IV. ESTOPPEL AND RES JUDICATA

Overview: “Cause of Action Estoppel” and “Issue Estoppel”

The word *estoppel* is derived from an old and obsolete French word, *estouppail* (a stopper; itself derived from the Latin *stuppa* referring to a plug) and is now only used as a legal term.

An *estoppel* is a general legal principle that prevents a party from contesting a fact or issue that has already been settled as between that person and another. There is no ‘unified theory’ of estoppel save for abstract legal concepts like equity or conscience. Rather, every estoppel rule is rationalized in its context and is capable of precise articulation and application as a rule of law in that same context.

For example, *estoppel by convention* operates where the parties have agreed that certain facts are deemed to be true and to form the basis of the transaction into which they are about to enter. If they have acted upon the agreed assumption, then, as regards that transaction, each is estopped against the other from questioning the truth of the statement of facts so assumed if it would be unjust to allow one to go back on it. An estoppel by representation arises where a positive representation made by the party whom it is sought to bind, with the intention that it shall be acted on by the party with whom he or she is dealing, the latter having so acted upon it as to make it inequitable that the party making the representation should be permitted to dispute its truth, or do anything inconsistent with it. The leading case on these two forms of estoppel is *Ryan v. Moore*, [2005] 2 S.C.R. 53.

Another example is *proprietary estoppel*. This doctrine requires proof of three elements: (i) an owner of the land induces, encourages or allows the claimant to believe that he has or will enjoy some right or benefit over the property; (ii) in reliance upon his belief, the plaintiff acts to his detriment to the knowledge of the owner; and (iii) the owner then seeks to take unconscionable advantage of the plaintiff by denying him the right or benefit which he expected to receive. There is a close connection between this form of estoppel and unjust enrichment; see *Schwark v. Cutting*, 2010 ONCA 61 (Ont. C.A.).

*Cause of action estoppel* and *issue estoppel* are two branches of *res judicata* (a matter adjudicated). A related doctrine is the prevention of collateral attacks on a judicial Order or finding. Each is different but all relate to the goal of preventing an abuse of the Court’s process by allowing the parties to re-litigate a particular issue or cause of action. The broad rationale for these rules is the interest in maintaining the finality of decisions.

The doctrine of *cause of action estoppel* is based on the premise that, where the legal rights or liabilities of the parties have been determined in a prior action, they should not be re-litigated. Cause of action estoppel applies...
not only to points on which the court has pronounced but to every point which properly belonged to the subject of the litigation; Reddy v. Oshawa Flying Club (1992), 11 C.P.C. 154 at 158 (Ont. Gen. Div.).

The doctrine of issue estoppel precludes a party from re-litigating a legal or factual issue that has been conclusively resolved in a prior proceeding. The doctrine rests on the finality principle, which is a compelling consideration that ordinarily limits a litigant ‘to one bite at the cherry’; Danyluk v. Ainsworth Technologies Inc., [2001] 2 S.C.R. 460 at paras. 18-19.

Cases:

Toronto (City) v. C.U.P.E., Local 79
2003 SCC 63

This case deals with the use of criminal convictions in an administrative law context, with implications for conventional litigation.

A municipal worker was convicted of sexual assault in the performance of his duties as a recreation instructor. He was convicted. He was fired from his job, grieved the dismissal, and was reinstated by a labour arbitrator who held that he had not committed the act on the reasoning that the conviction was admissible but not conclusive proof and that any evidential presumption was rebutted by the employee.

In the SCC, Arbour J. carefully examined the doctrine of abuse of process as it operates to prevent the relitigation of a criminal conviction and the abuse of process that would arise undermining confidence in the judicial system; it is preferable for the offender to appeal rather than mount a collateral attack through another process which, as here, results in inconsistent findings.

Per Arbour J.:

15 In this case, the reasonableness of the arbitrator’s decision to reinstate the grievor is predicated on the correctness of his assumption that he was not bound by the criminal conviction. That assumption rested on his analysis of complex common law rules and of conflicting jurisprudence. The body of law dealing with the relitigation of issues finally decided in previous judicial proceedings is not only complex; it is also at the heart of the administration of justice. Properly understood and applied, the doctrines of res judicata and abuse of process govern the interplay between different judicial decision makers. These rules and principles call for a judicial balance between finality, fairness, efficiency and authority of judicial decisions. The application of these rules, doctrines and principles is clearly outside the sphere of expertise of a labour arbitrator who may be called to have recourse to them. In such a case, he or she must correctly answer the question of law raised. An incorrect approach may be sufficient to lead to a patently unreasonable outcome. This was reiterated recently by Iacobucci J. in Parry Sound (District) Social Services Administration Board v. O.P.S.E.U., Local 324, 2003 SCC 42 (CanLII), [2003] 2 S.C.R. 157, 2003 SCC 42, at para. 21.
16 Therefore I agree with the Court of Appeal that the arbitrator had to decide correctly whether CUPE was entitled, either at common law or under a statute, to relitigate the issue decided against the grievor in the criminal proceedings.

1) Issue Estoppel

23 Issue estoppel is a branch of res judicata (the other branch being cause of action estoppel), which precludes the relitigation of issues previously decided in court in another proceeding. For issue estoppel to be successfully invoked, three preconditions must be met: (1) the issue must be the same as the one decided in the prior decision; (2) the prior judicial decision must have been final; and (3) the parties to both proceedings must be the same, or their privies... The final requirement, known as “mutuality”, has been largely abandoned in the United States and has been the subject of much academic and judicial debate there as well as in the United Kingdom and, to some extent, in this country...

