on a court order, the doctrine [of collateral attack] is a flexible doctrine, not an absolute doctrine ...
> - To prevent a collateral attack is to ensure fairness to all parties, but not all collateral attacks are offensive. In R. v. Domm, [1996] O.J. No. 4300 Doherty J.A., for the Ontario Court of Appeal, extensively reviewed the case law and scope of the doctrine of collateral attack and provided two exceptions to its application. The first exception is that obedience to a court order will be relaxed where no harm will come to the justice system ...
> - The second exception is if the litigant does not have an effective remedy through existing court procedures to attack the court order, for example, by way of variation, or appeal, or review ...

Bank of Montreal v. Jarjoura, [2007] A.J. No. 1394 (Q.B.) at par. 181-184 per McIntyre J.:

> [181] The formal documents that track Uniserve's bankruptcy proceedings were made an exhibit at trial for the purpose of determining whether the amounts in the Due from Shareholders Accounts had been dealt with previously. In *Peters v. Remington*, [2004] 339 A.R. 326, 2004 ABCA 5, Wittmann J.A., (as he then was) held at para. 17:
>
> > In evaluating what was decided for the purpose of res judicata, the court may look to documentation beyond the formal judgment itself: Lange, *The Doctrine of Res Judicata in Canada*; *Maynard v. Maynard*, [1951] S.C.R. 346, [1951] 1 D.L.R. 241 at 251-252, leave to appeal to Privy Council denied, [1952] 1 S.C.R. vii; and *Smode v. Deveaux* (1996), 216 A.R. 20 at para. 3 (C.A.).
>
> [182] There is no formal judgment before me in regards to Uniserve's bankruptcy as it is still ongoing. All that is before me are numerous interlocutory documents and Orders from various Masters. Where it is an interlocutory Order, as it is here, the court should look at the Notice of Motions and the evidence giving rise to the Order: Donald J. Lange, *The Doctrine of Res Judicata in Canada*, 2d ed. (Ontario: LexisNexis Canada Inc., 2004) at 21 (*Lange on Res Judicata*); *Burk Holdings Ltd. v. Alberta Real Estate Association* (1992), 129 A.R. 112 (Master) at 122-23. I will rely on the bankruptcy documentation that was provided to me in determining the issue of *res judicata.*
>
> [183] In the case *Ernst & Young Inc. v. Central Guaranty Trust Co.* (2006), 397 A.R. 225, 2006 ABCA 337; leave to appeal refused by S.C.C. 2007 CarswellAlta 517 (S.C.C. April 19, 2007), which was not referred to me by counsel but which

I find most instructive, the Court of Appeal dealt with the doctrine of *res judicata*. The court relied heavily on *Lange on Res Judicata* in its analysis but referred to the text as *Res Judicata*. In referring to this text, the Court stated at para. 29:

> The doctrine of *res judicata* has two branches: issue estoppel and cause of action estoppel. Issue estoppel precludes the litigation of an issue previously decided in another court proceeding, and cause of action estoppel precludes the litigation of a cause of action which was adjudged in a previous court proceeding.

[184] *Lange on Res Judicata*, at 223, endorses the judgment of Lander, J. in *Spender (Guardian ad litem of) v. Spender* (1999), 87 A.C.W.S. (3d) 1025 (B.C.S.C.) as the procedure to follow to establish whether issue estoppel or cause of action estoppel should apply to a Consent Order. Lander J. stated at para. 23-25:

> When faced with a plea of *res judicata* on grounds of a consent order in an earlier proceeding, the court must proceed as follows.
>
> First, the cause of action in the earlier proceeding must be compared to the cause of action in the later proceeding. If they are different, then no "cause of action" estoppel can arise. If the causes of action are identical, the court must examine the consent order and any agreement, correspondence, or releases leading to its entry, in order to ascertain objectively whether the consent order was intended to finally dispose of all issues in the cause of action.
>
> If no cause of action estoppel is established, the court must nevertheless examine the pleadings, the consent order, and any agreement, correspondence, or releases leading to its entry, in order to ascertain what issues, if any, were intended by the parties to be determined by the consent order. The parties will be precluded by "issue estoppel" from controverting any issue that the parties intended to dispose of through the consent order.

Walji v.Quiaishi, [2007] A.J. No. 1165 (Q.B.) at par. 54 per Graesser J.:

> [54] As noted by D. Lange in *The Doctrine of Res Judicata in Canada* 2nd ed. (Markham, Ont.: Butterworths, 2004) at p. 25, one of the principles of issue estoppel is that the question decided in the first proceeding must be the same as the question to be decided in the second proceeding, and the question must be fundamental to the decision in the first proceeding and not collateral to it.

Collavino Inc. v. Yemen (Tihama Development Authority), [2007] A.J. No. 149 (Q.B.) at par. 54 per Wittmann A.C.J.Q.B.:

> [54] Yemen did not plead the issue of *res judicata* and has admitted issue estoppel should not apply but has argued that abuse of process by relitigation should apply. Jurisprudence has established that the same considerations that arise for issue estoppel will also arise for abuse of process by relitigation. Donald

J. Lange, *The Doctrine of Res Judicata* 2d ed. (Markham: Lexis Nexis Butterworths: 2004) at 385 stated:

> It may, therefore, be summarized from the case law that the application of abuse of process is to avoid relitigation of the same question in the same way that issue estoppel is traditionally applied, that is, the same question must have been actually decided and the question must have been fundamental to the decision.

ESA Holdings Ltd. v. Shea Nerland Calnan,, [2007] A.J. No. 149 (Q.B.) at par. 30 per Gill J:

> [30] The doctrine of abuse of process is used in a variety of legal contexts, providing Judges with an inherent and residual discretion to prevent an abuse of the court's process. As noted in para. 37 of *Toronto (City)*:
>
> > ... the doctrine of abuse of process engages 'the inherent power of the court to prevent the misuse of its procedure, in a way that would ... bring the administration of justice into disrepute.'
> >
> > As Goudge J.A.'s comments indicate, Canadian courts have applied the doctrine of abuse of process to preclude **relitigation** in circumstances **where the strict requirements of issue estoppel** (typically the privity/mutuality requirements) **are not met**, but where allowing the litigation to proceed would nonetheless violate such principles as judicial economy, consistency, finality and the integrity of the administration of justice. [Emphasis added.]
>
> And at paragraph 38, quoting from Donald Lange, *The Doctrine of Res Judicata in Canada* (Toronto: Butterworths, 2000) at pp. 347 - 348:
>
> > The two policy grounds, namely, that there be an end to litigation and that no one should be twice vexed by the same cause, have been cited as policies in the application of abuse of process by relitigation. Other policy grounds have also been cited, namely, to preserve the courts' and the litigants' resources, to uphold the integrity of the legal system in order to avoid inconsistent results, and to protect the principle of finality so crucial to the proper administration of justice.

Foreman v. Foreman, [2005] A.J. No. 528 (Q.B.) at par. 9-10 per Slater J:

> [9] In D.J. Lange, *The Doctrine of Res Judicata in Canada* (2d ed.) the learned author notes at p. 312: "The doctrines of issue estoppel and cause of action estoppel apply in family law." The author goes on to note that family law statutes often provide exceptions to the doctrine. Those exceptions are generally triggered by one of the parties showing a change of circumstances, in which case one approach is that only the circumstances that have arisen since the original judgment will be considered, but the parties will not be allowed to re-litigate matters that arose before that. In other instances, once a change of circumstances is shown, the whole issue is reopened. The provisions in s. 17 of the Divorce Act, R.S.C. 1985, (2d Supp.) c. 3, which allow a change of custody when a change of

circumstances is shown, have been interpreted as being of the latter type: Gordon v. Goertz, [1996] 2 S.C.R. 27.

[10] Parties in family law disputes are encouraged to settle their differences. If they cannot, they have the right to go to trial and have the matter adjudicated. However, when they settle their differences (whether by agreement or consent order or both), or once they have had an adjudication, they are not thereafter entitled to re-litigate the issue. As D.J. Lange states in *The Doctrine of Res Judicata in Canada*, supra, at p. 313:

> Notwithstanding the policy and legislative considerations in family law, the common law estoppel doctrines, including the related doctrine of abuse of process by re-litigation, are applied in family law. Re-litigation is a frequent occurrence in family law, where the litigants' emotions often run high but the estoppel doctrines are useful shields and swords to repel these lovers of re-litigation.

Subject to the statutory exceptions previously noted, the parties are not entitled to re-litigate family law issues.

Mr. K. v. E. K., [2004] A.J. No. 544 (Q.B.) at par. 29 per Read J:

[29] Dismissing a motion to strike pleadings does bar a second motion by cause of action estoppel: H.L. Staebler Ltd. v. Lohnes (1986), 38 A.C.W.S. (2d) 385 (Ont. Dist. Ct.), D.J. Lange, *The Doctrine of Res Judicata in Canada* (Toronto: Butterworths, 2000) at p. 166; and motions to amend are also affected by issue and cause of action estoppel: Lange, supra at p. 167 and cases cited therein. However, a second motion to dismiss on different grounds than the first is not barred, according to Sporan Farms Inc. v. Hook's Ranches Ltd., [1993] B.C.J. No. 426 (S.C.). Thus, the fact that the application before me is interlocutory is not necessarily determinative.

[30] In my view, however, the real difficulty with the Plaintiff's position is that the parties to this application are not the same parties or privies to the proceedings before Ritter J. The same parties test is a requirement for application of issue estoppel and cause of action estoppel: Lange, supra at pp. 58, 131.

Dell Chemical & Marketing Ltd. v. Aquasol International Inc., [2004] A.J. No. 274 (Q.B.) at par. 9 per Veit J.:

Cases and authority cited:

[9] By the respondent: Argentia Beach (Summer Village) v. Warshawski (1991), *120 A.R. 27*; Favor v. Winnipeg, *[1989] 3 W.W.R. 374* (Man. C.A.); D.J. Lange*,* *The Doctrine of Res Judicata in Canada* (Toronto: Butterworths, 2000).

Re Promax Energy Inc., [2003] A.J. No. 1718 at par. 48 per Romaine J.:

[45] It is again important in addressing this issue to determine the real subject matter of the previous litigation: Donald L. Lange, *The Doctrine of Res Judicata in Canada*, (Toronto: Butterworth 2000) at 126. There was no reason for Promax

> to raise the character of the royalty on after-acquired lands in addressing the issues that arose in the previous litigation.

Hauck v. Dominion of Canada General Insurance Co., [2003] A.J. No. 1505 (Q.B.) at par. 36 per Lo Vecchio J.:

> [36] The burden of proof is on Dominion to establish the necessary elements of res judicata. Res judicata in Canada has two distinct forms: issue estoppel and cause of action estoppel [See Note 3 below]. In argument, Dominion also raised abuse of process by relitigation, which is founded on the same underlying principles as the doctrine of res judicata.
>
> Note 3: *The Doctrine of Res Judicata in Canada*, Lange, Donald J., Butterworths: 2000 at p. 1.

BRITISH COLUMBIA SUPREME COURT

MacKenzie (Re), [2013] B.C.J. No. 1987 (S.C.) at par. 74 per Groper J.:

> [74] Donald Lange's text *The Doctrine of Res Judicata in Canada*, 3rd ed. (Markham: LexisNexis, 2010) states at 464 - 465:
>
> > There are two kinds of lack of jurisdiction for the purpose of a judgment. An important distinction must be made between a judgment rendered where there is no jurisdiction, in and of itself, and a judgment rendered where there is no jurisdiction although jurisdiction is assumed to exist because of a set of facts which are assumed to exist. The former is a nullity and assailable in a subsequent proceeding as a defence to an estoppel argument. It is not viewed as a collateral attack on the judgment. The latter is only assailable by way of appeal. If it is attacked in a subsequent proceeding, it is viewed as a collateral attack on the judgment.

J.P. v. British Columbia (Director of Child, Family and Community Services), [2013] B.C.J. No. 1708 (S.C.) at par. 72 per Walker J.:

> [72] In *Giles v. Westminster Savings Credit Union*, 2006 BCSC 1600, aff'd 2010 BCCA 282 ("*Giles (C.A.)*"), Sigurdson J. quoted with approval the following remarks from the author of *The Doctrine of Res Judicata in Canada*, 2d. ed. (Toronto: Butterworths, 2004) at 77:
>
> > A privy of a party has been variously defined in issue estoppel cases. Before a person can be a privy of a party, there must be community or privity of interest between them, or a unity of interest between them. They cannot be different in substance. Privity can be one of blood, title, or interest. A person who is privy in interest to a party in an action and has notice of that action is equally bound by the findings in that action. A privy is a person who has a right to participate with a party in the proceeding or who has a participatory interest in its outcome. A person who has no right to participate as a party in a proceeding lacks a due process requirement to make a finding of privity of

> interest. To determine whether a person has a participatory interest in the outcome of the proceeding is to determine whether the outcome could affect the liability of that person. Privy requires parallel interest in the merits of the proceeding, not simply a financial interest in the result. However, a non-party who enters into a formal agreement with the party in a proceeding for disposing of the proceeds is a privy of that party and bound by the first proceeding. [Emphasis added]

Strata Plan K855 v. Big White Mountain Mart Ltd., [2013] B.C.J. No. 1699 (S.C.) at par. 20 per Johnston J.:

> [20] In *The Doctrine of Res Judicata in Canada,* Third Edition, by Donald J. Lange, the author says at page 1:
>
> > The doctrine of *res judicata* is a fundamental doctrine of the justice system in Canada. It has two distinct forms; issue estoppel and cause of action estoppel. It is part of the general law of estoppel comprising estoppel by conduct or representation, estoppel by deed, promissory estoppel, proprietary estoppel, and *res judicata.* Early terms used for *res judicata* were "estoppel *per rem judicatam,"* that is, estoppel by the matter decided, and "estoppel by record," that is, estoppel by the written record of a court of record. In Canada, the term most commonly used is *"res judicata"* which the Supreme Court of Canada has defined as "something that has clearly been decided" and as "it has passed into a matter adjudged." When *res judicata* applies, a litigant is "estopped" by the previous proceeding.

Mulligan v. Stephenson, [2013] B.C.J. No. 1685 (S.C.) at par. 82 per Affleck J.:

> [82] Donald J. Lange, in ***The Doctrine of Res Judicata in Canada***, 2nd ed. (Markham: LexisNexis Canada Inc., 2004), states the following at p. 32:
>
> > For the purposes of a separate and distinct cause of action, issue estoppel is treated in much the same way as cause of action estoppel. In cause of action estoppel, when the issue is decided, that cause merges in the decision and can not be revived in a second action because it is gone. In issue estoppel, when the issue is decided, that issue merges, so to speak, in the decision and cannot be revived in a second action, even based on a separate and distinct cause of action, because it is gone.

Bronson v. Tompkins Ranching Ltd., [2013] B.C.J. No. 1010 (S.C.) at par. 31-32 per Gropper J.:

> [31] The scope of the abuse of process doctrine was more broadly stated by Donald Lange in his text *The Doctrine of Res Judicata in Canada,* 3rd ed. (Markham: LexisNexis Canada, 2010) at 209:
>
> > Non-party conduct, that is, choosing not to intervene, is an abuse of process on the extended principle of "estoppel by

> conduct/abuse of process." A person, who may not technically be a party or privy to the first proceeding, but has notice of it and the opportunity to participate in the first proceeding, cannot bring a second proceeding as a result of the failure to raise the issue in the first proceeding.

