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APPLICANT	THIRD EYE CAPITAL CORPORATION
RESPONDENTS	OPSMOBIL INC., RANCH ENERGY CORPORATION, 1734163 ALBERTA INC., 1859821 ALBERTA INC., AIR DALLAIRE LTD., OPSMOBIL GROUP INC., OPSMOBIL CONSTRUCTION INC., OPSMOBIL ENERGY SERVICES INC. and K.L. CAPITAL CORP.
DOCUMENT	**BRIEF OF LAW AND ARGUMENT**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	STIKEMAN ELLIOTT LLP Barristers & Solicitors 4300 Bankers Hall West, 888-3rd Street S.W., Calgary, Canada T2P 5C5 **Attention: Joseph Reynaud / Nathalie Nouvet / David Price** jreynaud@stikeman.com / nnouvet@stikeman.com / dprice@stikeman.com Tel: (514) 397-3019/ (403) 266-9093 Fax: (403) 266-9034 Lawyers for Third Eye Capital Corporation File No.: 120536-1037

BRIEF OF LAW AND ARGUMENT IN RESPONSE TO THE APPLICATION BY PREDATOR OIL BC LTD. FOR ADVICE AND DIRECTION

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PART I - INTRODUCTION

1. This Brief is submitted by the first ranking secured creditor, Third Eye Capital Corporation ("**TEC**"), in contestation of the application for advice and direction filed by Predator Oil BC Ltd. ("**Predator**") on October 16, 2018 (the "**Predator Application**") regarding the operation, by Ernst & Young Inc. ("**E&Y**"), in its capacity as receiver (the "**Receiver**"), of oil and gas assets owned by Ranch Energy Corporation ("**Ranch**").

2. The Predator Application seeks, *inter alia*, advice, directions and orders with respect to:

   (a) The operation of the oil and gas assets of Ranch (the "**Assets**") by the Receiver, including whether Predator should act as contract operator of the Assets and, in such an event, ancillary orders including the creation of a charge against the Assets in favour of Predator for funds spent on operating the Assets;

   (b) In the alternative, whether the Receiver should initiate and complete the license transfer process contemplated in the Initial Trust Agreement (as defined below) and should pay certain fees allegedly accruing due under the Initial Trust Agreement;

   (c) The payment by the Receiver to Predator of alleged outstanding post-receivership trust fees, totaling $336,764.52;

   (d) The repayment to Predator of certain amounts allegedly paid by Predator on behalf of Ranch prior to the appointment of the Receiver; and

   (e) An extension of the timelines ordered by this Court for the sale of the Assets.

3. In this Brief, TEC supports the position adopted by the Receiver and submits that:

   (a) The Predator Application constitutes a collateral attack on the Receivership Order (as defined below) and is plagued by irregularities that prevent this Court from granting the remedies sought by Predator, regardless of the actual merit of the position adopted by Predator;

(b) The Predator Application is based on the erroneous factual premise that the disclaimer of the Amended Trust Agreement has created a situation whereby the Permits are no longer held in trust for Ranch by Predator, and consequently, the Receiver would be operating the Assets outside the regulatory scheme of the *Oil and Gas Activities Act* (British Columbia) (the "**OGAA**"), whereas the disclaimer in question is nothing but a red herring and has not fundamentally altered the *status quo* with respect to these Assets; and

(c) The only realistic and acceptable solution to the regulatory conundrum created by the separation of the assets from the permits is that the Receiver continue to operate the Assets, in accordance with the Receivership Order, so that the SISP can be completed, which is scheduled to be done within one month.

4. All capitalized terms used but not defined in this brief shall have the meanings given to them in the Sixth Horrox Affidavit dated October 24, 2018 (the "**Sixth Horrox Affidavit**").

PART II - FACTS

5. The factual background and basis for the relief is set out in detail in the Sixth Horrox Affidavit, in the Third Report of the Receiver dated October 17, 2018 and in the Fourth Report of the Receiver dated October 24, 2018 (the "**Fourth Report**").

6. The salient facts will not be repeated but may be summarized as follows:

(a) Predator was initially incorporated by its parent, Predator Oil Ltd., to purchase a large number of gas wells, facilities, pipelines, interests and related assets in British Columbia from Penn West Petroleum (the "**Penn West Assets**"), which assets included, among others, the Assets at issue in the Predator Application.[1]

[1] Fourth Report, para. 10.

(b) A number of the Penn West Assets with limited abandonment and reclamation liabilities were sold to corporate entities related to Predator Oil Ltd., including certain valuable mineral interests in the Montney basin in northeast British Columbia and a pipeline necessary to effect transportation of production from a gas processing plant in the Wildboy district of British Columbia.[2]

(c) The Assets at issue in the Predator Application, on the other hand, which carry approximately $105 million in abandonment and reclamation obligations and are regulated by the BCOGC, were sold by Predator to Ranch, despite the fact that Ranch was not qualified to hold the associated permits under the BCOGC's regulatory regime (the "**Permits**").[3]

(d) In that context, on May 8, 2017, Predator and Ranch entered into an Asset Purchase and Sale Agreement (the "**APSA**"), pursuant to which Predator agreed to sell the Assets to Ranch, including the Permits, in consideration of a purchase price of $5 million (the "**Purchase Price**").[4]

(e) The parties intended for Ranch to operate the Assets, but in light of the fact that Ranch was not qualified to hold the Permits at the time of closing, the APSA provided that to the extent Ranch needed to be recognized by a government authority under the Permits, until such time as that recognition could be effected, Predator would hold title to the Permits in trust for Ranch, represent Ranch and receive and hold all benefits and advantages accruing in respect of the Permits for the benefit, use and ownership of Ranch.[5]

(f) On June 16, 2017, Ranch and Predator entered into an Initial Trust Agreement, pursuant to which, Predator, as trustee, undertook to hold the Permits in trust for Ranch, as beneficiary, until such time as Ranch could accept the license

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[2] Fourth Report, para. 11.
[3] Fourth Report, para. 12.
[4] Sixth Horrox Affidavit, paras. 9 and 10.
[5] APSA, section 8.3.

transfers as provided for therein. Under the Initial Trust Agreement, Ranch was to pay Predator an escalating "administrative fee" (the "**Administrative Fees**"), designed to function as an increasingly punitive penalty with respect to Ranch, in order to induce it to take the actions necessary to become compliant with the BCOGC's requirements.[6]

(g) On July 7, 2017, Predator and Ranch executed a *Transition Services Agreement* (the "**TSA**"). The TSA was a temporary arrangement required upon closing of the transaction under the APSA because Ranch was not ready to operate the Assets at the time and it needed Predator to perform certain transitional services with respect to the operation of the Assets. The term of the TSA was three (3) months and said term expired in late 2017 and was never renewed.[7]

(h) On July 10, 2017, the transaction under the APSA closed and Ranch and Predator entered into an *Amended and Restated Trust Agreement* (the "**Amended Trust Agreement**"). While this agreement featured several modifications to the Initial Trust Agreement, at no point did either of these trust agreements contain any provisions dealing with the operation of the Assets, nor were the Administrative Fees payable under these agreements linked, in any way, to any sort of operatorship responsibility or the actual costs and expenses thereof.[8]

(i) Following the Closing of the transaction under the APSA, Tobber continued to run Ranch's operations, including the operation of the Assets. During this time, he requested, on a regular basis, and was provided with urgent and critical advances from TEC, in order to fund the Debtors' ongoing working capital needs.[9]

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[6] Sixth Horrox Affidavit, paras. 18 to 22. Initial Trust Agreement, s. 4.1.
[7] Sixth Horrox Affidavit, paras. 30 to 35.
[8] Sixth Horrox Affidavit, paras. 25, 27 and 28.
[9] Sixth Horrox Affidavit, paras. 38 to 40.

(j) On June 6, 2018, TEC issued and delivered to each of the Debtors a Notice of Intention to Enforce Security pursuant to Section 244 of the BIA (collectively, the "**NOIs**"). Despite the issuance of the NOIs, on June 15, 2018, Tobber caused 2118469 Alberta Ltd. ("**211 Alberta**"), a company of which he owns all the shares, to acquire all the shares in the capital of Predator for a purchase price of $7 million, most of which was pursuant to a promissory note.[10]

(k) On July 10, 2018, this Court issued, with the consent of TEC, an initial order (the "**Initial Order**") pursuant to the *Companies' Creditors Arrangement Act* (the "**CCAA**"), however shortly thereafter, in light of a material adverse change report filed by E&Y as monitor to the Debtors, this Court issued, on July 19, 2018, orders (the "**Receivership Order**") appointing the Receiver and suspending the proceedings of the Debtors under the CCAA.

(l) The Receivership Order was issued over the objection of Ranch and Predator and the regulatory issues surrounding the Permits and the operation of the Assets were the object of debates before this Court, with Ranch pleading that the resolution of the regulatory issues required a CCAA process in which Ranch (then controlled by Ryan Tobber) would be amalgamated with Predator (then controlled by Ryan Tobber), thereby allowing for a reunification of the holder of the Assets with the holder of the Permits.[11]

(m) Ranch, under Ryan Tobber's leadership, had been left in a significant state of disarray when the Receiver was appointed. Among other issues (i) Ranch's unpaid unsecured creditors were owed over $12.7 million, (ii) the Assets had been left in poor condition with a large number of non-compliances with the BCOGC, (iii) there were immediate concerns that the previous emergency response plan in respect of the Assets was in certain instances, incorrect or due to

[10] Sixth Horrox Affidavit, paras. 45 and 46.

[11] As appears from the Affidavit of Ryan Tobber sworn on July 3, 2018 in Court file number 1801-09424 ("**July 3 Tobber Affidavit**"), paras. 87 to 95. Exhibit A.

be updated, (iv) a sizable portion of surface and mineral lease rentals had gone unpaid since April 2018, and (v) the Canada Revenue Agency had significant claims against OpsMobil and its affiliates for unremitted source deductions, GST and other unsecured claims.[12]

(n) On October 2, 2018, Justice A.D. Macleod granted an order approving the sale and investment solicitation process (the "**SISP**") with respect to the property, assets or business of Ranch.

PART III - ISSUES

7. The following issues are to be resolved in light of the Predator Application:

(a) Is the Predator Application permissible from a procedural standpoint or does it constitute in reality a collateral attack on the Receivership Order that would require the stay of proceedings to be lifted?

(b) Has the disclaimer of the Amended Trust Agreement had the impact that Predator alleges on the Receiver's lawful operation of the Assets?

(c) If the Court concludes that the Receiver is not operating the Assets lawfully, can Predator be permitted to operate these Assets, or would it be preferable to maintain the *status quo*?

[12] Fourth Report, paras. 20-21.

PART IV – THE LAW AND ARGUMENTATION

A) The Direction, Advice and Orders Sought by Predator Amount to an Impermissible Collateral Attack on the Receivership Order that Would Require the Stay to be Lifted

a) Advice and Directions

8. Paragraph 33 of the Receivership Order stipulates that the Receiver may "*apply to this Court for advice and directions in the discharge of its powers and duties*". Article 249 of the BIA provides similar rights to court-appointed receivers.

9. These provisions are meant to enable a court-appointed receiver to obtain directions as to his own actions in the course of the administration of his duties, for his own protection and for the orderly conduct of the administration. There are limits however, that even receivers must follow in seeking advice from the court, including, for example, using the court to obtain legal advice:

> "*[46] Another circumstance in which the court should decline to provide directions is when the receiver is effectively using the court as a legal adviser. That circumstance is present here. <u>The Receiver has its own counsel to whom it can turn for legal advice and should not turn to the court for such advice</u>.*
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> *[47] In Re Canadian Steering Wheel Co. (1921), 21 O.W.N. 15 (Ont. S.C.), Canadian Steering Wheel Co. made an assignment into bankruptcy. Section 18(d) of the Bankruptcy Act allowed a trustee to apply to the court for direction regarding the administration of the estate of a bankrupt. Under the Act, any directions given by the court were binding and justified the subsequent consonant action of the trustee. The trustee of the estate made an ex parte application to the court for direction regarding the status of certain officers of the company and the validity of the assignment. The court refused to provide directions, stating at page 16 that "[c]lause (d) was not by any means intended to turn the Court into a sort of solicitor for the trustees to whom they might resort for advice in an informal way whenever they happened to be in doubt as to what they should do." The court went on to state that "on the affidavits filed, and in the absence of notice, it did not seem proper or possible to give the trustee any instructions as to what in the circumstances he should do or refrain from doing".*"[13]

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[13] *Griffiths McBurney & Partners* v. *Ernst & Young YBM Inc.*, 2000 ABCA 284 (CanLII), paras. 29-33, 46-47 [BA Tab 1].

10. In the case at bar, Predator is not the Receiver and it does not have the power, under statute or through the Receivership Order, to ask for "*directions or advice*" from this Court. Indeed, although pursuant to Rule 1.4(2) of the Alberta Rules of Court, a party may apply to the court for advice and guidance in respect of a practice or procedure, this rule does not apply to the case at hand, since Predator is seeking substantive relief.

11. Furthermore, Predator is not purporting to bring an application pursuant to section 248 of the BIA. Under that section, where the court is satisfied, on application by an interested party, that the "*secured creditor, the receiver or the insolvent person is failing or has failed to carry out any duty imposed by sections 244 to 247*" the court may direct such party to carry out that duty, or may restrain such party from realizing or otherwise dealing with the property of the insolvent person.

12. In the case at hand, Predator is represented by counsel, and is fully equipped to file an application requesting the appropriate relief from a procedural standpoint. It has chosen not do so, in all likelihood, as argued below, because it cannot meet the requisite standards for an application under section 248 BIA, because it does not meet the criteria to lift the stay of proceedings and because its recourse is, in reality, an attempt at exercising a contractual remedy to extract payments from the Ranch estate, at the expense of other unsecured creditors.

b) ***Lifting of the Stay***

13. The Receivership Order contains, amongst other provisions, a stay of proceedings that prevents proceedings from being commenced or continued against the Receiver, the Debtors or the Property (as defined in the Receivership Order), without prior leave of this Court, and that provides that all rights and remedies against the Debtors, the Receiver, or affecting the Property are stayed and suspended, except with the written consent of the Receiver or leave of this Court.[14]

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[14] Receivership Order, paras. 8-10. Exhibit B.

14. In order to lawfully seek the relief sought in the Predator Application, including varying or amending the Receiver's ability to possess or control the Assets and compelling what amounts to a contractual remedy by forcing the Receiver to make certain payments to Predator, Predator would have needed to ask this Court to lift the stay of proceedings provided in the Receivership Order.

15. The Predator Application does not request this Court to lift the stay of proceedings, probably because Predator is aware of the fact that it does not meet the criteria required for this kind of relief. Lifting of the stay would require Predator to demonstrate that it is being materially prejudiced by the stay, a burden it does not even attempt to meet in circumstances where doing so would amount to complaining about the prejudice it created for itself by setting up a structure designed to circumvent the regulatory regime in place and benefit itself economically.

c) *Collateral Attack*

16. The Receivership Order explicitly provides that the Receiver is empowered and authorized to operate the Debtors' Property, including the Assets:

> "4. [...] *the Receiver is hereby empowered and authorized, but not obligated, to act at once in respect of the Property and* [...] *the Receiver is hereby expressly empowered and authorized to do any of the following where the Receiver considers it necessary or desirable:*
>
> *(a) to take possession of and exercise control over the Property and any and all proceeds, receipts and disbursements arising out of or from the Property, which shall include the Receiver's ability to abandon, dispose of or otherwise release any interest in any of the Debtors' real property, or any right in any immoveable, and any license or authorization issued by the British Columbia Oil and Gas Commission, Alberta Energy Regulator, or any other similar government authority, in respect of such interest in real property or immoveable, including pursuant to section 14.06(4) of the BIA, notwithstanding the provisions of the Oil and Gas Activities Act, SBC 2008, c 36, the Oil and Gas Conservation Act, RSA 2000, c O-6, the Pipeline Act, RSA 2000, or any other similar legislation in any other province or territory;*
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> *(b) to receive, preserve and protect the Property, or any part or parts thereof* [...];

> (c) ***to manage, operate and carry on the business of the Debtors,*** *including the powers to enter into any agreements, incur any obligations in the ordinary course of business, cease to carry on all or part of the business, or cease to perform any contracts of the Debtors;*
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> [...]
>
> (p) *to apply for any permits, licenses, approvals or permissions as may be required by any governmental authority and any renewals thereof for and on behalf of and, if thought desirable by the Receiver, in the name of the Debtors;*" (our emphasis)

17. The regulatory issues surrounding the Assets and the transfer of the Permits were already before this Court at the time the that Receivership Order was issued.

18. In fact, prior to the issuance of the Receivership Order, Tobber, who at the time was a director and the most senior officer of Ranch, had argued on behalf of Ranch against a receivership on the basis, in part, that there were "*significant hurdles to a Receiver securing [the] Permits without the cooperation of Predator.*"[15] In making this argument, Tobber was referring to his own cooperation as sole director and officer of Predator, thereby displaying a deep-seated conflict of interest which was brought to the Court's attention by TEC at such time.

19. Predator was also an active party in the Ranch insolvency proceedings and it was present at the hearings for the CCAA Application and the Receivership Application, including on July 19, 2018, when the Receivership Order was issued by this Court. In that context, Predator filed the following affidavit evidence into the Court record in connection with the debates taking place in the Ranch insolvency proceedings:

   (a) The Affidavit of Wayne Pridham, sworn on July 3, 2018 (the "**Pridham Affidavit**")[16]; and

   (b) The Affidavit of Lindsay Farr, sworn on July 19, 2018 (the "**Farr Affidavit**")[17].

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[15] July 3 Tobber Affidavit, paras. 87-95. Exhibit A.
[16] Pridham Affidavit. Exhibit C.

20. According to the Pridham Affidavit, Mr. Pridham was "*specifically authorized and directed by Ryan Tobber, sole director and officer of Predator Oil BC Ltd.*" to swear the affidavit on Predator's behalf and in support of Ranch's CCAA Application. The Pridham Affidavit informed the Court, *inter alia*, that in the context of CCAA proceedings, Predator (as the permit holder of the Assets) could contemplate entering into a business combination or amalgamation with Ranch (as the owner of the Assets).

21. Despite the foregoing evidence, in light of Ranch's failure to provide its creditors and the Court with accurate and reliable financial information on which it could lay the groundwork for a comprehensive restructuring, this Court chose to suspend the Initial Order under the CCAA and to grant the Receivership Order sought by TEC.

22. Leaving aside the disclaimer of the Amended Trust Agreement, which as will be argued below, has had no impact on the Receiver's ability to operate the Assets, there have been no material developments with respect to the Assets since the issuance of the Receivership Order. Accordingly, the Predator Application amounts to a clear attempt to re-litigate the issues raised in the context of the Receivership Application, and requests substantive remedies, that if granted, would impermissibly vary the terms of the Receivership Order via a collateral attack:

> *"[20] Another aspect of the judicial policy favouring finality is the rule against collateral attack, i.e., that a judicial order pronounced by a court of competent jurisdiction should not be brought into question in subsequent proceedings except those provided by law for the express purpose of attacking it."* [18] (our emphasis)

23. The rule of collateral attack stipulates that a judicial order, such as the Receivership Order, should not be circumvented, except by the proper channels, failing which, the integrity of a court order would be too readily undermined and the issues decided therein, too easily re-litigated:

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[17] Farr Affidavit. Exhibit D.

[18] *Danyluk* v. *Ainsworth Technologies Inc.*, 2001 SCC 44, para. 20 [BA Tab 2]. See also *Ed Mirvish Enterprises Limited* v. *Stinson Hospitality Inc.*, 2009 CanLII 72031 (ON SC), para. 20 [BA Tab 3]; *McDonald* v. *Brookfield Asset Management Inc.*, 2016 ABCA 375, para. 32 [BA Tab 4].

> "*[152] The collateral attack rule rests on the need for court orders to be treated as binding and conclusive unless they are set aside on appeal or lawfully quashed. Court orders may not be attacked collaterally. That is, a court order may not be attacked in proceedings other than those whose specific object is the reversal, variation, or nullification of the order. See Wilson v. The Queen, 1983 CanLII 35 (SCC), [1983] 2 S.C.R. 594, at para. 8.*
>
> *[153] The fundamental policy behind the rule against collateral attacks is "to maintain the rule of law and to preserve the repute of the administration of justice": see R. v. Litchfield, 1993 CanLII 44 (SCC), [1993] 4 S.C.R. 333, at para. 22. If a party could avoid the consequences of an order issued against it by going to another forum, this would undermine the integrity of the justice system. Consequently, the doctrine is intended to prevent a party from circumventing the effect of a decision rendered against it: see Garland v. Consumers' Gas Co., 2004 SCC 25 (CanLII), [2004] 1 S.C.R. 629, at para. 72.*"[19] (our emphasis)

24. In the case at hand, it is also worth noting that the BCOGC was present during the hearing on the Receivership Order and prior to said hearing, had specifically requested that the standard language provided in the Receivership Order be modified so as to include specific provisions requested by the BCOGC.[20] However, at no point did the BCOGC contest the issuance of the provisions that provided the Receiver with full powers to operate the Debtors' business, including the Assets despite the BCOGC's knowledge that Ranch did not hold the Permits.

B) Lawful Operation of the Assets by the Receiver

25. The Predator Application is founded on the entire premise that due to the disclaimer of the Amended Trust Agreement, "*Predator no longer has any duty to Ranch in relation to the Assets*" and as a result "*Ranch has lost any and all rights and permissions in respect of the operation of the Assets.*"[21]

26. This factual premise is incorrect and the disclaimer of the Amended Trust Agreement constitutes nothing more than a red herring which has not produced the dire consequences lent to it by Predator, primarily because the Amended Trust Agreement does not contain the breadth of obligations which Predator seeks to read into it. Its

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[19] *Indalex Limited (Re)*, 2011 ONCA 265 (CanLII), paras.152-153 [BA Tab 5].
[20] Blackline of the Receivership Order against the Alberta template receivership order. Exhibit E.
[21] Predator Application, para. 1(f).

disclaimer, when analyzed in the context of the agreements entered into between the parties (and which Predator has failed to file in the Court record) has not fundamentally altered the status quo in respect of the Assets.

a) ***<u>The Intention of the Parties</u>***

27. Pursuant to the APSA, it was the intention of Predator and Ranch that Ranch operate the Assets and become the ultimate operator with the consent and cooperation of Predator.

28. However, the BCOGC's Information Bulletin 2010-23[22] ("**Information Bulletin**") provides for certain specific requirements relating to a transferor and transferee's Liability Management Rating ("**LMR**"), and due to Ranch's LMR, both Predator and Ranch knew that the Permits issued to Predator could not be transferred at Closing to Ranch as required by the APSA. Accordingly, Predator and Ranch entered into the Amended Trust Agreement to formulate the payment provisions for Predator to hold the Permits in trust (the Administrative Fees), which as will be described below, it had already committed to do pursuant to section 8.3 of the APSA.

29. The Administrative Fees were designed to function as an increasingly punitive penalty with respect to Ranch, in order to induce it to take the actions required to become BCOGC compliant[23] so that the Permits could be transferred to Ranch by Predator.

30. Once the closing of the transaction pursuant to the APSA occurred, Predator abandoned its statutory duties arising under the Permits to carry out any oil and gas activities in compliance with the OGAA. At that point, the operation of the Assets was left entirely to Ranch, and the latter operated the Assets in accordance with the APSA until July 19, 2018, when the Receiver was appointed.

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[22] BCOGC's Information Bulletin 2010-23 and BCOGC Liability Management Rating Program Manual October 2017. Exhibit F.
[23] Sixth Horrox Affidavit, paras. 18-21 and Initial Trust Agreement, s. 4.1.

31. For a period of over one year, from July 10, 2017 to October 18, 2018, Predator did not apply to this Court to seek to operate the Assets, knowing full well that neither the APSA nor the Amended Trust Agreement entitled it to do so.

32. Since the issuance of the Receivership Order, the Receiver has and continues to be the sole operator of the Assets. The regulatory issues surrounding these Assets existed well before the disclaimer of the Amended Trust Agreement and all parties to the Ranch insolvency proceedings were made well aware of these issues, as appears from the submissions made by the parties in the course of the Ranch CCAA and receivership proceedings.

33. In addition, before the beginning of Ranch's insolvency process, neither Ranch nor Predator were performing their obligations under the Amended Trust Agreement.[24] Ranch's insolvency made it impossible for Ranch to pay the Administrative Fees owed to Predator and the disclaimer of the financial obligations arising out of that agreement was the responsible course of action to be taken by the Receiver following a reasonable and necessary review of the estate's financial and operational situation.

34. Finally, it is worth noting that the case law cited by Predator (*Panamericana de Bienesy Servicios SA v Northern Badger Oil & Gas Ltd*, 1991 ABCA 181; *Strathcona (County) v Fantasy Construction Ltd Estate (Trustee of)*, 2005 ABQB 559; *Orphan Well Assn v Grant Thornton Ltd*, 2017 ABCA 124) is clearly distinguishable from the situation at bar, primarily since there are currently no outstanding orders issued under provincial law ordering the Receiver not to operate the Assets. To the contrary, the Receiver has kept the BCOGC fully informed of the situation regarding the Assets, and has adhered to the BCOGC's orders and requests which Ranch, under Tobber's management, ignored.

35. In addition, in the case law cited by Predator, it was the regulatory body itself who raised a claim regarding compliance with its own rules. In the case at hand, Predator, a party that has persistently ignored and has knowingly defied the rules imposed by the

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[24] Sixth Horrox Affidavit, paras. 44, 45, 58(d) and 62. July 3 Tobber Affidavit at paras. 44-47 [Exhibit A].

BCOGC[25] for the ultimate benefit of itself and its affiliated companies, now seeks to raise a claim for regulatory non-compliance against the Receiver, and this, despite the Receivership Order explicitly authorizing the Receiver to so operate the Assets.

b) ***Residual Trust Provisions***

36. The notion that Predator no longer has any duties towards Ranch in relation to the Assets is plainly without merit since the residual trust provisions at section 8.3 of the APSA continue to apply. These provisions provide that, until Ranch is recognized by certain third parties (including governmental authorities) under the Permits, Predator will hold title to the Permits in trust for Ranch:

> "*8.3 Post Closing Transaction. Following Closing and to the extent that [Ranch] must be recognized by Third Parties under the Title and Operating Documents or otherwise recognized as the owner of any of the Assets, the following will apply to those Assets until that recognition has been effected:*
>
> *[...]*
>
> *(b)* ***[Predator] shall hold title to the Assets, or any portion thereof, in trust for [Ranch], represent [Ranch] and receive and hold all proceeds, benefits and advantages accruing in respect of the Assets for the benefit, use and ownership of [Ranch];*** " (our emphasis)

37. The APSA does not give Predator the responsibility to operate the Assets while it holds the Permits in trust for Ranch. It merely requires Predator to act in an administrative fashion in keeping with the obligations of a bare trustee. Obviously, someone had to operate the Assets subject to the Permits on closing in these conditions and such responsibility was clearly left in the hands of Ranch, under the APSA and the relevant conveyance agreements delivered at Closing.

38. This was the situation the Receiver stepped into when it was appointed by the Court to operate the Assets, and ultimately, market and sell them pursuant to the SISP. Because the Amended Trust Agreement does not govern operatorship, the fact that the Receiver

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[25] Farr Affidavit, para. 2 and Exhibit "A" to the Farr Affidavit.

never adopted it, is irrelevant to whether either Ranch or the Receiver ever legally operated the Assets. The Amended Trust Agreement acted as a mechanism pursuant to which Predator sought compensation from Ranch as bare trustee of the Permits and as such, it primarily establishes financial arrangements. Operatorship of the Assets was addressed by the parties in the APSA, which (as mentioned) contemplates the Permits being held in trust by Predator for Ranch, and in the TSA, which contemplates that Ranch would assume operatorship within three (3) months of the APSA transaction.

39. To the extent that the Amended Trust Agreement was terminated, as Predator seems to imply, the parties must necessarily fall back on the provisions of the APSA that continue to govern, and pursuant to which Predator continues to hold the Permits in trust for Ranch.

40. Though the case law differs on the facts, the principle remains that if two agreements are in force with respect to the same subject and one such agreement is terminated, the provisions of the residual agreement govern. For example, in a case involving a purchase agreement terminated by a condominium board to purchase a manager's unit, the court ruled that the corporate condominium declaration on the same subject nonetheless governed the condominium corporation's obligations and said corporation nonetheless had to purchase the manager's unit as a result of such obligations.