29 ... What emerges from the American experience with the abandonment of mutuality is a twofold concern: (1) the application of the estoppel must be sufficiently principled and predictable to promote efficiency; and (2) it must contain sufficient flexibility to prevent unfairness. In my view, this is what the doctrine of abuse of process offers, particularly, as here, where the issue involves a conviction in a criminal court for a serious crime. In a case such as this one, the true concerns are not primarily related to mutuality. The true concerns, well reflected in the reasons of the Court of Appeal, are with the integrity and the coherence of the administration of justice. This will often be the case when the estoppel originates from a finding made in a criminal case where many of the traditional concerns related to mutuality lose their significance.

32 As the present case illustrates, the primary concerns here are about the integrity of the criminal process and the increased authority of a criminal verdict, rather than some of the more traditional issue estoppel concerns that focus on the interests of the parties, such as costs and multiple “vexation”. For these reasons, I see no need to reverse or relax the long-standing application of the mutuality requirement in this case and I would conclude that issue estoppel has no application. I now turn to the question of whether the decision of the arbitrator amounted to a collateral attack on the verdict of the criminal court.

(3) Abuse of Process

35 Judges have an inherent and residual discretion to prevent an abuse of the court’s process. This concept of abuse of process was described at
common law as proceedings “unfair to the point that they are contrary to the interest of justice”... and as “oppressive treatment”... McLachlin J. (as she then was) expressed it this way in R. v. Scott, 1990 CanLII 27 (SCC), [1990] 3 S.C.R. 979, at p. 1007:

. . . abuse of process may be established where: (1) the proceedings are oppressive or vexatious; and, (2) violate the fundamental principles of justice underlying the community's sense of fair play and decency. The concepts of oppressiveness and vexatiousness underlie the interest of the accused in a fair trial. But the doctrine evokes as well the public interest in a fair and just trial process and the proper administration of justice. The unfair or oppressive treatment of an accused may disentitle the Crown to carry on with the prosecution of a charge... When the Canadian Charter of Rights and Freedoms applies, the common law doctrine of abuse of process

The doctrine of abuse of process is used in a variety of legal contexts. is subsumed into the principles of the Charter such that there is often overlap between abuse of process and constitutional remedies... The doctrine nonetheless continues to have application as a non-Charter remedy...

37 In the context that interests us here, the doctrine of abuse of process engages “the inherent power of the court to prevent the misuse of its procedure, in a way that would . . . bring the administration of justice into disrepute”... Canadian courts have applied the doctrine of abuse of process to preclude relitigation in circumstances where the strict requirements of issue estoppel (typically the privity / mutuality requirements) are not met, but where allowing the litigation to proceed would nonetheless violate such principles as judicial economy, consistency, finality and the integrity of the administration of justice... This has resulted in some criticism, on the ground that the doctrine of abuse of process by relitigation is in effect non-mutual issue estoppel by another name without the important qualifications recognized by the American courts as part and parcel of the general doctrine of non-mutual issue estoppel...

...  

43 Critics of that approach have argued that when abuse of process is used as a proxy for issue estoppel, it obscures the true question while adding nothing but a vague sense of discretion. I disagree. At least in the context before us, namely, an attempt to relitigate a criminal conviction, I believe that abuse of process is a doctrine much more responsive to the real concerns at play. In all of its applications, the primary focus of the doctrine of abuse of process is the integrity of the adjudicative functions of courts. Whether it serves to disentitle the Crown from proceeding because of undue delay... or whether it prevents a civil party from using the courts for an improper purpose... the focus is less on the interest of parties and more on the integrity of judicial decision making as a branch of the administration of justice. In a case such as the present one, it is that concern that compels a bar against relitigation, more than any sense of unfairness to a party being called twice to put its case forward, for example. When that is understood,
the parameters of the doctrine become easier to define, and the exercise of discretion is better anchored in principle.

...

45 When asked to decide whether a criminal conviction, prima facie admissible in a proceeding under s. 22.1 of the Ontario Evidence Act, ought to be rebutted or taken as conclusive, courts will turn to the doctrine of abuse of process to ascertain whether relitigation would be detrimental to the adjudicative process as defined above. When the focus is thus properly on the integrity of the adjudicative process, the motive of the party who seeks to relitigate, or whether he or she wishes to do so as a defendant rather than as a plaintiff, cannot be decisive factors in the application of the bar against relitigation.

46 Thus, in the case at bar, it matters little whether Oliver’s motive for relitigation was primarily to secure re-employment, rather than to challenge his criminal conviction in an attempt to undermine its validity... A desire to attack a judicial finding is not in itself an improper purpose. The law permits that objective to be pursued through various reviewing mechanisms such as appeals or judicial review. Indeed reviewability is an important aspect of finality. A decision is final and binding on the parties only when all available reviews have been exhausted or abandoned. What is improper is to attempt to impeach a judicial finding by the impermissible route of relitigation in a different forum. Therefore, motive is of little or no import.

47 There is also no reason to constrain the doctrine of abuse of process only to those cases where the plaintiff has initiated the relitigation. The designation of the parties to the second litigation may mask the reality of the situation. In the present case, for instance, aside from the technical mechanism of the grievance procedures, who should be viewed as the initiator of the employment litigation between the grievor, Oliver, and his union on the one hand, and the City of Toronto on the other? Technically, the union is the “plaintiff” in the arbitration procedure. But the City of Toronto used Oliver’s criminal conviction as a basis for his dismissal. I cannot see what difference it makes, again from the point of view of the integrity of the adjudicative process, whether Oliver is labelled a plaintiff or a defendant when it comes to relitigating his criminal conviction.