[32] I note that an earlier edition of this text was relied upon by Arbour J. in *CUPE* at para. 37.

Reliable Mortgages Investment Corp. v. Chan, [2013] B.C.J. No. 384 (S.C.) at par. 13 per Burnyeat J.:

> [13] The primary argument of the applicants is that there should not be relitigation of what could have been dealt with at the trial before N. Smith J. In *The Doctrine of Res Judicata in Canada*, (Third Edition, 2010, LexisNexis), the learned author states:
>
> > There are six essential doctrines developed by the courts of Canada. Each one of these doctrines may be applied with rigour based on its precise meaning. in their most concise definitions, the six essential estoppel doctrines are:
> >
> > > (1) Issue estoppel bars an issue which has actually been decided in the first proceeding.
> > >
> > > (2) Issue estoppel under the rule in *Henderson* bars an issue which could have been brought in the first proceeding.
> > >
> > > (3) Cause of action estoppel, the trust *res judicata*, bars a cause which has actually been decided in the first proceeding.
> > >
> > > (4) Cause of action estoppel under the rule in *Henderson* bars a cause which could have been brought in the first proceeding.
> > >
> > > (5) Abuse of process by relitigation bars a second proceeding when the integrity of the judicial decision-making process in the first proceeding will be undermined.
> > >
> > > (6) Collateral attack bars a second proceeding when a party, bound by an order, seeks to avoid compliance with that order by challenging the order itself and its enforceability, not directly but indirectly in a separate forum.
> >
> > With respect to the policy grounds, a consideration of issue estoppel or cause of action estoppel focuses upon the interests of the litigants. A consideration of abuse of process by relitigation or collateral attack focuses upon the justice system.
> >
> > (at pp. 11-12)

MacDougall v. Lake Country (District), [2011] B.C.J. No. 2377 (S.C.) at par. 18 per Cole J.:

> [18] In Donald Lange, *The Doctrine of Res Judicata in Canada*, 3rd ed (Markham, Ontario: LexisNexis, 2010) at 482-83, it is explained that a judgment *in rem* does not require the parties or their privies to be the same. That text states:
>
>> A judgment in *rem* is always "as a status of the *res*" and that "*res*" is either a person or a thing. For the purpose of the doctrine of judgment in *rem*, a person is any legal entity, for example, a trade union. A thing may be a physical thing, such as a right of way, or other subject matter, such as a treaty.
>>
>> A judgment in rem is conclusion against all persons, not only against the parties to the proceeding. It removes the estoppel requirement of a litigant to a subject proceeding to prove that the litigant was a party to, or a privy of a party to, the earlier proceeding.

0713401 B.C. Ltd. v. Elgon Electrical Services Ltd., [2011] B.C.J. No. 25 (S.C.) at par. 7 per Leask J.:

> [7] The plaintiff relied on the text of Donald Lange, *The Doctrine of Res Judicata in Canada*, Second Edition. The special application of cause of action estoppel where a counterclaim is at issue is discussed at p. 145:
>
>> The general principle is that, if the counterclaim is a separate and distinct cause of action, there is no requirement to raise it in the original action. If the counterclaim is not a separate and distinct cause of action, it should be raised in the original action.

Cliffs Over Maple Bay Investments Ltd. (Re), [2010] B.C.J. No. 535 (S.C.) at par. 56 per Groves J.:

> [56] While issue estoppel is the predominant doctrine arising from interlocutory matters, cause of action estoppel may also apply. Donald Lange in *The Doctrine of Res Judicata in Canada*, 2nd ed. (Markham: LexisNexis Butterworths, 2004) states at page 178:
>
>> The subject matter of a motion may also be considered a cause of action for the purpose of cause of action estoppel. Where the question in the motion decides the proceeding itself because the question decides the cause of action a second proceeding based solely on the same question relitigates the same cause of action and is estopped by the decision in the motion on the basis of cause of action estoppel.

Foreman v. Nivel, [2009] B.C.J. No. 2148 (S.C.) at par. 9 per Savage J.:

> [9] The doctrine of *res judicata* has been called a cornerstone of the justice system, grounded in the public policy that there is an interest in putting an end to litigation, and in the individual right that no person should be vexed twice by the same cause of action: See, Donald J. Lange, *The Doctrine of Res Judicata in Canada*, 2nd edition, p. 4; Sopinka, Lederman, Bryant, *The Law of Evidence in*

> *Canada*, 2nd Edition, (Toronto: Butterworths, 1999) at p. 1068; *A Solicitor v. Law Society of New Brunswick,* 2004 NBQB 95, [2004] N.B.J. No. 81 (Q.B.), at para. 23; *574095 Alberta Ltd. v. Hamilton Brothers Exploration Co.*, 2002 ABQB 238, [2002] A.J. No. 317 (Q.B.) at para. 37; *Giles v. Westminster Savings Credit Union*, 2006 BCSC 1600 at para. 26.

Wolverton Securities Ltd. v. Schemel, [2009] B.C.J. No. 1546 (S.C.) at par. 42 per Brown J.:

> [42] A cause of action is "the combination of facts which give rise to the right of action by a party against another in the first action. Because a party frames a first action in contract and a second action in tort does not change the determinative issues which the first court decided and which the second court would be asked to decide again, but with different remedies as the objective. That is, [for example] restitution rather than damages. A new legal theory in a second action such as tort rather than contract, marshalling the combination of facts from the first action in a different way, will not create a separate and distinct cause of action": Donald J. Lange, *The Doctrine of Res Judicata in Canada*, 2d ed. (Markham, Ont.: Lexis Nexis 2004) at 140, citing *Comeau v. Breau* (1994), 145 N.B.R. (2d) 329 (C.A.) at 339, 343.

Brown v. Miller, [2008] B.C.J. No. 1905 (S.C.) at par. 83 per Martinson J.:

> [83] The Florida Court did leave it open to Mr. Brown to apply for a remedy in equity. In Donald J. Lange, *The Doctrine of Res Judicata in Canada*, 2nd ed. (Markham, Ont.: LexisNexis, 2004) at 86 the author noted, "where a court clearly indicates that a litigant is free to take further action on an issue, the court's adjudication on the issue may still, surprisingly, be final for issue estoppel." The fact that Mr. Brown is free to take further action in Florida does not mean that the Florida decision cannot be a final decision.

Laxton v. Colgon, [2008] B.C.J. No. 1136 (S.C.) at par. 30, 33 per Kelleher J.:

> [30] The doctrine of *res judicata* is a principle which ensures that a judgment of a court is final and determinative. A matter thus cannot be re-tried in a subsequent suit between the same parties. There are two forms of *res judicata*: issue estoppel and cause of action estoppel. They are defined in Donald J. Lange, *The Doctrine of Res Judicata in Canada*, 2nd ed. (Markham, Ontario: LexisNexis Canada, 2004) at 1 as follows:
>
>> When *res judicata* applies, a litigant is "estopped" by the previous proceeding. In their simplest definitions, issue estoppel means that a litigant is estopped because the issue has clearly been decided in the previous proceeding, and cause of action estoppel means that a litigant is estopped because the cause has passed into a matter adjudged in the previous proceeding.
>
> In this case, the defendant relies on the doctrine of issue estoppel.

> [33] It is settled law that a consent judgment is a judgment of the court. Where a consent order is intended to be final, it will operate as such for the purpose of issue estoppel (*The Doctrine of Res Judicata in Canada*, *supra* at 223).

Grant Mcleod Contracting Ltd. v. Forestech Industries Ltd., [2008] B.C.J. No. 1077 (S.C.) at par. 14, 15, 17, 18, 28 per Josephson J.:

> [14] In *The Doctrine of Res Judicata in Canada*, 2nd ed. (LexisNexis, 2004) at p. 158-62, D.J. Lange, referring to the Ontario High Court of Justice decision in *Four Embarcadero Center Venture v. Mr. Greenjeans Corp.* (1988), 64 O.R. (2d) 746, states that the test of finality is that a decision is final when the court pronouncing it has no further jurisdiction to rehear the issues or to vary or rescind the decision. This is the same test as for issue estoppel (see *Ernst and Young Inc. v. Central Guaranty Trust Co.*, 2006 ABCA 337). However, a decision that is under appeal is not, for the purpose of cause of action estoppel, considered to be a final judgment.
>
> [15] There is a debate as to whether cause of action estoppel is limited to issues that can fairly be regarded as having been disposed of "on their merits" (see Lange at pp. 156-157). However, according to Lange, the Supreme Court of Canada in *R v. Riddle*, [1980] 1 S.C.R. 380 held that there is actually no requirement that there be an adjudication on the merits for cause of action estoppel to apply when the first action is dismissed.
>
> [17] In *L.(R.) v. K.(P.)* (1991), 37 R.F.L. (3d) 191 (B.C.S.C.), this court held that the reference to common law in the foregoing passage does not extend to civil proceedings. However, Lange offers the opinion that this is a doubtful finding in view of the fact that the *bis vexari* maxim is firstly a doctrine from civil litigation. At p. 157 he concludes that "[s]tatements of the general principles of cause of action estoppel which require that the first decision be determined on the merits should not be relied upon".
>
> [18] In the case before me, N. Smith J.'s decision of February 29, 2008 was "final" as that term is defined by the authorities. Given the caution expressed by Lange, I decline to dismiss this application solely on the ground that the decision did not address the merits of the claim.
>
> [28] According to Lange at p. 140-44 the question to ask is: "Are the facts upon which the defendant was found liable to the plaintiff in the first action substantially the same and in issue in the second action"? Where the facts are the same and the causes of action are the same, although different legal descriptions are used in the two actions, the second action is barred.

Carr v. Cheng, [2007] B.C.J. No. 2511 (S.C.) at par. 99 per Rice J.:

> [99] Mr. Ottho argued that the dismissal of the First Action counterclaim having been ordered by consent rather than on the merits should not raise an estoppel. No authority was offered as proof that a consent final order is any less *res judicata* than a judgment rendered without consent. In Donald J. Lange, *The Doctrine of Res Judicata in Canada* (Toronto: Butterworths, 2000), the author comments at p. 197:

> The leading decision for consent judgments is the Ontario Court of Appeal case of *Re Ontario Sugar Co.* Moss C.J., [1911] O.J. No. 76, speaking for the court, stated the principle:
>
> It is not now questioned that a judgment by consent may raise an estoppel *inter partes*. That it is as binding and conclusive between the parties and their privies as any other judgment (subject, perhaps, to certain exceptions in cases of fraud or mistake), is well established by the authorities referred to by the learned Chief Justice, to which may be added the case of *Hardy Lumber Co. v. Pickerel River Improvement Co.* (1898), 29 S.C.R. 211.

Rivet v. British Columbia, [2007] B.C.J. No. 1085 (S.C.) at par. 82 per Arnold-Bailey J.:

> [82] Donald J. Lange, in *The Doctrine of Res Judicata in Canada*, 2nd ed. (Markham: LexisNexis Canada Inc., 2004), states the following at p. 32:
>
> > For the purposes of a separate and distinct cause of action, issue estoppel is treated in much the same way as cause of action estoppel. In cause of action estoppel, when the issue is decided, that cause merges in the decision and can not be revived in a second action because it is gone. In issue estoppel, when the issue is decided, that issue merges, so to speak, in the decision and cannot be revived in a second action, even based on a separate and distinct cause of action, because it is gone.

Pan-Afric Holdings Ltd. v. Ernst v. Young LLP , [2007] B.C.J. No. 1033 (S.C.) at par. 62 per Frankel J.:

> [62] Whether a dismissal in Maryland on the basis of an expired limitation period would operate as a bar to prosecuting this matter here is something I need not decide. There is some authority to the effect that it would not: see Lange, *The Doctrine of Res Judicata in Canada*, 2nd ed., Toronto: LexisNexis Butterworths, 2004, at 358.

Giles v. Westminster Credit Savings Credit Union, [2006] B.C.J. No. 1547 (S.C.) at par. 35, 38, 44-45 per Sigurdson J.:

> [35] There is conflicting authority in Canada on the question of when a decision is sufficiently final for the purpose of issue estoppel: Donald J. Lange, *The Doctrine of Res Judicata in Canada*, 2d ed. (Toronto: Butterworths, 2004) at p. 89. Can a decision be regarded as final for the purposes of issue estoppel when there is a pending appeal of a test case, or only after the appeal has been decided? . . . .
>
> [38] *Obiter dicta* from the Supreme Court of Canada cited in *The Doctrine of Res Judicata in Canada*, 2d ed., *supra*, suggests that there may be no finality to a decision for the purpose of issue estoppel until the appeal process has passed. *Toronto (City)* was a case that concerned an arbitrator's decision that reached a conclusion contrary to the grievor's earlier criminal conviction. Arbour J., for the

Court, considered whether the re-litigation of his criminal conviction in an arbitration was an abuse of process. She said at paragraph 46:

> A desire to attack a judicial finding is not in itself an improper purpose. The law permits that objective to be pursued through various mechanisms such as appeals or judicial review. Indeed reviewability is an important aspect of finality. A decision is final and binding on the parties <u>only when all available reviews have been exhausted or abandoned</u>.
> [emphasis added]

. . . .

[44] First of all, as to the third ground, who is a privy?

[45] In *The Doctrine of Res Judicata in Canada*, 2d ed., *supra*, the author describes what a privy is at p. 77:

> A privy of a party has been variously defined in issue estoppel cases. Before a person can be a privy of a party, there must be community or privity of interest between them, or a unity of interest between them. They cannot be different in substance. Privity can be one of blood, title, or interest. A person who is privy in interest to a party in an action and has notice of that action is equally bound by the findings in that action. A privy is a person who has a right to participate with a party in the proceeding or who has a participatory interest in its outcome. A person who has no right to participate as a party in a proceeding lacks a due process requirement to make a finding of privity of interest. To determine whether a person has a participatory interest in the outcome of the proceeding is to determine whether the outcome could affect the liability of that person. Privity requires parallel interest in the merits of the proceeding, not simply a financial interest in the result. However, a non-party who enters into a formal agreement with a party in a proceeding for disposing of the proceeds is a privy of that party and bound by the first proceeding.

Rodenkirchen v. Peters, [2006] B.C.J. No. 1547 (S.C.) at par. 6 per Macaulay J.:

> [6] There is a live issue whether Ms. Rodenkirchen has standing. Separate proceedings to overturn a court order on the basis that it was obtained by fraud or through some other abuse of process are permitted: see D.J. Lange, *The Doctrine of Res Judicata in Canada,* Butterworth's Canada Ltd. 2000, at 369.