> *"[60] Finally, I note that, in this case, the board of directors controlled by the appellant enacted a by-law and caused the corporation to enter into the Purchase Agreement with the appellant for the manager's unit. I accept that the New Board had authority to terminate that Purchase Agreement pursuant to s. 112. However, in my view, the exercise of that authority did not extend to the obligation created by the Declaration. The Corporation was obliged to purchase the manager's unit pursuant to the Declaration. To the extent that the Purchase Agreement gave effect to this obligation and did not add to or change it, it was superfluous. Terminating the Purchase Agreement did not terminate the pre-existing obligation."*[26] (our emphasis)

41. In a more factually similar judgment in a matter respecting execution pending appeal, the New Brunswick Court of Appeal acknowledged that – in light of the trial court's

[26] *Lexington on the Green Inc.* v. *Toronto Standard Condominium Corporation No. 1930*, 2010 ONCA 751 (CanLII), para. 60 [BA Tab 6].

finding of a validly terminated trust agreement for the beneficial holding of fishing licenses - the government entity in question could simply provisionally transfer the fishing licenses in question in accordance with the terms of the original purchase agreement.[27]

C) Preservation of the Status Quo Going Forward

42. Assuming this Court has jurisdiction to order that Predator should take over the operations of the Assets, it is submitted by TEC that the idea that Predator should even be considered as a lawful operator of the Assets is an anathema that cannot be entertained by this Court.

43. First, Predator has no title to - nor working interest in - the Assets and therefore Predator is no more than a bare trustee for Ranch of the Permits.

44. Sections 34 and 39(1) of the OGAA prevent a permit holder from carrying on activities when they no longer have the required land entry agreements or permits to do so, subject to obtaining additional approval from the BCOGC pursuant to section 39(2). Section 39(3) of the OGAA prohibits a permit holder from operating a well once it no longer is the owner of the petroleum and natural gas rights of the well or no longer has an agreement with the owner of the gas rights.

45. As a result, and pursuant to the APSA, Predator may not operate assets it does not own the underlying oil and gas rights to, and, importantly, the BCOGC does not have the statutory authority to sanction such operation.

46. Second, Predator has demonstrated, through its past behavior, that it is prepared to circumvent the regulatory regime and that it is unfit to carry out the oil and gas activities under the Permits. More fundamentally, Predator has been consistently unable to operate the Assets in compliance with the regulatory regime for several reasons:

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[27] *Dugas v Gaudet*, 2015 CanLII 17688 (NB CA), para. 13 [BA Tab 7].

(a) Ranch, led by Tobber, was in a state of disarray when the Receiver was appointed on July 19, 2018, and the "*Assets were left in poor condition with a large number of non-compliances with the BCOGC*";[28]

(b) The emergency response plan (the "**ERP**") in connection with the Assets was, in certain instances, incorrect and needed to be updated;[29]

(c) Predator has not submitted any evidence to demonstrate that it has the financial wherewithal to satisfy the operational losses associated with the Assets, which according to Receiver, average approximately $1 million per month;[30]

(d) Predator has not submitted any evidence that it has the necessary insurance coverage to operate the Assets, nor that it possesses the adequate and qualified staffing;[31] and

(e) Tobber was the controlling mind of Ranch until the issuance of the Receivership Order, and was instrumental in creating the regulatory, operational and contractual chaos that the parties are now forced to navigate.[32]

47. Given that Predator cannot legally operate the assets under section 39 of the OGAA (informed by sections 21, 24, and 34 of the OGAA), TEC submits that maintaining the status quo is the better approach, since the Receiver is far more suited to operate the Assets, as demonstrated, *inter alia*, by the following:

(a) Since the issuance of the Receivership Order, the Receiver has been in constant communication with the BCOGC and has kept the latter informed of its activities as they relate to the Assets;[33]

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[28] Fourth Report, para. 20.
[29] Fourth Report, para. 20.
[30] Fourth Report, para. 50. Sixth Horrox Affidavit, para. 63(c).
[31] Fourth Report, para. 50.
[32] Fourth Report, para. 55. Sixth Horrox Affidavit, para. 63.
[33] Fourth Report, paras. 22 and 36.

(b) The Receiver *"addressed the concerns with the ERP to the satisfaction of the BCOGC and communicated this to Predator"*;[34]

(c) In consultation with the BCOGC, the Receiver has completed 23 deficiencies and non-compliances associated with the Assets, most of which arose prior to the issuance of the Receivership Order;[35]

(d) The Receiver has disbursed $580,000 in order to comply with a number of BCOGC orders and has committed an additional $270,000 to the BCOGC to rectify certain regulatory deficiencies;[36]

48. In light of the foregoing, the only realistic and acceptable solution is that the Receiver continue to operate the Assets for a short-period of time, in accordance with the Receivership Order, so that the SISP can be completed. Handing over operations of the Assets to Predator, who is controlled by the former management (Tobber) responsible for the disarray and non-compliance described herein, only has the potential to cause further environmental and financial losses to the detriment of the Debtors' estate and the BCOGC.

PART V - CONCLUSION

49. For the reasons set forth above, TEC respectfully submits that the Predator Application should be dismissed, with costs against Predator.

Respectfully submitted in Calgary this 31st day of October, 2018,

STIKEMAN ELLIOTT LLP

Joseph Reynaud / Nathalie Nouvet / David Price
Counsel for Third Eye Capital Corporation

[34] Fourth Report, paras. 20 and 37.
[35] Fourth Report, para. 37.
[36] Fourth Report, para. 37.

TABLE OF EXHIBITS

Description	Exhibit
Affidavit of Ryan Tobber sworn on July 3, 2018 in Court file number 1801-09424 (without exhibits)	A
Receivership Order issued on July 19, 2018	B
Affidavit of Wayne Pridham, sworn on July 3, 2018 (without exhibits)	C
Affidavit of Lindsay Farr, sworn on July 19, 2018	D
Blackline of the Receivership Order against the Alberta template receivership order	E
BCOGC's Information Bulletin 2010-23 and BCOGC Liability Management Rating Program Manual October 2017	F

TABLE OF AUTHORITIES

Authority	Tab
Griffiths McBurney & Partners v. *Ernst & Young YBM Inc.*, 2000 ABCA 284	1
Danyluk v. *Ainsworth Technologies Inc.*, 2001 SCC 44	2
Ed Mirvish Enterprises Limited v. *Stinson Hospitality Inc.*, 2009 CanLII 72031 (ON SC)	3
McDonald v. *Brookfield Asset Management Inc.*, 2016 ABCA 375	4
Indalex Limited (Re), 2011 ONCA 265	5
Lexington on the Green Inc. v. *Toronto Standard Condominium Corporation No. 1930*, 2010 ONCA 751	6
Dugas v *Gaudet*, 2015 CanLII 17688 (NB CA)	7

TAB 1

Griffiths McBurney & Partners v. Ernst & Young YBM Inc., 2000 ABCA 284

Date: 20001023
Docket: 00-18827 00-18832, 00-18841

IN THE COURT OF APPEAL OF ALBERTA

THE COURT:

THE HONOURABLE MADAM JUSTICE McFADYEN
THE HONOURABLE MR. JUSTICE SULATYCKY
THE HONOURABLE MR. JUSTICE WITTMANN

IN RE S. 234 OF THE BUSINESS CORPORATIONS ACT R.S.A. (1980) c.J-1

IN RE THE MATTER OF YBM MAGNEX INTERNATIONAL, INC.

BETWEEN:

GRIFFITHS McBURNEY & PARTNERS AND NATIONAL BANK FINANCIAL INC.

Appellants

- and -

ERNST & YOUNG YBM INC., ROGER MONDOR, ADMIT M. KARIA, THE PLAINTIFF'S EXECUTIVE COMMITTEE, ROYAL TRUST CORPORATION OF CANADA, IN ITS CAPACITY AS TRUSTEE OF THE CC&L DEDICATED ENTERPRISE FUND, ROYAL TRUST CORPORATION OF CANADA, IN ITS CAPACITY AS TRUSTEE OF THE CC&L BALANCED CANADIAN EQUITY FUND, CONNOR CLARK & LUNN INVESTMENT MANAGEMENT LTD., AND HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF BRITISH COLUMBIA

Respondents

APPEAL FROM THE ORDER of THE HONOURABLE MADAM JUSTICE PAPERNY
Dated the 17th day of April, A.D. 2000; Filed the 12th day of May, A.D. 2000

REASONS FOR JUDGMENT RESERVED

REASONS FOR JUDGMENT OF THE HONOURABLE MR. JUSTICE WITTMANN
CONCURRED IN BY THE HONOURABLE MADAM JUSTICE McFADYEN
AND CONCURRED IN BY THE HONOURABLE MR. JUSTICE SULATYCKY

COUNSEL:
A. D. Macleod, Q.C., R. F. Smith (for Griffiths McBurney, et al)
D. J. Sorochan, Q.C., D. Mitchell (for Canaccord Capital Corporation)
D. F. Bell (for Parente, Randolph, et al)
Appellants

P. Howard (for Ernst & Young YBM Inc.)
C. Allen (for Roger Mondor and Amit Karia)
M. C. Freeman (for The Plaintiff's Executive Committee)
E. A. Cherniak, Q.C. (for Royal Trust Corporation)
Respondents

REASONS FOR JUDGMENT OF THE HONOURABLE MR. JUSTICE WITTMANN

INTRODUCTION

[1] This is an appeal by Griffiths McBurney & Partners ("Griffiths"), National Bank Financial Inc. ("National"), Canaccord Capital Corporation ("Canaccord") and Parente Randolph Orlando Carey and Associates ("Parente") from the Order of Paperny, J. dated April 17, 2000. Ernst & Young YBM Inc., the Receiver of YBM Magnex International Inc. (the "Receiver") and the plaintiffs in three different class actions (the "Class Action Plaintiffs") applied for advice and direction in respect of certain reports known as the 3(o) Report and the Miller Tate Report, which were prepared on the direction of, and on behalf of, the Receiver regarding the business and affairs of YBM Magnex International Inc. ("YBM").

[2] The learned chambers judge declared that the Receiver was in common interest privilege with the Class Action Plaintiffs and therefore could provide the 3(o) Report to counsel for those parties, on such terms and conditions as the Receiver deemed appropriate. She also authorized the Receiver to release the Miller Tate Report to the U.S. Attorney without waiving any privilege that exists with respect to that report on the basis that the waiver of privilege was limited to that document and is not a general or wider waiver of privilege. Finally, she held that if the Receiver was satisfied that it shared common interests with other entities against common adversaries on a particular issue, with benefit accruing to YBM's estate as a whole, the Receiver was authorized to release the Miller Tate Report to those entities on terms and conditions it deemed appropriate.

FACTS

[3] YBM is an Alberta corporation which traded on the Toronto Stock Exchange until May 13, 1998 when it was cease traded by the Ontario Securities Commission after a raid at YBM's head office in Pennsylvania by a United States Organized Crime Strike Force.

[4] YBM made a public offering of shares in a prospectus dated November 17, 1997. The share issue was underwritten by two lead underwriters, Griffiths and National, and three junior underwriters including Canaccord. The five underwriters (collectively the "Underwriters") entered into an Underwriting Agreement dated November 17, 1997 with YBM regarding the prospectus. The Underwriting Agreement contained indemnity provisions whereby YBM agreed to indemnify the Underwriters against all losses (other than loss of profits), claims, damages, liabilities, costs or expenses caused by, among other things, any statement which constituted or is alleged to have constituted a misrepresentation or material omission in YBM's offering documents or company information records. YBM also agreed to reimburse the Underwriters promptly, on demand, for any legal or other expenses reasonably incurred by the Underwriters in connection with investigating or defending any such losses, claims, damages, liabilities or actions in respect of any claims alleging such misrepresentations as incurred.

[5] Parente was the auditor of YBM from 1995 until mid-1997.

[6] Connor Clark & Lunn Investment Management Ltd. ("Connor Clark") is a Vancouver-based investment management firm. In 1998, Connor Clark retained VC & Co. International ("VC") for advice with respect to YBM. At the time of the engagement of VC, Connor Clark, on behalf of its institutional and other clients, had acquired approximately 14.4% of YBM's outstanding shares. A controlling shareholder of VC was appointed as YBM's Chairman of the Board of Directors on September 23, 1998.

[7] On December 8, 1998, YBM brought an application in the Court of Queen's Bench to have Ernest & Young YBM Inc. appointed as the Receiver of YBM. Ernst & Young YBM Inc. was appointed as the receiver of YBM by court order (the "Receivership Order"). Following the appointment, the Receiver appointed Stikeman Elliott to act as counsel for the Receiver.

[8] On June 7, 1999, YBM, through its Receiver, pleaded guilty in the United States to a multi-object conspiracy to commit fraud (the "Guilty Plea Agreement"). In the Guilty Plea Agreement, YBM admitted to committing overt acts intended to deceive its auditors. Parente was one of those deceived auditors. Also, pursuant to the Guilty Plea Agreement, YBM agreed to cooperate with the U.S. Attorney by providing complete and accurate information. However, the provision of information to the U.S. Attorney was stated to be subject to attorney work product privilege.

[9] The fraud and guilty plea have resulted in the following litigation:

1. An as yet, uncertified class action in Ontario, in which Connor Clark is Plaintiff, which alleges that certain misrepresentations were made in a short form prospectus filed by YBM dated November 17, 1997 (the "Ontario Prospectus Class Action");

2. An as yet, uncertified class action in Ontario, asserting claims for persons in Canada who suffered losses trading YBM shares in the secondary market between March 10, 1996 and May 14, 1998 (the "Ontario General Class Action"); and

3. A consolidated class action in the United States, on behalf of all purchasers (not limited to the U.S.) of YBM common stock between January 19, 1996 and May 14, 1998, as represented by the Plaintiff's Executive Committee (the "U.S. General Class Action").

[10] Each of the Underwriters, through their counsel, wrote to the Receiver and advised of their intention to assert their contractual indemnity rights against YBM under the Underwriting Agreement. The Receiver advised the Underwriters that indemnity claims would be treated as part of the proof of claims process. The Receiver anticipates that the indemnity claims will be disallowed and if the dis-allowances are contested by the Underwriters, there will be litigation as to whether the indemnity provisions in the Underwriting Agreement are enforceable. Parente has filed a proof of claim with the Receiver.

[11] Paragraph 3(o) of the Receivership Order appointing the Receiver authorized the creation of the 3(o) Report. Ernest & Young, an affiliate of the Receiver, had certain audit and other business relationships with parties against which YBM may have potential causes of action. For this reason, the Receiver retained the law firms of Stikeman Elliott and Voorheis & Co. to assist the Receiver in the analysis of potential legal claims which YBM may have and to assist in the development of a plan to present the analysis to YBM stakeholders, subject to court direction, pursuant to section 3(o) of the Receivership Order.

[12] On October 26, 1999, the Receiver sought an Order confirming that the 3(o) Report was privileged in the hands of the Receiver and that the provision of the 3(o) Report to certain specified individuals would not constitute waiver of privilege to the 3(o) Report. Paperny J. ruled that the Receiver was permitted to provide a copy of the 3(o) Report to institutional shareholders and shareholders who were not a party to the fraudulent acts of YBM (the "Innocent Shareholders"), subject to specific terms.

[13] To ensure that privilege and confidentiality were maintained for the 3(o) Report, the October 26, 1999 Order required that the Innocent Shareholders execute an Acknowledgement of Privilege and Undertaking of Confidentiality (the "Undertaking"). The Undertaking provided that the 3(o) Report was received by the Innocent Shareholders only for the purposes of assessing and pursuing causes of action on behalf of YBM. The undertaking also expressly provides that the 3(o) Report will not be used by the receiving party, directly or indirectly, for any purpose other than evaluating potential causes of action on behalf of the estate of YBM.

[14] On January 24, 2000, the Receiver filed a Notice of Motion seeking, among other things, an Order allowing the Innocent Shareholders to provide the 3(o) Report to their employees and/or their counsel provided that those individuals were approved by the Receiver, and provided they executed and delivered an Undertaking to the Receiver.

[15] The Receiver engaged Miller Coffey Tate LLP, a firm of Certified Public Accountants and Consultants, to prepare a draft report on share activity involving YBM (the "Miller Tate Report"). As part of the January 24, 2000 Motion, the Receiver sought an Order:

> 1. Directing the Receiver to waive privilege, if any, with respect to the Miller Tate Report on the basis that the waiver is limited to that document.
>
> 2. Authorizing the Receiver to provide a copy of the Miller Tate Report to the representatives of the U.S. Attorney for the Eastern District of Pennsylvania on the basis of the express acknowledgement by the U.S. Attorney of the limited nature of the waiver.
>
> 3. Authorizing the Receiver to provide a copy of the Miller Tate Report to the Class Action Plaintiffs on terms and conditions satisfactory to the Receiver, including an

express acknowledgement of the limited nature of the waiver of privilege, the application of the doctrine of absolute and qualified privilege to the document as if produced as an expert's report in litigation and that all parties and their counsel undertake not to use the document or the information contained in it for any purposes other than those of the proceeding or proceedings specified.

[16] On June 14, 2000, a United States Bankruptcy Judge in the Eastern District of Pennsylvania modified the stay of proceedings imposed by the United States Bankruptcy Court for the Eastern District of Pennsylvania on February 1, 1999 to allow certain parties including Parente to assert claims against YBM in the U.S. General Class Action. Apparently, this decision is under appeal. Also, on July 14, 2000, the plaintiffs in the U.S. General Class Action filed a motion for an application to have the stay of proceedings against YBM lifted.

COMMON INTEREST PRIVILEGE

[17] Litigation privilege, sometimes called legal professional privilege, protects documents from disclosure during litigation provided the dominant purpose of the creation of the documents is to submit the documents to a lawyer for advice and use in current or anticipated litigation: ***Nova v. Guelph Engineering*** [1984] 3 W.W.R. 314 (Alta. C.A.). For example, a lawyer's client obtains the written opinion of an expert to give to his lawyer to further the anticipated or current litigation.

[18] Common interest privilege extends the litigation privilege where the document or information has been shared with a third party (other than the client and the lawyer) provided that third party has a common interest with the client in the same anticipated or current litigation. This general principle was first articulated in ***Buttes Gas and Oil v. Hammer (No. 3)*** [1980] 3 All E.R. 475 (C.A.) where Denning, L.J. stated that it is a privilege in aid of anticipated litigation where several person have a common interest. They independently may prepare documents for their own lawyer. The exchange of those documents among and between those having a common interest does not operate to waive the litigation privilege.

DECISION BELOW

[19] In the decision below, the learned chambers judge referred to her decision of October 25, 1999, (1999), 75 Alta. L.R. (3d) 99 (Q.B.), in which she concluded that common interest privilege may attach to documents shared by parties with common interests even if the parties were also adverse in interest in some respects and that unusual circumstances present here meant that adversarial aspects did not preclude a finding of common interest privilege. In the October 26, 1999 Order, Papemy J. directed that the Receiver be permitted to provide the 3(o) Report to the Innocent Shareholders subject to terms.

[20] Papemy J. began by reviewing the law regarding common interest privilege. She adopted the law as set out in her October 25, 1999 decision and highlighted the decisions in ***Supercom of California Ltd.*** v. ***Sovereign General Insurance Co.*** (1998) 37 O.R. (3d) 597 (Ont. Gen. Div.),

General Accident Assurance Company* v. *Chrusz (2000), 45 O.R. (3d) 321 (C.A.), and ***Western Canadian Place Ltd.* v. *Con-Force Products Ltd.*** (1997), 50 Alta. L. R. (3d) 131 (Q.B.). She concluded [at paragraph 36] "I accept the test as outlined in ***Buttes*** and refined in ***Chrusz*** and ***Supercom***. There will be a common interest where parties anticipate litigation against a common adversary or share a united front against a common foe on the same issue."

[21] She then went on to determine whether common interest privilege applied as between the Receiver and the Class Action Plaintiffs. She began by noting that since any adversity between the Receiver and the Class Action Plaintiffs was latent, they were not adverse in interest. She further found that Griffiths, National, Canaccord and Parente were adverse in interest with the Receiver since they were demanding indemnification and other benefits from the Receiver which the Receiver was assessing and might resist.

[22] The learned chambers judge concluded by holding that the Receiver had the authority and discretion to distribute the 3(o) Report.

[23] The learned chambers judge then went on to consider the issue of whether release of the Miller Tate Report to certain parties would constitute a general and wider waiver of privilege. She authorized the Receiver to release the Miller Tate Report to the U.S. Attorney without such release operating as a general waiver of the Receiver's privilege over that report. She also authorized the Receiver to release the Miller Tate Report on terms and conditions it deemed appropriate to the parties with whom it was satisfied it shared common interests against common adversaries on a particular issue.

[24] In the result, Paperny J. held that assuming, without deciding, that the 3(o) Report was privileged, common interest privilege exists among the Receiver and the Class Action Plaintiffs such that there would be no general waiver of privilege should the Receiver decide to release the 3(o) Report and therefore the Receiver was permitted to use its discretion to distribute the 3(o) Report. She also held that the Receiver was permitted to use its discretion in deciding whether to distribute the Miller Tate Report.

ISSUE

[25] The issue to be determined is whether the learned chambers judge erred in making the order as worded since it impacts the Ontario Prospectus Class Action, the Ontario General Class Action and the U.S. General Class Action. Stated another way, should the issues of common interest privilege and waiver between the Receiver and the Class Action Plaintiffs, and general waiver of privilege over the Miller Tate Report be determined only by courts in the jurisdictions in which the actions were commenced by the Class Action Plaintiffs?

ANALYSIS

(i) Nature of a Court-Ordered Receivership

[26] In determining whether the learned chambers judge erred in making the order as worded since it impacts proceedings in other jurisdictions, it is useful to note the functions, powers and obligations of a court-ordered receiver.

[27] In ***Bennett on Receiverships***, 2d ed. (Toronto: Carswell, 1999), the author [at page 1] defines a receiver as a "person who has been appointed to take possession of property belonging to a third party." One method by which a receiver may be appointed is by court order, as is the case here. The court order appointing the receiver sets out the receiver's powers and duties. In addition to the powers and duties set out in the court order, the receiver also has any powers and duties provided for in any relevant statute. In this case, the Receiver was appointed by the court pursuant to s.234 of the ***Business Corporations Act***, SA 1981, c. B-15 ("***ABCA***"), and therefore, it is bound by the powers and duties provided in the ***ABCA***, in addition to those set out in the Receivership Order.

[28] Paragraph 1 of the Receivership Order provided for the appointment of the Receiver and its primary duties. It appointed the Receiver with respect to the present and future assets, property and undertaking of YBM wherever situate with authority to receive, preserve, protect realize and sell or otherwise dispose of the property and at its discretion, to oversee the operation of YBM. Paragraph 3 set out specific powers that the Receiver may exercise.

[29] It is common for a Receivership Order to contain a clause empowering it to make applications to the court for advice and direction. Paragraph 23 of the Receivership Order authorizes the Receiver to apply to the court for advice and direction regarding the exercise of its powers and duties under the Receivership Order. Paragraph 3(o) specifically permits the Receiver to seek the direction of the court regarding a mechanism and methodology for releasing the 3(o) Report to relevant stakeholders on a confidential basis.

[30] In ***Bennett on Receiverships, supra***, the author notes [at 166] that a court appointed receiver as an officer of the court, "must discharge its duties properly and is afforded protection on any motion for advice and direction." He describes the scope of the power of the receiver to apply to the court for advice and directions as follows at page 209:

> [a] receiver may initiate on its own behalf a motion for advice and directions if it relates to the receiver's administration, the powers and performance of duties including custody of assets, their disposition and approval of settlements. ... [I]f a motion is brought for advice and direction where the court is requested to adjudicate a dispute between the receiver and some third party, the court may turn the motion for directions into a substantive motion since the receiver is taking an adversarial position.

[31] The purpose behind granting a receiver the ability to apply to the court for advice and direction was noted in ***National Trust Co. v. Christian Community of Universal Brotherhood,*** [1941] S.C.R. 601. In that case, a court appointed receiver applied to the court under the ***Farmer's Creditors Arrangement Act*** for advice and direction with respect to whether it could accept a proposal. In the course of its judgment, the Supreme Court of Canada considered the purpose of a procedure which allows a receiver to apply to the court for advice and direction. At 613, the Court stated:

> [t]he purpose of the procedure is to enable the Official Receiver to obtain directions as to his own acts in the course of administration for his own protection and for the orderly conduct of the administration; it is not its purpose to empower the Court to make binding orders affecting the rights of third persons who are not parties to the proceeding.
>
> It does not follow, of course, that on an application for directions, when all parties are present, questions of right and jurisdiction may never be determined. The County Court has jurisdiction, speaking generally, to determine such questions in a summary way and the hearing of an application for directions in a particular case may be a convenient occasion for dealing with such questions, and there can be no objection to such a course when proper care is taken to see that everybody concerned is fully represented and has a full opportunity of bringing out the facts and presenting his case.

[emphasis added]

[32] In summary, a receiver is given the ability to apply to the court for advice and direction to ensure proper and timely administration of the estate, as well as to protect itself through court authorization of certain actions it wants to take in the course of the fulfilment of its duties under the receivership order. The court may also make substantive rulings in circumstances where the receiver takes an adversarial position against a third party where all affected parties have had the opportunity to present their case.

(ii) Exercise of the Power to Give Advice and Direction to a Receiver

[33] Although a receiver may be empowered to seek the advice and direction of the court, there are circumstances where the court should decline to provide it.

1. Impact on Proceedings in Another Jurisdiction

[34] One circumstance in which a court should decline to provide advice and direction is when that advice and direction would substantively impact proceedings in another jurisdiction which are properly before the court in that other jurisdiction. That circumstance exists here. The court should refuse to provide advice and direction on matters that do not directly relate to the receivership. The receiver and other parties seeking advice and direction should apply in the

court where the proceedings have been commenced for rulings as to matters that relate directly and substantively to those proceedings.

[35] In ***Re Abacus Cities Ltd.*** (1981), 128 D.L.R. (3d) 566 (Alta. Q.B.), the Attorney-General of Ontario brought a prosecution in Ontario against the employee of a bankrupt corporation, an Alberta company. The Attorney-General asked the trustee in bankruptcy to waive privilege to certain communications between the company and its solicitor. The trustee made an application for advice and direction to the Court of Queen's Bench of Alberta. MacDonald J. authorized the trustee to waive privilege if there would be no prejudice to the interests it represented. However, he refused to give advice and direction as to whether any privilege actually existed. At page 280, he stated

> . . . <u>this court can make no decision with respect to the proceedings in Ontario nor with respect to the admissibility of evidence and neither with respect to the existence or non-existence of solicitor-client privilege. All this is within the jurisdiction of the court seized with the hearing</u>. The only matter that it may be proper for this court to consider is the attitude the trustee should take with respect to waiver should it be determined in Ontario that communications between the solicitors and the bankrupt are subject to privilege in proceedings against Mr. Rogers.
>
> [emphasis added]

[36] MacDonald J. concluded at 284 by stating:

> I do not consider that an order should go directing the trustee to waive privilege as there may be circumstances of which this court has no knowledge, but <u>an order will go authorizing the trustee to waive privilege and suggesting he do so, if he has no reason to believe that such waiver would be to the prejudice of the interests that he represents</u>.
>
> [emphasis added]

[37] Paperny J.'s April 17, 2000 Order, in part, stated as follows:

> 1. The Receiver is authorized but not directed that in its discretion, and on terms and conditions the Receiver deems appropriate, it may waive privilege, if any, with respect to the Miller Tate Share Report <u>on the basis that the waiver of privilege is limited to that document and is not a general or wider waiver of privilege</u>, and it may provide the Report to representatives of the U.S. Attorney for the Eastern District of Pennsylvania if the Receiver considers that to do so would be in the best interests of the YBM estate as a whole.