...

51 Rather than focus on the motive or status of the parties, the doctrine of abuse of process concentrates on the integrity of the adjudicative process. Three preliminary observations are useful in that respect. First, there can be no assumption that relitigation will yield a more accurate result than the original proceeding. Second, if the same result is reached in the subsequent proceeding, the relitigation will prove to have been a waste of judicial resources as well as an unnecessary expense for the parties and possibly an additional hardship for some witnesses. Finally, if the result in the subsequent proceeding is different from the conclusion reached in the first on the very same issue, the inconsistency, in and of itself, will undermine the credibility of the entire judicial process, thereby diminishing its authority, its credibility and its aim of finality.
52 In contrast, proper review by way of appeal increases confidence in the ultimate result and affirms both the authority of the process as well as the finality of the result. It is therefore apparent that from the system’s point of view, relitigation carries serious detrimental effects and should be avoided unless the circumstances dictate that relitigation is in fact necessary to enhance the credibility and the effectiveness of the adjudicative process as a whole. There may be instances where relitigation will enhance, rather than impeach, the integrity of the judicial system, for example: (1) when the first proceeding is tainted by fraud or dishonesty; (2) when fresh, new evidence, previously unavailable, conclusively impeaches the original results; or (3) when fairness dictates that the original result should not be binding in the new context. This was stated unequivocally by this Court in Danyluk, supra, at para. 80.

53 The discretionary factors that apply to prevent the doctrine of issue estoppel from operating in an unjust or unfair way are equally available to prevent the doctrine of abuse of process from achieving a similar undesirable result. There are many circumstances in which the bar against relitigation, either through the doctrine of res judicata or that of abuse of process, would create unfairness. If, for instance, the stakes in the original proceeding were too minor to generate a full and robust response, while the subsequent stakes were considerable, fairness would dictate that the administration of justice would be better served by permitting the second proceeding to go forward than by insisting that finality should prevail. An inadequate incentive to defend, the discovery of new evidence in appropriate circumstances, or a tainted original process may all overcome the interest in maintaining the finality of the original decision (Danyluk, supra, at para. 51; Franco, supra, at para. 55).

54 These considerations are particularly apposite when the attempt is to relitigate a criminal conviction. Casting doubt over the validity of a criminal conviction is a very serious matter. Inevitably in a case such as this one, the conclusion of the arbitrator has precisely that effect, whether this was intended or not. The administration of justice must equip itself with all legitimate means to prevent wrongful convictions and to address any real possibility of such an occurrence after the fact. Collateral attacks and relitigation, however, are not in my view appropriate methods of redress since they inordinately tax the adjudicative process while doing nothing to ensure a more trustworthy result.

55 In light of the above, it is apparent that the common law doctrines of issue estoppel, collateral attack and abuse of process adequately capture the concerns that arise when finality in litigation must be balanced against fairness to a particular litigant. There is therefore no need to endorse, as the Court of Appeal did, a self-standing and independent “finality principle” either as a separate doctrine or as an independent test to preclude relitigation.

...
was convicted in a criminal court and he exhausted all his avenues of appeal. In law, his conviction must stand, with all its consequent legal effects...

Query:

What is the mutuality requirement in cause of action and issue estoppel, and its purpose? Is there a remedy available where mutuality is not present?

Danyluk v. Ainsworth Technologies Inc.
2001 SCC 44

When is a civil action precluded on the basis of issue estoppel where there is an administrative decision on the same issues?

Here an employee sued for wrongful dismissal and $300,000 in commission owed to her notwithstanding the decision of an ‘employment standards officer’ (as per the Employment Standards Act, R.S.O. 1990, c. E.14) that she was not entitled to the money claimed. The employee started the process by which that decision was made and made some errors in pursuing the grievance, but the process itself was unfair and the decision not made in a judicial manner.

Binnie J.:

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

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

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

... 

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 ....

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

33 The rules governing issue estoppel should not be mechanically applied. The underlying purpose is to balance the public interest in the finality of litigation with the public interest in ensuring that justice is done on the facts of a particular case. (There are corresponding private interests.) The first step is to determine whether the moving party (in this case the respondent) has established the preconditions to the operation of issue estoppel set out by Dickson J. in Angle, supra. If successful, the court must still determine whether, as a matter of discretion, issue estoppel ought to be applied...

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

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

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

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

Binnie J. thereafter reviewed the administrative process that had taken place and held that it would be unjust to consider the process capable of binding the parties; "[w]hatever 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;" para. 80-81.

Penner v. Niagara (Regional Police Services Board)
2013 SCC 19

The plaintiffs brought disciplinary complaints and an action against police officers for assault bound up with an unlawful arrest. The complaints under the Police Act were dismissed – issue estoppel in respect of the civil action? No (4:3).

Cromwell and Karakatsanis JJ. (majority):

28 Relitigation of an issue wastes resources, makes it risky for parties to rely on the results of their prior litigation, unfairly exposes parties to additional costs, raises the spectre of inconsistent adjudicative determinations and, where the initial decision maker is in the administrative law field, may undermine the legislature's intent in setting up the administrative scheme. For these reasons, the law has adopted a number of doctrines to limit relitigation.