Gubbels v. Fitterer, [2006] B.C.J. No. 1147 at par. 44, 46, and 48 per Parrett J.:

> [44] Where *res judicata* is raised, the burden of proving it falls on the party advancing that issue and the court may look to the documentation behind the formal judgment, the reasons, the pleadings, and appeal materials, including factums (Donald J. Lange, *The Doctrine of Res Judicata in Canada*, Markham Ontario: Butterworths 2000 at pp. 12-14).
>
> [46] The so-called same question test is the central feature of issue *estoppel* as is noted by author Donald J. Lange, where at p. 38 he observes that:

> > The traditional view of issue estoppel is that the same question has been decided. This means that the same question must have been decided, that is, actually decided, in the first proceeding. The Supreme Court of Canada has repeatedly maintained the traditional view of the same question test . . . In *Grandview (Town) v. Doering*, Ritchie J., [1976] 2 S.C.R. 621, speaking for the majority . . ., held that the same question test for issue estoppel is whether the question has been decided in the first proceeding, not whether the question could have been decided. If the question could have been decided, then cause of action estoppel applies.
>
> [48] The fundamental question criteria has been discussed in a number of authorities, including *R. v. Duhamel* (1984), 57 A.R. 204. Perhaps the most useful summary of the authorities is at p. 41 of *The Doctrine of Res Judicata in Canada*, where the author says:
>
> > The fastidious approach to the same question test became a guiding principle in *Heynen v. Frito-Lay Canada Ltd.* [(1999), 179 D.L.R. (4th) 317 (Ont. C.A.) at 323]. Goudge J.A., for the court stated:
> >
> > > Although at a high level of generalization, two proceedings might seem to address the same question, this requirement of issue *estoppel* is met only if on careful analysis of the relevant facts and the applicable law the answer to the specific question in earlier proceedings can be said to determine the issue in the subsequent proceeding.
> >
> > ... One criterion for the same question test is whether the same evidence is used in both proceedings.
> >
> > It is not necessary that the question said to be estopped in the subsequent action be the main point or the ratio in the previous action. It is only necessary that it be an essential point or fundamental to the decision.

Williams v. College Pension Board of Trustees, 2005 BCSC 1211 at par. 54 per Sigurdson J.:

> [54] The collateral attack rule, although not applicable on the facts of that case was described in Garland v. Consumers' Gas Co., [2004] 1 S.C.R. 629, 2004 SCC 25 at [paragraph] 71:
>
> > The doctrine of collateral attack prevents a party from undermining previous orders issued by a court or administrative tribunal (see Toronto (City) v. C.U.P.E., Local 79, [2003] 3 S.C.R. 77, 2003 SCC 63; D.J. Lange, *The Doctrine of Res Judicata in Canada* (2000), at pp. 369-70).

Telus Communications Inc. v. Telecommunications Workers Union, 2005 BCSC 378 at par. 21 per Rice J.:

> [21] The most recent comprehensive discussion on abuse of process by the Supreme Court of Canada is found in Toronto (City) v. C.U.P.E., Local 79, [2003] 3 S.C.R. 77, 2003 SCC 63, where the Court applied the doctrine to an arbitration, stating:
>
> > [37] In the context that interests us here, the doctrine of abuse of process engages "the inherent power of the court to prevent the misuse of its procedure, in a way that would ... bring the administration of justice into disrepute" (Canam Enterprises Inc. v. Coles (2000), 51 O.R. (3d) 481 (C.A.), at para. 55, per Goudge J.A., dissenting (approved [2002] 3 S.C.R. 307, 2002 SCC 63)). Goudge J.A. expanded on that concept in the following terms at paras. 55-56:
> >
> > > The doctrine of abuse of process engages the inherent power of the court to prevent the misuse of its procedure, in a way that would be manifestly unfair to a party to the litigation before it or would in some other way bring the administration of justice into disrepute. It is a flexible doctrine unencumbered by the specific requirements of concepts such as issue estoppel. See House of Spring Gardens Ltd. v. Waite, [1990] 3 W.L.R. 347 at p. 358, [1990] 2 All E.R. 990 (C.A.).
> > >
> > > One circumstance in which abuse of process has been applied is where the litigation before the court is found to be in essence an attempt to relitigate a claim which the court has already determined.
> >
> > [38] The policy grounds supporting abuse of process by re-litigation are the same as the essential policy grounds supporting issue estoppel ([D.J. Lange, *The Doctrine of Res Judicata in Canada*, (2000)], at pp. 347-48):
> >
> > > The two policy grounds, namely, that there be an end to litigation and that no one should be twice vexed by the same cause, have been cited as policies in the application [page104] of abuse of process by relitigation. Other policy grounds have also been cited, namely, to preserve the courts' and the litigants' resources, to uphold the integrity of the legal system in order to avoid inconsistent results, and to protect the principle of finality so crucial to the proper administration of justice.

Mohl v.The University of British Columbia, 2004 BCSC 1238 at par. 38, 44 per Holmes J.:

> [38] Issue estoppel prevents a litigant raising further an issue clearly decided in a previous proceeding. Cause of Action estoppel occurs when the cause of action has passed into a matter decided in a previous proceeding. [D.J. Lange, *The Doctrine of Res Judicata in Canada*, (Toronto: Butterworths, 2000); *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44 (CanLII), [2001] 2 S.C.R. 460, 2001 SCC 44]
>
> . . .

> [44] D.J. Lange in *The Doctrine of Res Judicata in Canada* at p. 124 describes "cause of action" as fact determined. At p. 125 the learned author provides this test:
>
> > … Whether the cause of action in the first proceeding is the same as that sought to be enforced in the second proceeding does not depend upon technical considerations but upon matters of substance, that is, whether they are in substance identical. Decisions of cause of action estoppel defining the term, "cause of action", apply the generally accepted definition of "cause of action". A cause of action is the facts which give a person a right to judicial relief against another person. [emphasis added]

Engineered Controls v. Gas Equipment Supplies, 2003 BCSC 697 at par. 28 per Macaulay J.:

> [28] As the order sought in the present case would dispose of the ECII claim in a manner similar to the result at trial, I prefer to apply the following statement from D.J. Lange, *The Doctrine of Res Judicata in Canada* (Toronto: Butterworths, 2000) at 339:
>
> > As a general rule, the refusal to grant an interlocutory injunction or, alternatively, the granting of an interlocutory injunction, should have no issue estoppel effect on the trial judge....

Withler v. Canada(Attorney General), 2002 BCSC 820 at par. 49, 59 per Garson J.:

> [49] The overlap between *res judicata* and *stare decisis* was noted by D.J. Lange in his text *The Doctrine of Res Judicata in Canada* (Toronto: Butterworths, 2000). At p. 385 the author says that the doctrines have been used interchangeably, and that a court may apply the decisions of one proceeding to another through *stare decisis* rather than through issue estoppel. He notes that failing to follow a decision of a court of appeal given in the very same matter with which the judge is seized is "not only a breach of the doctrine of *stare decisis*, but a breach of the doctrine of issue estoppel as well."
> . . . .
>
> [59] The plaintiffs correctly point to the 'Rule in Henderson' which is that the plea of *res judicata* applies not only to points upon which the court was actually required by the parties to pronounce a judgment, but also to every point which properly belonged to the subject of the litigation, and which the parties with reasonable diligence might have brought forward at the time (*Henderson v. Henderson* (1843), 67 E.R. 313 (Q.B.); D. J. Lange, *The Doctrine of Res Judicata in Canada (supra)* at p.50).

Bence v. Okanagan-Similkameen (Regional District), 2002 BCSC 1622 at par. 28 per Bennett J.:

> [28] In the book by D. Lange, *The Doctrine of Res Judicata in Canada*, (Toronto and Vancouver: Butterworths, 2000) the author sets out the key principles of issue estoppel at 23-24:

1. The same question test governs.
2. The question to be decided in the second proceeding must be the same question that has been decided in the first proceeding.
3. The question decided in the first proceeding, governing the same question test in the second proceeding, must be fundamental to the decision in the first proceeding, not collateral to the decision.
4. The question decided in the first proceeding, governing the same question test in the second proceeding, includes all the subject matter encompassing the question whether decided expressly or by necessary logical consequence.
5. If the question has been decided in the first proceeding, the same question cannot be relitigated in a second proceeding based on a separate and distinct cause of action.
6. The same parties, and their privies, cannot relitigate the same question in a second proceeding.
7. The decision in the first proceeding must be a final decision on the question.
8. The decision in the first proceeding must be a judicial decision on the question.
9. The decision-making forum in the first proceeding must have the jurisdiction to decide the question.

FEDERAL COURT OF CANADA (TRIAL DIVISION)

Jaballah (Re), [2010] F.C.J. No. 96 (T.D.) at par. 22 per Dawson J.:

> [22] However, special circumstances may operate to restrict the application in a second proceeding of both issue estoppel and cause of action estoppel. See: *Apotex Inc. v. Merck & Co.*, [2003] 1 F.C. 242 (C.A.). See also: Donald J. Lange, *The Doctrine of Res Judicata in Canada*, 2nd ed., (Markham: LexisNexis 2004) at page 231.

Eli Lilly Canada Inc. v. Novopharm Ltd., [2008] F.C.J. No. 649 (Proth.) at footnote 1 to par. 17 per Tremblay-Lamer Proth.:

> See discussions in Lange, Donald J., *The Doctrine of Res Judicata in Canada*, 2nd ed., Butterworth, 2004, at pages 89-100, 160-164, 389-390, and in particular, at page 89: "There is an unresolved conflict in decision-making in this area of the law in Canada". Also, while there is a body of decisions of the Ontario Courts that have determined that decisions under appeal are nevertheless final for the purposes of issue estoppel, including *Dableh v. Ontario Hydro* (1994), 58 C.P.R. (3d) 237, [1994] O.J. No. 2771, decisions in this Court have appeared to not consider decisions final for the purpose of issue estoppel or abuse of process until all avenues of appeal had been exhausted: *Novopharm Ltd. v. Eli Lilly and Co.*, [1998] F.C.J. No. 1634 (*ratio decidendi* at par. 29 to 32); see also *Wells v. Canada (Minister of Transport)* (1993), 48 C.P.R. (3d) 308, *Cardinal v. Canada* (1991), 47 F.T.R. 203 (reversed in part on other grounds at (1993), 164 N.R.

301), *Starlight v. Canada* [2001] F.C.J. No. 1685, and *Nordic Laboratories Inc. v. Deputy M.N.R.*, [1996] F.C.J. No. 1067 at par. 9.

Sanofi-Aventis Canda Inc. v. Canada (Minister of Health, [2007] F.C.J. No. 747 (T.D.) at par. 56-57, 75-77 per Lemieux J.:

> [56] In his reasons at paragraph 24, Justice Binnie set out his view as to the scope of issue estoppel:
>
> > "Issue estoppel was more particularly defined by Middleton J.A. of the Ontario Court of Appeal in McIntosh v. Parent, [1924] 4 D.L.R. 420, at p. 422:
> >
> > > When a question is litigated, the judgment of the Court is a final determination as between the parties and their privies. Any right, question, or fact distinctly put in issue and directly determined by a Court of competent jurisdiction as a ground of recovery, or as an answer to a claim set up, cannot be re-tried in a subsequent suit between the same parties or their privies, though for a different cause of action. The right, question, or fact, once determined, must, as between them, be taken to be conclusively established so long as the judgment remains. [Emphasis added.]
> > >
> > > This statement was adopted by Laskin J. (later C.J.), dissenting in Angle, supra, at pp. 267-68. This description of the issues subject to estoppel ("[a]ny right, question or fact distinctly put in issue and directly determined") is more stringent than the formulation in some of the older cases for cause of action estoppel (e.g., "all matters which were, or might properly have been, brought into litigation", Farwell, supra, at p. 558). Dickson J. (later C.J.), speaking for the majority in Angle, supra, at p. 255, subscribed to the more stringent definition for the purpose of issue estoppel. "It will not suffice" he said, "if the question arose collaterally or incidentally in the earlier proceedings or is one which must be inferred by argument from the judgment." The question out of which the estoppel is said to arise must have been "fundamental to the decision arrived at" in the earlier proceeding. In other words, as discussed below, the estoppel extends to the material facts and the conclusions of law or of mixed fact and law ("the questions") that [page477] were necessarily (even if not explicitly) determined in the earlier proceedings."
>
> [57] In his book, *The Doctrine of Res Judicata in Canada*, Second Edition, Lexus-Nexus, 2004, Donald Lange states "this paragraph in Justice Binnie's reasons in *Danyluk*, above, reflects the traditional view as to the scope of issue estoppel."
>
> [75] As recognized by the Supreme Court of Canada in *Danyluk* at paragraphs 56-58 and *Toronto (City)*, at paragraph 46 for issue estoppel to operate, there

> must be a final decision which has not been appealed or internally reviewed where available.
>
> [76] The thrust of the jurisprudence of this Court is that a decision in not final for the purposes of issue estoppel where there is an appeal pending or until the appeal period has expired or leave to appeal has been denied: *Novopharm Ltd*. v. *Eli Lilly and Co*. [1999] 1 F.C. 515 (T.D.); *Benisti Import-Export Inc*. v. *Modes TXT Carbon Inc*., [2002] F.C.J. No. 1081 (T.D.) at par. 17; *Wells* v. *Canada (Minister of Transport)* (1993), 48 C.P.R. (3d) (T.D.); *Leblanc* v. *Canada* [2003] F.C.J. No. 1005 (T.D.); *Nordic Laboratories Inc*. v. *Deputy M.N.R.* (1996), 64 A.C.W.S. (3d) 583 (Fed. T.D.) at 9).
>
> [77] The theoretical support for the proposition the prior decision must be final so as to estopp a second decision is because (1) the second decision is not yet bound by the findings in the first decision (2) the appeal process in the first instance may have an impact on the issue in the second decision, e.g., if Mayne is successful in overturning the prohibition order it will make moot the eligibility of the '682 patent to be on the Register, (see Lange, above, at pages 94-95).

Sanofi-Aventis Canda Inc. v. Novopharm Ltd., [2006] F.C.J. No. 1431 (T.D.) at par. 26 per Tremblay-Lamer J.:

> [26] The doctrine of abuse of process was discussed at length by the Supreme Court of Canada in *Toronto (City) v. Canadian Union of Public Employees (C.U.P.E.)*, Local 79, [2003] 3 S.C.R. 77. I recently reviewed the doctrine and the Supreme Court's decision in *Aventis Pharma Inc. v. Apotex Inc.*, 2005 FC 1504, [2005] F.C.J. No. 1843 (F.C.)(QL) at paragraphs 28 to 29:
>
>> [28] The doctrine provides the Court with an inherent and residual discretion to prevent the misuse of its procedure. The doctrine is flexible and is "unencumbered by the specific requirements of res judicata": *C.U.P.E., supra,* at para. 42. Whereas issue estoppel focuses "on the motive or status of the parties, the doctrine of abuse of process concentrates on the integrity of the adjudicate process": *C.U.P.E., supra*, at para. 51. As explained by Layden-Stevenson J. in *AB Hassle, supra*, at para. 94:
>>
>>> While critics have argued that when the doctrine of abuse of process is used as proxy for issue estoppel it obscures the true question, while adding nothing but a vague sense of discretion, that is not so. In all of its applications, the primary focus of the doctrine of abuse of process is the integrity of the adjudicative function of courts. The focus is less on the interests of the parties and more on the integrity of judicial decision making as a branch of the administration of justice. When the focus is properly on the integrity of the adjudicative process, the motive of the party who seeks to relitigate cannot be a decisive factor.
>>
>> [29] Abuse of process has a strong public policy dimension. Arbour J. in *C.U.P.E., supra*, stated that the policy grounds for both issue estoppel and abuse of process are essentially the same. At pages 103-104, she

quoted from D. J. Lange, *The Doctrine of Res Judicata in Canada* (2000) at pp. 347-48:

> The two policy grounds, namely, that there be an end to litigation and that no one should be twice vexed by the same cause, have been cited as policies in the application of abuse of process by relitigation. Other policy grounds have also been cited, namely, to preserve the courts' and the litigants' resources, to uphold the integrity of the legal system in order to avoid inconsistent results, and to protect the principle of finality so crucial to the proper administration of justice.