> 2. The Receiver is in common interest privilege with the plaintiffs in the Ontario Prospectus Class Action, the Ontario General Class Action and the U.S. Class Action, and the Receiver may in its discretion if it considers to do so would be for the benefit of the receivership estate, and without waiving privilege if it exists, provide the 3(o) Report to counsel for those parties, on such terms and conditions the Receiver deems appropriate, including without limitation the condition that counsel execute and deliver to the Receiver the Acknowledgement of privilege and Undertaking of Confidentiality substantially in the form required by the Order of October 26, 1999 as amended for the particular recipient in a manner satisfactory to the Receiver prior to receipt of the Report.
>
> [emphasis supplied]

[38] It is clear that Paperny J.'s order went further than merely authorizing the Receiver to release the reports in question. She held that release of the Miller Tate Report will not constitute waiver to the documents that underlie that report, and declared the Receiver is in common interest privilege with the Class Action Plaintiffs and therefore it may release the 3(o) Report to the Class Action Plaintiffs without waiving privilege in respect of it. She made declaratory orders which determine the existence or non-existence of common interest privilege and the conditions which prevent a general waiver of privilege. The April 17, 2000 Order is not merely permissive. It may be used, or an attempt may be made to use it, authoritatively, in the proceedings in Ontario and Pennsylvania.

[39] The facts in ***Abacus*** and the present case are not strictly analogous. In ***Abacus***, the trustee in bankruptcy applied for advice and direction which did not relate to the bankruptcy proceedings in Alberta but rather arose in response to a prosecution in Ontario. MacDonald, J. described the nature of the Ontario prosecutor's request in respect of charges brought in Ontario against a former officer and employee of the bankrupt, Kenneth D. Rogers at p.280:

> Counsel for the Attorney General of Ontario engaged to conduct the preliminary hearing into the charges has asked the trustee whether or not the trustee is prepared to waive privilege in connection with certain communications between the then solicitors for the bankrupt and the bankrupt, in order that the communications may be introduced in evidence at the preliminary hearings.

[40] Here, the Receiver's application relates to an Alberta receivership, but the questions of whether common interest privilege exists between the Receiver and the Class Action Plaintiffs, and whether release of the Miller Tate Report constitutes a general waiver relate entirely to the actions in Ontario and Pennsylvania. No doubt the questions are of great concern to the Receiver in assessing whether or not to release the reports, but they do not relate to the receivership as it is

being carried out by the Receiver in Alberta. These questions relate to the personal actions that the shareholders of YBM have against various parties as a result of the acts and omissions of YBM and others. The reason that the Receiver and the Class Actions Plaintiffs applied to the Alberta court for a ruling as to whether the Receiver could release the reports to the Class Action Plaintiffs was so that the reports could be released without waiving privilege. The purpose of the application is to allow the Receiver to release to the report without waiver of any privilege. It is clear that the Receiver and the Class Action Plaintiffs expect the April 17, 2000 Order and the Reasons of the learned chambers judge to be used in the Ontario and Pennsylvania proceedings. If the existence of common interest privilege and waiver were to be put in issue in Ontario and Pennsylvania, they may argue, among other things, that the issue has been decided in Alberta and therefore the matter is ***res judicata***.

[41] The question of whether the Receiver is authorized to release the reports is properly before this court as it relates to the receivership. To the extent that the learned chambers judge authorized the Receiver to release the reports to certain parties if to do so would be in the best interests of YBM's estate, her order was properly made. However, she went on to make declaratory orders with respect to existence of common interest privilege and the nature of the waiver of privilege now contemplated to relate only to the actions in Ontario and Pennsylvania. In ***Abacus***, the court recognized the notion that it should be the court that will actually determine the outcome of an action that should determine the existence and status of any privilege alleged.

[42] No convincing reason has been put forward as to why the Receiver and the Class Action Plaintiffs could not apply to the courts in Ontario and Pennsylvania for a determination as to whether there is common interest privilege and whether release of the Miller Tate Report would constitute a general waiver. It was argued that the Receiver cannot do it because it is not a party to those proceedings. It was not suggested the Receiver could not participate if it chose to do so, particularly if the Class Action Plaintiffs bring the application.

[43] Also, an issue arises as to whether a court in Ontario or Pennsylvania is bound to or will in fact obey an order of the Alberta court. Although arguments of abuse of process, estoppel and res judicata could be made to support upholding the decision of the Alberta court, the Ontario and Pennsylvania courts may determine they are masters of their own procedure, unfettered by a decision of an Alberta court.

[44] An Alberta court generally should not make orders that it cannot enforce. The declaratory orders made are for use only outside this jurisdiction. An Alberta court should decline to make such orders. The courts which have proper jurisdiction over the relevant proceeding should deal with these issues.

[45] If the Receiver wants to provide a copy of the 3(o) Report to the Class Action Plaintiffs without waiving any privilege that may attach to that report or release the Miller Tate Report without such release constituting a general waiver, it should seek such an order from the courts

in the jurisdictions in which the actions have been brought, or await the Class Action Plaintiffs seeking and obtaining the ruling.

2. Legal Advice

[46] Another circumstance in which the court should decline to provide directions is when the receiver is effectively using the court as a legal adviser. That circumstance is present here. The Receiver has its own counsel to whom it can turn for legal advice and should not turn to the court for such advice.

[47] In ***Re Canadian Steering Wheel Co.*** (1921), 21 O.W.N. 15 (Ont. S.C.), Canadian Steering Wheel Co. made an assignment into bankruptcy. Section 18(d) of the ***Bankruptcy Act*** allowed a trustee to apply to the court for direction regarding the administration of the estate of a bankrupt. Under the ***Act***, any directions given by the court were binding and justified the subsequent consonant action of the trustee. The trustee of the estate made an ***ex parte*** application to the court for direction regarding the status of certain officers of the company and the validity of the assignment. The court refused to provide directions, stating at page 16 that "[c]lause (d) was not by any means intended to turn the Court into a sort of solicitor for the trustees to whom they might resort for advice in an informal way whenever they happened to be in doubt as to what they should do." The court went on to state that "on the affidavits filed, and in the absence of notice, it did not seem proper or possible to give the trustee any instructions as to what in the circumstances he should do or refrain from doing."

[48] In ***Bennett on Receiverships***, the author considered receivership under the ***Bankruptcy and Insolvency Act***, S.C. 1992, c. 27 (the "***BIA***"). He considered s. 249 of the ***BIA*** which authorizes a receiver to apply to the court for directions in relation to provisions of the ***BIA***. At 698, he states:

> However, the court cannot be turned into a forum for giving advice nor should the court decide substantive law matters between the parties. In these situations, the court is directing its own officer. If there are substantive issues to be tried, the receiver should not apply for directions but rather commence an action or request a trial of an issue.

[49] As noted, the Receiver retained independent counsel from which it receives advice.

(iii) Other Discretionary Powers

[50] A party may make an application to the court for advice and directions. In the normal course, such applications are made by way of notice of motion pursuant to Part 33 of the ***Alberta Rules of Court***. Under the ***Alberta Rules of Court***, a party may apply to the court for advice and direction by way of a notice of motion in circumstances where there are no material facts in dispute between the parties. The matter is put to the court on the basis that the facts are as stated in the motion and on that given set of facts, advice or direction is sought. Part 33 of the ***Rules of***

Court sets out the rules relating to applications made by way of notice of motion. Rule 409 authorizes the court to dispose of applications in a summary manner while Rule 410 sets out the proceedings which may be commenced by way of originating notice. Under Rule 410(e), a proceeding may be commenced by way of originating notice where there are no material facts in dispute and the rights of the parties depend upon the construction of a written instrument or legislation.

[51] However, the courts have recognized that there are limits on when they should provide advice and directions under the Part 33 Rules. In ***Edmonton Telephones Corp. v. Stephenson*** (1994), 24 Alta. L.R. (3d) 96 (Q.B.), aff'd (1994), 26 Alta. L. R. (3d) 33 (C.A.), leave to appeal dismissed, [1995] S.C.C.A No. 39, the applicant corporation supported by the respondent City sought certain declarations regarding the City's relationship with the corporation pursuant to s. 410(e) of the ***Alberta Rules of Court***. Ritter J. summarized the general principles that apply when a party makes an application for advice and direction from the court as:

> 1. Rule 410(e) is a discretionary rule which should be exercised with restraint.
>
> 2. The question must be real and not a theoretical question.
>
> 3. The person raising it must have a real interest to raise it.
>
> 4. The person raising the question must be able to secure a proper contradictor, that is to say, someone presently existing who has a true interest to oppose the declaration sought.
>
> 5. Once the foregoing considerations have been met, the Court should endeavour to make a practical determination as to whether there is sufficient likelihood of relevant evidence being admitted at trial which will significantly assist the Court in interpreting the words of the document or documents to warrant the expense and delay of a full trial process.
>
> 6. Voluminous evidence will not take the matter outside Rule 410(e) by itself. If there are no material facts in dispute, then the matter may be brought to the Court by virtue of affidavit or affidavits.

[52] The court is also empowered to make a declaratory judgment under s. 11 of the ***Judicature Act***, R.S.A. 1980 c. J-1. In ***The Law of Declaratory Judgments***, 2d ed. (Toronto: Carswell, 1988), Lazar Sarna at page 1 defines a declaratory judgment as a judicial statement confirming or denying legal rights.

[53] Section 11 is often used in conjunction with Rule 410(e) so that the court may make a declaration as to the rights of parties in a summary way where there are no material facts in dispute and the rights of the parties depend upon the construction of a written instrument. See ***Oracle Resources*** v. ***Dome Petroleum Ltd.*** (1988), 86 A.R. 281 (Q.B.).

[54] Section 11 provides that

> [n]o proceeding is open to objection on the ground that a judgment or order sought is declaratory only, and the Court may make binding declarations of right whether or not any consequential relief is or could be claimed.

[55] The power of the court to make a declaratory judgment is limited only to the proper exercise of its discretion. This Court has recognized that its discretion to make declaratory judgments is subject to certain restrictions. In ***McMurray Homes Ltd.*** v. ***New Town of Fort McMurray***, [1976] 5. W.W.R. 442 (Alta. C.A.), this Court set out parameters for the exercise of its discretion under s. 11 of the *Judicature Act*. The Court underscored the fact that the exercise of the power to make declaratory judgments was subject to restraints and noted the comments of Estey J. in ***Hugh W. Simmons Ltd.*** v. ***Foster***, [1955] S.C.R. 324 where he considered the English equivalent of s. 11. Estey J. stated at page 331 that the power to grant a declaratory judgment was discretionary and should be exercised with "great care and caution." The Court cited 19 Hals. (2d) 215, para. 512, which, in part, states that

> [t]he power to make a declaratory judgment is a discretionary one; the discretion should be exercised with care and caution, and with regard to all the circumstances of the case, and must be exercised judicially. <u>The power to make a declaration will not be exercised where the relief claimed would be unlawful or unconstitutional, or inequitable for the Court to grant, or contrary to the accepted principles upon which the Court exercises its jurisdiction. The Court will not make a declaratory judgment where the declaration would be useless or embarrassing, or where an adequate alternative remedy is available</u>.

[emphasis added]

[56] It is clear that under the ***Rules of Court*** and s. 11 of the ***Judicature Act***, the courts have recognized the discretionary nature of the powers given therein and have constructed tests accordingly which limits their ability to make such orders. The courts have balanced the powers that have been given to them by the Legislature with the practicality of making such orders in particular circumstances.

[57] In the same way that the courts have recognized the limits on their powers to give advice and directions and make declaratory judgments, the courts should recognize that there are limits to the circumstances in which they should give advice and directions to receivers.

DECISION AND CONCLUSION

[58] The chambers judge erred in making the order as worded. She should have declined to give advice and direction as to the existence or non-existence of common interest privilege and whether release of the Miller Tate Report constituted a general wider waiver. These are matters that should properly be determined by the courts in Ontario and Pennsylvania, the jurisdictions in which the three actions have been brought.

[59] A receiver may ask the court for direction as to waiving privilege, if any, and for permission and direction to distribute the documents in question.

[60] Here, the authorization for the Receiver to waive privilege, if any, with respect to the Miller Tate Report and the 3(o) report was a valid exercise of the discretion of the learned chambers judge. Similarly, the authorization of the Receiver to provide the 3(o) Report to counsel for the Class Action Plaintiffs on such terms as the Receiver thinks appropriate, was a reasonable exercise of the chambers judge's discretion.

[61] The learned chambers judge ought not to have made any declaration as to the existence of common interest privilege, nor the legal effect or extent of any waiver.

[62] The appeal is allowed to this extent and the order varied accordingly.

APPEAL HEARD on July 18, 2000

REASONS FILED at Calgary, Alberta,
this 23rd day of October, 2000

WITTMANN, J.A.

I concur:

McFADYEN, J.A.

I concur: ______________________________
SULATYCKY, J.A.

TAB 2

Mary Danyluk *Appellant*

v.

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

INDEXED AS: DANYLUK *v.* AINSWORTH TECHNOLOGIES INC.

Neutral citation: 2001 SCC 44.

File No.: 27118.

2000: October 31; 2001: July 12.

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

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

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

In 1993, an employee became involved in a dispute with her employer over unpaid commissions. No agreement was reached, and the employee filed a complaint under the *Employment Standards Act* ("ESA") seeking

Mary Danyluk *Appelante*

c.

Ainsworth Technologies Inc., Ainsworth Electric Co. Limited, F. Jack Purchase, Paul S. Gooderham, Jack A. Taylor, Ross A. Pool, Donald W. Roberts, Timothy I. Pryor, Clifford J. Ainsworth, John F. Ainsworth, Kenneth D. Ainsworth, Melville O'Donohue, Donald J. Hawthorne, William I. Welsh et Joseph McBride Watson *Intimés*

RÉPERTORIÉ : DANYLUK *c.* AINSWORTH TECHNOLOGIES INC.

Référence neutre : 2001 CSC 44.

Nº du greffe : 27118.

2000 : 31 octobre; 2001 : 12 juillet.

Présents : Le juge en chef McLachlin et les juges Iacobucci, Major, Bastarache, Binnie, Arbour et LeBel.

EN APPEL DE LA COUR D'APPEL DE L'ONTARIO

Droit administratif — Préclusion découlant d'une question déjà tranchée — Plainte déposée par une employée contre son employeur en vertu de la Loi sur les normes de l'emploi et réclamant le versement de salaire et commissions impayés — Action en dommages-intérêts pour congédiement injustifié et pour salaire et commissions impayés intentée subséquemment par l'employée contre l'employeur — Rejet de la plainte par l'agente des normes d'emploi — Préclusion découlant d'une question déjà tranchée plaidée par l'employeur à l'égard de la réclamation pour salaire et commissions impayés — L'inobservation de l'équité procédurale par l'agente des normes dans sa décision sur la plainte de l'employée empêche-t-elle l'application de cette doctrine? — Les conditions d'application de la préclusion découlant d'une question déjà tranchée sont-elles réunies? — Dans l'affirmative, notre Cour doit-elle exercer son pouvoir discrétionnaire et refuser d'appliquer cette doctrine?

En 1993, un différend relatif à des commissions impayées a opposé une employée et son employeur. Aucune entente n'est intervenue et l'employée a déposé, en vertu de la *Loi sur les normes d'emploi* (la « LNE »), unpaid wages, including commissions. The employer rejected the claim for commissions and eventually took the position that the employee had resigned. An employment standards officer spoke with the employee by telephone and met with her for about an hour. Before the decision was made, the employee commenced a court action claiming damages for wrongful dismissal and the unpaid wages and commissions. The ESA proceedings continued, but the employee was not made aware of the employer's submissions in the ESA claim or given an opportunity to respond to them. The ESA officer rejected the employee's claim and ordered the employer to pay her $2,354.55, representing two weeks' pay in lieu of notice. She advised the employer of her decision and, 10 days later, notified the employee. Although she had no appeal as of right, the employee was entitled to apply under the ESA for a statutory review of this decision. She elected not to do so and carried on with her wrongful dismissal action. The employer moved to strike the part of the statement of claim that overlapped the ESA proceeding. The motions judge considered the ESA decision to be final and concluded that the claim for unpaid wages and commissions was barred by issue estoppel. The Court of Appeal affirmed the decision.

Held: The appeal should be allowed.

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

une plainte dans laquelle elle réclamait le versement de salaire impayé, y compris des commissions. L'employeur a rejeté sa demande de commissions et a finalement considéré qu'elle avait remis sa démission. Une agente des normes d'emploi a eu un entretien téléphonique avec l'employée, qu'elle a ensuite rencontrée pendant environ une heure. Avant que la décision soit rendue, l'employée a intenté une action en dommages-intérêts pour congédiement injustifié dans laquelle elle demandait le paiement du salaire et des commissions. La procédure prévue par la LNE a suivi son cours, mais l'employée n'a pas été avisée des arguments invoqués par l'employeur au sujet de sa plainte et elle n'a pas eu la possibilité d'y répondre. L'agente des normes d'emploi a rejeté la réclamation de l'employée et a ordonné à l'employeur de verser à cette dernière la somme de 2 354,55 $, soit deux semaines de salaire, à titre d'indemnité de préavis. Elle a informé l'employeur de sa décision et, 10 jours plus tard, elle en a avisé l'employée. L'employée ne pouvait interjeter appel de plein droit mais elle avait, en vertu de la LNE, le droit de demander la révision de cette décision. Elle a choisi de ne pas le faire et a plutôt poursuivi son action en dommages-intérêts pour congédiement injustifié. L'employeur a présenté une requête en radiation de la partie de la déclaration qui recoupait la procédure engagée en vertu de la LNE. Le juge des requêtes a considéré que la décision fondée sur la LNE était définitive et il a conclu que la préclusion découlant d'une question déjà tranchée faisait obstacle à la réclamation pour salaire et commissions impayés. La Cour d'appel a confirmé la décision.

Arrêt : Le pourvoi est accueilli.

Bien que, en règle générale, la préclusion découlant d'une question déjà tranchée (*issue estoppel*) puisse être invoquée pour empêcher une partie déboutée de saisir les cours de justice d'une question qu'elle a déjà plaidée sans succès devant un tribunal administratif, il ne s'agit pas en l'espèce d'une affaire où il convient d'appliquer cette doctrine. Le caractère définitif des instances est une considération impérieuse et, en règle générale, une décision judiciaire devrait trancher les questions litigieuses de manière définitive, tant qu'elle n'est pas infirmée en appel. Toutefois, la préclusion est une doctrine d'intérêt public qui tend à favoriser les intérêts de la justice. Dans les cas où, comme en l'espèce, par suite d'une décision administrative prise à l'issue d'une procédure qui était manifestement inappropriée et inéquitable, l'application de cette doctrine empêche le recours aux cours de justice, il convient de réexaminer certains principes fondamentaux.

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

Les conditions d'application de la préclusion découlant d'une question déjà tranchée sont au nombre de trois : (1) que la même question ait été décidée dans une procédure antérieure; (2) que la décision judiciaire antérieure soit définitive; (3) que les parties ou leurs ayants droit soient les mêmes dans chacune des instances. Si le requérant réussit à établir l'existence des conditions d'application, la cour doit ensuite se demander, dans l'exercice de son pouvoir discrétionnaire, si cette forme de préclusion devrait être appliquée.

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

Suivant ces conditions, la décision antérieure doit être une décision judiciaire. En l'espèce, la décision fondée sur la LNE était judiciaire. Premièrement, le décideur administratif ayant rendu la décision peut être investi d'un pouvoir juridictionnel et il est capable d'exercer ce pouvoir. Deuxièmement, sur le plan juridique, la décision devait être prise judiciairement. Bien que les agents des normes d'emploi aient recours à des procédures plus souples que celles des cours de justice, leurs décisions juridictionnelles doivent s'appuyer sur des conclusions de fait et sur l'application à ces faits d'une norme juridique objective.

The appellant denies the applicability of issue estoppel because, as found by the Court of Appeal, the ESA decision was taken without proper notice to the appellant and she was not given an opportunity to meet the employer's case. It is clear that an administrative decision which is made without jurisdiction from the outset cannot form the basis of an estoppel. Where an administrative officer or tribunal initially possessed the jurisdiction to make a decision in a judicial manner but erred in the exercise of that jurisdiction, the resulting decision is nevertheless capable of forming the basis of an estoppel. Alleged errors in carrying out the mandate are matters to be considered by the court in the exercise of its discretion. This result makes the principle governing estoppel consistent with the law governing judicial review in *Harelkin* and collateral attack in *Maybrun*.

L'appelante conteste l'application de la préclusion découlant d'une question déjà tranchée parce que, conformément à la conclusion de la Cour d'appel, la décision fondée sur la LNE a été rendue sans qu'on donne à l'appelante un préavis suffisant et la possibilité de répondre aux prétentions de l'employeur. Il est clair qu'une décision administrative qui a au départ été prise sans la compétence requise ne peut fonder l'application de la préclusion. Lorsque le décideur administratif — fonctionnaire ou tribunal — avait initialement compétence pour rendre une décision de manière judiciaire, mais a commis une erreur dans l'exercice de cette compétence, la décision rendue est néanmoins susceptible de fonder l'application de la préclusion. Les erreurs qui auraient été commises dans l'accomplissement du mandat doivent être prises en considération par la cour de justice dans l'exercice de son pouvoir discrétionnaire. Cela a pour effet d'assurer la conformité du principe régissant la préclusion avec les règles de droit relatives au contrôle judiciaire énoncées dans l'arrêt *Harelkin* et celles relatives aux contestations indirectes énoncées dans l'arrêt *Maybrun*.

In this case, the pre-conditions for issue estoppel have been met: the same issue is raised in both proceedings, the decision of the ESA officer was final for the purposes of the Act since neither the employer nor the employee took advantage of the internal review procedure, and the parties are identical. The Court must therefore decide whether to refuse to apply estoppel as a mat-

En l'espèce, les conditions d'application de la préclusion découlant d'une question déjà tranchée sont réunies : la même question est à l'origine des deux instances, la décision de l'agente des normes avait un caractère définitif pour l'application de la Loi en raison du fait que ni l'employeur ni l'employée ne se sont prévalus du mécanisme de révision interne, et les parties ter of discretion. Here this Court is entitled to intervene because the lower courts committed an error of principle in failing to address the issue of the discretion. The list of factors to be considered with respect to its exercise is open. The objective is to ensure that the operation of issue estoppel promotes the orderly administration of justice, but not at the cost of real injustice in the particular case. The factors relevant to this case include the wording of the statute from which the power to issue the administrative order derives, the purpose of the legislation, the availability of an appeal, the safeguards available to the parties in the administrative procedure, the expertise of the administrative decision maker, the circumstances giving rise to the prior administrative proceeding and, the most important factor, the potential injustice. On considering the cumulative effect of the foregoing factors, the Court in its discretion should refuse to apply issue estoppel in this case. The stubborn fact remains that the employee's claim to commissions worth $300,000 has simply never been properly considered and adjudicated.

sont les mêmes. La Cour doit par conséquent décider si elle doit exercer son pouvoir discrétionnaire et refuser d'appliquer la préclusion. En l'espèce, notre Cour a le droit d'intervenir puisque les tribunaux de juridiction inférieure ont commis une erreur de principe en omettant d'examiner la question de l'exercice du pouvoir discrétionnaire. La liste des facteurs à considérer pour l'exercice de ce pouvoir n'est pas exhaustive. L'objectif est de faire en sorte que l'application de la préclusion découlant d'une question déjà tranchée favorise l'administration ordonnée de la justice, mais pas au prix d'une injustice dans une affaire donnée. Parmi les facteurs pertinents en l'espèce, mentionnons : le libellé du texte de loi accordant le pouvoir de rendre l'ordonnance administrative, l'objet du texte de la loi, l'existence d'un droit d'appel, les garanties offertes aux parties dans le cadre de l'instance administrative, l'expertise du décideur administratif, les circonstances ayant donné naissance à l'instance administrative initiale et, facteur le plus important, le risque d'injustice. Vu l'effet cumulatif des facteurs susmentionnés, la Cour, dans l'exercice de son pouvoir discrétionnaire, doit refuser d'appliquer en l'espèce la préclusion découlant d'une question déjà tranchée. En effet, le fait demeure que la réclamation de l'employée visant des commissions totalisant 300 000 $ n'a tout simplement jamais été examinée et tranchée adéquatement.

Cases Cited

Considered: *Angle v. Minister of National Revenue*, [1975] 2 S.C.R. 248; **disapproved in part:** *Rasanen v. Rosemount Instruments Ltd.* (1994), 17 O.R. (3d) 267; **referred to:** *Re Downing and Graydon* (1978), 21 O.R. (2d) 292; *Farwell v. The Queen* (1894), 22 S.C.R. 553; *Wilson v. The Queen*, [1983] 2 S.C.R. 594; *R. v. Litchfield*, [1993] 4 S.C.R. 333; *R. v. Sarson*, [1996] 2 S.C.R. 223; *Robinson v. McQuaid* (1854), 1 P.E.I.R. 103; *Bell v. Miller* (1862), 9 Gr. 385; *Raison v. Fenwick* (1981), 120 D.L.R. (3d) 622; *Wong v. Shell Canada Ltd.* (1995), 15 C.C.E.L. (2d) 182; *Machin v. Tomlinson* (2000), 194 D.L.R. (4th) 326; *Hamelin v. Davis* (1996), 18 B.C.L.R. (3d) 112; *Thrasyvoulou v. Environment Secretary*, [1990] 2 A.C. 273; *R. v. Consolidated Maybrun Mines Ltd.*, [1998] 1 S.C.R. 706; *McIntosh v. Parent*, [1924] 4 D.L.R. 420; *British Columbia (Minister of Forests) v. Bugbusters Pest Management Inc.* (1998), 50 B.C.L.R. (3d) 1; *Schweneke v. Ontario* (2000), 47 O.R. (3d) 97; *Braithwaite v. Nova Scotia Public Service Long Term Disability Plan Trust Fund* (1999), 176 N.S.R. (2d) 173; *Guay v. Lafleur*, [1965] S.C.R. 12; *Thoday v. Thoday*, [1964] P. 181; *Machado*

Jurisprudence

Arrêt examiné : *Angle c. Ministre du Revenu national*, [1975] 2 R.C.S. 248; **arrêt critiqué en partie :** *Rasanen c. Rosemount Instruments Ltd.* (1994), 17 O.R. (3d) 267; **arrêts mentionnés :** *Re Downing and Graydon* (1978), 21 O.R. (2d) 292; *Farwell c. La Reine* (1894), 22 R.C.S. 553; *Wilson c. La Reine*, [1983] 2 R.C.S. 594; *R. c. Litchfield*, [1993] 4 R.C.S. 333; *R. c. Sarson*, [1996] 2 R.C.S. 223; *Robinson c. McQuaid* (1854), 1 P.E.I.R. 103; *Bell c. Miller* (1862), 9 Gr. 385; *Raison c. Fenwick* (1981), 120 D.L.R. (3d) 622; *Wong c. Shell Canada Ltd.* (1995), 15 C.C.E.L. (2d) 182; *Machin c. Tomlinson* (2000), 194 D.L.R. (4th) 326; *Hamelin c. Davis* (1996), 18 B.C.L.R. (3d) 112; *Thrasyvoulou c. Environment Secretary*, [1990] 2 A.C. 273; *R. c. Consolidated Maybrun Mines Ltd.*, [1998] 1 R.C.S. 706; *McIntosh c. Parent*, [1924] 4 D.L.R. 420; *British Columbia (Minister of Forests) c. Bugbusters Pest Management Inc.* (1998), 50 B.C.L.R. (3d) 1; *Schweneke c. Ontario* (2000), 47 O.R. (3d) 97; *Braithwaite c. Nova Scotia Public Service Long Term Disability Plan Trust Fund* (1999), 176 N.S.R. (2d) 173; *Guay c. Lafleur*, [1965] R.C.S. 12; *Thoday c. Thoday*, *v. Pratt & Whitney Canada Inc.* (1995), 12 C.C.E.L. (2d) 132; *Randhawa v. Everest & Jennings Canadian Ltd.* (1996), 22 C.C.E.L. (2d) 19; *Heynen v. Frito-Lay Canada Ltd.* (1997), 32 C.C.E.L. (2d) 183; *Perez v. GE Capital Technology Management Services Canada Inc.* (1999), 47 C.C.E.L. (2d) 145; *Munyal v. Sears Canada Inc.* (1997), 29 C.C.E.L. (2d) 58; *Alderman v. North Shore Studio Management Ltd.*, [1997] 5 W.W.R. 535; *R. v. Nat Bell Liquors Ltd.*, [1922] 2 A.C. 128; *Harelkin v. University of Regina*, [1979] 2 S.C.R. 561; *Poucher v. Wilkins* (1915), 33 O.L.R. 125; *Minott v. O'Shanter Development Co.* (1999), 42 O.R. (3d) 321; *Saskatoon Credit Union Ltd. v. Central Park Ent. Ltd.* (1988), 22 B.C.L.R. (2d) 89; *General Motors of Canada Ltd. v. Naken*, [1983] 1 S.C.R. 72; *Arnold v. National Westminster Bank plc*, [1991] 3 All E.R. 41; *Susan Shoe Industries Ltd. v. Ricciardi* (1994), 18 O.R. (3d) 660; *Iron v. Saskatchewan (Minister of the Environment & Public Safety)*, [1993] 6 W.W.R. 1.