29 The one relevant on this appeal is the doctrine of issue estoppel. It balances judicial finality and economy and other considerations of fairness to the parties. It holds that a party may not relitigate an issue that was finally decided in prior judicial proceedings between the same parties or those who stand in their place. However, even if these elements are present, the court retains discretion to not apply issue estoppel when its application would work an injustice.
30 The principle underpinning this discretion is that "[a] judicial doctrine developed to serve the ends of justice should not be applied mechanically to work an injustice": Danyluk, at para. 1; see also Toronto (City) v. C.U.P.E., Local 79, 2003 SCC 63, [2003] 3 S.C.R. 77 (S.C.C.), at paras. 52-53.

31 Issue estoppel, with its residual discretion, applies to administrative tribunal decisions. The legal framework governing the exercise of this discretion is set out in Danyluk. In our view, this framework has not been overtaken by this Court's subsequent jurisprudence. The discretion requires the courts to take into account the range and diversity of structures, mandates and procedures of administrative decision makers however, the discretion must not be exercised so as to, in effect, sanction collateral attack, or to undermine the integrity of the administrative scheme. As highlighted in this Court's jurisprudence, particularly since New Brunswick (Board of Management) v. Dunsmuir, 2008 SCC 9, [2008] 1 S.C.R. 190 (S.C.C.), legislation establishing administrative tribunals reflects the policy choices of the legislators and administrative decision making must be treated with respect by the courts. However, as this Court said in Danyluk, at para. 67: "The objective is to ensure that the operation of issue estoppel promotes the orderly administration of justice but not at the cost of real injustice in the particular case."

B. No Public Policy Rule Precluding Issue Estoppel with Respect to Police Disciplinary Hearings

32 The Ontario Court of Appeal applied a conventional analysis of issue estoppel, analyzing the various factors identified in Danyluk. Mr. Penner and a number of interveners ask this Court, as a matter of public policy, to prohibit the application of issue estoppel to findings made in a police disciplinary hearing if it prevents a complainant from accessing the courts for damages on the same claims. They submit that the application of issue estoppel to police disciplinary hearings usurps the role of the courts as guardians of the Constitution and the rule of law, and that public policy requires that police accountability be subject to judicial oversight. These submissions were raised overtly for the first time before this Court.

33 Police oversight is a complex issue that attracts intense public attention and differing public policy responses. Over time, legislative frameworks have been revised with the stated goals of promoting efficient police services and increasing the transparency and accountability of the public complaints process. In a 2006 case, the Ontario Divisional Court concluded that the legislature allowed for "institutional bias" in the manner of appointing a hearing officer under s. 76(1) of the PSA: Sharma v. Waterloo Regional Police Service (2006), 213 O.A.C. 371 (Ont. Div. Ct.), at para. 27. The parties in this case do not contest that this is a legitimate exercise of the legislature's authority, and the Divisional Court in Sharma, at para. 28, concluded that the ability to appoint "retired police officers not associated with this force is capable of founding such independence as necessary". See also the Honourable Patrick J. Lesage, Report on the Police Complaints System in Ontario (2005), at pp. 77-78.
The public complaints process incorporates a number of features to enhance public participation and accountability. For instance, pursuant to Part II of the PSA, the Commission, as an agency comprised of civilian members, provides independent oversight of police services in Ontario to ensure fairness and accountability to the public. Part V sets out a comprehensive public complaints process by which members of the public can file official complaints against policies or services. Judicial oversight of disciplinary hearings under the PSA is available by statutory right of appeal to the Commission and then to the Divisional Court: see ss. 70(1) and 71(1).

We are not persuaded that it is either necessary or desirable to create a rule of public policy excluding police disciplinary hearings from the application of issue estoppel. The doctrine of issue estoppel allows for the exercise of discretion to ensure that no injustice results; it calls for a case-by-case review of the circumstances to determine whether its application would be unfair or unjust.

C. Discretionary Application of Issue Estoppel

(1) Approach to the Exercise of Discretion

We agree with the decisions of the courts below that all three preconditions for issue estoppel are established in this case. Thus, this case turns upon the Court of Appeal's exercise of discretion in determining whether it would be unjust to apply the doctrine of issue estoppel in this case.

This Court in Danyluk, at paras. 68-80, recognized several factors identified by Laskin J.A. in Minott v. O'Shanter Development Co. (1999), 42 O.R. (3d) 321 (Ont. C.A.), that are relevant to the discretionary analysis in the context of a prior administrative tribunal proceeding.

The list of factors in Danyluk merely indicates some circumstances that may be relevant in a particular case to determine whether, on the whole, it is fair to apply issue estoppel. The list is not exhaustive. It is neither a checklist nor an invitation to engage in a mechanical analysis.

Broadly speaking, the factors identified in the jurisprudence illustrate that unfairness may arise in two main ways which overlap and are not mutually exclusive. First, the unfairness of applying issue estoppel may arise from the unfairness of the prior proceedings. Second, even where the prior proceedings were conducted fairly and properly having regard to their purposes, it may nonetheless be unfair to use the results of that process to preclude the subsequent claim.

(a) Fairness of the Prior Proceedings

If the prior proceedings were unfair to a party, it will likely compound the unfairness to hold that party to its results for the purposes of a subsequent proceeding. For example, in Danyluk, the prior administrative
decision resulted from a process in which Ms. Danyluk had not received notice of the other party's allegations or been given a chance to respond to them.