Thambituria v. Canada (Solicitor General), 2006 F.C. No. 750 (T.D.) at par. 34 per Pinard J.:

> [34] Donald Lange, a well-respected author on the doctrine of *res judicata* summarizes the common law principles on abuse of process in *The Doctrine of Res Judicata in Canada*, 2nd ed. (Canada, LexisNexis Canada Inc., 2004), at pages 375-376:
>
> > (1) The doctrine is not encumbered by the specific requirements of *res judicata*.
> >
> > (2) The proper focus for the application of the doctrine is the integrity of the judicial decision-making process.
> >
> > (3) Relitigation may be necessary to enhance the credibility and effectiveness of judicial decision-making when, for example, there are…special circumstances.
> >
> > (4) The interests of the parties, who may be twice vexed by relitigation, are not a decisive factor.
> >
> > (5) The motive of a party in relitigating a previous court decision for a purpose other than undermining the validity of the decision is of little import in the application of the doctrine.
> >
> > (6) The status of a party, as a plaintiff or defendant, in the relitigation proceeding is not a relevant factor.
> >
> > (7) The discretionary factors that are considered in the operation of the doctrine of issue estoppel are equally applicable to the doctrine of abuse of process by relitigation.

Aventis Pharma Inc. v. Apotex Inc., [2005] F.C.J. No. 1843 (T.D.) at par. 29 per Tremblay-Lamer J.:

> [29] Abuse of process has a strong public policy dimension. Arbour J. in C.U.P.E., supra, stated that the policy grounds for both issue estoppel and abuse of process are essentially the same. At pages 103-104, she quoted from D. J. Lange, *The Doctrine of Res Judicata in Canada* (2000) at pp. 347-48:
>
> > The two policy grounds, namely, that there be an end to litigation and that no one should be twice vexed by the same cause, have been cited as

> policies in the application of abuse of process by relitigation. Other policy grounds have also been cited, namely, to preserve the courts' and the litigants' resources, to uphold the integrity of the legal system in order to avoid inconsistent results, and to protect the principle of finality so crucial to the proper administration of justice.

Canada (Canadian Human Rights Commission) v. Canada Post Corp., [2004] F.C.J. No. 439 (T.D.) at par. 31 per Von Finckenstein J.:

> [30] It is well established that issue estoppel is one of the two legs of the doctrine of res judicata. The doctrine of res judicata is a fundamental doctrine of the justice system of Canada. It has two distinct forms: issue estoppel and cause of action estoppel. (Donald J. Lange: *The Doctrine of Res Judicata in Canada*, Butterworths 2000, at p. 1.)

Budget Steel Ltd. v. Seaspan 175 (The), 2003 FCT 390 at par. 54 per Hargrave P.:

> [54] Counsel for Budget Steel refers to various cases in which issue estoppel has been founded upon a default judgment: *T & D Roofing Ltd. v. C.I.B.C.*, an unreported 29 June 1993 Saskatchewan Court of Queen's Bench decision in action no. 112/1992 (Yorkton), [1993] Sask. D. 3711-01, *Harland v. Williams*, an unreported BC Supreme Court decision of 11 May 1993, Vancouver Registry C896028, [1993] B.C.J. No. 1047, *Brass Tacks Concrete and Drilling Ltd. v. Gateway Construction and Engineering Ltd.* (2000), 151 Man.R. (2d) 284 (MBQB), *Chackowsky v. Precision Toyota Ltd.* (1990), 64 Man.R. (2d) 156 (MBQB) and *Wawanesa Mutual Insurance Co. v. Carson*, an unreported 16 June 2000 decision in action 9703-17288 (Edmonton), [2000] Alta. D. 770.69.60.20-01. However these cases are to a degree fact-specific. In most instance the case contains a caveat to the effect that while a default judgment can be a foundation for *res judicata*, caution ought to be exercised. Indeed, Lange on *The Doctrine of Res Judicata in Canada*, Butterworth, at 191 and following, concedes that default judgments will support both issue estoppel and cause of action estoppel "however the full vigour of these doctrines may not apply. One reasons is that it is not a judgment actually determined or pronounced by the courts.". (Pages 191 and 192). Thus Lange espouses a conservative application of estoppel in the case of default judgments. Quite correctly counsel for Budget Steel goes on to refer to other cases in which default judgment has not supported a *res judicata*.

Yamani v. Canada (Minister of Citizenship and Immigration), 2002 FCT 1162 at par. 21 per Kelen J.:

> [21] The key tenet of cause of action estoppel is that a plaintiff must bring forward the subject matter of the whole case relating to the cause of action at one time, once and for all, and every remedy flowing from the cause of action based on the subject matter, see Donald J. Lange, *The Doctrine of Res Judicata in Canada* (Toronto: Butterworths, 2000) at p. 111. The same principle applies to defendants, who must bring forward every defence based on the subject matter at one time.

MANITOBA COURT OF QUEEN'S BENCH

Putter v. Intelligent Renovation and Inspection Services Inc., [2013] M.J. No. 411 (Q.B.) at par. 28 per Martin J.:

> [28] As to the exercise of my discretion, I acknowledge Ms. Putter's argument - that caution must be exercised in applying *res judicata* based on a default judgment. Donald J. Lange in ***The Doctrine of Res Judicata in Canada***, 2d ed. (Markham: LexisNexis Canada Inc., 2004) comments at page 344:
>
>> Default judgments, which are judgments *ex parte*, will support a plea of issue estoppel or cause of action estoppel. However, the full vigour of these doctrines may not apply. One reason is that it is not a judgment actually determined or pronounced by the courts ....
>>
>> ...
>>
>> Whether it is issue estoppel or cause of action estoppel, the doctrine is conservatively applied to default judgments. In *Heartland v. Williams*, [1993] B.C.J. No. 1047, Finch J. summarized the rationale for a cautionary approach to default judgments. Finch J. stated:
>>
>>> It appears to be well established that a restrictive operation must be given to an estoppel arising from a default judgment. A judgment in default can only be used to estop what must "necessarily and with complete precision" have been determined in that proceeding. The reasoning behind this cautious approach to estoppel pleas based on judgment obtained in default, is that the policy considerations which underlie the principle of estoppel per rem judicatam do not necessarily apply to uncontested proceedings. There may be many reasons why a party might allow a default judgment to be entered against him or her. The litigation may be inconvenient, expensive, or the party might simply be unaware that he has a potential defence or counterclaim. Courts appear generally to be of the view that this should not prevent a litigant from subsequently raising important issues which were not necessarily decided by the default judgment.

Incorporated Broadcasters Ltd. v. CanWest Global Communications Corp., [2008] M.J. No. 400 (Q.B.) at par. 53, 60 per Monnin J.:

> [53] The doctrine of *res judicata* is the proposition that once a matter has been decided, it cannot be re-litigated. The doctrine has two distinct forms, namely, issue estoppel and cause of action estoppel. Under the first aspect, the litigant is estopped from raising an issue in a subsequent proceeding if the issue has been decided in a previous one. The second aspect, cause of action estoppel, means that a litigant is estopped as the same cause of action has previously been

adjudicated. (Donald J. Lange, *The Doctrine of Res Judicata in Canada*, 2d ed., (Toronto: LexisNexis Canada Inc., 2004) at p. 1.)

[60] As stated by Lange in *The Doctrine of Res Judicata in Canada* at pp. 384-385:

- The doctrine of abuse of process by relitigation is largely a response to the technical requirements of issue estoppel. ...
- Although it remains to be seen whether the evolving doctrine of abuse of process by relitigation will be shrouded in the technical cloak of issue estoppel, it is clear that litigating the same question twice is an abuse of process. ...
- It may, therefore, be summarized from the case law that the application of abuse of process is to avoid the relitigation of the same question in the same way that issue estoppel is traditionally applied, that is, the same question must have been actually decided and the question must have been fundamental to the decision.

CLE Owners Inc. v. Wanlass, [2004] M.J. No. 78 (Q.B.) at par. 31 per Greenberg J.:

[33] As explained in Lange, *The Doctrine of Res Judicata in Canada* (at p. 370):

There are two kinds of lack of jurisdiction for the purposes of a judgment. An important distinction must be made between a judgment rendered where there is no jurisdiction, in and of itself, and a judgment rendered where there is no jurisdiction although jurisdiction is assumed to exist because of a set of facts which are assumed to exist. The former is a nullity and assailable in a subsequent proceeding as a defence to an estoppel argument. It is not viewed as a collateral attack on the judgment. The latter is only assailable by way of appeal. If it is attacked in a subsequent proceeding, it is viewed as a collateral attack on the judgment.

R. v. Rybachuk, 2001 MBQB 225 at par. 17 per Monnin J.:

[17] It should be noted that unlike the special pleas of *autrefois acquit* and *autrefois convict*, there is no plea of issue estoppel. It is a defence. It is part of the general plea of not guilty and the common law defences protected by the *Criminal Code*. See D.J. Lange, *The Doctrine of Res Judicata in Canada* (Toronto: Butterworths, 2000) at 267.

NEW BRUNSWICK COURT OF QUEEN'S BENCH

513012 N.B. Inc. v. New Brunswick, [2013] N.B.J. No. 294 (Q.B.) at par. 12-13 per Morrison J.:

[12] Support for the above proposition is found in D.J. Lange, *The Doctrine of Res Judicata in Canada,* 3d ed. (Markham: LexisNexis Canada Inc., 2010):

As a general rule, the refusal to grant an interlocutory injunction or, alternatively, the granting of an interlocutory

> **injunction should have no issue estoppel effect on the trial judge.** A good summary of the rationale is set out in *Edmonton Catholic School District No. 7 v. Edmonton (City)*, [1977] A.J. No. 744. Miller J. stated:
>
>> Counsel for the Defendants also argued that the question of onus, on which a declaratory judgment is sought in this action, has already been decided by Steer, J., when he refused to grant the interlocutory injunction and that the matter is therefore *res judicata*. I do not think this position is an accurate reflection of the law nor of the practice in this jurisdiction. An interlocutory injunction, if granted, is only designed to preserve the status quo, or to prevent further problems, until the court has a full opportunity to hear all sides to a dispute and render a decision. It is a discretionary order. If there is merit to the Defendants' suggestion that a refusal by a judge to grant an interlocutory injunction pending the trial of the action amounts to a decision on the issue giving rise to the application of the *res judicata* principle, then logically, it should follow that if the judge had granted the interlocutory injunction the matter would also have been decided and was now *res judicata*. I hardly think the Defendants would have been prepared to accept that position in this action had the injunction been granted by Mr. Justice Steer. I am therefore of the opinion that the decision of a judge on an interlocutory injunction application does not and should [not] prevent the trial judge from conducting a full inquiry into all aspects of the matter at the trial of the action and coming to a decision which might or might not agree with the position of the judge who granted or refused the interlocutory injunction application and propose [to] deal with the matter on that basis.
>
> **The refusal to grant an interlocutory injunction does not estop an issue central to the case and does not finally determine the cause of action.** A final decision refusing an interlocutory injunction means the contrived finality natural to such an order, namely, until the trial or hearing which addresses the order. **The refusal relates only to an injunction pending trial, deals with the balance of convenience, and does not make a decision on the merits of an issue.** (emphasis added)

[13] And at page 459:

> A motion refusing to grant, or granting, an interlocutory injunction does not create an estoppel in a summary judgment motion.

MacCallum v. Moncton Golf & Country Club, [2007] N.B.J. No. 277 (Q.B.) at par. 18 per Bell J.:

> [18] The Golf Club submits that the rule in *Henderson* does not apply to a separate and distinct cause of action where the defendant in the second action was also the defendant in the first. Simply stated, the Golf Club argues that the rule in *Henderson* is limited to the principle that a defence foregone cannot be used to convert the defendant to a plaintiff in a subsequent action. See, Donald J. Lange, *The Doctrine of Res Judicata in Canada*, 2nd Edition (Canada: LexisNexis Canada Inc.: 2004) at 129.

A Solicitor v. Law Society of New Brunswick, [2004] N.B.J. No. 81 (Q.B.) at par. 23 per Guerette J.:

> [23] In his text, *The Doctrine of Res Judicata in Canada*, Donald J. Lang[e] sets out the foundation for the doctrine (at p. 14):
>
>> The doctrine of res judicata is a corner stone of the justice system in Canada. The foundation of the doctrine is traditionally grounded upon two policy considerations: firstly, the ground of public policy that it is in the interest of the public that an end be put to litigation, and secondly, the ground of individual right that no one should be twice vexed by the same cause.

NEWFOUNDLAND SUPREME COURT

Nordica Foods A/s v. Eimskip, USA, Icelandic Steamship Inc., [2013] N.J. No. 241 (S.C.) at par. 72 per LeBlanc J.:

> [72] A privy of a party is equally barred by issue estoppel from re-litigating an issue which as been decided in a prior proceeding. As to what qualifies as a "privy" Donald J. Lange, author of *The Doctrine of Res Judicata in Canada*, wrote:
>
>> A privy of a party has been variously defined in issue estoppel cases. Privity can be one of blood, title, or interest. Before a person can be a privy of a party, there must be community or privity of interest between them, or a unity of interest between them. They cannot be different in substance. A person who is privy in interest to a party in an action and has notice of that action is equally bound by the findings in that action. The privy must have notice of the previous proceeding to be bound by it. A privy is a person who has a right to participate with a party in the proceeding or who has a participatory interest in its outcome. A person who has no right to participate as a party in a proceeding lacks a due process requirement to make a finding of privity of interest. To determine whether a person has a participatory

> interest in the outcome of the proceeding is to determine whether the outcome could affect the liability of that person. Privity requires parallel interest in the merits of the proceeding, not simply a financial interest in the result. However, a non-party who enters into a formal agreement with a party in a proceeding for disposing of the proceeds is a privy of that party and bound by the first proceeding. To establish privity, it is not enough that the non-party have control over the first proceeding. The non-party must be taken into the confidence of the party in the first proceeding. A non-party in an earlier proceeding is a privy on the basis of being involved in the first proceeding by being present and by giving evidence. The term "parties" includes those who are named in the proceeding and those who have an opportunity to attend the proceeding. The measure of whether a party in a subsequent proceeding is a privy of a party in the earlier proceeding requires that the same question be involved in both proceedings. The forum must also have jurisdiction over the non-party.

John Doe (HGM #1) v. Roman Catholic Episcopal Corp. of St. John's, [2011] N..J. No. 389 (S.C.) at footnote 2 per LeBlanc J.:

> In *Donald J. Lange, The Doctrine of Res Judicata in Canada*, 3rd ed., (Canada: LexisNexis Canada Ltd., 2010) at page 11 it is stated that there are six types of estoppel that have developed in Canada to support the application of *res judicata*. These are:
>
> > (1) Issue estoppel bars an issue which has been actually been decided in the first proceeding.
> >
> > (2) Issue estoppel under the rule in *Henderson* bars an issue which could have been brought in the first proceeding.
> >
> > (3) Cause of action estoppel, the true *res judicata*, bars a cause which has actually been decided in the first proceeding.
> >
> > (4) Cause of action estoppel under the rule in *Henderson* bars a cause which could have been brought in the first proceeding.
> >
> > (5) Abuse of process by relitigation bars a second proceeding when the integrity of the judicial decision-making process in the first proceeding will be undermined.
> >
> > (6) Collateral attack bars a second proceeding when a party, bound by an order, seeks to avoid compliance with that order by challenging the order itself and its enforceability, not directly but indirectly in a separate forum.

In Re Hickman Equipment (1985) Ltd. (In Receivership), 2005 NLTD 140 at par. 47 per Hall J.:

> [47] . . . (iv) The basis of the cause of action was or could have been argued.