Statutes and Regulations Cited

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

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

Employment Standards Improvement Act, 1996, S.O. 1996, c. 23, s. 19(1).

O. Reg. 626/00, s. 1(1).

Authors Cited

American Law Institute. *Restatement of the Law, Second: Judgments 2d*, vol. 2. St. Paul, Minn.: American Law Institute Publishers, 1982.

Brown, Donald J. M., and John M. Evans. *Judicial Review of Administrative Action in Canada*, vol. 2. Toronto: Canvasback, 1998 (loose-leaf updated 2001, release 2).

Handley, K. R. "Res Judicata: General Principles and Recent Developments" (1999), 18 *Aust. Bar Rev.* 214.

Holmested, George Smith, and Garry D. Watson. *Ontario Civil Procedure*, vol. 3 Supp. Toronto: Carswell, 1984 (loose-leaf updated 2000, release 3).

[1964] P. 181; *Machado c. Pratt & Whitney Canada Inc.* (1995), 12 C.C.E.L. (2d) 132; *Randhawa c. Everest & Jennings Canadian Ltd.* (1996), 22 C.C.E.L. (2d) 19; *Heynen c. Frito-Lay Canada Ltd.* (1997), 32 C.C.E.L. (2d) 183; *Perez c. GE Capital Technology Management Services Canada Inc.* (1999), 47 C.C.E.L. (2d) 145; *Munyal c. Sears Canada Inc.* (1997), 29 C.C.E.L. (2d) 58; *Alderman c. North Shore Studio Management Ltd.*, [1997] 5 W.W.R. 535; *R. c. Nat Bell Liquors Ltd.*, [1922] 2 A.C. 128; *Harelkin c. Université de Regina*, [1979] 2 R.C.S. 561; *Poucher c. Wilkins* (1915), 33 O.L.R. 125; *Minott c. O'Shanter Development Co.* (1999), 42 O.R. (3d) 321; *Saskatoon Credit Union Ltd. c. Central Park Ent. Ltd.* (1988), 22 B.C.L.R. (2d) 89; *General Motors of Canada Ltd. c. Naken*, [1983] 1 R.C.S. 72; *Arnold c. National Westminster Bank plc*, [1991] 3 All E.R. 41; *Susan Shoe Industries Ltd. c. Ricciardi* (1994), 18 O.R. (3d) 660; *Iron c. Saskatchewan (Minister of the Environment & Public Safety)*, [1993] 6 W.W.R. 1.

Lois et règlements cités

Loi de 1996 sur l'amélioration des normes d'emploi, L.O. 1996, ch. 23, art. 19(1).

Loi sur les normes d'emploi, L.R.O. 1990, ch. E.14, art. 1 « salaire », 2(2), 6, 65(1)a), b), c) [abr. & rempl. 1991, ch. 16 (suppl.), art. 9(1)], (7) [aj. *idem*, art. 9(2)], 67(1) [mod. *idem*, art. 10(1)], (2) [abr. & rempl. *idem*, art. 10(2)], (3) [aj. *idem*], (5) [*idem*], (7) [*idem*], 68(1) [mod. *idem*, art. 11(1); mod. 1991, ch. 5, art. 16; mod. 1993, ch. 27, ann.], (3) [abr. & rempl. 1991, ch. 16 (suppl.), art. 11(2)], (7).

Loi sur les tribunaux judiciaires, L.R.O. 1990, ch. C.43, art. 23(1).

Règl. de l'Ont. 626/00, art. 1(1).

Doctrine citée

American Law Institute. *Restatement of the Law, Second : Judgments 2d*, vol. 2. St. Paul, Minn. : American Law Institute Publishers, 1982.

Brown, Donald J. M., and John M. Evans. *Judicial Review of Administrative Action in Canada*, vol. 2. Toronto : Canvasback, 1998 (loose-leaf updated 2001, release 2).

Handley, K. R. « Res Judicata : General Principles and Recent Developments » (1999), 18 *Aust. Bar Rev.* 214.

Holmested, George Smith, and Garry D. Watson. *Ontario Civil Procedure*, vol. 3 Supp. Toronto : Carswell, 1984 (loose-leaf updated 2000, release 3).

Lange, Donald J. *The Doctrine of Res Judicata in Canada*. Markham, Ont.: Butterworths, 2000.

Sopinka, John, Sidney N. Lederman, and Alan W. Bryant. *The Law of Evidence in Canada*, 2nd ed. Toronto: Butterworths, 1999.

Spencer Bower, George, and Sir Alexander Kingcome Turner. *The Doctrine of Res Judicata*, 3rd ed. by K. R. Handley. London, U.K.: Butterworths, 1996.

Watson, Garry D. "Duplicative Litigation: Issue Estoppel, Abuse of Process and the Death of Mutuality" (1990), 69 *Can. Bar Rev.* 623.

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

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

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

The judgment of the Court was delivered by

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

Lange, Donald J. *The Doctrine of Res Judicata in Canada*. Markham, Ont. : Butterworths, 2000.

Sopinka, John, Sidney N. Lederman, and Alan W. Bryant. *The Law of Evidence in Canada*, 2nd ed. Toronto : Butterworths, 1999.

Spencer Bower, George, and Sir Alexander Kingcome Turner. *The Doctrine of Res Judicata*, 3rd ed. by K. R. Handley. London, U.K. : Butterworths, 1996.

Watson, Garry D. « Duplicative Litigation : Issue Estoppel, Abuse of Process and the Death of Mutuality » (1990), 69 *R. du B. can.* 623.

POURVOI contre un arrêt de la Cour d'appel de l'Ontario (1998), 42 O.R. (3d) 235, 167 D.L.R. (4th) 385, 116 O.A.C. 225, 12 Admin. L.R. (3d) 1, 41 C.C.E.L. (2d) 19, 27 C.P.C. (4th) 91, [1998] O.J. No. 5047 (QL), qui a rejeté l'appel formé par l'appelante contre une décision de la Cour de l'Ontario (Division générale) rendue le 10 juin 1996. Pourvoi accueilli.

Howard A. Levitt et *J. Michael Mulroy*, pour l'appelante.

John E. Brooks et *Rita M. Samson*, pour les intimés.

Version française du jugement de la Cour rendu par

LE JUGE BINNIE — L'appelante prétend que, le 1
12 octobre 1993, elle a été congédiée du poste de chargée de projet qu'elle occupait chez l'intimée Ainsworth Technologies Inc. Elle soutient que, au moment de son congédiement, son employeur lui devait quelque 300 000 $ en commissions impayées. Les cours de justice ontariennes ont jugé que l'appelante était précluse (« *estopped* ») de saisir les tribunaux de ce différend en raison de sa tentative infructueuse d'obtenir le paiement de cette somme en vertu de la *Loi sur les normes d'emploi*, L.R.O. 1990, ch. E.14 (la « LNE » ou la « Loi »). Adoptant une procédure que la Cour d'appel de l'Ontario a jugé inappropriée et inéquitable, une agente des normes d'emploi a rejeté la demande de l'appelante. En règle générale, la préclusion découlant d'une question déjà tranchée (« *issue estoppel* ») peut, j'en conviens, être invoquée pour empêcher une partie déboutée de saisir les cours de justice d'une question qu'elle a déjà plaidée sans succès devant un tribunal administratif. Toutefois, je suis d'avis que la présente espèce

should not be applied mechanically to work an injustice. I would allow the appeal.

n'est pas une affaire où il convenait d'appliquer cette doctrine. Une doctrine élaborée par les tribunaux dans l'intérêt de la justice ne devrait pas être appliquée mécaniquement et donner lieu à une injustice. J'accueillerais le pourvoi.

I. Facts

I. Les faits

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

À l'automne 1993, un différend relatif à des commissions impayées a opposé l'appelante et son employeur, l'intimée Ainsworth Technologies Inc. L'appelante a rencontré ses supérieurs et elle leur a envoyé diverses lettres exposant son point de vue. Copie conforme de chacune de ces lettres était généralement transmise à son avocat, M[e] Howard A. Levitt. L'appelante prétendait principalement avoir droit à environ 200 000 $ à titre de commissions à l'égard d'un projet connu sous le nom de projet CIBC Lan, ainsi qu'à d'autres commissions portant à approximativement 300 000 $ la somme totale réclamée.

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

L'appelante a rejeté le règlement proposé par l'employeur. Le 4 octobre 1993, elle a déposé, en vertu de la LNE, une plainte dans laquelle elle réclamait le versement de salaire impayé, y compris des commissions. Le dossier n'indique pas clairement si elle a profité des conseils d'un avocat sur cet aspect du litige. Le 5 octobre, l'employeur a écrit à l'appelante, lui indiquant qu'il rejetait sa demande visant les commissions. Subséquemment, lorsqu'elle s'est présentée au travail, il l'a fait conduire hors de ses locaux, considérant qu'elle avait remis sa démission.

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

On a demandé à une agente des normes d'emploi, M[me] Caroline Burke, d'enquêter sur la plainte déposée par l'appelante. Madame Burke a d'abord eu un entretien téléphonique avec l'appelante puis, vers le 30 janvier 1994, elle l'a rencontrée pendant environ une heure. L'appelante a remis à M[me] Burke divers documents, dont sa correspondance avec l'employeur. Aucune autre rencontre n'a eu lieu par la suite.

5 On March 21, 1994, more than six months after filing her claim under the Act, but as yet without an ESA decision, the appellant, through Mr. Levitt, commenced a court action in which she claimed

Le 21 mars 1994, plus de 6 mois après avoir déposé sa plainte en vertu de la Loi, mais sans qu'une décision ait encore été rendue à cet égard, l'appelante a intenté, par l'entremise de M[e] Levitt, damages for wrongful dismissal. She also claimed the unpaid wages and commissions that were already the subject-matter of her ESA claim.

une action en dommages-intérêts pour congédiement injustifié dans laquelle elle demandait également le paiement du salaire et des commissions impayés qui faisaient déjà l'objet de la plainte qu'elle avait présentée en vertu de la LNE.

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

6 Le 1er juin 1994, les procureurs de l'employeur ont écrit à Mme Burke au sujet de la plainte de l'appelante. La lettre de l'employeur était accompagnée d'un certain nombre de documents étayant la thèse de ce dernier. Aucun de ces documents n'a été communiqué à l'appelante. Madame Burke n'a pas non plus fourni d'information à l'appelante relativement à la thèse de l'employeur et elle ne lui a pas donné la possibilité de répondre aux arguments qui, selon l'appelante, seraient vraisemblablement avancés par l'employeur. Bref, l'appelante a été tenue à l'écart.

On September 23, 1994, the ESA officer advised the respondent employer (but not the appellant) that she had rejected the appellant's claim for unpaid commissions. At the same time she ordered the employer to pay the appellant $2,354.55, representing two weeks' pay in lieu of notice. Ten days later, by letter dated October 3, 1994, Ms. Burke for the first time advised the appellant of the order made against the employer for two weeks' termination pay and the rejection of her claim for the commissions. The letter stated in part: "[w]ith respect to your claim for unpaid wages, the investigation revealed there is no entitlement to $300,000.00 commission as claimed by you". The letter went on to explain that the appellant could apply to the Director of Employment Standards for a review of this decision. Ms. Burke repeated this advice in a subsequent telephone conversation with the appellant. The appellant did not apply to the Director for a review of Ms. Burke's decision; instead, she decided to carry on with her wrongful dismissal action in the civil courts.

7 Le 23 septembre 1994, l'agente des normes d'emploi a informé l'employeur intimé (mais non l'appelante) qu'elle avait rejeté la réclamation de l'appelante pour commissions impayées. Par contre, elle a ordonné à l'employeur de verser à l'appelante la somme de 2 354,55 $, soit deux semaines de salaire, à titre d'indemnité de préavis. Dix jours plus tard, dans une lettre datée du 3 octobre 1994, Mme Burke a informé l'appelante de l'ordonnance intimant à l'employeur de lui verser deux semaines de salaire à titre d'indemnité de licenciement et du rejet de la réclamation visant les commissions. La lettre disait notamment ce qui suit : [TRADUCTION] « [r]elativement à votre réclamation pour salaire impayé, l'enquête a révélé que vous n'avez pas droit aux 300 000,00 $ que vous réclamez à titre de commissions ». Elle ajoutait que l'appelante pouvait présenter au directeur des normes d'emploi une demande de révision de cette décision, information que Mme Burke a répétée lors d'un entretien téléphonique subséquent avec l'appelante. L'appelante n'a toutefois pas demandé la révision de la décision de Mme Burke, décidant plutôt de poursuivre son action en dommages-intérêts pour congédiement injustifié déposée au civil.

The respondents contended that the claim for unpaid wages and commissions was barred by issue estoppel. They brought a motion in the appellant's civil action to strike the relevant paragraphs

8 Les intimés ont invoqué la préclusion découlant d'une question déjà tranchée à l'encontre de la réclamation pour salaire et commissions impayés. Dans le cadre de l'instance civile engagée par l'ap-

from the statement of claim. On June 10, 1996, McCombs J. of the Ontario Court (General Division) granted the respondents' motion. Only her claim for damages for wrongful dismissal was allowed to proceed. On December 2, 1998, the appellant's appeal was dismissed by the Court of Appeal for Ontario.

pelante, ils ont présenté une requête en radiation des paragraphes pertinents de la déclaration. Le 10 juin 1996, le juge McCombs de la Cour de l'Ontario (Division générale) a accueilli cette requête. Seule la demande de dommages-intérêts pour congédiement injustifié a pu suivre son cours. Le 2 décembre 1998, la Cour d'appel de l'Ontario a rejeté l'appel formé par l'appelante.

II. Judgments

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

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

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

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

> This case concerns the second requirement of issue estoppel, that the decision which is said to create the estoppel be a final judicial decision. The appellant submits that the decision of an employment standards officer is neither judicial nor final. She also submits that, in any event, the process followed by Ms. Burke in this particular case was unfair and therefore her decision

II. Les décisions des juridictions inférieures

A. *Cour de l'Ontario (Division générale)* (10 juin 1996)

Le juge McCombs devait décider si la doctrine de la préclusion découlant d'une question déjà tranchée s'appliquait en l'espèce. S'appuyant sur l'arrêt *Rasanen c. Rosemount Instruments Ltd.* (1994), 17 O.R. (3d) 267 (C.A.), il a estimé que cette doctrine pouvait s'appliquer à une question déjà tranchée par un décideur administratif — fonctionnaire ou tribunal. Selon lui, la seule question à trancher était de savoir si la décision de l'agente des normes d'emploi était une décision définitive. Le juge des requêtes a souligné que l'appelante n'avait pas demandé la révision de la décision de l'agente des normes d'emploi ainsi que le lui permettait le par. 67(2) de la Loi. Il a considéré que la décision de l'agente des normes d'emploi était définitive. Les critères d'application de la doctrine de la préclusion découlant d'une question déjà tranchée étaient donc respectés. Les paragraphes de la déclaration de l'appelante ayant trait aux salaire et commissions impayés ont été radiés.

B. *Cour d'appel de l'Ontario* (1998), 42 O.R. (3d) 235

Après examen des faits de l'espèce, le juge Rosenberg, s'exprimant pour la Cour d'appel, a fait état des questions que soulevait l'appel aux p. 239-240 :

> [TRADUCTION] La présente affaire porte sur la seconde condition d'application de la préclusion découlant d'une question déjà tranchée, savoir celle voulant que la décision qui, affirme-t-on, donne ouverture à la préclusion soit une décision judiciaire définitive. L'appelante prétend que la décision que rend un agent des normes d'emploi n'est ni judiciaire ni définitive. Elle soutient

should not create an estoppel. Specifically, the appellant argues she was not treated fairly as she was not provided with a copy of the submissions made by the employer and thus not given an opportunity to respond to those submissions.

également que, quoiqu'il en soit, la procédure suivie par Mme Burke en l'espèce était inéquitable et donc que sa décision ne devrait pas donner naissance à la préclusion. De façon plus particulière, l'appelante plaide qu'elle n'a pas été traitée équitablement puisqu'on ne lui a pas remis copie des observations de l'employeur et qu'on ne lui a pas, de ce fait, accordé la possibilité de les réfuter.

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

Le juge Rosenberg a rejeté les prétentions de l'appelante, qu'il a regroupées sous les trois questions suivantes : La décision de l'agente des normes d'emploi était-elle une décision définitive? Cette décision était-elle une décision judiciaire? Quel est l'effet d'une iniquité procédurale sur l'application de la doctrine de la préclusion découlant d'une question déjà tranchée? 11

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

Selon lui, la décision de l'agente était une décision définitive, étant donné que ni l'une ni l'autre des parties n'avaient exercé le droit d'appel interne prévu au par. 67(2) de la Loi. De plus, bien que les décisions administratives statuant définitivement sur les droits des parties ne soient pas toutes considérées comme « judiciaires » pour l'application de la doctrine de la préclusion découlant d'une question déjà tranchée, le juge Rosenberg a estimé que la procédure établie par la Loi respectait les conditions requises. Il a jugé que l'arrêt *Re Downing and Graydon* (1978), 21 O.R. (2d) 292 (C.A.), était [TRADUCTION] « décisif à cet égard » (p. 249). 12

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

Enfin, le juge Rosenberg s'est demandé si l'inobservation par l'agente des normes d'emploi des règles d'équité procédurale avait un effet en l'espèce sur l'application de la doctrine de la préclusion découlant d'une question déjà tranchée. Il a reconnu que l'agente des normes avait effectivement manqué à ces règles en statuant sur la plainte de l'appelante. Il a néanmoins jugé que ce manquement ne faisait pas obstacle à l'application de la doctrine (à la p. 252): 13

The officer was required to give the appellant access to, and an opportunity to refute, any information gathered by the officer in the course of her investigation that was prejudicial to the appellant's claim. At a minimum, the appellant was entitled to a copy of the June 1, 1994 letter and a summary of any other information gathered in the course of the investigation that was prejudicial to her claim. She was also entitled to a fair opportunity to con-

[TRADUCTION] L'agente était tenue de donner à l'appelante la possibilité de consulter et de réfuter toute information préjudiciable à sa réclamation recueillie par l'agente dans le cours de l'enquête. L'appelante aurait dû tout au moins recevoir copie de la lettre du 1er juin 1994 ainsi qu'un résumé de toute autre information préjudiciable à sa réclamation recueillie dans le cours de l'enquête. Elle aurait également dû se voir accorder la sider and reply to that information. The appellant was denied the opportunity to know the case against her and have an opportunity to meet it: Ms. Burke failed to act judicially. In this particular case, this failure does not, however, affect the operation of issue estoppel.

possibilité d'examiner cette information et d'y répondre. L'appelante n'a pas reçu communication des allégations formulées contre elle et elle a été privée de la possibilité de les réfuter : M^me Burke n'a donc pas agi judiciairement. En l'espèce, toutefois, ce manquement n'empêche pas l'application de la doctrine de la préclusion découlant d'une question déjà tranchée.

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

De l'avis du juge Rosenberg, même si les agents des normes d'emploi ont l'obligation d'agir judiciairement, le manquement à cette obligation dans un cas donné, du moins lorsqu'il est possible d'interjeter appel, ne fait pas obstacle à l'application de la préclusion découlant d'une question déjà tranchée. Sa conclusion s'appuie sur les considérations de politique d'intérêt général qui sont à la base de deux règles de droit administratif (à la p. 252):

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

> [TRADUCTION] Ces deux règles sont les suivantes : (1) la règle écartant les recours discrétionnaires en matière de contrôle judiciaire lorsqu'il existe un autre recours approprié; (2) la règle prohibant les contestations indirectes. Dans les faits, ces règles exigent que les parties demandent réparation au moyen de la procédure administrative établie par le législateur. Lorsque les parties disposent d'une voie d'appel, elles ne sont pas admises à l'écarter pour s'adresser aux cours de justice.

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

Le juge Rosenberg de la Cour d'appel a souligné que, si l'appelante avait demandé la révision de la décision de l'agente des normes d'emploi en vertu du par. 67(3) de la Loi, l'arbitre saisi de l'affaire aurait dû tenir une audience. Cette constatation étayait son opinion selon laquelle la procédure de révision prévue par la Loi constitue un autre recours approprié. Le juge Rosenberg a conclu ainsi, à la p. 256 :

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

> [TRADUCTION] En résumé, M^me Burke n'a pas accordé à l'appelante le bénéfice des règles de justice naturelle. Le recours qui s'offrait à cette dernière était de demander la révision de la décision de l'agente. Elle ne l'a pas fait. Elle et son employeur sont liés par cette décision.

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

La Cour d'appel a en conséquence appliqué la doctrine de la préclusion découlant d'une question déjà tranchée et a débouté l'appelante.

III. Relevant Statutory Provisions

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

1. In this Act,

. . .

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

(a) tips and other gratuities,

(b) any sums paid as gifts or bonuses that are dependent on the discretion of the employer and are not related to hours, production or efficiency,

(c) travelling allowances or expenses,

(d) contributions made by an employer to a fund, plan or arrangement to which Part X of this Act applies; ("salaire")

. . .

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

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

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

(a) arrange with the employer that the employer pay directly to the employee the wages to which the employee is entitled;

(b) receive from the employer on behalf of the employee any wages to be paid to the employee as the result of a compromise or settlement; or

(c) issue an order in writing to the employer to pay forthwith to the Director in trust any wages to which an employee is entitled and in addition such order shall provide for payment, by the employer to the

III. Les dispositions législatives pertinentes

Loi sur les normes d'emploi, L.R.O. 1990, ch. E.14 17

1 Les définitions qui suivent s'appliquent à la présente loi.

. . .

« salaire » Rémunération en espèces payable par un employeur à un employé aux termes d'un contrat de travail, verbal ou écrit, exprès ou implicite, paiement qu'un employeur doit verser à un employé en vertu de la présente loi, et allocations de logement ou de repas prescrites par les règlements ou prévues par un accord ou un arrangement à cette fin, à l'exclusion des éléments suivants :

a) les pourboires et autres gratifications,

b) les sommes versées à titre de cadeaux ou de primes qui sont laissées à la discrétion de l'employeur et qui ne sont pas liées au nombre d'heures qu'un employé a travaillé, à sa production ou à son efficacité,

c) les allocations ou indemnités de déplacement,

d) les cotisations de l'employeur à une caisse, un régime ou un arrangement auxquels la partie X de la présente loi s'applique. (« wages »)

. . .

6 (1) La présente loi ne suspend pas les recours civils dont dispose un employé contre son employeur ni n'y porte atteinte.

(2) Si un employé introduit une instance civile contre son employeur en vertu de la présente loi, l'avis d'instance est signifié au directeur, selon la formule prescrite, le jour même où l'instance civile est inscrite au rôle.

65 (1) Si l'agent des normes d'emploi conclut qu'un employé a le droit de percevoir un salaire d'un employeur, il peut, selon le cas :

a) s'entendre avec l'employeur pour que celui-ci verse directement à l'employé le salaire auquel ce dernier a droit;

b) recevoir de l'employeur, au nom de l'employé, le salaire qui doit être versé à ce dernier par suite d'une transaction;

c) ordonner, par écrit, que l'employeur verse sans délai au directeur, en fiducie, le salaire auquel un employé a droit; il ordonne également à l'employeur de verser au directeur, à titre de frais d'administration, celle

Director, of administration costs in the amount of 10 per cent of the wages or $100, whichever is the greater.

des deux sommes suivantes qui est la plus élevée, à savoir : 10 pour cent du salaire ou 100 $.

. . .

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

(7) Si un employeur ne fait pas la demande visée à l'article 68 en vue de la révision d'une ordonnance rendue par un agent des normes d'emploi, l'ordonnance devient sans appel et lie l'employeur même si une audience en révision est tenue afin de déterminer l'obligation d'une autre personne aux termes de la présente loi.

. . .

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

67 (1) Si, à la suite d'une plainte par écrit d'un employé, l'agent des normes d'emploi conclut que l'employeur a versé à un employé le salaire auquel ce dernier a droit ou a conclu que l'employé n'a droit à rien d'autre ou qu'il n'y a rien que l'employeur doive faire ou s'abstenir de faire pour se conformer à la présente loi, il peut refuser de rendre une ordonnance visant l'employeur. Il en avise l'employé par lettre affranchie à sa dernière adresse connue.

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

(2) L'employé qui se croit lésé par le refus de l'agent de rendre une ordonnance contre l'employeur ou par une ordonnance qui, à son avis, ne comprend pas le salaire complet auquel il a droit ni ses autres droits peut, dans les quinze jours de la mise à la poste de la lettre visée au paragraphe (1) ou de la date où l'ordonnance a été rendue ou dans le délai plus long que le directeur peut autoriser pour des motifs particuliers, demander au directeur, par écrit, de réviser le refus ou le montant fixé dans l'ordonnance.

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

(3) Sur réception de la demande de révision, le directeur peut nommer un arbitre de griefs pour tenir une audience.

. . .

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

(5) L'arbitre de griefs qui tient l'audience peut exercer, avec les adaptations nécessaires, les pouvoirs que la présente loi confère à un agent des normes d'emploi, et peut rendre une ordonnance à l'égard du refus ou une ordonnance modifiant, annulant ou confirmant l'ordonnance de l'agent des normes d'emploi.

. . .

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

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

. . .

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

. . .

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

(7) L'ordonnance de l'arbitre de griefs n'est pas susceptible de révision dans le cadre de l'article 68. Elle est sans appel et lie les parties.

68 (1) Après avoir versé le salaire qu'il lui est ordonné de payer ainsi que la somme à titre de pénalité qui s'y rapporte, s'il y a lieu, l'employeur qui s'estime lésé par une ordonnance rendue en vertu de l'article 45, 48, 51, 56.2, 58.22 ou 65 peut, dans les quinze jours qui suivent la remise ou la signification de l'ordonnance ou dans le délai plus long que le directeur peut autoriser pour des motifs particuliers, et à la condition que le salaire n'ait pas été versé en vertu du paragraphe 72 (2), demander que l'ordonnance fasse l'objet d'une révision par voie d'audience.

. . .

(3) Le directeur choisit un arbitre au sein du tableau des arbitres pour tenir l'audience de révision.

. . .

(7) La décision que l'arbitre prend en vertu du présent article est sans appel et lie les parties et les autres personnes que l'arbitre peut préciser.

IV. Analysis

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

19 Finality is thus a compelling consideration and judicial decisions should generally be conclusive of the issues decided unless and until reversed on appeal. However, estoppel is a doctrine of public policy that is designed to advance the interests of

IV. L'analyse

Le droit tend à juste titre à assurer le caractère définitif des instances. Pour favoriser la réalisation de cet objectif, le droit exige des parties qu'elles mettent tout en œuvre pour établir la véracité de leurs allégations dès la première occasion qui leur est donnée de le faire. Autrement dit, un plaideur n'a droit qu'à une seule tentative. L'appelante a décidé de se prévaloir du recours prévu par la LNE. Elle a perdu. Une fois tranché, un différend ne devrait généralement pas être soumis à nouveau aux tribunaux au bénéfice de la partie déboutée et au détriment de la partie qui a eu gain de cause. Une personne ne devrait être tracassée qu'une seule fois à l'égard d'une même cause d'action. Les instances faisant double emploi, les risques de résultats contradictoires, les frais excessifs et les procédures non décisives doivent être évités.

Le caractère définitif des instances est donc une considération impérieuse et, en règle générale, une décision judiciaire devrait trancher les questions litigieuses de manière définitive, tant qu'elle n'est pas infirmée en appel. Toutefois, la préclusion est justice. Where as here, its application bars the courthouse door against the appellant's $300,000 claim because of an administrative decision taken in a manner which was manifestly improper and unfair (as found by the Court of Appeal itself), a re-examination of some basic principles is warranted.

une doctrine d'intérêt public qui tend à favoriser les intérêts de la justice. Dans les cas où, comme en l'espèce, par suite d'une décision administrative prise à l'issue d'une procédure qui était manifestement inappropriée et inéquitable (conclusion tirée par la Cour d'appel elle-même), l'application de cette doctrine empêche l'appelante de s'adresser aux cours de justice pour réclamer les 300 000 $ qui lui seraient dus, il convient de réexaminer certains principes fondamentaux.