41 Many of the factors identified in the jurisprudence, including the procedural safeguards, the availability of an appeal, and the expertise of the decision maker, speak to the opportunity to participate in and the fairness of the administrative proceeding. These considerations are important because they address the question of whether there was a fair opportunity for the parties to put forward their position, a fair opportunity to adjudicate the issues in the prior proceedings and a means to have the decision reviewed. If there was not, it may well be unfair to hold the parties to the results of that adjudication for the purposes of different proceedings.

(b) The Fairness of Using the Results of the Prior Proceedings to Bar Subsequent Proceedings

42 The second way in which the operation of issue estoppel may be unfair is not so much concerned with the fairness of the prior proceedings but with the fairness of using their results to preclude the subsequent proceedings. Fairness, in this second sense, is a much more nuanced enquiry. On the one hand, a party is expected to raise all appropriate issues and is not permitted multiple opportunities to obtain a favourable judicial determination. Finality is important both to the parties and to the judicial system. However, even if the prior proceeding was conducted fairly and properly having regard to its purpose, injustice may arise from using the results to preclude the subsequent proceedings. This may occur, for example, where there is a significant difference between the purposes, processes or stakes involved in the two proceedings. We recognize that there will always be differences in purpose, process and stakes between administrative and court proceedings. In order to establish unfairness in the second sense we have described, such differences must be significant and assessed in light of this Court's recognition that finality is an objective that is also important in the administrative law context. As Doherty and Feldman JJ.A. wrote in Schweneke v. Ontario (2000), 47 O.R. (3d) 97 (Ont. C.A.), at para. 39, if courts routinely declined to apply issue estoppel because the procedural protections in the administrative proceedings do not match those available in the courts, issue estoppel would become the exception rather than the rule.

43 Two factors discussed in Danyluk — the "wording of the statute from which the power to issue the administrative order derives" (paras. 68-70) and "the purpose of the legislation" (paras. 71-73), including the degree of financial stakes involved — are highly relevant here to the fairness analysis in this second sense. They take into account the intention of the legislature in creating the administrative proceedings and they shape the reasonable expectations of the parties about the scope and effect of the proceedings and their impact on the parties' broader legal rights: Minott, at pp. 341-42.

44 For example, in British Columbia (Minister of Forests) v. Bugbusters Pest Management Inc. (1998), 50 B.C.L.R. (3d) 1 (B.C. C.A.), a defendant in
a civil action relied on the decision of a Deputy Chief Forester to preclude the Crown's civil action for damages caused by a forest fire. The Court of Appeal upheld the chambers judge's decision to exercise discretion against applying issue estoppel. As the statute did not contemplate that the Deputy Chief Forester's decision about the cause of a fire would be a final resolution of that issue, it followed that it "was not within the reasonable expectation of either party at the time of those proceedings" that it would be: Bugbusters, at para. 30.

45 Thus, where the purposes of the two proceedings diverge significantly, applying issue estoppel may be unfair even though the prior proceeding was conducted with scrupulous fairness, having regard to the purposes of the legislative scheme that governs the prior proceeding. For example, where little is at stake for a litigant in the prior proceeding, there may be little incentive to participate in it with full vigour: Toronto (City), at para. 53.

46 There is also a general policy concern linked to the purpose of the legislative scheme which governs the prior proceeding. To apply issue estoppel based on a proceeding in which a party reasonably expected that little was at stake risks inducing future litigants to either avoid the proceeding altogether or to participate more actively and vigorously than would otherwise make sense. This could undermine the expeditiousness and efficiency of administrative regimes and therefore undermine the purpose of creating the tribunal: Burchill v. Yukon Territory (Commissioner), 2002 YKCA 4, [2002] Y.J. No. 19 (Y.T. C.A.), at para. 28; Minott, at p. 341; and Danyluk, at para. 73. In the context of this appeal, it might discourage citizens from filing complaints about police misconduct.

47 Thus, the text and purpose of the legislative scheme shape the parties' reasonable expectations in relation to the scope and effect of the administrative proceedings. They guide how and to what extent the parties participate in the process. Where the legislative scheme contemplates multiple proceedings and the purposes of those proceedings are widely divergent, the application of the doctrine in such circumstances might not only upset the parties' legitimate and reasonable expectations but may also undermine the efficacy and policy goals of the administrative proceedings by either encouraging more formality and protraction or even discouraging access to the administrative proceedings altogether.

48 These considerations are also relevant to weighing another factor identified in Danyluk: the procedural safeguards available to the parties in the prior administrative process. The consideration of a party's decision whether to take advantage of procedural protections available in the prior proceeding cannot be divorced from the consideration of the party's reasonable expectations about what is at stake in those proceedings or the fundamentally different purposes of the two proceedings. The connections between the relevant considerations must be viewed as a whole.

(2) Fairness of Using the Disciplinary Finding to Preclude a Civil Action in this Case
In our respectful view, the Court of Appeal failed to focus on fairness in the second sense we have just described. We do not quarrel with the finding of the Court of Appeal that the disciplinary hearing was itself fair and that Mr. Penner participated in a meaningful way. However, while the court thoroughly assessed the fairness of the disciplinary proceeding itself, it failed to fully analyze the fairness of using the results of that process to preclude the appellant's civil claims, having regard to the nature and scope of those earlier proceedings and the parties' reasonable expectations in relation to them.