Yes. In *The Doctrine of Res Judicata in Canada* (Second Edition) Butterworths 2004 at 51-52 the author, Donald J. Lange states:

> The fundamental nature of the question cannot be changed by advancing it in a different fashion. Where different legal consequences flow from the same factual question, or the same factual question can be cloaked in different legal classifications or categorizations, the question is estopped since “re-engineering” a claim and the “never-ending ingenuity of counsel to create new formulations and characterizations cannot displace” issue estoppel.
>
> ...Within any one issue, there may be several arguments available which assist a party to secure a favourable determination of the issue and, although a party may fail to advance certain arguments, the issue itself may nevertheless be estopped.

Furlong v. Avalon Bookkeeping Svs. Ltd., 2003 NLSCTD 140 at par. 12-16 per Hall J.:

> [12] In his text *The Doctrine of Res Judicata in Canada*, Dr. Donald J. Lange, B.A., LL.B., Ph.D. (Butterworths - Toronto), at p. 1 commences a discussion of the general nature of *res judicata*. He states:
>
> > "The doctrine of *res judicata* is a fundamental doctrine of the justice system in Canada. It has two distinct forms: issue estoppel and cause of action estoppel. It is part of the general law of estoppel comprising estoppel by conduct or representation, estoppel by deed, promissory estoppel, proprietary estoppel, and *res judicata*. ... When *res judicata* applies, a litigant is 'estopped' by the previous proceeding. In their simplest definitions, issue estoppel means that a litigant is estopped because the issue has clearly been decided in the previous proceeding, and cause of action estoppel means that a litigant is estopped because the cause has passed into a matter adjudged in the previous proceeding." [Footnotes omitted.]
>
> [13] At p. 2 Dr. Lange continues:
>
> > "... The best early pronouncement of the meaning of *res judicata* by the Supreme Court of Canada is in the 1893 decision in *Farwell v. R.* [(1893), 22 S.C.R. 553 at 558]. King, J. defined the general meaning, respectively, of both cause of action estoppel and issue estoppel, stating:
> >
> > Where the parties (themselves or privies) are the same, and the cause of action is the same, the estoppel extends to all matters which were, or might properly have been, brought into litigation. Where the parties (themselves or privies) are the same, but the cause of action is different, the estoppel is as to matters which, having been brought in issue, the finding upon them was material to the former decision."
>
> [14] At p. 4 of his work Dr. Lange continues:

> "The doctrine of *res judicata* is a cornerstone of the justice system in Canada. The foundation of the doctrine is traditionally grounded upon two policy considerations: firstly, the ground of public policy that it is in the interest of the public that an end be put to litigation, and secondly, the ground of individual right that no one should be twice vexed by the same cause. ..."

[15] At p. 5 Dr. Lange continues:

> "... The two considerations are equally applicable to the disposition of an entire proceeding and to the disposition of an interlocutory proceeding. But they are not equal between themselves. The public policy consideration outweighs the consideration of the individual. Thus, the social necessity to respect the finality of judgments is paramount. To these two traditional policy grounds may be added two other substantive considerations: firstly, the irrebuttable legal presumption of the validity of judgments, and secondly, the court's reluctance to deprive a litigant of the opportunity to litigation adjudicated upon the merits. ... Other policy considerations have been expressed by the courts in different ways. They may be distilled into two general statements: firstly, the doctrine of *res judicata* should apply to avoid the scandal of conflicting decisions in order to promote confidence and predictability in the courts, and secondly, the doctrine should be applied to avoid the squander of the courts' scarce resources and the imposition of additional costs to the litigants." [Footnotes omitted.]

[16] At p. 6 Dr. Lange continues:

> "*Res judicata* is a fundamental doctrine of the justice system which has not been rendered obsolete by the Canadian Charter of Rights and Freedoms. The test is to arrive at justice or fairness. Of the test of justice, Jackson J.A., in *Iron v. Saskatchewan (Minister of the Environment & Public Safety),* stated:
>
>> The doctrine of *res judicata*, being a means of doing justice between the parties in the context of the adversarial system, carries with its tenets the seeds of injustice, particularly in relation to issues of allowing parties to be heard.
>
> Of the test of fairness, Conrad J.A., in *Wavel Ventures Corp. v. Constantini*, stated:
>
>> The principles are easily stated, less easily applied. Generally speaking, *res judicata* is a rule of fairness. The administration of justice could not sustain repeated attacks on judgments resulting in retrials of issues and causes. Being a rule of fairness, however, it must not deprive a litigant of a retrial in whole, or with respect to issues, in the appropriate circumstances. The authorities recognize the need to balance the competing issues of fairness, and exceptions to the doctrine of *res judicata* [that] have developed." [Footnotes omitted.]

NOVA SCOTIA SUPREME COURT

Fancy v. Clayton Professional Centre Ltd., [2007] N. S. J. No. 758 (S.C.) at par. 22 per Davidson J.:

> [22] This case was referred to by Justice Roscoe in 2301072 Nova Scotia Ltd. v. Lienaux 234 N.S.R. (2d) 185. In that case Justice Roscoe dealt with the issue of privity and made reference with approval to *The Doctrine of Res Judicata in Canada*, Donald J. Lange, Butterworths, 2000 and in particular the comments at page 71:
>
>> ... For the purpose of issue estoppel, a privy of a party has been variously defined. Before a person can be a privy of a party, there must be community or privity of interest between them, or a unity of interest between them. They cannot be different in substance. Privity can be one of blood, or title, or interest. A person who is privy in interest to a party in an action and has notice of that action is equally bound by the findings in that action. A privy is a person who has a right to participate with a party in the proceeding or who has a participatory interest in its outcome. To determine whether a person has a participatory interest in the outcome of the proceeding, is to determine whether the outcome could affect the liability of that person. A non-party in an earlier proceeding is a privy on the basis of being involved in the first proceeding by being present and by giving evidence. The term "parties" includes those who are named in the proceeding and those who have an opportunity to attend the proceeding.
>>
>> When there is a finding that a privy of a party is estoppel by issue estoppel, the doctrine of estoppel by conduct or representation has, on occasion, also been applied to that person. Factors which have been considered in applying estoppel by conduct or representation are similar to factors which have been considered to establish a privy of a party, namely, having knowledge of the previous proceeding, a clear interest in the proceeding, the ability to intervene as a participant but choosing to stand-by and watch, active participation in the previous proceedings by giving evidence, and being part of the litigation team ...

Smith v. Doucette, [2005] N. S. J. No. 758 (S.C.) at par. 9 per Pickup J.:

> [9] In *The Doctrine of Res Judicata in Canada*, 2nd Ed. (2004), Donald J. Lange put it thus at p. 444:
>
>> To rely upon a prior conviction as prima facie evidence, the particular violation, conviction, and the surrounding circumstances should be pleaded as material facts relevant to the civil proceeding. In proving the doctrine of prima facie evidence, a court may look behind a certificate of conviction to the indictment, to the reasons for judgment, and to the transcript of the previous proceedings.

> The failure of an accused to testify in a criminal proceeding which results in a conviction may be a factor to be considered in a civil proceeding. Other factors to be considered are: not being present at the criminal trial, not being represented by counsel at the criminal trial, and not being able to exercise the right to make full answer and defence at the criminal trial.

Imperial Oil Ltd. v. White, [2004] N. S. J. No. 380 (S.C.) at par. 67 per Murphy J.:

> [67] The rule against collateral attack has recently been described as follows by the Supreme Court of Canada in Garland v. Consumers' Gas Co., [2004] S.C.J. No. 21:
>
>> The doctrine of collateral attack prevents a party from undermining previous orders issued by a court or administrative tribunal (see Toronto (City) v. C.U.P.E., Local 79, [2003] 3 S.C.R. 77, 2003 SCC 63; D.J. Lange, *The Doctrine of Res Judicata in Canada* (2000), at pp. 369-70).

ONTARIO SUPERIOR COURT OF JUSTICE

Magder v. Ford, [2013] O. J. No. 299 (S.C.J. Div.Ct.) at par. 53, 55 per the Court:

> [53] 'Collateral attack' is well defined in the following excerpt from Donald J. Lange, *The Doctrine of Res Judicata in Canada*, 3rd ed. (LexisNexis), p. 463:
>
>> Collateral attack cases involve a party, bound by an order, who seeks to avoid compliance with that order by challenging the order itself and its enforceability, not directly but indirectly in a separate forum.
>
> . . .
>
> [55] The appellant emphasizes the words in the first sentence of this quotation that show a court order stands, provided the court had jurisdiction to make the order. As Lange states, above at p. 464, 'Where the judgment is attacked for lack of jurisdiction, there is no collateral attack because the validity of the judgment, and its binding effect, is in question.' . . .

Toronto (City) v. Rexlington Heights Ltd., [2013] O. J. No. 76 (S.C.J.) at par. 29 per Morgan J.:

> [29] Ms. Ross' answer to this is quite straightforward. She cites the Court of Appeal's decision in *Re Bagaric and Juric* (1984), 44 O.R. (2d) 638 for the proposition that, "Being new legislation incorporating a new right, no question of issue estoppel or cause of action estoppel can arise ..." She puts the matter in much the same way as Donald J. Lange puts it in his text, *The Doctrine of Res Judicata in Canada*, 3rd edn. (Markham: LexisNexis Canada, 2010), at p. 56: "[a] question raised in an earlier proceeding cannot give rise to estoppel in a later proceeding where the same question is raised on the basis of new legislation creating a new right."

Gravelle v. Ontario, [2012] O. J. No. 4388 (S.C.J.) at par. 133 per Quigley J.:

> [133] However, a consent dismissal of an action may feed a finding of *res judicata*. On the first element, Ground J. held in, *Reddy v. Oshawa Flying Club,* that "a consent order which ends an action is of the same effect for purposes of the *res judicata* doctrine as a judgment issued by the court on completion of a trial or hearing". On the second element, in *The Doctrine of Res Judicata in Canada*, Donald Lange states that non-parties are privy when their employer is a named party, as is the case here, and that "adding new party defendants will not suffice to avoid cause of action estoppel where these additional defendants were known or ought to have been."

Canwest Publishing (Re), [2011] O. J. No. 3471 (S.C.J.) at par. 29 per Pepall J.:

> [29] The issue engaged by this case is the second precondition which relates to finality. In *The Doctine of Res Judicata in Canada*, the author, Donald J. Lange, writes that there is an unresolved conflict in the law relating to the effect of the appeal process on the finality of a decision for the purpose of issue estoppel. He reviews numerous decisions that hold that a pending appeal does not preclude the application of issue estoppel and others that do. He also refers to Supreme Court of Canada *obiter dicta* and particularly *Toronto (City) v. CUPE, Local 79*[6], in which Arbour J. wrote:
>
>> "A decision is final and binding on the parties only when all available reviews have been exhausted or abandoned."

McRitchie v. Natalie, [2011] O. J. No. 2489 (S.C.J.) at par. 20 per Tausendfreund J.:

> [20] I am also guided by these comments of the author of *The Doctrine of Res Judicata in Canada*, 3d edition at p. 351:
>
>> The traditional view of a consent judgment is that it is a judgment of the court, not an agreement between the parties to the proceeding, and it is enforceable in the same manner as if it had not been created by consent, but by the court on completion of a trial or hearing. It is to be regarded as a judgment after a hearing on the merits: *Whitmell v. Ritchie*, [2009] O.J. No. 2064 (Div. Ct.) at para. 42.

Kaymar Rehabilitation Inc. v. Champlain Community Care Access Centre, [2010] O. J. No. 3865 (S.C.J.) at par. 206, 238 per Polowin J.:

> [206] . . .Estoppel extends to the material facts and the conclusions of law or of mixed fact and law that were necessarily, even if not explicitly, determined in the earlier proceeding. Further, as noted by Donald J. Lange, in the text *The Doctrine of Res Judicata in Canada*, 2nd ed. (Markham: Butterworths, 2004), *obiter dicta* is not fundamental and may not create an estoppel.
>
> [238] In *The Doctrine of Res Judicata in Canada, supra,* the principles with respect to abuse of process are summarized as follows at pages 375-376:
>
>> (1) The doctrine is not encumbered by the specific requirements of *res judicata*.

> (2)The proper focus for the application of the doctrine is the integrity of the judicial decision-making process.
>
> (3) Relitigation may be necessary to enhance the credibility and effectiveness of judicial decision-making when, for example, there are special circumstances.
>
> (4) The interests of the parties, who may be twice vexed by relitigation, are not a decisive factor.
>
> (5)The motive of a party in relitigating a previous court decision for a purpose other than undermining the validity of the decision is of little import in the application of the doctrine.
>
> (6)The status of a party, as a plaintiff or defendant, in the relitigation proceeding is not a relevant factor.
>
> (7) The discretionary factors that are considered in the operation of the doctrine of issue estoppel are equally applicable to the doctrine of abuse of process by relitigation.

Stojanic v. Bulut, Ontario Court File No. 05-CV-294945PD2 (S.C.J. Master), December 30, 2008 at par. 7, 9 per Master Birnbaum:

> [7] Counsel for the plaintiff raised the doctrine of collateral attack. In his text *The Doctrine of Res Judicata in Canada[2],* Donald Lange writes:
>
> > ... A valid and binding judgment, or order of any kind, may be attacked directly in only three ways: (1) by appealing or quashing the judgment, (2) by an application to the court under the rules of civil procedure to vary the judgment, for example, on the basis of new evidence, and (3) by a separate action to set aside the judgment on the basis of fraud. A judgment cannot be attacked indirectly, that is collaterally. if a proceeding is for a cause other than attacking a judgment directly, an attack on the judgment incidental to the cause is barred by the doctrine of collateral attack. Put another way, “a decision of a superior court is not subject to judicial review in another action…”
>
> [9] Lange also discusses at p. 407 the distinction of collateral attack and issue estoppel. He says, “The same parties test for estoppel is not a test for the application of the doctrine of collateral attack.” Collateral attack is not a doctrine to be applied only to prevent the original litigant from relitigating an issue; it also can apply to persons not a party to the original litigation.

Slade v. Lopelle, [2008] O. J. No. 5208 (S.C.J.) at par. 17 per Kane J.:

> [17] There is a legal principle relevant to the action and it's relationship to the first action, known as *res judicata*. *Res Judicata* has been held by the Supreme Court to mean "something that has clearly been decided" (*R. v. Duhamel* (1984), 15 C.C.C. (3d) 491 at 497), and as something that "has passed into a matter adjudged" (*R. v. Riddle*, [1980] 1 S.C.R. 380 at 385). It is founded in two broad policy considerations: "firstly, the ground of public policy that it is in the interest of the public that an end be put to litigation, and secondly, the ground of individual right that no one should be twice vexed by the same cause" (Donald J.

> Lange, *The Doctrine of Res Judicata In Canada*, 2 ed. (Markham: LexisNexis, 2004) at 4).

McIntyre v. Connelly, [2008] O. J. No. 1097 (S.C.J.) at par. 21 per Himmel J.:

> [21] The purpose of Rule 21 and Rule 25 is to eliminate frivolous or legally unfounded claims at the earliest stage possible. By doing so, the court is shortening the length of trials and reducing costs for the litigants in appropriate circumstances. It is also preventing prejudice from continuing. There are clear policy reasons including preserving the resources of the parties, upholding the integrity of the legal system in order to avoid inconsistent results and protecting the principle of finality which is crucial to the administration of justice: see Donald J. Lang, *The Doctrine of Res Judicata in Canada* (Markham, Ont.: Butterworths, 2000) at 347 cited in *Toronto (City) v. Canadian Union of Public Employees (C.U.P.E.) Local 79* [2003] 3 S.C.R. 77 per Arbour J. This is one such case where, for numerous reasons outlined, including policy reasons, it is appropriate to grant the relief available under the *Rules* at this stage.