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

Le droit s'est doté d'un certain nombre de moyens visant à prévenir les recours abusifs. L'un des plus anciens est la doctrine de la préclusion *per rem judicatem*, qui tire son origine du droit romain et selon laquelle, une fois le différend tranché définitivement, il ne peut être soumis à nouveau aux tribunaux : *Farwell c. La Reine* (1894), 22 R.C.S. 553, p. 558, et *Angle c. Ministre du Revenu national*, [1975] 2 R.C.S. 248, p. 267-268. La doctrine est opposable tant à l'égard de la cause d'action ainsi décidée (on parle de préclusion fondée sur la demande, sur la cause d'action ou sur l'action) que des divers éléments constitutifs ou faits substantiels s'y rapportant nécessairement (on parle alors généralement de préclusion découlant d'une question déjà tranchée) : G. S. Holmested et G. D. Watson, *Ontario Civil Procedure* (feuilles mobiles), vol. 3 suppl., 21§17 et suiv. Un autre aspect de la politique établie par les tribunaux en vue d'assurer le caractère définitif des instances est la règle qui prohibe les contestations indirectes, c'est-à-dire la règle selon laquelle l'ordonnance rendue par un tribunal compétent ne doit pas être remise en cause dans des procédures subséquentes, sauf celles prévues par la loi dans le but exprès de contester l'ordonnance : *Wilson c. La Reine*, [1983] 2 R.C.S. 594; *R. c. Litchfield*, [1993] 4 R.C.S. 333; *R. c. Sarson*, [1996] 2 R.C.S. 223.

21 These rules were initially developed in the context of prior court proceedings. They have since been extended, with some necessary modifications, to decisions classified as being of a judicial or quasi-judicial nature pronounced by administrative officers and tribunals. In that context the more specific objective is to balance fairness to the parties with the protection of the administrative decision-

Initialement, ces règles ont été établies dans le contexte de procédures judiciaires antérieures. Leur champ d'application a depuis été élargi, avec les adaptations nécessaires, aux décisions de nature judiciaire ou quasi judiciaire rendues par les juridictions administratives — fonctionnaires ou tribunaux. Dans ce contexte, l'objectif spécifique poursuivi consiste à assurer l'équilibre entre le respect making process, whose integrity would be undermined by too readily permitting collateral attack or relitigation of issues once decided.

de l'équité envers les parties et la protection du processus décisionnel administratif, dont l'intégrité serait compromise si on autorisait trop facilement les contestations indirectes ou l'engagement d'une nouvelle instance à l'égard de questions déjà tranchées.

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

Dans *The Doctrine of Res Judicata in Canada* (2000), p. 94 et suiv., D. J. Lange attribue l'application aux organismes administratifs canadiens de la doctrine de la préclusion découlant d'une question déjà tranchée à certaines décisions datant du milieu du XIX^{e} siècle — notamment les affaires *Robinson c. McQuaid* (1854), 1 P.E.I.R. 103 (C.S.), p. 104-105, et *Bell c. Miller* (1862), 9 Gr. 385 (Ch. H.-C.), p. 386. Parmi les arrêts contemporains rendus par des cours d'appel, mentionnons les suivants : *Raison c. Fenwick* (1981), 120 D.L.R. (3d) 622 (C.A.C.-B.); *Rasanen*, précité; *Wong c. Shell Canada Ltd.* (1995), 15 C.C.E.L. (2d) 182 (C.A. Alb.); *Machin c. Tomlinson* (2000), 194 D.L.R. (4th) 326 (C.A. Ont.); et *Hamelin c. Davis* (1996), 18 B.C.L.R. (3d) 112 (C.A.). Voir également *Thrasyvoulou c. Environment Secretary*, [1990] 2 A.C. 273 (H.L.). Des modifications s'imposaient en raison des « différences importantes qui peuvent exister entre ces deux types d'ordonnances [c.-à-d. les ordonnances administratives et les ordonnances judiciaires], notamment quant à leur nature juridique et la place des institutions qui les rendent à l'intérieur de la structure étatique » : *R. c. Consolidated Maybrun Mines Ltd.*, [1998] 1 R.C.S. 706, par. 4. On s'entend généralement pour dire que les ordonnances des cours de justice sont des ordonnances de nature judiciaire; il n'en est pas de même pour les innombrables ordonnances rendues par les différents tribunaux administratifs. 22

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

Dans le présent pourvoi, les parties n'ont pas plaidé la préclusion fondée sur la « cause d'action », estimant apparemment que le cadre législatif de la demande fondée sur la LNE distingue suffisamment cette demande du cadre juridique de common law de l'instance judiciaire. Je n'en dirai par conséquent pas davantage à ce sujet. Les parties ont cependant lié contestation quant à l'application de la préclusion découlant d'une question 23 the application of issue estoppel and the relevance of the rule against collateral attack.

déjà tranchée et à la pertinence de la règle prohibant les contestations indirectes.

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

La préclusion découlant d'une question déjà tranchée a été définie de façon précise par le juge Middleton de la Cour d'appel de l'Ontario dans l'arrêt *McIntosh c. Parent*, [1924] 4 D.L.R. 420, 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.]

> [TRADUCTION] Lorsqu'une question est soumise à un tribunal, le jugement de la cour devient une décision définitive entre les parties et leurs ayants droit. Les droits, questions ou faits distinctement mis en cause et directement réglés par un tribunal compétent comme motifs de recouvrement ou comme réponses à une prétention qu'on met de l'avant, ne peuvent être jugés de nouveau dans une poursuite subséquente entre les mêmes parties ou leurs ayants droit, même si la cause d'action est différente. Le droit, la question ou le fait, une fois qu'on a statué à son égard, doit être considéré entre les parties comme établi de façon concluante aussi longtemps que le jugement demeure. [Je souligne.]

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

Le juge Laskin (plus tard Juge en chef) a souscrit à cet énoncé dans ses motifs de dissidence dans l'arrêt *Angle*, précité, p. 267-268. Cette description des aspects visés par la préclusion (« [l]es droits, questions ou faits distinctement mis en cause et directement réglés ») est plus exigeante que celle utilisée dans certaines décisions plus anciennes à l'égard de la préclusion fondée sur la cause d'action (par exemple [TRADUCTION] « toute question ayant été débattue ou qui aurait pu à bon droit l'être », *Farwell*, précité, p. 558). S'exprimant au nom de la majorité dans l'arrêt *Angle*, précité, p. 255, le juge Dickson (plus tard Juge en chef) a également fait sienne la définition plus exigeante de l'objet de la préclusion découlant d'une question déjà tranchée. « Il ne suffira pas », a-t-il dit, « que la question ait été soulevée de façon annexe ou incidente dans l'affaire antérieure ou qu'elle doive être inférée du jugement par raisonnement. » La question qui est censée donner naissance à la préclusion doit avoir été « fondamentale à la décision à laquelle on est arrivé » dans l'affaire antérieure. En d'autres termes, comme il est expliqué plus loin, la préclusion vise les faits substantiels, les conclusions de droit ou les conclusions mixtes de fait et de droit (« les questions ») à l'égard desquels on a nécessairement statué (même si on ne were necessarily (even if not explicitly) determined in the earlier proceedings.

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

(1) that the same question has been decided;

(2) that the judicial decision which is said to create the estoppel was final; and,

(3) that the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised or their privies.

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

A. *The Statutory Scheme*

1. The Employment Standards Officer

27 The ESA applies to "every contract of employment, oral or written, express or implied" in Ontario (s. 2(2)) subject to certain exceptions under the regulations, and establishes a number of minimum

l'a pas fait de façon explicite) dans le cadre de l'instance antérieure.

Les conditions d'application de la préclusion découlant d'une question déjà tranchée ont été énoncées par le juge Dickson dans l'arrêt *Angle*, précité, p. 254 :

(1) que la même question ait été décidée;

(2) que la décision judiciaire invoquée comme créant la [préclusion] soit finale; et

(3) que les parties dans la décision judiciaire invoquée, ou leurs ayants droit, soient les mêmes que les parties engagées dans l'affaire où la [préclusion] est soulevée, ou leurs ayants droit.

L'appelante soutient que l'agente des normes d'emploi n'a pas — bien quelle ait été tenue de le faire — pris sa décision de manière judiciaire. L'agente disposait, en vertu de la LNE, de la compétence nécessaire pour connaître de la réclamation, mais elle a perdu cette compétence en omettant de communiquer à l'appelante les prétentions de l'employeur et de lui donner la possibilité de les réfuter. L'agente n'a donc jamais rendu une « décision judiciaire » comme elle était tenue de le faire. L'appelante soutient en outre que sa propre omission d'exercer son droit de demander la révision administrative interne de la décision de l'agente ne devrait pas se voir accorder l'effet déterminant que lui a attribué la Cour d'appel de l'Ontario. Selon elle, même si les conditions d'application de la préclusion découlant d'une question déjà tranchée étaient réunies, la cour avait, dans les circonstances de l'espèce, le pouvoir discrétionnaire de la soustraire aux effets draconiens de la préclusion *per rem judicatem*, et elle a commis une erreur en s'abstenant de le faire.

A. *Le cadre législatif*

1. L'agent des normes d'emploi

La LNE s'applique à « tout contrat de travail, verbal ou écrit, exprès ou implicite » en Ontario (par. 2(2)), sous réserve de certaines exceptions prévues par règlement, et elle établit un certain employment standards for the protection of employees. These include hours of work, minimum wages, overtime pay, benefit plans, public holidays and vacation with pay. More specifically, the Act provides a summary procedure under which aggrieved employees can seek redress with respect to an employer's alleged failure to comply with these standards. The objective is to make redress available, where it is appropriate at all, expeditiously and cheaply. In the first instance, the dispute is referred to an employment standards officer. ESA officers are public servants in the Ministry of Labour. They are generally not legally trained, but have some experience in labour relations. The statute does not set out any particular procedure that must be followed in disposing of claims. ESA officers are given wide powers to enter premises, inspect and remove documents and make other relevant inquiries. If liability is found, ESA officers have broad powers of enforcement (s. 65).

nombre de normes d'emploi minimales en vue de protéger les employés. Ces normes portent notamment sur les heures de travail, le salaire minimum, le salaire pour les heures supplémentaires, les régimes d'avantages sociaux, les jours fériés et les congés payés. Plus particulièrement, la Loi établit une procédure sommaire permettant aux employés qui s'estiment lésés parce que leur employeur aurait omis de se conformer à ces normes de demander réparation à cet égard. L'objectif est d'offrir, dans les cas appropriés, un recours rapide et peu coûteux. Au premier palier, l'examen du différend est confié à un agent des normes d'emploi. Fonctionnaires du ministère du Travail, ces personnes n'ont généralement pas de formation juridique, mais elles possèdent une certaine expérience en matière de relations de travail. La Loi ne prescrit pas la procédure à suivre pour statuer sur les demandes. L'agent des normes d'emploi dispose de pouvoirs étendus qui l'autorisent notamment à pénétrer dans des locaux, à effectuer des inspections, à emporter des documents avec lui et à interroger toute personne à l'égard de questions pertinentes. S'il constate l'inobservation de la loi, l'agent dispose de larges pouvoirs afin de la faire respecter (art. 65).

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

En règle générale, sur réception de la demande d'un employé, l'agent des normes d'emploi communique avec l'employeur pour vérifier si le salaire est effectivement impayé et, dans l'affirmative, pour connaître la raison du non-paiement. Bien que, dans la présente affaire, l'agente des normes d'emploi se soit entretenue avec l'appelante pendant une heure, rien n'exige la tenue d'une telle rencontre et, manifestement, aucune audience à laquelle participeraient les deux parties n'est envisagée. D'aucuns estimeraient qu'il s'agit d'une procédure expéditive tout à fait inappropriée pour trancher de façon définitive des prétentions contractuelles présentant une certaine complexité sur les plans juridique et factuel.

29 There are many advantages to the employee in such a forum. The services of the ESA officer are supplied free of charge. Legal representation is unnecessary. The process moves more rapidly than could realistically be expected in the courts. There

Ce mécanisme présente de nombreux avantages pour les employés. Les services de l'agent des normes d'emploi sont gratuits. La représentation par avocat n'est pas nécessaire. L'instance se déroule plus rapidement que ce à quoi on pourrait are corresponding disadvantages. The ESA officer is likely not to have legal training and has neither the time nor the resources to deal with a contract claim in a manner comparable to the courtroom setting. At the time of these proceedings a double standard was applied to an appeal (or, as it is called, a "review"). The employer was entitled as of right to a review (s. 68) but, as discussed below, the employee could ask for one but the request could be refused by the Director (s. 67(3)). At the time, as well, there was no monetary limit on the ESA officer's jurisdiction. The Act has since been amended to provide an upper limit on claims of $10,000 (S.O. 1996, c. 23, s. 19(1)). Had the ESA officer's determination gone the other way, the employer could have been saddled with a $300,000 liability arising out of a deeply flawed decision unless reversed on an administrative review or quashed by a supervising court.

vraisemblablement s'attendre devant les tribunaux judiciaires. À ces avantages correspondent toutefois des désavantages. Il est probable que l'agent n'a pas de formation juridique et qu'il n'a ni le temps ni les ressources nécessaires pour examiner une demande de nature contractuelle comme cela se passerait dans la salle d'audience d'une cour de justice. Au moment où ces procédures se sont déroulées, des règles inégales s'appliquaient en matière d'appel (ou de « révision » selon les termes de la Loi). En effet, l'employeur pouvait demander de plein droit la révision de la décision (art. 68). Toutefois, comme nous le verrons plus loin, l'employé pouvait lui aussi présenter une demande de révision, mais le directeur pouvait refuser d'y donner suite (par. 67(3)). De même, au cours de la période pertinente le montant des demandes à l'égard desquelles l'agent des normes d'emploi avait compétence n'était pas plafonné. La Loi a depuis été modifiée et seules les réclamations d'au plus 10 000 $ sont maintenant visées (L.O. 1996, ch. 23, par. 19(1)). Si, en l'espèce, l'agente avait statué en faveur de l'employée, l'employeur aurait pu devoir supporter une obligation de 300 000 $ découlant d'une décision présentant de profondes lacunes, à moins d'avoir gain de cause à la suite d'une révision administrative ou d'un contrôle judiciaire.

2. The Review Process

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

It seems clear the legislature did not intend to confer an appeal as of right. Where the Director

2. La procédure de révision

30 Comme nous l'avons indiqué, les employés ne peuvent pas interjeter appel de plein droit. En vertu du par. 67(2) de la Loi, l'employé insatisfait de la décision rendue au premier palier peut, dans les 15 jours qui suivent la mise à la poste de la décision, demander par écrit au directeur de réviser cette décision. Aux termes du par. 67(3), « le directeur peut nommer un arbitre de griefs pour tenir une audience » (je souligne). L'emploi du mot « peut » confère au directeur le pouvoir discrétionnaire de décider s'il y aura ou non une audience. La Cour d'appel de l'Ontario a souligné ce point, mais a affirmé que les parties y avaient attaché peu d'importance.

31 Il paraît clair que le législateur n'a pas voulu créer un appel de plein droit. Lorsque le directeur

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

nomme un arbitre de griefs, la Loi exige la tenue d'une audience. Il en résulte évidemment des délais et des dépenses supplémentaires pour le ministère et les parties. La juxtaposition des auxiliaires « *may* » et « *shall* » dans la version anglaise du par. 67(3) (et, dans la version française, l'indication que le directeur « peut nommer un arbitre de griefs pour tenir une audience » (je souligne)) écarte tout doute à cet égard. Le législateur ontarien entendait que le directeur dispose du pouvoir discrétionnaire de refuser de saisir un arbitre de griefs d'une demande qui, à son avis, n'est tout simplement pas justifiée. Même les arbitres chargés de la révision prévue au par. 67(3) de la LNE ne sont pas tenus par la loi de posséder une formation juridique. Le législateur ontarien a probablement jugé qu'il n'était pas souhaitable que tout employé insatisfait d'une décision puisse obtenir de plein droit la révision de celle-ci, compte tenu particulièrement du fait que la somme en jeu est souvent relativement modeste. Il va de soi que ce pouvoir discrétionnaire doit être exercé en conformité avec les principes pertinents, mais il n'en demeure pas moins un pouvoir discrétionnaire.

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

Si une révision interne avait été ordonnée, un arbitre aurait alors examiné *de novo* la demande de l'appelante et aurait sans aucun doute permis à cette dernière de prendre connaissance des documents de l'employeur et lui aurait donné la possibilité d'y répondre et de les commenter. Je reconnais que, sous le régime de la Loi, les vices procéduraux qui surviennent à l'étape de la décision initiale, y compris l'omission de donner aux intéressés un préavis suffisant et la possibilité de se faire entendre pour réfuter la thèse de la partie adverse, peuvent être corrigés à l'étape de la révision. L'intimée soutient que, du fait que l'appelante a choisi de se prévaloir de la Loi, elle devait recourir au mécanisme de révision prévue pour celle-ci si elle était insatisfaite de la décision rendue au premier palier. Comme elle ne l'a pas fait, elle est précluse de continuer de réclamer la somme de 300 000 $. L'appelante réplique que la procédure prévue par la LNE souffrait de lacunes si profondes qu'il lui était loisible de renoncer à y recourir.

B. *The Applicability of Issue Estoppel*

1. Issue Estoppel: A Two-Step Analysis

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

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

2. The Judicial Nature of the Decision

A common element of the preconditions to issue estoppel set out by Dickson J. in *Angle, supra*, is the fundamental requirement that the decision in the prior proceeding be a judicial decision. According to the authorities (see e.g., G. Spencer Bower, A. K. Turner and K. R. Handley, *The Doc-*

B. *L'applicabilité de la préclusion découlant d'une question déjà tranchée*

1. Préclusion découlant d'une question déjà tranchée : analyse à deux volets

33 Les règles régissant la préclusion découlant d'une question déjà tranchée ne doivent pas être appliquées machinalement. L'objectif fondamental est d'établir l'équilibre entre l'intérêt public qui consiste à assurer le caractère définitif des litiges et l'autre intérêt public qui est d'assurer que, dans une affaire donnée, justice soit rendue. (Il existe des intérêts privés correspondants.) Il s'agit, au cours de la première étape, de déterminer si le requérant (en l'occurrence l'intimée) a établi l'existence des conditions d'application de la préclusion découlant d'une question déjà tranchée énoncées par le juge Dickson dans l'arrêt *Angle*, précité. Dans l'affirmative, la cour doit ensuite se demander, dans l'exercice de son pouvoir discrétionnaire, si cette forme de préclusion *devrait* être appliquée : *British Columbia (Minister of Forests) c. Bugbusters Pest Management Inc.* (1998), 50 B.C.L.R. (3d) 1 (C.A.), par. 32; *Schweneke c. Ontario* (2000), 47 O.R. (3d) 97 (C.A.), par. 38-39; *Braithwaite c. Nova Scotia Public Service Long Term Disability Plan Trust Fund* (1999), 176 N.S.R. (2d) 173 (C.A.), par. 56.

34 L'appelante avait parfaitement le droit, en première instance, de saisir la Cour supérieure de l'Ontario de ses diverses réclamations financières. L'intimée ne pouvait se voir accorder de plein droit l'application de la préclusion. Il appartenait à la cour de décider, dans l'exercice de son pouvoir discrétionnaire, s'il convenait qu'elle refuse de connaître ou non de certains aspects de la demande ayant déjà fait l'objet de la procédure administrative engagée sous le régime de la LNE.

2. La nature judiciaire de la décision

35 L'exigence fondamentale selon laquelle la décision antérieure doit être une décision judiciaire est un élément qui est commun aux conditions préalables à l'application de la préclusion découlant d'une question déjà tranchée énoncées par le juge Dickson dans l'arrêt *Angle*, précité. Selon la doc-

trine of Res Judicata (3rd ed. 1996), at paras. 18-20), there are three elements that may be taken into account. First is to examine the nature of the administrative authority issuing the decision. Is it an institution that is capable of receiving and exercising adjudicative authority? Secondly, as a matter of law, is the particular decision one that was required to be made in a judicial manner? Thirdly, as a mixed question of law and fact, *was* the decision made in a judicial manner? These are distinct requirements:

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

(Spencer Bower, Turner and Handley, *supra*, para. 20)

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

> The prior decision judicial, arbitral, or administrative, must have been made within jurisdiction before it can give rise to *res judicata* estoppels.

("Res Judicata: General Principles and Recent Developments" (1999), 18 *Aust. Bar Rev.* 214, at p. 215)

37 The main controversy in this case is directed to this third aspect, i.e., is a decision taken without regard to requirements of notice and an opportunity to be heard *capable* of supporting an issue

trine (voir, par exemple, G. Spencer Bower, A. K. Turner et K. R. Handley, *The Doctrine of Res Judicata* (3e éd. 1996), par. 18-20), trois éléments peuvent être pris en considération. Premièrement, il faut se pencher sur la nature du décideur administratif ayant rendu la décision. S'agit-il d'un organe pouvant être investi d'un pouvoir juridictionnel et capable d'exercer ce pouvoir? Deuxièmement, sur le plan juridique, la décision litigieuse devait-elle être prise judiciairement? Troisièmement — question mixte de fait et de droit — la décision *a-t-elle été* rendue de manière judiciaire? Il s'agit d'exigences distinctes :

> [TRADUCTION] Il ne sert à rien de prouver que la prétendue chose jugée était une décision ou qu'elle a été prononcée conformément aux principes applicables aux tribunaux judiciaires à moins qu'elle ait été rendue par un tel tribunal dans l'exercice de son pouvoir juridictionnel; il ne suffit pas non plus qu'elle ait été prononcée par un tel tribunal, sauf s'il s'agit d'une décision judiciaire sur le fond. Par conséquent, il importe de bien saisir dès le départ ce qu'est un tribunal judiciaire et ce qu'est une décision judiciaire pour les fins qui nous occupent.

(Spencer Bower, Turner et Handley, *op. cit.*, par. 20)

En ce qui concerne le troisième élément, soit la question de savoir si la décision en cause a effectivement été rendue conformément aux exigences applicables aux décisions judiciaires, je souligne l'affirmation suivante, faite récemment par le juge Handley (éditeur actuel de l'ouvrage *The Doctrine of Res Judicata*) en dehors du cadre de ses fonctions de juge :

> [TRADUCTION] La décision antérieure — qu'elle soit judiciaire, arbitrale ou administrative — doit avoir été rendue dans les limites de la compétence du décideur pour que puisse être plaidée la préclusion découlant d'une question déjà tranchée.

(« Res Judicata : General Principles and Recent Developments » (1999), 18 *Aust. Bar Rev.* 214, p. 215)

En l'espèce, le désaccord porte principalement sur ce troisième élément : une décision prise sans avoir respecté les exigences en matière de préavis et sans avoir donné à l'intéressé la possibilité de se estoppel? In my opinion, the answer to this question is yes.

faire entendre est-elle *capable* de fonder l'application de la préclusion découlant d'une question déjà tranchée? À mon avis, la réponse à cette question est oui.

(a) *The Institutional Framework*

a) *Le cadre institutionnel*

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

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

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

38 La décision sur laquelle s'est appuyé le juge Rosenberg de la Cour d'appel de l'Ontario à cet égard a trait à la fonction et au rôle génériques de l'agent des normes d'emploi : *Re Downing and Graydon*, précité, le juge Blair, p. 305 :

> [TRADUCTION] En l'espèce, l'agent des normes d'emploi a le pouvoir de décider ainsi que celui d'enquêter. Il fait enquête afin de recueillir les renseignements qui fonderont la décision qu'il doit rendre. Ses fonctions comportent tous les indices importants de l'exercice d'un pouvoir judiciaire, notamment la détermination des faits, l'application du droit à ces faits et la prise d'une décision liant les parties.

Les parties ne contestent pas le fait que les fonctionnaires chargés de l'application de la LNE pouvaient à bon droit être investis de fonctions juridictionnelles devant être exercées de manière judiciaire. Le plafond de 4 000 $ que prévoyait la Loi à l'égard des réclamations pour salaire impayé (à l'exclusion de l'indemnité de cessation d'emploi et des prestations payables au titre des dispositions relatives au congé de maternité et au congé parental) a été aboli en 1991 par L.O. 1991, ch. 16, par. 9(1), mais après la décision rendue en application de la LNE dans la présente affaire, un nouveau plafond de 10 000 $ a été fixé. Il s'agit du même plafond auquel est assujettie la Cour des petites créances par la *Loi sur les tribunaux judiciaires*, L.R.O. 1990, ch. C.43, par. 23(1), et le Règl. de l'Ont. 626/00, par. 1(1).

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

b) *La nature des décisions rendues en application du par. 65(1)*

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

39 Un tribunal administratif peut exercer des fonctions judiciaires ainsi que des fonctions administratives ou ministérielles. Il en est de même d'un fonctionnaire.

One distinction between administrative and judicial decisions lies in differentiating adjudica-

40 Une des caractéristiques qui distinguent les décisions administratives des décisions judiciaires est

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

la différence qui existe entre des fonctions juridictionnelles et des fonctions d'enquête. Dans l'exercice des secondes, l'agent des normes d'emploi prend l'initiative de recueillir des éléments d'information. Il agit en tant qu'enquêteur autonome et n'est pas assujetti aux contraintes de la procédure contradictoire. La distinction entre les pouvoirs d'enquête et les pouvoirs juridictionnels a été examinée dans l'arrêt *Guay c. Lafleur*, [1965] R.C.S. 12, p. 17-18. L'inapplicabilité de la préclusion découlant d'une question déjà tranchée aux enquêtes administratives a été mentionnée par le lord juge Diplock dans *Thoday c. Thoday*, [1964] P. 181 (C.A. Angl.), p. 197.

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

Quoique les agents des normes d'emploi puissent avoir des fonctions non juridictionnelles, lorsqu'ils accomplissent des fonctions juridictionnelles ils sont tenus de le faire de manière judiciaire. Bien qu'ils aient recours à des procédures plus souples que celles des cours de justice, leurs décisions doivent s'appuyer sur des conclusions de fait et sur l'application à ces faits d'une norme juridique objective. Il s'agit là d'une caractéristique de fonctions judiciaires : D. J. M. Brown et J. M. Evans, *Judicial Review of Administrative Action in Canada* (1998), vol. 2, par. 7:1310, p. 7-7.

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

La décision qui statue sur une plainte après l'obtention de l'information pertinente est une décision de nature judiciaire.

(c) *Particulars of the Decision in Question*

c) *Le détail de la décision en cause*

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

La Cour d'appel de l'Ontario a conclu que la décision de l'agente des normes d'emploi avait de fait été rendue au mépris des principes de justice naturelle. L'appelante n'a pas été informée des prétentions de l'employeur et n'a pas eu la possibilité de les réfuter.

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

L'appelante soutient qu'il ne suffit pas de dire que la décision *aurait dû* être prise de manière judiciaire, mais qu'il faut plutôt se demander : La décision a-t-elle été prise de manière judiciaire en l'espèce? Cet argument trouve un certain appui dans l'arrêt *Rasanen*, précité, où madame le juge Abella de la Cour d'appel de l'Ontario a dit ceci, à la p. 280 :

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

[TRADUCTION] Pour autant que la procédure d'instruction du tribunal administratif donne à chacune des parties la possibilité de connaître les prétentions de l'autre et de les réfuter et que la décision rendue relève de la compétence du tribunal, peu importe alors à quel point la procédure s'apparente à un procès ou aux procédures préalables à celui-ci, je ne vois aucune raison fondée sur des principes qui justifierait, dans le cadre d'une action subséquente, de soustraire les questions décidées par un tribunal administratif à l'application de la préclusion découlant d'une question déjà tranchée. [Je souligne.]