(a) The Legislation Establishing the Disciplinary Hearing

As the Court of Appeal pointed out, "the legislature did not intend to foreclose [Mr. Penner's] civil action simply because he filed a complaint under the [PSA]" (para. 42). The PSA features statutory privilege provisions, three of which are noteworthy here. Documents generated during the complaint process are inadmissible in civil proceedings: s. 69(9). Persons who carry out duties in the complaint process cannot be forced to testify in civil proceedings about information obtained in the course of their duties: s. 69(8). Finally, persons engaged in the administration of the complaints process are obligated to keep information obtained during the process confidential, subject to certain exceptions: s. 80. These provisions specifically contemplate parallel proceedings in relation to the same subject matter.

Here, as recognized by the Court of Appeal, the legislation does not intend to foreclose parallel proceedings when a member of the public files a complaint. This would shape the reasonable expectations of the parties and the nature and extent of their participation in the process.

Nothing in the legislative text, therefore, could give rise to a reasonable expectation that the disciplinary hearing would be conclusive of Mr. Penner's legal rights against the Constables, the Chief of Police or the Police Services Board in his civil action.

(b) Reasonable Expectations of the Parties: Different Purposes of the Proceedings and Other Considerations

The Court of Appeal recognized that the purposes of a police disciplinary proceeding and a civil action were different and that this weighed against the application of issue estoppel.

The police disciplinary hearing is part of the process through which the officers' employer decides whether to impose employment-related discipline on them. By making the complainant a party, the PSA promotes transparency and public accountability. However, this process provides no remedy or costs for the complainant. A civil action, on the other hand, provides a forum in which a party that has suffered a wrong may obtain compensation for that wrong.
In addition to the legislative text, several other facts point to the same conclusion about the parties' reasonable expectations about the impact of the disciplinary hearing on the civil action.

First, Mr. Penner's civil action was filed in July 2003; almost a year before the hearing officer released his decision on June 28, 2004. In Danyluk, the civil proceedings had commenced before the administrative proceedings concluded. Binnie J. reasoned that this weighed against applying issue estoppel because "the respondents were well aware, in law and in fact, that they were expected to respond to parallel and to some extent overlapping proceedings" (para. 70).

Second, Hermiston J., in the most pertinent Ontario case on the question of issue estoppel in the police disciplinary hearing context at the time, Porter v. York Regional Police, [2001] O.J. No. 5970 (Ont. S.C.J.), stated that an acquittal of an officer at a disciplinary hearing did not give rise to issue estoppel in relation to the same issues in a subsequent civil action.

Third, a person in Mr. Penner's position might well think it unlikely that a proceeding in which he or she had no personal or financial stake could preclude a claim for significant damages in his or her civil action.

(c) Financial Stake in the Disciplinary Hearing

The Court of Appeal noted that the lack of a financial stake in the administrative proceeding, on its own, does not ordinarily resolve how the court should exercise its discretion in applying issue estoppel in a civil action. However, the Court of Appeal went further. With respect to the absence of a financial stake in the outcome of the disciplinary hearing, the court said, at para. 43:

This is an important consideration weighing against applying issue estoppel, but its strength is diminished by the potential indirect benefit to Mr. Penner from the disciplinary proceedings. If, for example, the hearing officer had found that the two police officers did not have reasonable and probable grounds to arrest Mr. Penner or used excessive force on him, those findings would likely have estopped the officers from asserting otherwise in Mr. Penner's civil action. In other words, issue estoppel works both ways.

In our view, this analysis is flawed. It cannot necessarily be said that issue estoppel "works both ways" here. As the Court of Appeal recognized, because the PSA requires that misconduct by a police officer be "proved on clear and convincing evidence" (s. 64(10)), it follows that such a conclusion might, depending upon the nature of the factual findings, properly preclude relitigation of the issue of liability in a civil action where the balance of probabilities — a lower standard of proof — would apply. However, this cannot be said in the case of an acquittal. The prosecutor's failure to prove the charges by "clear and convincing evidence" does not necessarily mean that those same allegations could not be established on a balance of probabilities. Given the different standards of proof, there would have been no reason for a complainant to expect that issue estoppel would apply if the
officers were acquitted. Indeed, in Porter, at para. 11, the court refused to apply issue estoppel following an acquittal in a police disciplinary hearing because the hearing officer's decision "was determined by a high standard of proof and might have been different if it had been decided based on the lower civil standard". Thus, the parties could not reasonably have contemplated that the acquittal of the officers at the disciplinary hearing would be determinative of the outcome of Mr. Penner's civil action.

By assuming that issue estoppel "works both ways", the Court of Appeal attached too little weight to the fact that Mr. Penner had no financial stake in the disciplinary hearing and wrongly concluded that he had more at stake than he could reasonably have thought at the time.

(d) Issue Estoppel May Work to Undermine the Purpose of Administrative Proceedings

Another important policy consideration referred to earlier arises in this case: the risk of adding to the complexity and length of administrative proceedings by attaching undue weight to their results through applying issue estoppel. It is true that Mr. Penner could have participated even more fully in the proceedings by hiring counsel in an attempt to obtain a finding of misconduct so as to assist his civil action. But accepting this line of argument too readily may lead to unintended and undesirable results. It risks turning the administrative process into a proxy for Mr. Penner's civil action. If it is before the hearing officer, and not the court, that an action for damages is to be won or lost, litigants in Mr. Penner's position will have every incentive to mount a full-scale case, which would tend to defeat the expeditious operation of the disciplinary hearing.