R. v. Martin, [2008] O. J. No. 1596 (S.C.J.) at par. 10, 12 per O'Connor J.:

> [10] Relying on the principles set out by Donald J. Lange in The *Doctrine of Res Judicata in Canada* 2nd ed. (LexisNexis Butterworths, 2004), the Respondent submits that all the prerequisites for the doctrine of issue estoppel apply in this case:
>
> - the question to be decided in the second proceeding is the same question that has been decided in the first proceeding;
> - the question decided in the first proceeding is fundamental to the decision in the first proceeding, not collateral to the decision;
> - the question decided in the first proceeding includes all subject matter encompassing the question whether decided expressly or by necessary logical consequence;
> - the decision in the first Proceeding is a final decision on the question;
> - the decision in the first Proceeding is a judicial decision; and
> - the decision-making forum in the first proceeding held jurisdiction to decide the question.
>
> [12] The Respondent also notes that issue estoppel applies to a second motion in the same proceeding dealing with the same issue, relying on Lange's chapter on "Dispositions Without a Trial". He argues that parties in the first motion must bring forward all subject matter germane to the motion, and all subject matter that could have been brought forward on the first motion by exercise of reasonable diligence. Mr. Brown was available to give evidence before Clements J., but did not do so. The Crown was put on notice that this was an issue. The Respondent argues that it was incumbent upon the Crown to put all material before the court, and it cannot now file new evidence on a new motion. The rule in Leier v. Shumiatcher (1962), 37 W.W.R. 605 (Sask. C.A.) applies. Where the first motion is based on inadequate material, issue estoppel will apply to a second motion based on more complete material.

Lynch v. Segal, [2007] O. J. No. 4983 (S.C.J.) at par. 57 per Herman J.:

> [57] The respondents also point to the principle that, in order for the doctrine of issue estoppel to apply, the question decided in the first proceeding must be fundamental, not collateral to the decision (Donald J. Lange, *The Doctrine of Res Judicata in Canada*, 2nd ed. (LexisNexis Canada, 2005) at p. 25). I do not agree that the issue of the vesting of the lands was a collateral one. Both the trial judge and the Court of Appeal fully canvassed the issue; indeed, in the Court of Appeal, the issue of the appropriateness of the vesting order was the focus of the decision.

Brookfield Lepage Johnson Controls Facilities Management Services Ltd. v. Ontario Labour Relations Board, [2007] O. J. No. 490 (S.C.J.) at par. 21 per Cumming J.:

> [27] The employers say there is estoppel by conduct on the part of the Council. The employers argue that the evidence establishes that in the circumstances the Council is either a party or a privy to the Settlement such that it is an abuse of process for the Council to now bring a second proceeding that mirrors the issues raised in the 1998 proceeding and resolved through the Settlement. See generally, Donald J. Lange, *The Doctrine of Res Judicata in Canada* (2d ed.: Lexis Nexis Butterworths) at 387.

Martin v. Goldfarb, [2006] O. J. No. 2768 (S.C.J.) at par. 62 per Perrel J.:

> [62] Privity, which is not a precise concept, can be established by blood (heirs and successors), title (for example, landlord and tenant), or community of interest. More generally, privity is established if there is a sufficient degree of identification between persons such that it would be just to hold that the decision to which one is a party should be binding in proceedings to which the other is a party: Bank of Montreal v. Mitchell (1997), 143 D.L.R. (4th) 697 (Ont. Gen. Div.), affd. (1997), 151 D.L.R. (4th) 574 (C.A.); Machlin v. Tomlinson (2000), 46 O.R. (3d) 550 (S.C.J.); Banque Nationale de Paris (Canada) v. Canadian Imperial Bank of Commerce (2000), 195 D.L.R. (4th) 308 (Ont. C.A.); Las Vegas Strip Ltd. v. Toronto (City) (1997), 30 O.R. (3d) 286 (Gen. Div.), affd. (1997), 32 O.R. (3d) 651 (C.A.); Gleeson v. J. *Wippel & Co. Ltd.*, [1977] 3 All E.R. 54 (Ch. D.); Donald J. Lange, *The Doctrine of Res Judicata in Canada*, 2nd ed. (Toronto: LexisNexis Butterworths, 2004), pp. 151-55.

Penny v. Royal & Sun Allliance Insurance Co. of Canada, [2006] O. J. No. 2858 (S.C.J.) at par. 29 per Smith J.:

> [29] Issue estoppel is a distinct form of *res judicata.* It means "that a litigant is estopped because the issue has clearly been decided in the previous proceeding." [See Note 1 below]
>
> Note 1: Donald J. Lange, *The Doctrine of Res Judicata in Canada*, 2d ed. (Markham, Ont.: LexisNexis Canada, 2004) at 1.

Durham Children's Aid Society v. R.B., [2005] O. J. No. 3794 (S.C.J.) at par. 6 per Rogers J.:

> A thorough discussion of these cases is to be found in the text *The Doctrine of Res Judicata in Canada* by Donald J. Lange B.A., LL.B., Ph.D., published by Butterworths.

Laufer v. Canadian Investment Protection Fund, 2004 Canlii 31862 (ONSC) at par. 196-197 per Wilson J.:

> [7] Cause of action estoppel as outlined in D. J. Lang[e], *The Doctrine of Res Judicata in Canada*, Butterworths (2000) involves the following principles:
>
> - The plaintiff must bring forward the subject matter of the whole case relating to the cause of action at one time, once and for all, and every remedy flowing from the cause of action based on the subject matter.
> - The defendant must bring forward every defence based on the subject matter at one time, once and for all, and any related counterclaim which is not a separate and distinct cause of action.
> - All subject matter germane to the claim or defence, which could have been brought forward in the first action by the exercise of reasonable diligence but was not, is estopped in a second action.
> - A separate and distinct cause of action is not governed by cause of action estoppel and need not be brought in the same action, either as a claim by the plaintiff or as a counterclaim by the defendant.
> - Cause of action estoppel applies to the same parties, and their privies, in the second action and in any second proceeding which is not an action.

Dattels v. White, 2003 ONSC 03-CL-5233 at par. 15 per Cameron J.:

> [15] Parties may plead causes of action and remedies in the alternative: Rule 25.06(4), (7). Following discoveries or evidence at trial they may elect which claims to pursue: Lange, Donald J., *The Doctrine of Res Judicata in Canada*, Butterworths, Toronto and Vancouver, 2002.

Hilltop Group Ltd. v. 806046 Ontario Ltd., 2003 ONSC 03-CV-245753CM1 at par. 21 per Sanderson J. citing *Hilltop Group Ltd. v. Katana*, 2002 ONSC 96-CU-106768 at par. 196-197 per Greer J below.

Hilltop Group Ltd. v. Katana, 2002 ONSC 96-CU-106768 at par. 196-197 per Greer J.:

> [196] Donald J. Lange, in *The Doctrine of Res Judicata in Canada*, Butterworths, 2000, at pp. 12 -14 sets out parameters of the doctrine. The burden is on the party proving *res judicata*. The Court may look to the documentation behind the formal judgment to determine what was decided for the purpose of *res judicata*. See: Rolston et al. V. Lapa Cadillac Gold Mines (1937) Limited et al. [1950] O.R. 103-114, citing Johanesson v. Canadian Pacific Railway, 32 Man. R. 210, [1922] 2 W.W.R.341, 66 D.L.R. 599, affirmed 32 Man. R. at 221, [1922] 2 W.W.R. 761, 67 D.R.L. 636. Lange, in summarizing the ambit of inquiry, says it is almost open-ended. The Court is entitled to look at the Record, the reasons for Judgment as well as pleadings and formal judgment, may examine evidence and

proceedings at the trial. Facta may also be examined. In Bear Island Foundation v. Ontario, (1999) Carswell Ont 3603, 126 O.A.C. 385, the Court of Appeal notes that *res judicata* is a form of estoppel. It states in para.29 that it "means that any action or issue that has been litigated and decided cannot be retried in a subsequent lawsuit between the same parties or their privies." That case also notes that there can be an element of judicial discretion even when issue estoppel would otherwise apply.

[197] The issue of *res judicata* is tied in with that of issue estoppel as the same question test is the focal point for issue estoppel. Lange, at p.38, supra, says that the traditional view is that the same question has been decided, that is I must be deciding the same question, which has actually been decided in the action before MacKenzie, J., not whether it could have. Lange refers to the decision of McLachlin J. in R. v. Van Rassel, [1990] 1 S.C.R.225 at p.238, where she states that issue estoppel "applies only in circumstances where it is clear from the facts that the question has already been decided." Lange further notes that at p.49 that an issue, which was not raised in the first action as a defence, is not barred in the second action when the second action is based upon a separate and distinct cause of action. Cause of action estoppel is limited to issues, which can be fairly regarded as having been disposed of on their merits, on admission, or by compromise, says Lange. Holmstead and Watson, in their Ontario Civil Procedure, (Carswell looseleaf) at 21-146 set out the differences between cause of action estoppel (claim preclusion) and that of issue estoppel (issue preclusion). By definition, issue estoppel has a much narrower scope than cause of action estoppel. An analysis of the causes of action before me were those before MacKenzie J. in the action by Katana against DiBattista and Hilltop. Therefore, cause of action estoppel does not apply to the case at bar.

SASKATCHEWAN COURT OF QUEEN'S BENCH

F.M.I. Developments Ltd. v.1269917 Alberta Ltd., [2011] S. J. No. 786 (Q.B.) at par. 45 per Smith J.:

> [45] A helpful overview of *res judicata*, as same pertains to costs, can be found in Donald J. Lange, *The Doctrine of Res Judicata in Canada*, 3rd ed. (Markham: LexisNexis, 2010), at pages 432 to 434. Some relevant portions of that learned discussion are (at page 433):
>
>> ... All arguments in regard to costs must be brought forward at the same time to avoid cause of action estoppel [*Smith's Field Manor Development Ltd. v. Campbell*, [2004] N.S.J. No. 106 (C.A.) at par. 30]. Where the amount of costs, or who may be liable for the costs, in a proceeding is determined, those issues are estopped [*Condominium Plan No. 7510189 v. Jones* (1997), 48 Alta. L.R. (3d) 281 (C.A.) at 288; additional reasons at (1997), 50 Alta. L.R. (3d) 245 (C.A.); *Humble v. V.M.R.E.U.* (1989), 90 CLLC para. 14,009 at at 12068, at 12,077 (B.C.S.C.); aff'd on other grounds (1991), 85 D.L.R. (4th) 384 (B.C.C.A.)]. A determination of the scale of costs gives rise to issue estoppel in a subsequent proceeding [*P. & G. Cleaners Ltd. v. Johnson* (1996), 117 Man. R. (2d) 1 (Q.B.) at 3-4]. The scale of costs on

> interlocutory motions where a costs order has been made cannot be revisited by the trial judge or a judge subsequently presiding over a taxation [*Smith's Field Manor Development Ltd. v. Campbell*, [2004] N.S.J. No. 106 (C.A.) at par. 40, and see the cases cited therein].... When an argument on costs is raised and determined in an appeal, the issue is barred in a subsequent proceeding [*Re Wilcox Estate*, [2005] B.C.J. No. 123 (S.C.) at par. 52]. Where the issue of costs has not been appealed, an appellant may not re-argue the lower court costs when arguing the costs of the appeal [*Kurian v. Alberta (Administrator of the Motor Vehicle Accident Claims Act)*, [2004] A.J. No. 733 (C.A.) par. 2, 6]....

Barbagianis v. Canada (Attorney General), [2009] S. J. No. 481 (Q.B.) at par. 8 per Ball J.:

> [8] The principle of *res judicata* applies where a matter in dispute has already been decided in earlier litigation. *Res judicata* has two distinct forms: issue estoppel and cause of action estoppel. In their simplest terms, issue estoppel means that the litigant is estopped because the matter has clearly been decided in a previous proceeding. Cause of action estoppel means that a litigant is estopped because the cause has been extinguished by a judgment. See Lange, *The Doctrine of Res Judicata in Canada*, 2nd ed. Lexis Nexis Butterworths p.1.

Moody v. Ashton, [2004] S. J. No. 758 (Q.B.) at par. 171 per Bayton J.:

> [171] The "new evidence" special circumstances exception includes situations in which the decision in the first proceeding was obtained through fraud: Donald J. Lange, *The Doctrine of Res Judicata in Canada* (Toronto: Butterworths, 2000) at 223.

Mryglod v. Mryglod, 2001 SKQB 182 at par. 6 per Barclay J.:

> [6] Kotrla also submits that as the claim by Sylvia and Allen relates to the valuation and ownership of shares in various corporations, matters that have already been dealt with in the matrimonial trial, the doctrine of res judicata applies. I disagree. In order for the doctrine of res judicata to apply, the parties to one proceeding must be the same as the parties to the second proceeding. Neither Sylvia nor Allen were parties to the matrimonial property proceeding and accordingly, they are not estopped or bound by that decision.(D. Lange, *The Doctrine of Res Judicata* (Toronto: Butterworths) pp. 2-12, Farwell v. R. (1893), 22 S.C.R. 553 at 553.

TAX COURT OF CANADA

McFadyen v.Canada, [2008] T.C.J. No. 396 at par. 25 per Rip C.J.T.J.:

> [25] *Henderson* not only forecloses the relitigation of issues that have been conclusively decided by a court of competent jurisdiction. It also enunciates what has been referred to as the "might or ought" principle[9] - matters that

properly should have been part of the original litigation but that a party failed to argue cannot be raised in subsequent litigation.[10]

> 9 See Donald J. Lange, *The Doctrine of Res Judicata in Canada*, 2nd ed. (Markham: LexisNexis Canada Inc., 2004) at page 127.

[38] The appellant submits that there is new evidence *viz*. a consent decision of the Ontario Superior Court that warrants a rehearing of this matter. With regards to new evidence, Donald J. Lange, *The Doctrine of Res Judicata in Canada*,[20] summarizes the special circumstance of new evidence nicely:

> ... Where fraud is not involved, the common law position with respect to new evidence is very clear. For new evidence to preclude the operation of issue estoppel or cause of action estoppel resulting from an entered judgment, the new evidence must be practically conclusive of the matter. The incontrovertible nature of the new evidence is at the heart of the test. It must be virtually impossible to controvert the new evidence.

Commission Scolaire Des Patriotes v. The Queen, (2002) CCI/TCC 1999-1464-GST-G at par. 60, 64, and footnotes, per Archambault J.:

[60] As for *res judicata*, the following definition is found in Lange, *op. cit.*, at page 9:

> … In *C.U.P.E. Local 1394 v. Extendicare Health Services Inc.*, Doherty J.A. stated the principle:
>
> *Res judicata* is a rule of evidence. Assuming the requirements of the doctrine are met, the party against whom the issue was decided in the earlier litigation cannot proffer evidence to challenge that result. Looked at from the vantage point of the successful litigant in the earlier proceedings, the doctrine operates to admit into evidence at the second proceeding the judicial determination of the relevant issue at the earlier proceedings. Not only is that earlier determination rendered admissible, it is also declared to be conclusive with respect to that issue: Spencer-Bower and Turner, *The Doctrine of Res Judicata*, 2nd ed (1969) at 9; Sopinka, Lederman and Bryant, *The Law of Evidence in Canada* (1992) at 989-90.