45

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

Cette approche a subséquemment été retenue par des tribunaux de première instance en Ontario : *Machado c. Pratt & Whitney Canada Inc.* (1995), 12 C.C.E.L. (2d) 132 (C. Ont. (Div. gén.)); *Randhawa c. Everest & Jennings Canadian Ltd.* (1996), 22 C.C.E.L. (2d) 19 (C. Ont. (Div. gén.)); *Heynen c. Frito-Lay Canada Ltd.* (1997), 32 C.C.E.L. (2d) 183 (C. Ont. (Div. gén.)); *Perez c. GE Capital Technology Management Services Canada Inc.* (1999), 47 C.C.E.L. (2d) 145 (C.S.J.). Les propos suivants du juge Métivier dans l'affaire *Munyal c. Sears Canada Inc.* (1997), 29 C.C.E.L. (2d) 58 (C. Ont. (Div. gén.)), p. 60, reflètent ce point de vue :

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

[TRADUCTION] La partie demanderesse s'appuie sur [l'arrêt *Rasanen*] et sur d'autres décisions au même effet pour affirmer que le principe de la préclusion découlant d'une question déjà tranchée devrait s'appliquer aux décisions administratives. Ce n'est le cas que lorsque la décision est le fruit d'un processus décisionnel équitable et impartial « comportant une audience dans le cadre de laquelle chacune des parties a la possibilité de prendre connaissance des prétentions de l'autre et de les réfuter ».

46

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

Dans l'arrêt *Wong*, précité, la Cour d'appel de l'Alberta a rejeté une contestation visant la décision d'un agent de révision en matière de normes d'emploi et a conclu qu'il était possible de plaider la préclusion à l'égard de cette décision dans la mesure où [TRADUCTION] « l'appelant connaissait les prétentions formulées contre lui et avait eu la possibilité de faire valoir son point de vue » (par. 20). Voir également *Alderman c. North Shore Studio Management Ltd.*, [1997] 5 W.W.R. 535 (C.S.C.-B.).

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

En toute déférence, j'estime que la thèse voulant que l'inobservation des principes de justice naturelle ait pour effet d'enlever tout caractère « judiciaire » à la décision fondée sur la LNE repose sur une idée fausse. Il se peut que la décision présente des failles, mais elle demeure « judiciaire » (plutôt qu'administrative ou législative). Une fois qu'il est établi que l'auteur de la décision pouvait être investi d'un pouvoir juridictionnel, qu'il pouvait exercer ce pouvoir et que la décision litigieuse devait être rendue de manière judiciaire, celle-ci ne perd pas son caractère « judiciaire » parce que son auteur a commis une erreur dans l'accomplissement de ses fonctions. Dans un vieil arrêt, *R. c. Nat Bell Liquors Ltd.*, [1922] 2 A.C. 128 (H.L.), il a été jugé que la déclaration de culpabilité inscrite par un magistrat albertain ne pouvait être annulée pour cause d'absence de compétence sur le fondement que les témoignages ne révélaient aucune preuve étayant la déclaration de culpabilité ou parce que le magistrat s'était donné des directives erronées dans l'examen de la preuve. Une distinction a été établie entre le pouvoir de juger les accusations et les erreurs qui auraient été commises en matière d'[TRADUCTION] « observation de la loi dans l'exercice de ce pouvoir » (p. 156). Si les conditions préalables à l'exercice d'une compétence de nature judiciaire sont réunies (comme c'est le cas en l'espèce), toute erreur subséquente dans l'exercice de cette compétence, y compris les manquements aux règles de la justice naturelle, ne rend pas la décision nulle mais annulable : *Harelkin c. Université de Regina*, [1979] 2 R.C.S. 561, p. 584-585. La décision reste une décision « judiciaire », quoiqu'elle souffre de sérieuses lacunes du fait de l'absence de préavis suffisant et du défaut d'accorder la possibilité de se faire entendre.

48 I mentioned at the outset that estoppel *per rem judicatem* is closely linked to the rule against collateral attack, and indeed to the principles of judicial review. If the appellant had gone to court to seek judicial review of the ESA officer's decision without first following the internal administrative review route, she would have been confronted with the decision of this Court in *Harelkin*, *supra*. In that case a university student failed in his judicial review application to quash the decision of a

Comme je l'ai mentionné plus tôt, la préclusion *per rem judicatem* est étroitement liée à la règle prohibant les contestations indirectes et, de fait, aux principes régissant le contrôle judiciaire. Si l'appelante s'était adressée à une cour de justice pour demander le contrôle judiciaire de la décision de l'agente des normes d'emploi sans se prévaloir au préalable du mécanisme de révision administrative interne, on lui aurait opposé l'arrêt *Harelkin*, précité, de notre Cour. Dans cette affaire, la faculty committee of the University of Regina which found his academic performance to be unsatisfactory. The faculty committee was required to act in a judicial manner but failed, as here, to give proper notice and an opportunity to be heard. It was held that the failure did not deprive the faculty committee of its adjudicative jurisdiction. Its decision was subject to judicial review, but this was refused in the exercise of the Court's discretion. Adoption of the appellant's theory in this case would create an anomalous result. If she is correct that the ESA officer stepped outside her judicial role and lost jurisdiction for all purposes, including issue estoppel, the *Harelkin* barrier to judicial review would be neatly sidestepped. She would have no need to seek judicial review to set aside the ESA decision. She would be, on her theory, entitled as of right to have it ignored in her civil action.

demande de contrôle judiciaire qu'avait présentée un étudiant de l'université de Regina en vue d'obtenir l'annulation de la décision rendue par un comité d'une faculté de cet établissement et portant que ses notes étaient insatisfaisantes a été rejetée. Ce comité était tenu d'agir judiciairement, mais, tout comme en l'espèce, il avait omis de donner à l'étudiant un préavis suffisant et la possibilité de se faire entendre. Il a été jugé que cette omission n'avait pas fait perdre au comité sa compétence juridictionnelle. La décision du comité était susceptible de contrôle judiciaire, mais notre Cour, dans l'exercice de son pouvoir discrétionnaire, a refusé de faire droit à ce recours. Retenir la thèse de l'appelante en l'espèce entraînerait un résultat anormal. Si elle a raison de prétendre que l'agente des normes d'emploi a cessé d'agir judiciairement et a perdu compétence, à tout point de vue, y compris pour l'application de la préclusion découlant d'une question déjà tranchée, l'obstacle au contrôle judiciaire que constitue l'arrêt *Harelkin* serait habilement contourné. Elle n'aurait en effet pas besoin de demander le contrôle judiciaire de la décision de l'agente pour la faire annuler puisque, selon ce qu'elle soutient, elle a d'office droit à ce qu'on n'en tienne pas compte dans le cadre de son action au civil.

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

La thèse avancée par l'appelante créerait également une situation anormale pour ce qui concerne la règle prohibant les contestations indirectes. 49
Comme l'a souligné l'intimée, le refus d'appliquer la préclusion découlant d'une question déjà tranchée en l'espèce équivaudrait, en un sens, à faire droit à une contestation indirecte de la décision de l'agente des normes d'emploi, décision qui n'a été contestée ni par voie de révision administrative ni par voie de contrôle judiciaire. Suivant la thèse de l'appelante, un excès de compétence pendant le déroulement de la procédure administrative prévue par la LNE empêche l'application de la préclusion découlant d'une question déjà tranchée, bien que dans l'arrêt *Maybrun*, précité, notre Cour ait dit qu'une mesure outrepassant la compétence que possédait initialement le décideur ne donne pas nécessairement ouverture aux contestations indirectes de cette décision. Suivant cet arrêt, tout dépend du forum devant lequel le législateur a

the legislature intended the jurisdictional attack to be made in, the administrative review forum or the court (para. 49).

voulu que soit présentée la contestation d'ordre juridictionnel, savoir le tribunal administratif chargé de la révision ou une cour de justice (par. 49).

50 It seems to me that the unsuccessful litigant in administrative proceedings should be encouraged to pursue whatever administrative remedy is available. Here, it is worth repeating, she elected the ESA forum. Employers and employees should be able to rely on ESA determinations unless steps are taken promptly to set them aside. One major legislative objective of the ESA scheme is to facilitate a quick resolution of termination benefits so that both employee and employer can get on to other things. Where, as here, the ESA issues are determined within a year, a contract claim could nevertheless still be commenced thereafter in Ontario within six years of the alleged breach, producing a lingering five years of uncertainty. This is to be discouraged.

À mon sens, il faut inciter le plaideur qui n'a pas gain de cause dans le cadre d'une instance administrative à se prévaloir de tous les recours administratifs qui lui sont ouverts. Il convient de rappeler que, en l'espèce, l'appelante a opté pour le recours prévu par la LNE. Tant les employeurs que les employés doivent être en mesure de s'en remettre aux décisions rendues sous le régime de la LNE à moins qu'une mesure ne soit prise rapidement pour en obtenir l'annulation. Un objectif important du régime établi par le législateur dans la LNE est de faciliter le règlement rapide des différends portant sur les indemnités de licenciement, de sorte que l'employé et l'employeur puissent tourner la page. Dans les cas où, comme en l'espèce, les questions touchant à l'application de la LNE sont tranchées dans un délai d'un an ou moins, il est néanmoins possible, en Ontario, d'intenter une action contractuelle dans les six ans qui suivent le manquement allégué, ce qui peut donner lieu à cinq années d'incertitude. De telles situations doivent être évitées.

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

En résumé, il est clair qu'une décision administrative qui a au départ été prise sans la compétence requise ne peut fonder l'application de la préclusion. Les conditions préalables à l'exercice de la compétence juridictionnelle doivent être réunies. Lorsqu'il est possible d'affirmer que le décideur administratif — fonctionnaire ou tribunal — avait initialement compétence pour rendre une décision de manière judiciaire, mais qu'il a commis une erreur dans l'exercice de cette compétence, la décision rendue est néanmoins susceptible de fonder l'application de la préclusion. Les erreurs qui auraient été commises dans l'accomplissement du mandat doivent être prises en considération par la cour de justice dans l'exercice de son pouvoir discrétionnaire. Cela a pour effet d'assurer la conformité du principe régissant la préclusion avec les règles de droit relatives au contrôle judiciaire énoncées dans l'arrêt *Harelkin*, précité, et celles governing judicial review in *Harelkin*, *supra*, and collateral attack in *Maybrun*, *supra*.

relatives aux contestations indirectes énoncées dans l'arrêt *Maybrun*, précité.

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

Là où je diverge d'opinion avec la Cour d'appel de l'Ontario, c'est relativement à sa conclusion que le fait pour l'appelante de ne pas avoir demandé la révision administrative de la décision lacunaire de l'agente porte un coup fatal à la thèse de l'appelante. En toute déférence, je suis d'avis que le refus de l'agente des normes d'emploi de donner à l'appelante un préavis suffisant et la possibilité de se faire entendre est un facteur très important dans l'exercice du pouvoir discrétionnaire de la cour, comme nous le verrons plus loin. 52

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

Je vais maintenant examiner les trois conditions d'application de la préclusion découlant d'une question déjà tranchée énoncées par le juge Dickson dans l'arrêt *Angle*, précité, p. 254. 53

3. Issue Estoppel: Applying the Tests

3. La préclusion découlant d'une question déjà tranchée : application des conditions

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

a) *La condition requérant que la même question ait déjà été tranchée*

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

Traditionnellement, on définit la cause d'action comme étant tous les faits que le demandeur doit prouver, s'ils sont contestés, pour étayer son droit d'obtenir jugement de la cour en sa faveur : *Poucher c. Wilkins* (1915), 33 O.L.R. 125 (C.A.). Pour que le demandeur ait gain de cause, chacun de ces faits (souvent qualifiés de faits substantiels) doit donc être établi. Il est évident que des causes d'action différentes peuvent avoir en commun un ou plusieurs faits substantiels. En l'espèce, par exemple, l'existence d'un contrat de travail est un fait substantiel commun au recours administratif et à l'action pour congédiement injustifié intentée au civil par l'appelante. L'application de la préclusion découlant d'une question déjà tranchée signifie simplement que, dans le cas où le tribunal judiciaire ou administratif compétent a conclu, sur le fondement d'éléments de preuve ou d'admissions, à l'existence (ou à l'inexistence) d'un fait pertinent — par exemple un contrat de travail valable —, cette même question ne peut être débattue à nouveau dans le cadre d'une instance ultérieure opposant les mêmes parties. En d'autres termes, la pré- 54 that are necessarily bound up with the determination of that "issue" in the prior proceeding.

clusion vise les questions de fait, les questions de droit ainsi que les questions mixtes de fait et de droit qui sont nécessairement liées à la résolution de cette « question » dans l'instance antérieure.

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

En l'espèce, les parties conviennent que la condition relative à l'existence d'une « même question » est remplie. Dans son action pour congédiement injustifié, l'appelante réclame 300 000 $ à titre de commissions impayées. Cela met en jeu le droit même qui lui a été refusé dans le cadre de l'instance fondée sur la LNE. Une ou plusieurs des questions de fait ou de droit essentielles à la reconnaissance de ce droit ont nécessairement été tranchées en faveur de l'employeur dans le cadre de la procédure administrative. Si la préclusion découlant d'une question déjà tranchée s'applique, cela a pour effet d'empêcher l'appelante de soutenir que ces questions devraient maintenant être tranchées en sa faveur.

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

b) *La condition requérant que la décision judiciaire qui entraînerait l'application de la préclusion ait un caractère définitif*

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

Comme il a été indiqué plus tôt, la condition requérant que la décision antérieure soit une décision « judiciaire » (plutôt qu'administrative ou législative) est satisfaite en l'espèce.

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

En outre, je souscris à l'opinion de la Cour d'appel de l'Ontario selon laquelle, en raison du fait que l'employée ne s'est pas prévalue du mécanisme de révision interne, la décision de l'agente des normes d'emploi avait un caractère définitif pour l'application de la Loi et était donc susceptible, dans le cours normal des choses, de faire naître la préclusion.

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

J'ai déjà souligné que, en l'espèce, contrairement à l'affaire *Harelkin*, précitée, l'appelante ne disposait d'aucun droit d'appel. Elle pouvait uniquement demander au directeur de faire réviser par un arbitre la décision de l'agente des normes d'emploi. Bien qu'il puisse s'agir d'un facteur à prendre en considération dans l'exercice du pouvoir discrétionnaire de refuser l'application de la préclusion découlant d'une question déjà tranchée, il n'a aucun effet sur le caractère définitif de la décision.

decision must nevertheless be treated as final for present purposes.

(c) *That the Parties to the Judicial Decision or Their Privies Were the Same Persons as the Parties to the Proceedings in Which the Estoppel Is Raised or Their Privies*

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

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

L'appelante pourrait à juste titre prétendre, dans le cadre d'une demande de contrôle judiciaire, que contrairement à M. Harelkin elle ne disposait pas, de plein droit, d'un autre « recours approprié ». Néanmoins, la décision de l'agente des normes d'emploi doit être tenue pour définitive pour les fins du présent pourvoi.

c) *La condition requérant que les parties à la décision judiciaire invoquée, ou leurs ayants droit, soient les mêmes que les parties aux procédures au cours desquelles la préclusion est plaidée, ou leurs ayants droit*

Cette condition garantit la réciprocité. Si elle ne 59
s'appliquait pas, un tiers aux procédures antérieures pourrait exiger qu'une partie à celles-ci soit considérée comme liée, dans le cadre d'une instance ultérieure, par les conclusions tirées au cours des premières procédures, alors que ce tiers, qui ne serait partie qu'à la seconde instance, ne serait pas lié par ces conclusions : *Machin*, précité; *Minott c. O'Shanter Development Co.* (1999), 42 O.R. (3d) 321 (C.A.), le juge Laskin, p. 339-340. Cette condition de réciprocité a fait l'objet de certaines critiques par le juge McEachern (plus tard Juge en chef de la Colombie-Britannique), pendant qu'il siégeait en première instance, dans l'affaire *Saskatoon Credit Union Ltd. c. Central Park Ent. Ltd.* (1988), 22 B.C.L.R. (2d) 89 (C.S.), p. 96, et elle a été modifiée de façon substantielle dans bon nombre d'États américains : voir Holmested et Watson, *op. cit.*, 21§24, et G. D. Watson, « Duplicative Litigation : Issue Estoppel, Abuse of Process and the Death of Mutuality » (1990), 69 *R. du B. can.* 623.

Évidemment, la notion de « lien de droit » est 60
assez élastique. J. Sopinka, S. N. Lederman et A. W. Bryant, les éminents éditeurs de l'ouvrage *The Law of Evidence in Canada* (2^{e} éd. 1999), affirment avec un certain pessimisme, à la p. 1088, qu'[TRADUCTION] « [i]l est impossible d'être catégorique quant à l'étendue de l'intérêt qui crée un lien de droit » et qu'il faut trancher au cas par cas. En l'espèce, les parties sont les mêmes et il n'y a pas lieu d'explorer davantage les confins des notions de « réciprocité » et d'« identité des parties ».

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

J'arrive à la conclusion que les conditions d'application de la préclusion découlant d'une question déjà tranchée sont réunies en l'espèce.

4. The Exercise of the Discretion

4. L'exercice du pouvoir discrétionnaire

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

L'appelante fait valoir que la Cour doit néanmoins exercer son pouvoir discrétionnaire et refuser l'application de la préclusion. Il ne fait aucun doute que ce pouvoir discrétionnaire existe. Dans l'arrêt *General Motors of Canada Ltd. c. Naken*, [1983] 1 R.C.S. 72, le juge Estey a souligné, à la p. 101, que dans le contexte d'une instance judiciaire « ce pouvoir discrétionnaire est très limité dans son application ». À mon avis, le pouvoir discrétionnaire est nécessairement plus étendu à l'égard des décisions des tribunaux administratifs, étant donné la diversité considérable des structures, missions et procédures des décideurs administratifs.

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

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

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

Dans l'arrêt *Bugbusters*, précité, le juge Finch de la Cour d'appel (maintenant Juge en chef de la Colombie-Britannique) a fait les observations suivantes, au par 32 :

> [TRADUCTION] Il faut toujours se rappeler que, bien que les trois conditions d'application de la préclusion découlant d'une question déjà tranchée doivent être réunies pour que celle-ci puisse être invoquée, le fait que ces conditions soient présentes n'emporte pas nécessairement l'application de la préclusion. Il s'agit d'une doctrine issue de l'*equity* et, comme l'indique la jurisprudence, elle présente des liens étroits avec l'abus de procédure. Elle se veut un moyen de rendre justice et de protéger contre l'injustice. Elle implique inévitablement l'exercice par la cour de son pouvoir discrétionnaire pour assurer le respect de l'équité selon les circonstances propres à chaque espèce.

Mis à part, entre parenthèses, le fait que la préclusion *per rem judicatem* soit généralement considérée comme une doctrine de common law (contrairement à la préclusion fondée sur une promesse, qui tire clairement son origine de l'*equity*), j'estime qu'il s'agit d'un énoncé fidèle du droit applicable. Cette remarque incidente du juge Finch a été retenue et appliquée par la Cour d'appel de l'Ontario dans l'affaire *Schweneke*, précitée, par. 38 et 43 :

The discretion to refuse to give effect to issue estoppel becomes relevant only where the three prerequisites to the operation of the doctrine exist. . . . The exercise of the discretion is necessarily case specific and depends on the entirety of the circumstances. In exercising the discretion the court must ask — is there something in the circumstances of this case such that the usual operation of the doctrine of issue estoppel would work an injustice?

. . .

. . . The discretion must respond to the realities of each case and not to abstract concerns that arise in virtually every case where the finding relied on to support the doctrine was made by a tribunal and not a court.

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

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

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

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

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

In my view it was an error of principle not to address the factors for and against the exercise of

[TRADUCTION] Le pouvoir discrétionnaire de refuser de donner effet à la préclusion découlant d'une question déjà tranchée ne naît que lorsque les trois conditions d'application de la doctrine sont réunies. [. . .] Ce pouvoir discrétionnaire est nécessairement exercé au cas par cas et son application dépend de l'ensemble des circonstances. Dans l'exercice de ce pouvoir discrétionnaire, la cour doit se poser la question suivante : existe-t-il, en l'espèce, une circonstance qui ferait en sorte que l'application normale de la doctrine créerait une injustice?

. . .

. . . L'exercice du pouvoir discrétionnaire doit tenir compte des réalités propres à chaque affaire et non de préoccupations abstraites, qui sont présentes dans pratiquement tous les cas où la décision invoquée au soutien de la demande d'application a été rendue par un tribunal administratif et non par un tribunal judiciaire.

Voir également *Braithwaite*, précité, par. 56.

Les cours de justice d'autres pays du Commonwealth appliquent des principes analogues. Dans l'arrêt *Arnold c. National Westminster Bank plc*, [1991] 3 All E.R. 41, la Chambre des lords a exercé son pouvoir discrétionnaire et refusé d'appliquer la préclusion découlant d'une question déjà tranchée à l'égard d'une sentence arbitrale. Voici ce qu'a dit lord Keith of Kinkel, à la p. 50 : 64

[TRADUCTION] L'une des raisons d'être de la préclusion étant de rendre justice aux parties, il est loisible aux cours de justice de reconnaître que, dans certaines circonstances, son application rigide produirait l'effet contraire. . .

Dans la présente affaire, le juge Rosenberg a mentionné, aux p. 248-249, l'existence possible d'un pouvoir discrétionnaire potentiel mais, en toute déférence, il ne s'y est pas attardé. Il n'a ni examiné ni analysé le bien-fondé de l'exercice de ce pouvoir. Il a simplement conclu ainsi, à la p. 256 : 65

[TRADUCTION] En résumé, M[me] Burke n'a pas accordé à l'appelante le bénéfice des règles de justice naturelle. Le recours qui s'offrait à cette dernière était de demander la révision de la décision de l'agente. Elle ne l'a pas fait. Elle et son employeur sont liés par cette décision.

Je suis d'avis que la Cour d'appel a commis une erreur de principe en omettant de soupeser les fac- 66 the discretion which the court clearly possessed. This is not a situation where this Court is being asked by an appellant to substitute its opinion for that of the motions judge or the Court of Appeal. The appellant is entitled at some stage to appropriate consideration of the discretionary factors and to date this has not happened.

teurs favorables et défavorables à l'exercice du pouvoir discrétionnaire dont elle était clairement investie. Il ne s'agit pas d'un cas où notre Cour est invitée par la partie appelante à substituer son opinion à celle du juge des requêtes ou de la Cour d'appel. L'appelante a droit à ce que, à un certain point dans le processus, on examine de façon appropriée les facteurs pertinents à l'exercice du pouvoir discrétionnaire, et jusqu'à maintenant on ne l'a pas fait.

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

La liste de ces facteurs n'est pas exhaustive. Elle comporte bon nombre de ceux qui ont été mentionnés dans l'arrêt *Maybrun* en rapport avec la règle prohibant les contestations indirectes. Le juge Laskin a lui aussi proposé une liste fort utile dans l'affaire *Minott*, précitée. L'objectif est de faire en sorte que l'application de la préclusion découlant d'une question déjà tranchée favorise l'administration ordonnée de la justice, mais pas au prix d'une injustice concrète dans une affaire donnée. Sept facteurs, mentionnés ci-après, sont pertinents dans la présente affaire.

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

a) *Le libellé du texte de loi accordant le pouvoir de rendre l'ordonnance administrative*

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

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

En l'espèce, la LNE comporte le par. 6(1), qui prévoit ce qui suit :

> La présente loi ne suspend pas les recours civils dont dispose un employé contre son employeur <u>ni n'y porte atteinte</u>. [Je souligne.]

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

Cette disposition tend à indiquer que, à l'époque pertinente, le législateur ontarien n'entendait pas que le forum prévu par la LNE ait pour effet d'exclure tous les autres. (De récentes modifications apportées à la Loi obligent désormais l'employé à choisir entre la procédure prévue par la LNE ou le recours aux tribunaux judiciaires. Cependant, même avant ces modifications, les cours de justice pouvaient à bon droit conclure que l'engagement de nouvelles procédures à l'égard d'une question constituait un abus : *Rasanen*, précité, le juge en chef adjoint Morden de la Cour d'appel de l'Ontario, p. 293, le juge Carthy, p. 288.)

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

70 Bien qu'il soit généralement raisonnable pour un défendeur d'escompter pouvoir tourner la page après des procédures — y compris tout appel possible — au terme desquelles sa responsabilité n'a pas été retenue, en l'espèce l'appelante a intenté son action civile contre les intimés avant que l'agente des normes d'emploi n'ait rendu sa décision (comme l'y autorisait clairement la loi pertinente à l'époque). En conséquence, les intimés savaient parfaitement, en droit et en fait, qu'ils devaient se défendre dans des procédures parallèles se chevauchant dans une certaine mesure.

(b) *The Purpose of the Legislation*

b) *L'objet de la loi*

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

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

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

> It would be unfair to an employee who sought out immediate and limited relief of $4,000, forsaking dis-

71 Il est fort possible que le nœud d'une instance administrative soit totalement différent de celui d'un litige subséquent, même si une ou plusieurs des questions litigieuses sont les mêmes. Dans l'affaire *Bugbusters*, précitée, une entreprise forestière a été conscrite afin d'aller combattre un incendie de forêt en Colombie-Britannique. Elle a par la suite demandé le remboursement de ses dépenses en vertu de la *Forest Act*, R.S.B.C. 1979, ch. 140, de cette province. On a fait droit à sa demande *malgré* des allégations selon lesquelles l'incendie avait été causé par un de ses employés qui aurait négligemment jeté une cigarette. (Si l'allégation avait été prouvée, Bugbusters n'aurait pas eu droit au remboursement.) Sa Majesté a par la suite intenté une action en négligence de 5 000 000 $ contre Bugbusters pour être indemnisée des pertes occasionnées par le feu de forêt. Cette dernière a plaidé la préclusion découlant d'une question déjà tranchée. Exerçant son pouvoir discrétionnaire, la Cour d'appel a refusé d'appliquer la doctrine, notamment pour le motif suivant, exposé par le juge Finch, au par. 30 :

> [TRADUCTION] . . . pendant l'instance [en remboursement fondée sur la *Forest Act*], aucune des parties ne pouvait raisonnablement s'attendre à ce qu'il soit statué définitivement sur le droit de Sa Majesté d'être indemnisée de ses pertes.

Une remarque au même effet a été formulée par le juge Carthy dans l'affaire *Rasanen*, précitée, p. 290 :

> [TRADUCTION] Il serait injuste vis-à-vis d'un employé qui a demandé sans délai une indemnité limitée de

covery and representation in doing so, to then say that he is bound to the result as it affects a claim for ten times that amount.

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

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

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

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

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

(c) *The Availability of an Appeal*

74 This factor corresponds to the "adequate alternative remedy" issue in judicial review: *Harelkin, supra*, at p. 592. Here the employee had no *right* of appeal, but the existence of a potential administrative review and her failure to take advantage of it

4 000 $, renonçant de ce fait à la communication de la preuve et au droit d'être représenté par avocat, de lui opposer ensuite qu'il est lié par le résultat de ce recours et par son effet sur la réclamation d'une somme dix fois plus élevée.

Une réserve semblable est formulée dans l'ouvrage américain *Restatement of the Law, Second : Judgments 2d* (1982), vol. 2, § 83(2)(c), où l'on fait état

[TRADUCTION] . . . des éléments procéduraux requis pour que l'instance permette de régler décisivement le différend, compte tenu de l'ampleur et de la complexité de celui-ci, de l'urgence avec laquelle il faut le trancher et de la possibilité pour les parties de recueillir de la preuve et de formuler des arguments juridiques.

Je suis bien sûr conscient du fait que, en l'espèce, l'appelante a choisi la procédure prévue par la LNE. L'avocat de l'intimée a fait remarquer à juste titre, non sans une certaine exaspération :

[TRADUCTION] Comme l'indique clairement le dossier, Mme Danyluk était représentée par avocat avant la cessation d'emploi, au moment de celle-ci et par la suite. Son avocat et elle savaient fort bien qu'elle avait au départ le choix du forum devant lequel présenter sa réclamation pour salaire et commissions impayés. . .

Néanmoins, l'objet de la LNE est d'offrir un moyen relativement rapide et peu coûteux de régler les différends entre employés et employeurs. Accorder un poids excessif aux décisions prises en vertu de la LNE, dans le contexte de l'application de la préclusion découlant d'une question déjà tranchée, obligerait vraisemblablement les parties, en pareils cas, à préparer une demande et une défense équivalentes à celles préparées dans le cadre d'un véritable procès et tendrait ainsi à enlever à l'ensemble du régime établi par la LNE son caractère expéditif. Cette situation compromettrait l'objectif visé par la loi.

c) *L'existence d'un droit d'appel*

Ce facteur correspond à celui de l'autre « recours approprié » applicable en matière de contrôle judiciaire : *Harelkin*, précité, p. 592. Dans la présente affaire, l'employée ne disposait d'aucun *droit* d'appel, mais la possibilité d'une révision must be counted against her: *Susan Shoe Industries Ltd. v. Ricciardi* (1994), 18 O.R. (3d) 660 (C.A.), at p. 662.