In the context of this appeal, it would also mean that the officers, who have much at stake in the hearing, would effectively be forced to face two prosecutors rather than one, given the presence of counsel for the complainant. We doubt that this would enhance either the efficacy of or the fairness to the officers in the disciplinary hearing. Finally, a further significant risk is that potential complainants will simply not come forward with public complaints in order to avoid prejudicing their civil actions.

(e) The Role of the Chief of Police

Under the public complaints process of the PSA at the relevant time, the Chief of Police investigated and determined whether a hearing was required following the submission of a public complaint. The Chief of Police appointed the investigator, the prosecutor and the hearing officer.

It has been recognized that these arrangements are not objectionable for the purposes of a disciplinary hearing (as in Sharma). However, in our view, the fact that this decision was made by the designate of the Chief of Police should be taken into account is assessing the fairness of using the results of the disciplinary process to preclude Mr. Penner's civil claims. While this point was not clearly placed before the Court of Appeal, we think it is an important one.
Applying issue estoppel against the complainant here had the effect of permitting the Chief of Police to become the judge of his own case, with the result that his designate's decision had the effect of exonerating the Chief and his police service from civil liability. In our view, applying issue estoppel here is a serious affront to basic principles of fairness.

We emphasize that this unfairness does not reside in the Chief of Police carrying out his statutory duties. The parties accept that, given the statutory framework, there is no objection on fairness grounds to the role of the Chief and there is certainly no suggestion that he failed in any way to carry out his statutory duties. Further, no obvious unfairness arises if the disciplinary decision finds police misconduct, as this is a decision against the interests of the Chief or the Police Services Board. The unfairness that concerns us only arises at the point that the Chief's (or his designate's) decision that there was no police misconduct in a disciplinary context is used for the quite different purpose of exonerating him, by means of issue estoppel, from civil liability relating to the same matter.

Had the Court of Appeal been given the opportunity to fully consider the importance of these points, our view is that it would have seen that applying issue estoppel against the appellant in the circumstances of this case was fundamentally unfair.

VI. Conclusion

Issue estoppel is about balancing judicial economy and finality and other considerations of fairness to the parties. It is a flexible doctrine that permits the court to respond to the equities of a particular case. We see no reason to depart from that approach and create a rule of public policy to preclude the application of issue estoppel in the context of public complaints against the police.

Given the legislative scheme and the widely divergent purposes and financial stakes in the two proceedings, the parties could not reasonably have contemplated that the acquittal of the officers at the disciplinary hearing would determine the outcome of Mr. Penner's civil action. These are important considerations and the Court of Appeal did not take them into account in assessing the weight of other factors, such as Mr. Penner's status as a party and the procedural protections afforded by the administrative process. Further, the application of issue estoppel had the effect of using the decision of the Chief of Police's designate to exonerate the Chief in the civil claim.

Applying issue estoppel against Mr. Penner to preclude his civil claim for damages in the circumstances of this case was fundamentally unfair.
LeBel and Abella JJ. (Dissent):

75 The applicable approach to issue estoppel was most recently articulated by this Court in 2011 in British Columbia (Workers' Compensation Board) v. British Columbia (Human Rights Tribunal), 2011 SCC 52, [2011] 3 S.C.R. 422 (S.C.C.) [hereinafter Figliola]. This is the precedent, therefore, that governs the application of the doctrine in this case.

76 The key relevant aspect of this precedent is that it moved away from the approach taken in Danyluk v. Ainsworth Technologies Inc., 2001 SCC 44, [2001] 2 S.C.R. 460 (S.C.C.), which enunciated a different test for the discretionary application of issue estoppel in the context of administrative tribunals. In so doing, Danyluk said that the approach should be "fairness" and set out a number of factors for assessing how "fairness" applied. In our view, these factors can no longer play the same role, nor be given the same weight, based on this Court's subsequent jurisprudence starting with New Brunswick (Board of Management) v. Dunsmuir, 2008 SCC 9, [2008] 1 S.C.R. 190 (S.C.C.). These factors have largely been overtaken by the Court's subsequent jurisprudence. For example, the breach of natural justice factor based on the procedural differences between courts and administrative tribunals and the expertise of the decision maker focus on concepts eschewed by this Court in Dunsmuir and Alliance Pipeline Ltd. v. Smith, 2011 SCC 7, [2011] 1 S.C.R. 160 (S.C.C.). The factors dealing with the wording of the statute and the purpose of the legislation are now referred to as the tribunal's mandate (Canada (Attorney General) v. Mowat, 2011 SCC 53, [2011] 3 S.C.R. 471 (S.C.C.)).

77 The approach of our colleagues is not only inconsistent with recent developments in the law of judicial review, it also raises potential difficulties in the branch of judicial review which is concerned with procedural fairness. Inasmuch as a process is considered to be unfair, the proper way to attack it would be to challenge it, under the principles of natural justice. In addition, the position of our colleagues may also ignore the ability of legislatures to design administrative processes and define the nature and limits of procedural fairness in the absence of constitutional considerations. Finally, the justice system faces important difficulties in respect of access to civil and criminal justice. To hold that the traditional model of civil and criminal justice is the golden standard against which the fairness of administrative justice is to be measured clearly does not meet the needs of the times from a policy perspective.