[64] Moreover, and this is the most important reason, there seem to be significant differences in the conditions of application of the two rules. For example, for the authority of a final judgment to exist, it is essential that there be three identities in the two proceedings: identity of object, identity of cause and identity of parties. On the other hand, *res judicata* in the common law can be subdivided into two separate rules: issue estoppel and cause of action estoppel. As we saw above, issue estoppel applies where the causes of action are distinct. D. Lange, *op. cit.*, states the following at page 29: "*The Supreme Court of Canada has clearly established the principle that issue estoppel applies to separate and distinct causes of action*." For there to be issue estoppel and thus *res judicata*, only two identities are necessary: identity of issue and identity of parties. There is another important distinction: as I understand the common law rule, "issue" is

> not a synonym of "object". In the civil law, an object is a right - I will come back to this later - whereas in the common law, an issue is apparently not limited to a right. It applies to any conclusion of fact, any conclusion of law and any mixed conclusion of law and fact. Thus, it is not necessarily the same thing as an object. The concept of issue is much broader. Issue estoppel and the authority of a final judgment therefore represent two rules that do not apply under the same conditions. They are not "*interchangeable*" rules. [Footnotes omitted.]

Footnote citations:

> [7] Donald J. Lange expresses the same opinion in *The Doctrine of Res Judicata in Canada* (Markham, Ont.: Butterworths, 2000), at page 9.
>
> [28] In support of this conclusion, she cited (at paragraph 36 of her decision) Lange, *op. cit.*, who states at page 34 that the rules of issue estoppel and the authority of a final judgment are "interchangeable".
>
> [31] To illustrate the first point of view, consider what Laskin J. of the Supreme Court of Canada stated in *Angle, supra*, at page 268, which is quoted by D. Lange, *op. cit.*, at page 31: "I see no reason to introduce any anomalies or exceptions to its general application if the facts call for it." Lange states: "*In other words, if the three criteria or requirements of issue estoppel are met, issue estoppel should apply to the facts of the case.*" To illustrate the second line of thought, Lange writes at page 32:
>
>> In *Minott v. O'Shanter Development Co.*, the Ontario Court of Appeal also held that, even if the requirements of issue estoppel are met, <u>the court may exercise its discretion and refuse to apply it</u> "when to do so would cause unfairness or work an injustice." Emphasis was placed on the exception of special circumstances as illustrative of this exercise of discretion. Laskin J.A., for the court, stated:
>>
>> Issue estoppel is a rule of public policy and, as a rule of public policy, it seeks to balance the public interest in the finality of litigation with the private interest in achieving justice between litigants. Sometimes these two interests will be in conflict, or at least there will be tension between them. Judicial discretion is required to achieve practical justice without undermining the principles on which issue estoppel is founded. <u>Issue estoppel should be applied flexibly</u> where an unyielding application of it would be unfair to a party who is precluded from relitigating an issue.

Leduc v. The Queen, (2001) CCI/TCC 2000-4503-IT-1 at par. 36 per Lamarre J.:

> [36] Thus it will be noted, for the application both of the doctrine of *res judicata* under the Civil Code and of the doctrine of issue estoppel in common law, that the required conditions are similar. Donald J. Lange moreover makes that very observation in *The Doctrine of Res Judicata in Canada* (Markham, Ont.: Butterworths, 2000), at page 34:
>
>> In the law of Canada, there is compelling support for the proposition that the common law doctrine of issue estoppel and the Québec Civil Code

> doctrine of *res judicata* are to be treated as equivalent, interchangeable doctrines.

ALBERTA PROVINCIAL COURT

Condominium Plan No. 772 1985 v. McNeil [2012] A.J. No. 927 at par. 11 per Sharek J.:

> [11] McNeil argues that notwithstanding the *Condominium Property Act* provisions, the doctrine of res judicata applies, particularly the principle of issue estoppel. Furthermore, citing the textbook *The Doctrine of Res Judicata in Canada*, 3rd ed. (LexisNexis, 2010) by Donald J. Lange, McNeil relies on the following, taken from page 346:
>
> > "Decisions in regards to costs in a proceeding are the following. All arguments in regard to costs must be brought forward at the same time to avoid cause of action estoppel. Where the amount of costs, or who may be liable for the costs, in a proceeding is determined, those issues are estopped."
>
> I note that further on that same page, it is stated:
>
> > "A determination of the scale of costs gives rise to issue estoppel in a subsequent proceeding."

R. v. Yelle, 2002 ABPC 158 at par. 58-59 per Fradshaw J.:

> [58] If Clark, J. is not *functus officio*, then his decision is not yet final. In *The Doctrine of Res Judicata in Canada* by Donald J. Lange, (Butterworths, Toronto, 2000), the learned author states at p. 79:
>
> > "An issue may arise as to whether the decision is final for the purpose of issue estoppel although it has not been entered in the courts. As a general rule, if the court is not *functus officio* because the order has not been entered, the court is at liberty to further hear the question and then to vary or rescind it in the appropriate circumstance. That means that the decision is not final. Tribunal decisions are considered not final for the purpose of issue estoppel if the constating legislation permits the tribunal to revisit the question. When the court is *functus officio*, the decision meets the test of finality for issue estoppel, as previously stated, that the decision is final when the court has no capacity or jurisdiction to revisit the question."
>
> [59] I respectfully agree with Mr. Lange. I rely on Purvis, J.'s decision in *Athabasca Realty Co. Ltd. v. Foster* (1981) 35 A.R. 516 (Alta. Q.B.) at 518, and Freedman, C.J.M.'s reasons in *Pierre v. Montage Management Ltd.* [1981] 5 W.W.R. 272 (Man. C.A.) at 273-4. Consequently, I find that the decision of Clark, J. was not a final decision.

BRITISH COLUMBIA PROVINCIAL COURT

Burgess v. Cst. K.D. Rutten, 2001 BCPC 0298 at par. 13, 16-17 per Brecknell J.:

[13] THE PREVIOUS APPLICATION: In light of the issue of res judicata raised by the claimant, it is necessary to review the transcript of the proceeding before Judge Ramsay, as well as the applicable case law and legal texts. In the latter regard, I would recommend to counsel the recent text of *The Doctrine of Res Judicata in Canada* by Donald J. Lange, published in September, 2000 by Butterworth's. In that text the author covers in great detail the history of, and the present state of, res judicata jurisprudence in Canada. I found this text of great assistance in dealing with this matter.

....

[16] The underpinnings of the claimant's assertion that this matter is res judicata relate to the doctrine of issue estoppel. The key principles of issue estoppel, as set out by Donald Lange in his book, that apply to this case are as follows:

1. The same question test governs;
2. The question to be decided in the second proceeding must be the same question that has been decided in the first proceeding;
3. The question decided in the first proceeding governing the same question test in the second proceeding includes all subject matter encompassing the question whether decided expressly, or by necessary logical consequence;
4. If the question has been decided in the first proceeding, the same question cannot be relitigated in the second proceeding based on a separate and distinct cause of action;
5. The same parties and their privies cannot relitigate the same question in a second proceeding;
6. The decision in the first proceeding must be a final decision on the question;
7. The decision in the first proceeding must be a judicial decision on the question;
8. The decision making for[u]m in the first proceeding must have the jurisdiction to decide the question.

[17] In addition, Lange also reviews the application of the principles of issue and action estoppel as they relate to dispositions without a trial, such as this application, on pps. 157 and 158, in the following way:

1. The doctrines of issue estoppel and cause of action estoppel apply to a second motion in the same proceeding;
2. The parties in the first motion must bring forward all subject matter germaine to the motion;
3. All subject matter which could have been brought forward in the first motion by the exercise of reasonable diligence but was not is estopped in a second motion;
4. A first motion which decides a substantive question in a proceeding estops a second motion on the same question;

5. A first motion based on an inadequate material estops a second motion based on more complete material if one applies the rule in Lere;
6. A first motion based on inadequate material may not estop a second motion based on more complete material if it involves a procedural question in the proceeding, applying the rule in Talbot;
7. Technicalities or irregularities in the first motion which prevent the subject matter of the motion from being decided do not estop the second motion;
8. The decision in the first motion must be final for the purpose of issue estoppel and cause of action estoppel;
9. The decision in the first motion applies to the same parties and their privies in the second motion.

> And then it goes on to describe some other matters which are not applicable in this case.

TRIBUNALS

Humphrey v. Community Living Huntsville, [2012] O.H.R.T.D. No. 1893 at par. 8 per Vice-Chair Keene:

> . . .This reflects well-established jurisprudence developed in both courts and administrative tribunals. "When two parties contract to settle legal matters between them, the principle of finality demands that the contract be given effect and prevents parties from litigating settled matters, unless there are compelling reasons to set the contract aside altogether" (Donald J. Lange, The Doctrine of Res Judicata in Canada, Markham, Ontario: Butterworths, 2000, at 347-48). See *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63, *Perricone v. Fabco Plastics Wholesale*, 2010 HRTO 1655, *Sooriyakumaran v. Delta Chelsea Hotel*, 2012 HRTO 34.

Iwata v. Canada (Deputy Minister of Human Resources and Skills Development), [2012] LNCPSST No. 19 at par. 20 per Vice-Chair Mooney:

> . . . As such, the Tribunal made a preliminary ruling that it had not been clearly established that it lacked the jurisdiction to hear the complaints. The Tribunal's preliminary ruling was not a final decision that disposed, once and for all, of the question to be decided See Donald J. Lange, *The Doctrine of Res Judicata in Canada*, 2nd ed. (Toronto: Butterworths, 2004) at 86.

Decision No. 1970/11I2, [2011] O.W.S.I.A.T.D. No. 2892 at par. 19 per Vice-Chair Smith:

> [19]He refers me also to the text book *The Doctrine of Res Judicata in Canada* at page 20. That text book set out 9 components to the test based on the analysis of *Angle*. The third test provides that:

> The question decided in the first proceeding, governing the same question test in the second proceeding, must be fundamental to the decision, not collateral to the decision.

McIntosh v. Ontario (Ministry of the Environment), [2010] O.E.R.T.D. No. 11 at par. 20 per Member Valiante:

> [20]The concept of abuse of process applies to a broad power to control judicial process. The one aspect invoked here, referred to as "abuse of process by relitigation", overlaps with the concept of *res judicata* (Donald Lange, *The Doctrine of Res Judicata in Canada*, 2d Ed., 2004, pp 371- 375). According to Lange,
>
>> The policy supporting abuse of process by relitigation is the same as the essential policy grounds of issue estoppel and cause of action estoppel. The two policy grounds, namely, that there be an end to litigation and that no one should be twice vexed by the same cause, have been cited as policies in the application of abuse of process by relitigation. Other policy grounds have also been cited, namely, to preserve the courts' and the litigants' resources, to uphold the integrity of the legal system in order to avoid inconsistent results, and to protect the principle of finality so crucial to the proper administration of justice.
>>
>> As stated previously, courts have maintained that abuse of process by relitigation is an extraordinary remedy to be applied sparingly and only in the clearest and most obvious cases (pages 378-9).

Boulanger v. Canada (Correctional Services), [2008] LNCPSST No. 31 at par. 44 per Member Cabana:

> [44] Although there may be an overlap in the facts in the two proceedings, this does not mean that the doctrine of issue estoppel is applied automatically (*The Doctrine of Res Judicata in Canada*, Second Edition, Butterworths, Donald J. Lange, 2004).

Copying for Private Use (Re), [2007] C.B.D. No. 5 at par. 41 per the three member panel:

> [41] The doctrine of *res judicata* is part of the general law of estoppel and has two distinct forms: issue estoppel and cause of action estoppel. Donald J. Lange in his text *The Doctrine of Res Judicata in Canada* summarized these doctrines as follows:
>
>> In their simplest definitions, issue estoppel means that a litigant is estopped because the issue has clearly been decided in the previous proceeding, and cause of action estoppel means that a litigant is estopped because the cause has passed into a matter adjudged in the previous proceeding.

Warman v. Bahr & Western Canada, 2006 C.H.R.D. No. 15 at par. 9 per Member Jensen:

> [9] I can appreciate Mr. Bahr's situation. However, there are some difficulties with the motion as it is currently framed. First of all, strictly speaking, the Tribunal's decision in the *Lemire* matter will not bind the Tribunal in the present case (Donald Lange, *The Doctrine of Res Judicata in Canada,* 2nd edition, Toronto: 2004, at p. 423).

Rainbow County Estates Ltd. v. Resort Muncipality of Whistler, October 31, 2005 Exprop.Comp.Bd. 33/92/263 at par.9 per Member Walls:

> [9] Rainbow cites *Doctrine of Res Judicata in Canada,* 2nd ed., Donald J. Lange, (Toronto, Butterworths. 2004) which states at p 39:
>
>> The same question test is the focal point for the doctrine of issue estoppel. The traditional view of issue estoppel is that the same question has been decided, that is, actually decided, in the first proceeding.
>
> And at page 42:
>
>> In addition to the requirement that the question be actually decided, the question in the first proceeding must have been fundamental to the decision for the purpose for issue estoppel. A finding that is collateral or incidental is not essential to the decision.

St. Joseph's General Hospital v. Ontario General Nurses' Assoc. (Glynn Grievance), [2005] O.L.A.A. No. 761 at par. 12 per Member Randall:

> [12] Secondly, and in any case, the Association argues that the issue before me is not identical to the one before Arbitrator Luborsky. Rather, it is a new one, because the factual basis for the claim has completely changed. On this issue, the Association cautions against finding that the grievances are the same simply because the remedies being sought in both are identical. Mr. D'Orsay submits that a determination of the "issue in dispute" or the "cause of action", for the purpose of the application of the doctrine, is not predicated on the relief sought. In support of this distinction, the Association cites Donald Lange, *The Doctrine of Res Judicata in Canada*, Second Edition, Butterworths at page 143:
>
>> ... the relief sought in two actions is not a good guideline to determine whether the causes of action are the same for the purpose of cause of action estoppel. In the cause of action estoppel case of Bank of Nova Scotia v. Guenette, [(1986), 75 A.R. 361 at page 371-2, 3781 Master Funduk defined cause of action "as a set of facts which, if established, would entitle the plaintiff to some kind of remedy," rejecting the argument that causes of action advanced in two actions are the same if the relief claimed in each action is the same. "The remedy does not determine the cause of action. It is the other way around. The cause of action, if established, determines the remedy." The same statement was made by Master Funduk in Re Demitor [(1993), 17 C.B.R. (3d) 132 at page 139]: "A cause of action is determined by the facts pled, not by what is suggested in the prayer of relief."

J.F. Ventures Ltd. (Re, [2005] B.C.E.S.T.D. No. 131 at par. 29 per Adjudicator Savage:

> [29] As noted by Lange in *The Doctrine of Res Judicata in Canada*, supra, "The decision must be a 'judicial' decision" (p. 84).

Decision No. 1664 02, [2005] O.W.S.I.A.T.D. No. 1340 at par. 29 per the three member appeal panel:

> [29] Tribunal Counsel Delorme thoroughly reviewed and summarized the text, *The Doctrine of Res Judicata in Canada* (2000), Butterworths, authored by D.J. Lange. As stated in that text, and as succinctly summarized by Tribunal Counsel Delorme, a non-party can be a privy of a party where, amongst other factors, a new company is formed from the merger of the old company with another company.