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

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

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

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

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

administrative et l'omission de s'en prévaloir doivent être retenues contre elle : *Susan Shoe Industries Ltd. c. Ricciardi* (1994), 18 O.R. (3d) 660, (C.A.), p. 662.

d) *Les garanties offertes aux parties dans le cadre de l'instance administrative*

75 Comme il a été mentionné précédemment, la procédure expéditive propre à permettre la réalisation des objectifs de la LNE peut tout simplement ne pas convenir pour l'examen de complexes questions de fait ou de droit. Étant maîtres de leur procédure, les organismes administratifs peuvent écarter des éléments de preuve que les cours de justice estiment probants ou encore agir sur le fondement d'éléments que ces dernières ne jugent pas fiables. Si cela s'est produit, il peut s'agir d'un facteur à prendre en compte dans l'exercice du pouvoir discrétionnaire de la cour. En l'espèce, le manquement aux règles de justice naturelle est un facteur clé en faveur de l'appelante.

76 Dans l'affaire *Rasanen*, précitée, p. 295, le juge en chef adjoint Morden a souligné le point suivant, dans ses motifs de jugement concourants : [TRADUCTION] « Je n'exclus pas la possibilité que des lacunes dans la procédure ayant conduit à la première décision puissent à juste titre constituer un facteur dans la décision d'appliquer ou non la préclusion découlant d'une question déjà tranchée. » Le juge Laskin de la Cour d'appel de l'Ontario a tenu des propos analogues dans l'affaire *Minott*, précitée, p. 341-342.

e) *L'expertise du décideur administratif*

77 Dans la présente affaire, l'agente des normes d'emploi, qui n'avait aucune formation juridique, était appelée à trancher une question potentiellement complexe en matière de droit des contrats. L'approche expéditive qui convient pour la grande majorité des demandes fondées sur la LNE n'est pas le genre d'expertise requise en l'espèce. Un facteur similaire s'applique à l'égard de la règle prohibant les contestations indirectes (*Maybrun*, précité, par. 50) :

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

. . . le fait que la contestation de l'ordonnance repose sur des considérations étrangères à l'expertise ou à la raison d'être d'une instance administrative d'appel suggère, sans toutefois être déterminant en lui-même, que le législateur n'a pas voulu réserver à cette instance le pouvoir exclusif de se prononcer sur la validité de l'ordonnance.

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

f) *Les circonstances ayant donné naissance à l'instance administrative initiale*

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

Un argument qui peut être avancé en faveur de l'appelante est qu'elle s'est prévalue du recours fondé sur la LNE à un moment où l'imminence de son congédiement faisait d'elle une personne vulnérable. Il est peu probable que le législateur ait voulu qu'une procédure sommaire applicable à la réclamation de petites sommes fasse obstacle à l'examen approfondi de réclamations plus considérables. (La décision ultérieure du législateur de plafonner à 10 000 $ les réclamations pouvant être présentées en vertu de la LNE concorde avec cette interprétation.) Comme l'a fait observer le juge Laskin dans l'arrêt *Minott*, précité, p. 341-342 :

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

[TRADUCTION] . . . les employés présentent une demande au moment où ils sont le plus vulnérables, soit immédiatement après la perte de leur emploi. Le fait qu'ils doivent invariablement agir rapidement pour demander réparation compromet leur aptitude à présenter adéquatement leur point de vue ou à réfuter la thèse de la partie adverse. . .

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

Par contre, il convient de rappeler que dans la présente affaire l'appelante, agissant alors de son propre chef ou sur les conseils de son avocat, a inclus dans sa demande fondée sur la LNE les 300 000 $ réclamés à titre de commissions et elle doit assumer la responsabilité d'au moins une partie des difficultés résultant de cette décision.

(g) *The Potential Injustice*

g) *Le risque d'injustice*

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

Suivant ce dernier facteur, qui est aussi le plus important, notre Cour doit prendre un certain recul et, eu égard à l'ensemble des circonstances, se demander si, dans l'affaire dont elle est saisie, l'application de la préclusion découlant d'une question déjà tranchée entraînerait une injustice. Le juge Rosenberg de la Cour d'appel a conclu que l'appelante n'avait pas été informée des allégations problem identified by Jackson J.A., dissenting, in *Iron v. Saskatchewan (Minister of the Environment & Public Safety)*, [1993] 6 W.W.R. 1 (Sask. C.A.), at p. 21:

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

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

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

V. Disposition

I would therefore allow the appeal with costs throughout.

Appeal allowed with costs.

Solicitors for the appellant: Lang Michener, Toronto.

Solicitors for the respondents: Heenan Blaikie, Toronto.

de l'intimée et n'avait pas eu la possibilité d'y répondre. Le juge Rosenberg était donc aux prises avec le problème signalé par le juge Jackson, dans ses motifs dissidents dans l'arrêt *Iron c. Saskatchewan (Minister of the Environment & Public Safety)*, [1993] 6 W.W.R. 1 (C.A. Sask.), p. 21 :

> [TRADUCTION] Constituant un moyen de rendre justice aux parties dans le contexte d'une procédure contradictoire, la doctrine de l'autorité de la chose jugée porte en elle-même le germe de l'injustice, spécialement lorsque le droit des parties de se faire entendre est en jeu.

Indépendamment des diverses erreurs de nature procédurale commises par l'appelante en l'espèce, il n'en demeure pas moins que sa réclamation visant des commissions totalisant 300 000 $ n'a tout simplement jamais été examinée et tranchée adéquatement.

Vu l'effet cumulatif des facteurs susmentionnés, je suis d'avis que notre Cour doit exercer son pouvoir discrétionnaire et refuser d'appliquer en l'espèce la préclusion découlant d'une question déjà tranchée. 81

V. Le dispositif

Je suis d'avis d'accueillir le pourvoi avec dépens devant toutes les cours. 82

Pourvoi accueilli avec dépens.

Procureurs de l'appelante : Lang Michener, Toronto.

Procureurs des intimés : Heenan Blaikie, Toronto.

TAB 3

COURT FILE NO.: 07-CL6913 and 08-CL-7368
DATE: 20091222

SUPERIOR COURT OF JUSTICE – ONTARIO
COMMERCIAL LIST

RE: ED MIRVISH ENTERPRISES LIMITED and 1 KING WEST INC.

Applicants

STINSON HOSPITALITY INC. and DOMINION CLUB OF CANADA CORPORATION and HARRY STINSON

Respondents

BEFORE: Justice Newbould

COUNSEL: J. Robert Verdun - Self-represented

Jessica Kimmel and *Lauren Butti*, for the Ira Smith Trustee and Receiver Inc., and Goodmans LLP

DATE HEARD: December 10, 2009

ENDORSEMENT

[1] This is a motion by Mr. Verdun for leave to bring an action for alleged gross negligence and willful misconduct against Ira Smith Trustee and Receiver Inc. (the "Receiver"), and its counsel Goodmans LLP ("Goodmans").

[2] This motion arises out of the receivership of four debtor companies in connection with the development at 1 King Street West, Toronto. On September 25, 2009, the Receiver was discharged. The discharge order of Pepall J. provided that the Receiver and its counsel Goodmans were released and discharged from all liabilities in connection with their conduct, involvement or duties with respect to the four debtor companies or in any way in connection with these proceedings, save and except for gross negligence or willful misconduct. In her endorsement released September 25, 2009, Pepall J. stated:

> It seems to me that as a matter of principle, on discharge, a receiver should not be granted a release that encompasses gross negligence or willful misconduct. It may be that such conduct only comes to light after a receiver has been discharged.

> In such circumstances, a receiver should be liable for its actions. That said, post discharge, a claimant should still be required to obtain leave of the Court to institute and continue proceedings against a former receiver. When addressing the request for such leave, the Court will consider, amongst other things, prior Court approval of the conduct of the receiver, the claims bar process, if any, and its outcome, and whether as a condition of proceeding with litigation, it is appropriate for the claimant to post full indemnity security for costs by letter of credit or otherwise. In my view, absent a strong prima facie case, the latter should be the norm, such a regime strikes me as an appropriate balance between the desirability of providing appropriate protection to the Court's former officer and the need to address instances of gross negligence and willful misconduct.

[3] During the receivership there was a claims bar process. Because of problems that the Receiver and its counsel had with Mr. Verdun, which were referred to in the endorsement of Pepall J. dated September 25, 2009 and also in the fourteenth Report of the Receiver, the claims bar process provided for a call for claims against both the Receiver and its counsel regarding their conduct since the original proceedings in this matter, including any claims for intentional or unintentional torts. All claims were to be barred on January 23, 2009 unless a claim had been made before then. The claims now sought to be made by Mr. Verdun were not made by him under the claims bar process. He did make a claim for $25,654.02 for lost income and expenses in respect of his unit at 1 King West on the basis that he claimed the Receiver was liable for lost income as a result of the stay contained in the receivership order which prevented him from removing his unit from the rental pool. That claim was disallowed by the Receiver and Mr. Verdun did not appeal that. Thus that claim is barred.

[4] Apart from the claims bar process, orders were made throughout the receivership by Pepall J. approving the thirteen reports made by the Receiver to the court to the date of the Receiver's discharge and the actions and activities of the Receiver contained in those reports.

[5] Mr. Verdun now seeks to commence a claim against the Receiver and Goodmans for a number of claims on behalf of the residential condominium corporation ("TSCC 1703"). During the receivership from April 2007 until January 2008, Mr. Verdun was president of TSCC 1703. He remains a member of the board of directors. He has no right to be commencing any action on behalf of TSCC 1703. TSCC 1703 has not applied for leave to commence any action.

[6] Mr. Verdun also seeks to commence a claim on behalf of "unsecured creditors". He has not named these unsecured creditors or named any entity or person against whom they are creditors. He has no right to be suing on behalf of other persons and he has not established in any way that he is an unsecured creditor of either the Receiver or Goodmans.

[7] Mr. Verdun also seeks to claim on behalf of individual suite owners for losses incurred by them in participating in the hotel rental pool during the receivership. He has no right to be suing on behalf of any other suite owner. This claim is asserted as a result of the dismissal by Pepall J. on October 24, 2007 of a motion by TSCC 1703 and one unit holder on behalf of all unit holders to vacate the stay provisions of the receivership order to allow the unit holders to

freely leave the rental pool. Mr. Verdun made a claim with respect to these losses in the claims bar process in the receivership and it was disallowed. He has no right now to be commencing another claim for that. In any event, there is no evidence that the Receiver or Goodmans did anything wrong that led to the order of Pepall J. refusing the motion to allow the unit holders to leave the rental pool.

[8] Mr. Verdun has also seeks to claim for lost market value caused by the receivership payable to all owners of suites based on $25,000 for each of 540 units. He cannot sue on behalf of anyone else other than himself. This claim appears to be based on an assertion that the receivership order should not have been granted in the first place.

[9] Mr. Verdun also seeks to claim for what he says are the fees and disbursements paid to the Receiver and the fees and disbursements paid to Goodmans from the income streams of Stinson Hospitality Inc. et al. during the receivership. He has not claimed to have paid these amounts himself and he has no right to be making any such claim on behalf of anyone else.

[10] During the course of argument, Mr. Verdun indicated that a primary concern is that TSCC 1703 ended up paying for hotel operational assets which it purchased from the Receiver and he contends that TSCC 1703 should not have had to acquire those assets. He said that his damages would be his share of the $13.9 million paid for those assets, his share to be measured by his percentage that his unit bears to all of the units of TSCC 1703. This claim would not be one for him to make but for TSCC 1703 to make, which it has not sought to do.

[11] There are other problems with the claims sought to be made by Mr. Verdun.

[12] Much of the complaints of Mr.Verdun relate to the residential condominium corporation TSCC 1703 and the commercial condominium corporation TSCC 1726. Neither of these condominium corporations were the subject of the receivership. While his complaints in his affidavit are somewhat rambling, they in large part boil down to allegations that matters were not brought to the court's attention by the Receiver or its counsel which resulted in court orders that Mr. Verdun does not think were correct. He says there should never have been a receiving order in the first place as the security was invalid and that there should not have been a sale of assets to TSCC 1703 as the assets should not have been the subject of any sale.

[13] However, Mr. Verdun's affidavit of October 3, 2007 that he filed with the Court referred to many of the pieces of information which he asserts ought to have been provided by the Receiver to the Court. In his e-mail of October 10, 2007 to other suite owners, he stated that Justice Pepall had confirmed in court that she had read his affidavit. Moreover, there was nothing preventing Mr. Verdun or TSCC 1703 from bringing any fact to the attention of the Court that they thought relevant.

[14] Regarding Mr. Verdun's complaint that the Receiver ought to have realized that it had nothing of substance to sell and that TSCC 1703 ought not to have been required to purchase the assets that it did, Mr. Verdun's e-mail of October 24, 2007 to the Receiver indicates that he was of the same view back then, well before the bar claims process was in place. Moreover, on May 9, 2008, Mr. Gardiner of Gardiner Miller Arnold LLP, solicitors at that time for TSCC 1703,

wrote to TSCC 1726 and the Receiver, who was not the Receiver for TSCC 1726, indicating problems with the status of TSCC 1726. Mr. Verdun said in argument that he did not realize that TSCC 1726 had not been set up properly. That statement is belied by the letter from Mr. Gardiner. At the time of the letter Mr. Verdun was president of TSCC 1703 on whose behalf the letter was sent.

[15] Mr. Verdun complains about the mortgage security under which the Receiver was appointed. He asserts that there is an issue as to whether or not the security was the result of a fraudulent conveyance and that nothing was done about that at the time by the Receiver or its counsel. This complaint is contrary to the facts and in any event the issue was known to Mr. Verdun before the claims bar date. The relevant facts are contained in the Receiver's fourteenth Report at section 2.9 and 2.10. In substance, the issue of security being invalid was raised by the Receiver including the concern that there was a potential preference. A motion was authorized for Segura to bring a motion to lift the stay in order to advance a rectification application, which motion was brought. The Receiver was made a party to that motion at the direction of Pepall J. After documentary production and examinations of several witnesses, a case conference was held before Campbell J. and a settlement of the issue was arrived at subject to court approval. The Receiver reported on the proposed settlement in its ninth Report and the motion to approve the settlement was served on Mr. Verdun who took no steps to oppose the order. The order approving the settlement was made on December 11, 2008, the date when the claims bar process was ordered to take place.

[16] In late January 2009 after the orders had been made recognizing the validity and the quantum of the security, Mr. Verdun stated he intended to move for a lift of the stay of proceedings for leave to file a statement of claim challenging the quantum of the security. A timetable was set by Pepall J. and the parties were ordered to attend a case conference before Campbell J. Mr. Verdun had retained counsel for his motion. Following the settlement conference held with Campbell J. the Receiver was advised in writing by Mr. Verdun's counsel that Mr. Verdun was abandoning his motion. Costs were ordered by Pepall J. on May 29, 2009 against Mr.Verdun for the costs of the abandoned motion.

[17] Mr. Verdun was well aware of the issues of the security. If he was dissatisfied with the actions of the Receiver or its counsel and wanted to make a claim against them, he should have done so in the claims bar procedure. He did not.

[18] Mr. Verdun also complained about a furniture, fixtures, and equipment reserve, which he says the Receiver accessed improperly. The Receiver's fourteenth Report at page 15 deals with this issue. Funding of this reserve was the responsibility of Stinson Hospitality Inc., one of the debtors over which the Receiver was appointed. After its appointment, the Receiver funded the reserve. The Receiver eventually brought a motion to confirm that it could utilize funds in the reserve to meet obligations of the estates. The motion was heavily contested by TSCC 1703, supported by Mr. Verdun who was its president, and the matter was ultimately settled.

[19] I have not referred to every allegation of fact made by Mr. Verdun. They do not all fall into neat compartments. However, I am satisfied that Mr. Verdun has not established that there

were any facts giving rise to his complaints that he now wishes to make the subject of an action of which he was not aware at the time of the claims bar process.

[20] The actions of the Receiver were approved by court order at various stages. Orders were made, both before the date of the initial receivership order and thereafter. What Mr. Verdun seeks to do essentially amounts to a collateral attack on one or more of those orders. There is no basis for making such a collateral attack. It would be an abuse of process for him to be permitted to do so.

[21] In any event, Mr. Verdun has not established at all a prima facie case, let alone a strong prima facie case, of negligence or intentional misconduct against the Receiver. There is nothing in the record before me at all that could be considered to amount to any such conduct.

[22] With respect to Goodmans, their duty was to the Receiver. There is no evidence of any kind that Goodmans owed any duty to Mr. Verdun and no evidence that they engaged in any intentional wrong doing towards him, or any wrong doing for that matter. Moreover, any claim that Mr. Verdun may have had against Goodmans was barred by the claims bar process. Mr. Verdun has no cogent evidence of information relating to Goodmans coming to light before or after the claims bar process that could be considered negligence or willful misconduct.

[23] In all of the circumstances, the motion by Mr. Verdun for leave to commence an action against the Receiver and Goodmans is dismissed. The Receiver and Goodmans are entitled to their costs. In light of the allegations made against the Receiver and Goodmans in their professional capacity, including allegations of fraud, they are entitled to their costs on a substantial indemnity basis. They may make submissions as to the quantum of costs within 15 days from the release of these reasons and Mr. Verdun will have 15 days to respond. Costs submissions by both parties are to be no longer than five pages double spaced. The submissions of the Receiver and Goodmans should attach an outline of costs in accordance with the Rules.

NEWBOULD J.

DATE: December 22, 2009

TAB 4

In the Court of Appeal of Alberta

Citation: McDonald v Brookfield Asset Management Inc., 2016 ABCA 375

Date: 20161205
Docket: 1501-0131-AC
Registry: Calgary

Between:

Lanny K. McDonald

Appellant
(Plaintiff)

- and -

Brookfield Asset Management Inc., Brookfield Special Situation Partners Ltd. and Hammerstone Corporation

Respondents
(Defendants)

The Court:

The Honourable Chief Justice Catherine Fraser
The Honourable Mr. Justice Frans Slatter
The Honourable Mr. Justice Brian O'Ferrall

Memorandum of Judgment

Appeal from the Order by
The Honourable Madam Justice J. Strekaf
Dated the 30th day of April, 2015
Filed on the 25th day of May, 2015
(2015 ABQB 281, Docket: 1401-05797)

Memorandum of Judgment

The Court:

[1] The plaintiff appeals the summary dismissal of this action: ***McDonald v Brookfield Asset Management Inc.***, 2015 ABQB 281. The action was a proposed class action on behalf of shareholders arising from a failed investment known as Birch Mountain Resources. Birch Mountain was initially thought to own a quarry with a value of $1.6 billion, but it was unable to fund its operations, and its assets were sold under receivership for less than $50 million.

<u>Facts</u>

[2] Birch Mountain Resources Limited was a publicly traded company focussed at the relevant time on developing a limestone quarry it had discovered in northern Alberta. At one point the quarry was valued at $1.6 billion, but Birch Mountain had trouble funding its operations from the outset. Birch Mountain eventually lost the quarry in receivership proceedings when it was unable to meet its obligations.

[3] The plaintiff McDonald was a director and shareholder of Birch Mountain. He brings this action as a potential class action on behalf of all those who held common shares of Birch Mountain between April 2005 and November 2008.

[4] The defendants Brookfield Asset Management Inc., Brookfield Special Situations Partners Ltd. (sometimes known as "Brookfield Capital Partners Ltd." or "Tricap Partners"), and Hammerstone Corporation are a part of a group of venture capital companies that attempt to identify and then invest in companies with potential, but facing business challenges. The defendants' business model is to provide financial and operating experience, as well as capital, to these companies with a view to eventual profit.

[5] The ultimate demise of Birch Mountain, and the source of this claim, can be traced to a number of financial transactions and events between 2006 and 2008:

a) Birch Mountain issued $30 million of Convertible Unsecured Subordinated Debentures in November 2006 (EKE A65). Great Pacific Capital Corp. was or became the holder of $29.28 million of those debentures.

b) In March 2007 Birch Mountain obtained a $15.5 million senior secured one year term credit facility from Brookfield Bridge Lending Fund, which was designed to bridge cash requirements pending an expected increase in sales from operations by December 2007.

c) The anticipated increase in sales did not materialize, and Birch Mountain committed events of default under the bridge loan between May and August 2007. Brookfield

Bridge Lending agreed to waive those defaults in July, August and September 2007, on various conditions.

d) In September 2007, Birch Mountain established a special committee to explore strategic alternatives for the company.

e) In December 2007, Tricap subscribed for a $31.5 million Convertible Secured Senior Debenture (EKE A71) under the terms of a blanket Loan Agreement. The proceeds were to be used to pay off the $15.5 million bridge loan to Brookfield Bridge Lending Fund, and to provide additional capital. The Birch Mountain Directors recommended this transaction, and in May 2008 it was approved by a 94% vote of the shareholders.

f) In June and July 2008, Birch Mountain defaulted on interest payments due under the Convertible Secured Senior Debenture. Tricap and Birch Mountain entered into a Waiver and Amending Agreement in August 2008 with respect to these defaults, in return for a fee of $3 million which was funded by an increase in the principal indebtedness. This agreement waived certain existing defaults, and granted Birch Mountain a "covenant holiday" under the Loan Agreement.

g) In August 2008 the American Stock Exchange signalled an intention to delist the Birch Mountain shares because of the company's impaired financial condition, and Birch Mountain advised in a press release that it was experiencing serious financial difficulty.

h) On October 31, 2008 Tricap commenced enforcement of its security. Birch Mountain executed a waiver of the notice period, and consented to the enforcement of the security.

i) On November 3, 2008, Birch Mountain issued a press release advising that it was unable to pay its indebtedness, and that Tricap had commenced enforcement of its security. The press release noted that a receiver might be appointed, but that the receiver might not continue to operate the business of the Company.

j) An Interim Receiver and Manager was appointed by the Court on November 5, 2008. The application for a receiver was made on notice to Birch Mountain, and was not opposed by Birch Mountain or any other party.

k) At this time Great Pacific Capital Corp. was the holder of $29.28 million of the Convertible Unsecured Subordinated Debentures issued in November 2006. On November 20, 2008 Great Pacific entered into an agreement with Tricap to assign its interests to Tricap's subsidiary Hammerstone.

l) The receiver attempted to find a buyer for the Birch Mountain quarry, but was unsuccessful despite contacting approximately 146 potential purchasers. On December 17, 2008 Tricap offered to purchase all of the assets of Birch Mountain through Hammerstone for $42.4 million, through a combination of forgiveness of debt and assumption of third party claims against Birch Mountain.

m) The receiver recommended acceptance of the Tricap offer, and the sale was approved by the Court on January 8, 2009. None of the orders granted in the receivership proceedings (including the receivership order itself and the order selling the Birch Mountain assets to Hammerstone) were appealed.

As a result of the defaults and the eventual judicial sale of the quarry to Hammerstone, the shares of Birch Mountain lost all of their value, motivating this action.

[6] Another shareholder initiated the claim in Ontario, but the action was stayed because there was no real and substantial connection to that jurisdiction: ***Bond v Brookfield Asset Management Inc.***, 2011 ONSC 2529, aff'd 2011 ONCA 730, 18 CPC (7th) 74. The claim was then continued in Alberta in this action by the new representative plaintiff. Before an application could be heard to certify it as a class proceeding, the defendants brought an application for summary dismissal.

[7] The chambers judge summarily dismissed the action, concluding that there was no substantial evidence on the record showing any "merit" to the claims (reasons, para. 25). She concluded that, to a large extent, the claim amounted to a collateral attack on the unopposed and unappealed receivership order (reasons, para. 33).

[8] The chambers judge concluded that the plaintiff class did not qualify as "complainants" for the purposes of the corporate oppression remedy (reasons, para. 45). The statement of claim alleges that the defendants were "affiliates" of Birch Mountain, because if the Convertible Secured Senior Debentures were in fact converted to common shares, the defendants would fall into the definition of "affiliate" in s. 2 of the *Business Corporations Act*, RSA 2000, c. B-9. Alternatively, the statement of claim alleged that the defendants were "affiliates" because of certain provisions of the loan agreements. If the defendants were affiliates, then the plaintiff alleged that they had conducted the business of Birch Mountain in a way that was oppressive or unfairly prejudicial to the proposed class. The chambers judge rejected the argument that the defendants were "affiliates" of Birch Mountain (reasons, para. 42). The chambers judge agreed with the Ontario decision in ***Bond v Brookfield Asset Management*** that a creditor is not to be regarded as a shareholder for the purpose of determining if two companies are affiliates prior to actual conversion of a debt instrument into shares (reasons, para. 43).

[9] The chambers judge dismissed the claim based on the "good-faith doctrine", on the basis that this claim was a part of the law of contract, the proposed class did not have any contractual relationship with the defendants, and there was no independent tort of bad faith (reasons, para. 47).

[10] The chambers judge outlined the requirements for a claim of negligent misrepresentation, as set out in cases like ***Queen v Cognos Inc.***, [1993] 1 SCR 87 at p. 110. She concluded that the "special relationship" needed to maintain this claim did not exist between a creditor and a borrower (reasons, para. 51). In any event, there was no evidence to suggest that the representations complained of were false, that they were made negligently, or that they were relied on (reasons, paras. 53-4).

[11] The end result was that the chambers judge dismissed the claim in its entirety, because the plaintiff failed to provide any substantive evidence to support the oppression, the misrepresentation, or the bad faith claims. The plaintiff appeals, and seeks to introduce fresh evidence on appeal.

Standard of Review

[12] Questions of law, such as the interpretation of the Rules of Court and any conclusions about the applicable law arising in the summary judgment application are reviewed for correctness. The chambers judge's assessment of the facts based on the record before the court, the application of the law to those facts, and the ultimate determination on whether summary judgment is appropriate are all reviewed for palpable and overriding error: ***Hryniak v Mauldin***, 2014 SCC 7 at paras. 81-4, [2014] 1 SCR 87; ***Amack v Wishewan***, 2015 ABCA 147 at para. 27, 24 Alta LR (6th) 44; ***Windsor v Canadian Pacific Railway Ltd.***, 2014 ABCA 108 at para. 10, 94 Alta LR (5th) 301, 572 AR 317.

The Test for Summary Dismissal

[13] Rule 7.3 provides that an action can be summarily dismissed if there is "no merit to a claim or part of it". The onus is first on the defendant to bring forward evidence indicating an absence of merit. If that is done, the plaintiff must provide some evidence of "merit", which often involves demonstrating that there are difficult questions of fact or law that cannot fairly be resolved summarily. The plaintiff is not required, at this stage, to demonstrate that the action will succeed, or to show that there is merit on a balance of probabilities. The application for summary dismissal can successfully be resisted without proving the case to the normal civil standard.

[14] Summary judgment is an appropriate procedure where there is no genuine issue requiring a trial, which comes down to whether the chambers judge is able to reach a fair and just determination on the merits on the application for summary judgment. This will be the case when the process (1) allows the judge to make the necessary findings of fact, (2) allows the judge to apply the law to the facts, and (3) is a proportionate, more expeditious and less expensive means to achieve a just result. The summary judgment rules must be interpreted broadly, favouring proportionality and fair access to the affordable, timely and just adjudication of claims: ***Hryniak v Mauldin*** at paras. 4, 5, 49; ***Amack v Wishewan*** at para. 26; ***Windsor v Canadian Pacific Railway*** at para. 13.

The State of the Record

[15] A plaintiff who is responding to a summary dismissal application cannot just rely on the contents of the pleadings, or speculation about what might be proved at trial. The respondent must "put its best foot forward" and meet the application for summary dismissal with evidence showing merit:

> A summary judgment motion cannot be defeated by vague references to what may be adduced in the future, if the matter is allowed to proceed. To accept that proposition would be to undermine the rationale of the rule. A motion for summary judgment must be judged on the basis of the pleadings and materials actually before the judge, not on suppositions about what might be pleaded or proved in the future: ***Canada (Attorney General) v Lameman***, 2008 SCC 14 at para. 19, [2008] 1 SCR 372.

This action was dismissed primarily because the plaintiff failed to provide any substantive evidence showing merit.

[16] The defendants applied for summary dismissal based on a detailed affidavit rebutting and denying all of the allegations made. The only evidence the plaintiff brought to the summary dismissal application was an affidavit of David Johnson, a consultant working with the plaintiff's counsel; neither the named plaintiff nor any member of the proposed class provided any evidence. Johnson had no personal involvement with or personal knowledge about the events underlying the claim. His affidavit primarily identified, and attached as exhibits, a large number of publicly available documents relating to the business and financing of Birch Mountain. The defendants accurately describe it as a "secretarial affidavit" that "occasionally makes bald unsupported assertions about [their] motives and supposed wrongdoing". The chambers judge concluded that the affidavit and the attached documents, on their face, did not show any possible merit to the claim.

[17] The chambers judge's assessment of the plaintiff's evidence was:

> 24 . . . Mr. Johnson had no involvement with Birch Mountain until he was retained in the fall of 2010 to prepare a report based upon his review of various documents. He was not presented or qualified as an expert. His affidavit consists entirely of hearsay and his non-expert interpretation of various documents. It is of little or no evidentiary value. . . .

The plaintiff argues that this passage discloses reviewable error, because a respondent to a summary dismissal application can rely on hearsay. He cites R. 13.18(3), which provides that hearsay evidence can be used when the relief requested is not "final", and ***Court v Debaie***, 2012 ABQB 640 at para. 34, 550 AR 231.

[18] It is, however, too narrow a reading of the reasons to conclude that the only objection to the evidence was its hearsay nature. The chambers judge's overall assessment of the evidence was that it had no probative value for many reasons, including the fact that it deserved little weight because it was all hearsay: ***Murphy Oil Co. v Predator Corp.***, 2006 ABCA 69 at paras. 38-40, 55 Alta LR (4th) 1, 384 AR 251. For example, a contract exhibited to the affidavit would show that there was a contract, but would not show any breach. Other documents may have shown representations, but

they would not show that those representations were inaccurate, were negligently made, were relied on, or that any reliance was reasonable. Merely appending these documents to the affidavit did not show any merit to the claims set out in the statement of claim. The affidavit purports to provide opinions and draw conclusions on issues of business management, banking and finance, public investment, accounting, and law, and speculates imaginatively on the motives and intentions of the defendants. As noted, Mr. Johnson was not qualified as an expert witness, and it is unlikely that he is a mind reader. The chambers judge did not err in attributing "little or no evidentiary value" to this affidavit.

[19] The plaintiff sought to overcome this evidentiary deficiency by applying to introduce fresh evidence on appeal in the form of an affidavit of the named plaintiff. The test for introducing fresh evidence originates in ***Palmer v The Queen***, [1980] 1 SCR 759 and has been applied in civil cases like ***Xerex Exploration Ltd. v Petro-Canada***, 2005 ABCA 224 at paras. 116-117, 367 AR 201:

> a) The evidence should generally not be admitted if, by due diligence, it could have been adduced at trial,
>
> b) The evidence must be relevant in the sense that it bears upon a decisive or potentially decisive issue in the trial,
>
> c) The evidence must be credible in the sense that it is reasonably capable of belief, and
>
> d) It must be such that if believed it could reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result.

It is immediately apparent that the tendered affidavit of the plaintiff does not meet the first part of the test, because there is no reason why he could not have sworn an affidavit before the original application.

[20] The plaintiff argues that the substantive parts of the new evidence could not be produced at the application, even with due diligence, because some of it has only recently been discovered. The plaintiff deposes that the widow of Mr. Rowe, a former president of Birch Mountain, provided a computer hard drive to the plaintiff in June 2014. The plaintiff deposes that it took two months to obtain a computer that could read the hard drive, and a full 14 months to download all the documents. The summary dismissal application was argued on October 9, 2014, and the defendants' objections to the insufficiency of the record would have been well known at that time. The reserved decision was released on April 30, 2015, suggesting that there was ample time to supplement the record, or at least advise the chambers judge that further critical evidence was being uncovered during the downloading from the hard drive.

[21] The absence of due diligence on the part of the plaintiff is significant in a summary dismissal application. As was pointed out in ***Lameman***, it undermines the rationale of the summary judgment rule if the plaintiff can ignore the obligation to produce evidence of merit

before the trial court, and then rely on a fresh evidence application on appeal to defeat summary dismissal.

[22] The plaintiff Bond in the Ontario case apparently had sufficient particulars to commence her action advancing the same claims. The present plaintiff's counsel had drafted a lengthy, detailed statement of claim in September 2010, and turned it into a 69 page (168 paragraph) amended statement of claim by May 2014. The causes of action now being advanced, and many of the particulars, were known by then, and there was no reason why the named plaintiff could not have sworn an affidavit deposing to any merit in the claim. Counsel for the plaintiff advised the chambers judge (reasons, para. 25) that the plaintiff "would provide evidence in due course"; this is directly contrary to the rule in ***Lameman***. The hard drive from the Rowe estate may have provided more evidence, but the appellant only had to introduce enough evidence to show an issue requiring a trial. As previously noted the respondent to a summary dismissal application does not have to prove the case on a balance of probabilities. Given the amount of detail in the statement of claim, it is difficult to believe that the plaintiff was not able to depose to any merit prior to the summary dismissal application being argued.

[23] In addition to the absence of due diligence, the tendered new evidence cannot reasonably be thought to affect the outcome, as will be seen from the balance of these reasons.

The "Merit" of the Action

[24] The plaintiff proposes to advance three causes of action on behalf of the class of shareholders:

a) negligent misrepresentation,

b) oppressive conduct in the operation of the business of Birch Mountain, and

c) what is described as "the good faith doctrine".

The ultimate issue on the summary dismissal application was whether the plaintiff had shown sufficient "merit" in these claims to send the matter to trial. Put another way, was the state of the record such that the chambers judge could reach a fair and just determination on the merits on the motion for summary judgment. An analysis shows that the chambers judge correctly concluded that there is no merit shown on this record to any of these claims.

Negligent Misrepresentation

[25] The plaintiff acknowledges five essential components of a claim of negligent misrepresentation:

(a) a duty of care based on a special relationship,

(b) misrepresentations that were untrue, inaccurate or misleading,

(c) negligence in making the misrepresentations,

(d) detrimental reliance, and

(e) resulting damage.

The weight of the case law suggests that creditors are not generally in a special relationship with borrowers giving rise to a duty of care: ***Canada Trustco Mortgage Co. v Pierce Estate*** (2005), 254 DLR (4th) 79 at paras. 26-7, 197 OAC 369 (CA); ***CareVest Capital Inc. v Chychrun***, 2008 BCSC 201 at para. 17, 55 CCLT (3d) 75. The shareholder class has an even more remote connection to the defendant lenders than Birch Mountain, the principal debtor. It is, however, not necessary to resolve whether the defendants, as financiers of Birch Mountain, owed any duty to the class of shareholders of that corporation, as the proposed negligent misrepresentation claim fails to meet several of the other requirements.

[26] The amended statement of claim pleads a number of discrete misrepresentations. The chambers judge summarized at para. 52 the misrepresentations complained of:

a) A statement on the Brookfield website that Tricap has a "long term perspective", that it "targets transactions in which it can invest between $50 million and $500 million", and that it "has a 3 to 7 year investment horizon".

b) Various press releases stating that Tricap was established to provide a "source of patient, long term capital and strategic assistance to mid-market companies".

All of the alleged misrepresentations are related to the Brookfield group's stated corporate philosophy, and were said to be made on its public website. They disclosed that Brookfield's business model was to provide "strategic assistance" to companies with potential but experiencing financial or operational difficulties, and to provide the necessary operational and financial assistance to turn them around. It is clear that these alleged misrepresentations were known well before the fresh evidence was received from the Rowe estate.

[27] In December 2007 Tricap and Birch Mountain both issued press releases, on the issuance of the Senior Secured Convertible Debenture, which noted that Tricap's business model was to be a "source of patient, long term capital". The Loan Agreement allowed Tricap to review (acting reasonably) any public disclosures relating to "this Agreement or the Credit Facilities". The plaintiff argues that this provides some link between the representations about Tricap's business model and the business of Birch Mountain. There is, however, no evidence that any press release was inaccurate, or negligently prepared, or that any member of the shareholder class reasonably relied on one.

[28] The plaintiff's essential complaint is that the defendants arguably did not follow their own corporate philosophy and guidelines in their investment in Birch Mountain. Firstly, the plaintiff notes that Brookfield only invested about $35 million in Birch Mountain, below its target threshold

of $50 million. Further, when the loans went into default the defendants commenced enforcement proceedings before their own 3 to 7 year investment horizon had been reached. The plaintiff alleges that "long term patient capital" would have waited longer. The argument is therefore not that the representations were inaccurate when made, but that with hindsight the defendants' corporate objectives were not achieved.

[29] It is clear that there is no "merit" to the allegations that these general statements of corporate philosophy could support a claim in negligent misrepresentation, either in their original form on the defendants' website, or as repeated in the press releases:

- There is no evidence that these statements are in any respect inaccurate. There is no evidence that Brookfield's corporate philosophy was other than as stated.
- There is likewise no evidence that the statements are in any respects "negligent". There is no evidence that someone at Brookfield negligently set out the corporate philosophy on the website.
- There is no evidence that any class member relied on the representations prior to making an investment in Birch Mountain.
- There is, in any event, no evidence that any class member relied on the particular interpretation of the representations alleged by the plaintiff. In other words, no class member has deposed that he or she thought Brookfield would unconditionally keep investing money until it reached the $50 million threshold. There is no evidence that any class member thought that Brookfield would not enforce its lending agreements, notwithstanding any defaults, for at least three years.
- Finally, and conclusively, if any class member did purport to rely on this latter interpretation of the representations, such reliance would be patently unreasonable. It would be unreasonable for any investor to rely on a general statement of corporate philosophy as if it was a guarantee that no less than $50 million would be invested for no shorter than a three year period, notwithstanding any defaults, and no matter what happened with the investment along the way.

When considered holistically and in context, it is clear that the claim based on negligent misrepresentation has no merit.

Oppressive Conduct

[30] The plaintiff alleges oppressive conduct in the operation of Birch Mountain's business. The underlying theory is that the defendants lent money to Birch Mountain as part of a long term scheme to obtain the limestone quarry, which had been valued at $1.6 billion, for a fraction of that value. The theory is that the defendants instigated or participated in a number of transactions that

had little or no legitimate business purpose, and were designed to unjustly transfer the value of the limestone quarry to the defendants.

[31] Many of the plaintiff's complaints relate to transactions that allegedly damaged Birch Mountain. Any claim for damages arising from those transactions would properly belong to the corporation, not the shareholders; the shareholders could only apply to advance a derivative claim.

[32] Secondly, many of the complaints involve a collateral attack on the orders made in the receivership proceedings:

(a) An allegation that is inconsistent with one of the fundamental or necessary findings of an order amounts to a collateral attack; it is not necessary that there be an application to set aside the order: ***574095 Alberta Ltd. v Hamilton Brothers Exploration Co.***, 2003 ABCA 34 at paras. 47, 52, 10 Alta LR (4th) 23, 320 AR 351; ***Ernst and Young Inc. v Central Guaranty Trust Co.***, 2006 ABCA 337 at paras. 47-51, 66 Alta LR (4th) 231, 397 AR 225.

(b) Any argument that there were in fact no genuine defaults of the loan agreements, or that the loan agreements were somehow unenforceable or breached by the defendants would be inconsistent with the orders made during the receivership.

(c) Further, the plaintiff alleges that the affidavits provided in support of the receivership order were "misleading", and that material information was withheld from the Court. It must be remembered that the application for the receivership order was not *ex parte*; it was on notice, unopposed, and unappealed. Any allegation that the receivership order was improperly obtained is a clear collateral attack on that order.

(d) Likewise, it is alleged that the affidavits in support of the eventual sale of the Birch Mountain assets to Hammerstone were incomplete, or inaccurate, or failed to disclose some information. These arguments all amount to collateral attacks on the unappealed sale order.

To the extent that the claim for an oppression remedy relies on any of these arguments, the claim is barred by the rule against collateral attacks on final orders of the Court.

[33] The plaintiff relies on the anomalous decision in ***Royal Bank of Canada v W. Got & Associates Electric Ltd.***, [1999] 3 SCR 408. That case is distinguishable, because the claim for damages was advanced in a counterclaim in the receivership action itself. The effect of the decision was that the *in rem* portion of the action represented by the receivership order was allowed to proceed, while the *in personam* claim for damages was preserved: ***David M. Gottlieb Professional Corp. v Nahal***, 2012 ABCA 88 at para. 19, 522 AR 25.

[34] In any event, the record does not support the plaintiff's overall theory that the defendants were engaged in a scheme to obtain the quarry below its actual value. There were at least three occasions when the defendants made decisions which were inconsistent with any such plan:

(a) Brookfield Bridge Lending agreed to waive defaults under the bridge loan in July, August and September 2007.

(b) In December 2007, Tricap subscribed for the $31.5 million Convertible Secured Senior Debenture to pay off the $15.5 million bridge loan to Brookfield Bridge Lending Fund which was in default.

(c) In August 2008 Tricap agreed to waive defaults under the Convertible Secured Senior Debenture.

If the defendants were engaged in a long term plan to obtain the quarry, they let it slip through their fingers on at least these three occasions. Rather than waiving defaults, or providing additional funds to cure defaults, the defendants could have commenced enforcement of their security. Their conduct in attempting to keep Birch Mountain going is inconsistent with the plaintiff's thesis.

[35] Most, if not all, of the oppression claim depends on the plaintiff class demonstrating that the defendants and Birch Mountain were "affiliates". That involves showing that the defendants were deemed by statute to have a controlling interest in Birch Mountain by reason of the convertible debt they held, even though the debt had not been converted into shares. The argument then picks up the definition of oppressive conduct in s. 242(2) of the *Act*, that the "corporation or <u>any of its affiliates</u>" conducted the business of the corporation (i.e., Birch Mountain) in an oppressive way. The shareholder class argues that the financial decisions that the defendants (as "affiliates") made respecting their dealings with Birch Mountain actually amounted to "conducting the business of Birch Mountain", not conducting the defendants' own business.

[36] The *Act* defines "affiliate" as follows:

> 2(1) For the purposes of this Act,
>
> (a) one body corporate is affiliated with another body corporate if one of them is the subsidiary of the other or both are subsidiaries of the same body corporate or each of them is <u>controlled by the same person</u>, and
>
> (b) if 2 bodies corporate are affiliated with the same body corporate at the same time, they are deemed to be affiliated with each other.
>
> (2) For the purposes of this Act, a body corporate is <u>controlled by a person</u> if
>
> (a) securities of the body corporate to which are attached more than 50% of the votes that may be cast to elect directors of the body corporate are

> held, other than by way of security only, by or for the benefit of that person, and
>
> (b) the votes attached to those securities are sufficient, if exercised, to elect a majority of the directors of the body corporate.

When affiliation is said to arise as a result of "control" there is a two part test: holding 50% of the votes plus the ability to elect a majority of the directors.

[37] A person holding unexercised rights to convert securities into voting shares has no votes, much less 50% of the votes. Such a person does not have the ability to elect a majority of the directors. Absent "control" as defined in the statute, there is no affiliation. The *Act* does not contemplate any sort of *de facto* "control" apart from that specifically defined in s. 2.

[38] For the reasons given by the chambers judge (*supra*, para. 8) and by the Ontario courts in ***Bond v Brookfield Asset Management***, the members of the proposed class do not qualify as "complainants" for the purposes of advancing the pleaded oppression claim. A lender holding a convertible debt instrument does not obtain voting rights until the conversion option is actually exercised. Accordingly, Birch Mountain and the defendants were not "affiliates" under the *Act*. Whether companies are affiliates for the purposes of the oppression remedy depends on the definitions in the statute, not the terms of the loan agreements between them.

[39] On behalf of the class, the plaintiff alleges oppressive conduct arising from a number of discrete transactions: the "contrived interest default", "death spiral stock trading", the terms of the Tricap Amending Agreement, and the Great Pacific transaction. Even if the members of the proposed class qualified as complainants, the record does not disclose any merit to these claims.

The "Contrived Interest Default"

[40] The factual context relates to the South Haul Road that was built to access the Birch Mountain quarry. The South Haul Road was built by Birch Mountain, but it was entitled to receive proceeds (approximately $4.8 million) from some of the major oil companies that had acquired an interest in the road.

[41] Birch Mountain wanted to use the South Haul Road proceeds as part of its general cash flow. The original Loan Agreement did not deal with these funds other than as part of "all present and after acquired personal property" of Birch Mountain. The August 2008 Waiver and Amending Agreement (EKE R287), however, specifically dealt with the issue. It provided that the South Haul Road proceeds would be held in escrow, but they could be released to pay pre-approved expenditures, on certain conditions, one being that Birch Mountain was not in default under the Loan Agreement.

[42] Interest was payable by Birch Mountain on the Convertible Unsecured Subordinated Debentures. The failure to pay that interest would adversely affect Birch Mountain's financial reputation in the public markets, and likely be deemed a further default under the Tricap financing as well. Birch Mountain did not have funds available to pay that interest, but Tricap consented to the interest being paid out of a new issue of equity. Birch Mountain wanted to pay the interest out of the South Haul Road funds, but Tricap would not agree. Tricap took the position that it would not agree to payments to junior creditors while there were any defaults under the senior debt. In the end, Tricap's position prevailed, which was one of the events that led to Birch Mountain's eventual receivership.

[43] The plaintiff alleges that Birch Mountain's default in paying the interest was "contrived". He alleges that under a proper interpretation of the Loan Agreement, the South Haul Road cost recovery was not within the category of funds that had to be paid to Tricap. Thus, the plaintiff alleges that any default was "contrived" because of conduct of the defendants in refusing to acknowledge that the South Haul Road proceeds were freely available to Birch Mountain to pay the interest on the Debentures. The obvious barrier to this argument is that it is inconsistent with the uncontested and unappealed receivership order. That order found that the Tricap Loan Agreement was valid and enforceable, and implicitly held that there were no defaults by Tricap precluding enforcement. Any inconsistent argument is a collateral attack on the receivership order.

[44] Secondly, this argument ignores the detailed covenants in the Waiver and Amending Agreement that specifically dealt with the use of the proceeds of the South Haul Road. Whatever the status of the South Haul Road proceeds under the general wording of the Loan Agreement, the specific terms of the later Waiver and Amending Agreement would prevail.

[45] In addition, the position taken by the plaintiff is inconsistent with that taken by Birch Mountain at the time. The officers of Birch Mountain essentially conceded that Tricap was entitled to control the South Haul Road proceeds; the efforts of the officers were to obtain Tricap's consent to the use of these funds to pay the interest, not to convince it that it was not entitled to control the funds in the first place. Tricap was entitled to assert its claim to the proceeds of the South Haul Road. When Birch Mountain acquiesced in or conceded that claim it effectively conceded any argument it might have had about entitlement. Tricap's ultimate success in advancing its position does not generate any actionable claim against it, and it certainly does not fall under the definition of "oppressive" conduct.

[46] There is no merit to the claim that there was an artificial default, nor that it was generated by any actionable misconduct of the defendants. Any lingering doubt terminated when the receivership order confirmed the enforceability of the Tricap Loan Agreement. The chambers judge correctly determined that there is no merit to this claim.

"Death Spiral Stock Trading"

[47] The price of the Birch Mountain common shares collapsed between 2006 and 2008. Given Birch Mountain's financial circumstances, and the eventual delisting of its shares, this is hardly surprising. There was evidence that short selling contributed to the collapse. The statement of claim alleged that the defendants were responsible for this decline, as part of the scheme to obtain the Birch Mountain quarry at below its real value. The defendants deposed that they had never owned any Birch Mountain shares, they never engaged in trading in the shares, and they therefore had nothing to do with the collapse of the share price. The chambers judge correctly noted that this evidence was uncontradicted, and there was no merit shown to this portion of the claim (reasons, para. 57).

The Tricap Amending Agreement

[48] In June and July 2008, Birch Mountain defaulted on interest payments due under the $31.5 million Convertible Secured Senior Debenture granted to Tricap to pay out the bridge loan to Brookfield Bridge Lending Fund (which at the time was in default), and to provide further capital for Birch Mountain. Rather than commencing enforcement proceedings, in August 2008 Tricap entered into a Waiver and Amending Agreement with Birch Mountain with respect to these defaults.

[49] The consideration paid by Birch Mountain for the waiver of the default was significant: a fee of $3 million, an increase in the interest rate, more favourable terms and price on the conversion option, and other amendments to the terms of the loan. The plaintiff argues that these terms were so onerous as to be "oppressive".

[50] This argument is one premised on Tricap and Birch Mountain being "affiliates". The argument is that by imposing such strict terms the "corporation or <u>any of its affiliates</u>" conducted the affairs of Birch Mountain in a manner that was unfairly prejudicial to or unfairly disregarded the interest of the shareholders (to paraphrase s. 242(2) of the *Act*). As previously noted (*supra*, para. 38) the two companies are not affiliates, which is fatal to this argument.

[51] As to the substance of the allegation, Birch Mountain agreed to the terms of the Acknowledgment, Waiver and Amending Agreement. There was no evidence that its agreement was anything other than voluntary. At this point Birch Mountain and Tricap were doing business on an arms-length basis. The officers of Birch Mountain obviously faced a difficult choice: they could default on the Debenture or accept the terms offered by Tricap. A creditor negotiating with a debtor in default might well impose strict terms, but such a transaction does not amount to "conducting the affairs of the borrower corporation"; the lender is conducting its own affairs, not the affairs of the borrower.

[52] It cannot be argued that the terms of the loan were so unreasonable as to be unconscionable; that argument would be a further collateral attack on the receivership order. There is no expert evidence tendered to show what type of terms a lender might ordinarily extend to a borrower in default. All things considered, the chambers judge correctly determined that there was no merit to this argument.

The Great Pacific Capital Transaction

[53] Great Pacific Capital Corp. was controlled by James Pattison, who was at the relevant time a director of Brookfield. Great Pacific was the holder of $29.28 million of the Convertible Unsecured Subordinated Debentures issued by Birch Mountain in November 2006. This appears to be close to 100% of the debentures actually issued. In September 2008 Birch Mountain arranged a private and confidential tour of the quarry by a number of potential investors, including Pattison. The plaintiff vaguely hints that Pattison's participation in this tour was somehow nefarious or ominous, but there is nothing on this record to indicate that it was anything more than an earnest attempt by the officers of Birch Mountain to access more capital.

[54] The granting of the receivership order would obviously cause all the creditors of Birch Mountain to consider the status of their debts, and the options open to them. On November 20, 2008, two weeks after the receivership order was granted, Great Pacific entered into an agreement with Tricap to assign its interests to Hammerstone, a wholly owned subsidiary of Tricap. In exchange for the assignment, Great Pacific acquired the option to obtain either:

(a) 30% of the Senior Secured Convertible Debenture owned by Tricap (see *supra*, para. 4(e)), or

(b) 30% of the shares in Hammerstone, if Hammerstone ended up acquiring Birch Mountain's assets through the receivership process.

The option was open for three years. The option price, payable on exercise of the option, was $11.8 million in the first year, increasing through a formula by 25% for each subsequent year. In substance, on payment of the formula option price Great Pacific:

(a) under the first option, would effectively trade Unsecured Subordinated debt for Senior Secured Convertible debt, or

(b) under the second option, would have a right to purchase 30% of the equity in the Birch Mountain assets, but only if Hammerstone was successful in acquiring those assets through the receivership.

The advantage for Tricap, in addition to receiving the option price, was that it gave Tricap greater control and flexibility in the enforcement of its own debts. Tricap's acquisition of the Convertible

Unsecured Subordinated Debentures was publicly reported, but the details of the consideration obtained by Great Pacific were not.

[55] The plaintiff raises a number of issues with respect to the Great Pacific transaction:

(a) The parties "dealt without restriction with a Birch Mountain asset". This categorization is inaccurate, because the parties dealt only with their own assets, namely the various debentures and loans and the shares of Hammerstone. To the extent that Birch Mountain assets were indirectly involved, they were not dealt with "without restriction" because the receivership was under the supervision of the Court.

(b) The transaction is said to have breached insider trading rules, or material change rules, or was not properly disclosed to the public as required. A "cover-up" of the transaction is alleged, but that depends on demonstrating that further disclosure was required by law. Securities regulation is a highly technical area, and no particulars are given of these alleged breaches. At the time of this transaction the common shares had been delisted, and the receivership order granted, which further complicates the situation. In any event, the remedies lie with the regulatory agencies that oversee the securities industry.

(c) The transaction is said to allow Great Pacific to either convert the nature of its debt, or obtain an equity interest in the underlying assets. This merely describes the effect of the transaction, and does not disclose any actionable wrong.

(d) The transaction granted Great Pacific and Pattison preferences and advantages not available to other debenture holders and common shareholders. Great Pacific appears to have owned nearly 100% of the issued Unsecured Subordinated Debentures; there were no other debenture holders left behind. Even if there were, the shareholder class has no standing to pursue any claim they may have. Since none of the shareholders owned any of the debentures, there was no reason why they would be extended any of the rights obtained by Great Pacific in the transaction.

(e) Great Pacific was granted a "preference" over other unsecured creditors. Great Pacific did not receive any preference through this transaction. It merely exchanged its debt interests for other contractual rights. The obligations of Birch Mountain under the Subordinated Debentures were unchanged, and the rights obtained by the transferee Hammerstone were in no way enhanced.

Efforts of Tricap and Great Pacific to reorganize and coordinate their interests in Birch Mountain after the receivership order was granted were to be expected. Once insolvency proceedings commence, the priority of obligations becomes critical: the secured debt would rank ahead of the unsecured debt, and both would rank ahead of the equity position of the shareholders. In the face of the receivership there was nothing "oppressive" about the efforts of the various creditors to consolidate or improve their position.

Summary

[56] In summary, the chambers judge correctly concluded that there was no merit to the proposed claim of corporate oppression. With respect to the bulk of the allegations, the claim fails because the defendants were not "affiliates" of Birch Mountain, an assumption which underlies much of the argument. Many of the allegations represent a collateral attack on the receivership orders. On this record, the various identified transactions were shown to be legitimate business transactions that did not amount to "oppression". This portion of the claim was properly summarily dismissed. Whether a lender might in some circumstances be liable to a borrower in tort, contract or on another basis can be left for another day.

"The Good Faith Doctrine"

[57] The plaintiff proposes to rely on what is described as "the good faith doctrine". The simple answer to this proposed claim is that there is no such freestanding cause of action, and the good faith doctrine is only a "general organizing principle of the common law of contract". The applicable cause of action is "breach of contract". In ***Bhasin v Hrynew***, 2014 SCC 71, [2014] 3 SCR 494 the Supreme Court of Canada concluded that contracting parties have a general obligation to perform their obligations under a contract honestly. The circumstances in which this doctrine will come into play are rare, but it will never come into play absent a contract. If there is no contract, there are no contractual obligations to perform. If there is nothing to perform, it cannot be performed in bad faith.

[58] The defendants depose that they have never entered into contracts with any of the members of the proposed class. This evidence is uncontradicted, even if the proposed fresh evidence is considered. If there are no contracts, there can be no breach of contract, nor any application of the related "honest performance doctrine" relating to the performance of contracts. This portion of the claim was properly summarily dismissed.

[59] It is possible that the plaintiff class intended to assert that the defendants did not perform in good faith contracts the defendants had with Birch Mountain. That would be a claim in the hands of the corporation Birch Mountain, not the shareholders. The assertion of that claim would also amount to a collateral attack on the receivership orders. It is potentially inconsistent with the "whole agreement" clauses in the lending agreements. Many of the specific allegations overlap, in any event, with the asserted examples of oppressive conduct. If this was the claim being asserted by the class of shareholders, it too has no merit.

Conclusion

[60] In conclusion, the chambers judge correctly concluded that there was no merit to the proposed claim, and the Court could reach a fair and just determination on the merits on the motion for summary judgment. The claim fails because the appellant failed to adduce sufficient evidence

of oppressive conduct, misrepresentations or bad faith on the part of the defendants. The application to admit fresh evidence and the appeal are both dismissed.

Appeal heard on June 15, 2016

Memorandum filed at Calgary, Alberta
this 5th day of December, 2016

Fraser C.J.A.

Slatter J.A.

O'Ferrall J.A.

Appearances:

J.W. McDonald
for the Appellant

H. Gorman, Q.C. and A. Badami
for the Respondents