Sherman v. Canada (Revenue), 2005 C.H.R.D. No. 30 at par. 33 per Member Jensen:

> [33] A decision is final for the purposes of issue estoppel when the decision-making forum pronouncing it has no further jurisdiction to rehear the question or to vary or rescind a finding (Donald J. Lange, *The Doctrine of Res Judicata in Canada*, 2nd ed. (Toronto: LexisNexis Canada, 2004) at 86).

Barter v. I.C.B.C., 2003 BCHRT 9 at par. 25-27 per Member Lyster:

> [25] The recent cases make it clear that issue estoppel and cause of action estoppel have much in common. That said, important distinctions do remain. Some of these are highlighted in the English case of *Henderson v. Henderson* (1843), 3 Hare 100:
>
> > In trying this question I believe I state the rule of the Court correctly when I say that, where a given matter becomes the subject of litigation in, and of adjudication by, a Court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of *res judicata* applies, except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time. (quoted in D.J. Lange, *The Doctrine of Res Judicata in Canada* (Markham, Ontario: Butterworths, 2000) at p. 112)
>
> [26] This quotation highlights two important distinctions between cause of action estoppel and issue estoppel. First, and most obviously, for cause of action estoppel to apply, the cause of action in which the estoppel is pleaded must be the same as that in which the estoppel is said to arise, whereas issue estoppel applies with respect to common issues in two proceedings, whether the same cause of action is in issue or not. The question of what constitutes the "same

cause of action" can be difficult to answer. The general principle is stated by Lange as follows:

> Whether the cause of action in the first proceeding is the same as that sought to be enforced in the second proceeding does not depend upon technical considerations but upon matters of substance, that is, whether they are in substance identical… A cause of action is the facts which give a person a right to judicial relief against another person. (at p. 124)

[27] Second, cause of action estoppel applies not only to matters pleaded in the first action, but to all matters which could have been pleaded. This is known as the "might and ought" principle arising out of the rule in *Henderson*: Lange at pp. 112-113. This prevents litigants from splitting their case and subjecting others to "litigation of the thousand cuts": *Blair Athol Farms Ltd. v. Black*, [1996] 8 W.W.R. 1 (Man. Q.B.). Issue estoppel, by contrast, applies only to issues which were actually decided in the previous litigation. Further, not only must the issue have been decided for issue estoppel to apply; issue estoppel covers only "fundamental issues determined in the first proceeding, issues that were essential to the decision": *Minott* at para 23.

Desormeaux v. Ottawa-Carleton Regional Transit Commission, Canadian Human Rights Commission, 2002, T701/0602 at footnote 24 per Member Mactavish:

> [24]Sopinka, Lederman and Bryant, *The Law of Evidence in Canada*, (2d Ed.) at pp. 1078 et seq. This has been described as the 'might and ought' principle (Lange, *The [Doctrine] of Res Judicata in Canada*, at p. 113).

Cremasco v. Canada Post Corporation, Canadian Human Rights Commissions, 2002 T702/0702 at par. 54-56 per Member Groarke:

> [54] Donald Lange recognizes the difficulty in characterization in *The Doctrine of Res Judicata in Canada*, where he writes that the doctrine of *res judicata* "is an exclusionary rule of evidence". He then cites *Masunda v. Downing* (1986), 27 D.L.R. (4th) 268 (B.C.S.C.), for the proposition that "it goes to the capacity of the parties to raise the matter and to the capacity of the second tribunal to determine the matter now having no jurisdiction to do so". It may be this problem in characterization that explains why Bower prefers to describe *res judicata* as "a rule of public policy".
>
> [55] Since the question that needs to be answered is whether the complaint should proceed to a hearing there is no need to consider the evidentiary branch of the doctrine any further. There appears to be a third branch of the doctrine, however. It seems fair to say that a more informal concept of *res judicata* has sprung up in the case law, which arises in those situations where the existence of other proceedings would simply make it unfair to proceed.
>
> [56] Donald Lange appears to describe this as a doctrine of abuse of process by re-litigation. The function of such a doctrine is apparently to remedy the lapses in the application of the doctrine of *res judicata*, where the technical requirements of the doctrine have not been made out. This would appear to be a discretionary

> form of relief, which gives an adjudicative body the ability to reject a case that would undermine the integrity of its process.

Achille v. Canada (Minister of Citizenship and Immigration), 2002 I.A.D.D. No. 1311 at par. 8 per Member Lamarche

> [8] However, doctrine and case law [See Note 1 below] have established that, even if all the conditions for applying the principle of res judicata are met, it will only be applicable if there are no special circumstances raising issues of natural justice, concerning important new evidence that could not reasonably have been produced in the previous case, or in the case of an amendment to the Act or a change in public policy issues.
>
> Note 1 : Danyluk v. Ainsworth Technologies Inc., [2001] 2 S.C.R. 460.
>
> LANGE, Donald J. *The Doctrine of Res Judicata in Canada*, Toronto, Butterworths, 2000, page 208, note 2.

Hamid v. Canada (Minister of Citizenship and Immigration), 2002 I.A.D.D. No. 707 at par. 7 per Member Lamarche:

> [7] Similarly, the tribunal concludes that the present appeal must be dismissed. The doctrine of res judicata applies when the following three conditions are met: the same question has already been decided; the decision which disposed of the question was final; the parties to the decision are the same parties. All three conditions are met here. Thus this doctrine, the purpose of which is to ensure the finality of decisions save in special circumstances, seems to apply here. However, the tribunal has the discretion to determine that res judicata does not apply, if there exist special circumstances which bring the appeal within the exception to the doctrine [See Note 3 below], which will be the case where it is satisfied that there was fraud or a denial of natural justice in the previous proceedings, where there is decisive fresh evidence which could not have been presented in the previous proceedings or where there are changes in the law and public policy considerations [See Note 4 below].
>
> Note 3: Danyluk v. Ainsworth Technologies Inc. [2001] S.C.J. No. 46, Q.L. (S.C.C.); Cobb v. Holding Lumber Co. (1977) 79 D.L.R. (3rd) (BCSC) 332.
>
> Note 4: *The Doctrine of Res Judicata in Canada*, Donald J. Lange, Butterworths, Toronto, 2000, at 208, footnote 2.

Pannu v. Canada (Minister of Citizenship and Immigration), 2002 I.A.D.D. No. 154 at par. 10 per Member Boscariol:

> [10] It is clear that all three requirements for res judicata to apply in this case are present, therefore this repeat appeal is caught by the doctrine of res judicata unless it is established that special circumstances exist which would bring the appeal within the exception to the doctrine. Such a special circumstance would be the existence of decisive new evidence which could not have been discovered by the exercise of reasonable diligence in the first proceeding. [See Note 6 below] Much of the evidence proffered by counsel for the appellant, which goes

to establish that the marriage took place, information concerning the appellant's divorce from her first husband, and information which purportedly establishes the "correct age" of the appellant, cannot be considered decisive fresh evidence as it appears to me it is all evidence which could have been discovered, with due diligence, and disclosed at the time of the first hearing.
Note 6: *The Doctrine of Res Judicata in Canada*, Donald J. Lange, Butterworths, Toronto, 2000, 2 at p. 208.

Mally v. Canada (Minister of Citizenship and Immigration), 2002 I.A.D.D. No. 1269 at par. 14 per Member Boscariol:

> [14] The exception of special circumstances applies where in the previous proceedings there was fraud or other misconduct that raises natural justice issues. It is to be noted that none are alleged in the present case. It also applies to changes in the law and public policy considerations, the former inapplicable as this repeat appeal is governed by the former Immigration Act, [See Note 7 below] and the later not raised by either counsel. In addition, the exception extends to decisive fresh evidence that could not have been discovered by the exercise of reasonable diligence in the first proceeding. [See Note 8 below]
>
> Note 7: Immigration Act, R.S.C. 1985, c.I-2 as amended (the Act).
>
> Note 8: "*The Doctrine of Res Judicata in Canada*" Lange, p. 208 at footnote 2.

Purba v. Canada (Minister of Citizenship and Immigration), 2002 I.A.D.D. No. 1035 at par. 11 per Member Boscariol:

> [11] The special circumstances where in the previous proceedings there was fraud or other misconduct that raises natural justice issues; decisive fresh evidence that could not have been discovered by the exercise of reasonable diligence in the first proceedings; changes in the law, public policy considerations. [See Note 5 below]
>
> Note 5: "*The Doctrine of Res Judicata in Canada*", Donald J. Lange, (Butterworths, Toronto, 2000) at 208, footnote 2.

Sangha v. Canada (Minister of Citizenship and Immigration), 2002 I.A.D.D. No. 174 at par. 9 per Member Boscariol:

> [9] The exception of special circumstances applies where in the previous proceedings there was fraud or other misconduct that raises natural justice issues. The exception also extends to the existence of decisive fresh evidence, and to changes in the law and public policy considerations. [See Note 5 below]
>
> Note 5: *The Doctrine of Res Judicata in Canada*, Donald J. Lange, Butterworths, Toronto, 2000 at 208, footnote 2.

Sohi v. Canada (Minister of Citizenship and Immigration), 2002 I.A.D.D. No. 1094 at par. 11 per Member Boscariol:

> [14] The exception of special circumstances applies where in previous proceedings there was fraud or other misconduct that raises natural justice issues. In addition, the exception extends to decisive fresh evidence that could not have been discovered by the exercise of reasonable diligence in the first proceeding, and to changes in the law and public policy considerations. [See Note 6 below] Whether to apply the doctrine of res judicata is a matter of discretion, and in cases where it is evident that applying the doctrine would potentially create an injustice, the doctrine ought not to be applied. [See Note 7 below]
>
> Note 6: *The Doctrine of Res Judicata in Canada*, Donald J. Lange Butterworths, Toronto, 2000 at p. 208, footnote 2.
>
> Note 7: Danyluk v. Ainsworth Technologies Inc. [2001] S.C.R. 460.

British Columbia Lottery Corporation, Office of the Information & Privacy Commissioner for British Columbia, 2001 Order 01-03 at par. 29 per Comm. Loukidelis:

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

Grewal v. Canada (Minister of Citizenship and Immigration), 2001 I.A.D.D. No. 1111 at par. 7 per Member Egya Sangmuah:

> It is the substance of the matter decided which governs the determination of whether relitigation of the same issue constitutes an abuse of process. In *The Doctrine of Res Judicata in Canada* [Note 7: D.J. Lange, *The Doctrine of Res Judicata in Canada* (Toronto, Butterworths, 2000).] Donald Lange notes, with respect to proving res judicata that:
>
>> In early court practice, the court was limited in its access to the documentation of the first action in determining whether the same issues and facts had been previously decided. There is, nevertheless, overwhelming authority, old and new, that the court may look to the documentation behind the formal judgment to determine what was decided for the purpose of res judicata. It is the substance of the matter decided which should control whether res judicata applies, not the form of the judgment.
>>
>> At the very least, the reasons for judgment and the pleadings may be looked at beyond the formal judgment itself. In Pratt v. Johnson [(1958), 16 D.L.R. (2d) 385 (S.C.C.)], Cartwright J. stated the principle:
>>
>>> When a plea of res judicata is raised, to decide what questions of law and fact were determined in the earlier judgment the Court is entitled to look not only at the formal judgment but at the reasons and the pleadings.
>>
>> In Johanesson v. Canadian Pacific Railway [[1922] 2 W.W.R. 761 (Man. C.A.) at 771-72], Cameron J.A. of the Manitoba Court of Appeal reviewed various decisions which went beyond the well-established

> principle in Pratt. To summarize this review, the ambit of the inquiry is almost open-ended:
>
> > (1) The court record alone is not determinative of what points were in issue and decided.
> >
> > (2) The court is entitled to look at the reasons for judgment as well as the pleadings and formal judgment.
> >
> > (3) The court may look beyond the judgment and the pleadings to examine the evidence and proceedings at the trial.
> >
> > (4) Parole evidence is admissible to identify points or issues adjudicated in the former action when the record is silent or ambiguous in that regard.

Sekhon v. Canada (Minister of Citizenship and Immigration), 2001 I.A.D.D. No. 129 at par. 14-15 per Member Sangmuah:

> [14] The current jurisprudence indicates that abuse of process by relitigation would not apply if the same question was not actually decided and the question was not fundamental to the decision. The issue must have been contested between the parties and the parties must have had a full and fair opportunity to be heard. [See Note 14 below] This is but one example of an overriding question of fairness requiring a rehearing. Abuse of process by relitigation also does not apply if there is decisive fresh evidence that could not have been obtained by reasonable diligence at the time of the first proceeding. [See Note 15 below] This is important in that the exception is not based on a change in circumstances after the first proceeding per se, but on fresh evidence not obtainable by due diligence at the time of the first proceeding. Equitable considerations may warrant not finding abuse of process by relitigation. Abuse of process by relitigation would also not apply if the previous determination had been obtained by fraud. Finally, under special circumstances, a court may permit relitigation of the same issue. These circumstances may very well involve equitable considerations, but it is for the court to determine what constitutes special circumstances on the facts of each case. [See Note 16 below]
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> Note 14: D.J. Lange, *The Doctrine of Res Judicata in Canada* (Toronto, Butterworths, 2000) pp. 353, 356-357.
>
> Note 15: Saskatoon Credit Union v. Central Park Enterprises Ltd. (1988), 47 D.L.R. (4th) 431 (B.C.S.C.) at 438.
>
> Note 16: See Bradford & Bingley Building Society v. Seddon, [1999] 1 W.L.R. at 1482, at 1494-1496.
>
> [15] An inquiry as to whether an action or appeal is an abuse of process by relitigation is essentially fact-driven. The court, or the IAD, may look at the previous order, reasons for the decision in the previous proceeding, transcripts of the proceeding, affidavits, and other documentary evidence. Where necessary, for example in cases where fraud is alleged, viva voce evidence may be required. [See Note 17 below]

> Note 17: Lange, *The Doctrine of Res Judicata in Canada*, pp. 351-352.

Chopra v. Dept. of National Health and Welfare, Canadian Human Rights Tribunal, 2001 T.D. 10/01 at par. 249 per Member Hadjis:

> [249] It is helpful to examine the method in which issue estoppel is ordinarily applied. The doctrine may be pleaded by a defendant in his defence when faced with an action which seeks to relitigate a matter which has already been adjudged. As Donald J. Lange explains in his text, *The Doctrine of Res Judicata in Canada*, a plaintiff is entitled to invoke the principle as well, but it must be pleaded:
>
>> [T]he plaintiff may also utilize the doctrine because *res judicata* is reciprocal. Although there is no authority on point, it is clear that, if the plaintiff relies upon *res judicata*, the plaintiff should also plead it in its statement of claim.
>>
>> Leave may be granted to plead *res judicata*. Where a defendant considers that it has a plea of res judicata, the proper course is to plead it as a defence with the requisite specificity and proceed to trial, or alternatively, to seek a determination of it as a preliminary issue. The plea of *res judicata* must set out fully the facts which create the plea, not simply plead the first proceeding and the order. It must distinctly plead the facts sufficient to show the question raised in the second proceeding was absolutely adjudicated upon in the first proceeding. It is a rule of evidence which must be pleaded if it is to be raised at trial. Otherwise, the party omitting to plead, when there is an opportunity to plead, waives the estoppel. However, pleading res judicata is only required where there is a traversable plea to be met.