78 The "twin principles" which underlie the doctrine of issue estoppel — "that there should be an end to litigation and ... that the same party shall not be harassed twice for the same cause" (Carl-Zeiss-Stiftung v. Rayner & Keeler Ltd. (No. 2) (1966), [1967] 1 A.C. 853 (U.K. H.L.), at p. 946) — are core principles which focus on achieving fairness and preventing injustice by preserving the finality of litigation. This, as the majority said in Figliola, is the case whether we are dealing with courts or administrative tribunals. Our colleagues' approach undermines these principles and risks transforming issue estoppel into a free-floating inquiry into "fairness" and "injustice" for
administrative tribunals and revives an approach that our Court refused to apply in Figliola.

... 

98 More recently, in Figliola, this Court considered the discretionary application of issue estoppel and its related doctrines in administrative proceedings. In that case, the majority emphasized the importance of the underlying principle of finality to the integrity of the justice system, noting that the discretionary application of doctrines such as issue estoppel, "should be guided less by precise doctrinal catechisms and more by the goals of the fairness of finality in decision-making and the avoidance of ... relitigation" (para. 36).

99 In Figliola, the majority explicitly rejected an approach that suggests that fairness and finality are discrete objectives. Rather, the majority embraced the notion that preserving the finality of administrative adjudication and preventing relitigation better protected the fairness and integrity of the justice system and the interests of justice.

Justice is enhanced by protecting the expectation that parties will not be subjected to the relitigation in a different forum of matters they thought had been conclusively resolved. Forum shopping for a different and better result can be dressed up in many attractive adjectives, but fairness is not among them. [para. 36]

100 This approach is consistent with the longstanding principles underlying issue estoppel and res judicata that emphasize and protect the finality of litigation.

C. Issue Estoppel and Administrative Decisions

101 This Court's recent affirmation of the principle of finality underlying issue estoppel in Figliola is crucial to preserving the principles underlying our modern approach to administrative law. Our colleagues' failure to safeguard the finality of litigation also substantially undermines these principles. In applying the doctrine of issue estoppel, there is no reason to treat administrative proceedings differently from court proceedings in the name of "fairness". To do so would undermine the entire system of administrative law.

102 In Rasanen v. Rosemount Instruments Ltd. (1994), 17 O.R. (3d) 267 (Ont. C.A.), the purpose of administrative tribunals was described as follows:

[Administrative tribunals] were expressly created as independent bodies for the purpose of being an alternative to the judicial process, including its procedural panoplies. Designed to be less cumbersome, less expensive, less formal and less delayed, these impartial decision-making bodies were to resolve disputes in their area of specialization more expeditiously and more accessibly, but no less effectively or credibly.
... The methodology of dispute resolution in these tribunals may appear unorthodox to those accustomed only to the court-room's topography, but while unfamiliar to a consumer of judicial justice, it is no less a form and forum of justice to its consumers.

103 In applying issue estoppel in the context of administrative law, differences in the process or procedures used by the administrative body should not be used to override the principle of finality. The different purposes of administrative tribunal proceedings should not be invoked either. Otherwise, every substantive legal issue could be reconsidered in subsequent or concurrent civil proceedings, as it could almost always be said that such proceedings have different purposes. The discretionary application of issue estoppel in the administrative law context recognizes that the full panoply of protections and procedures may not exist in an administrative proceeding, but that neither a lack of such protections nor the different objectives of an administrative process are, by themselves, sufficient to warrant the exercise of the court's discretion. In other words, the moving party cannot seek to "rely on general fairness concerns which exist whenever the finding relied on emanates from a tribunal whose procedures are summary and whose tasks are narrower than those used and performed by the courts" (Schweneke v. Ontario (2000), 47 O.R. (3d) 97 (Ont. C.A.), at para. 41).

104 The majority in Figliola consistently referred to tribunal and court decisions together when discussing the applicable principles, including the exercise of discretion, and never distinguished between them. The idea that discretion should be exercised more broadly when dealing with administrative tribunals was found only in the dissent (para. 61).

105 The policy objectives underlying issue estoppel — avoiding duplicative litigation, inconsistent results, undue costs, and inconclusive proceedings — are enhanced by acknowledging administrative decisions as binding in appropriate circumstances. As this Court recognized in Figliola,

[respect for the finality of a[n] ... administrative decision increases fairness and the integrity of ... administrative tribunals and the administration of justice; on the other hand, relitigation of issues that have been previously decided in an appropriate forum may undermine confidence in this fairness and integrity by creating inconsistent results and unnecessarily duplicative proceedings (Toronto (City) v. C.U.P.E., Local 79, 2003 SCC 63, [2003] 3 S.C.R. 77, at paras. 38 and 51). [para. 34].

106 Moreover, the principle of finality underlying issue estoppel is directly linked to the principles of deference in the administrative law. The application of issue estoppel recognizes that "[p]arties should be able to rely particularly on the conclusive nature of administrative decisions ... since administrative regimes are designed to facilitate the expeditious resolution of disputes" (Figliola, at para. 27). It also acknowledges the principle of deference which underlies the judicial review jurisprudence of this Court and the importance and values that it attaches to administrative decisions (see,
for example, N.L.N.U. v. Newfoundland & Labrador (Treasury Board), 2011 SCC 62, [2011] 3 S.C.R. 708 (S.C.C.), at para. 11). It also gives effect to the "adequate alternative remedy" principle, which requires parties to use the appropriate judicial review or appeal mechanism to challenge the validity or correctness of an administrative decision, by preventing parties from circumventing these processes to seek a different result in a new forum. The broad exercise of the residual discretion not to apply issue estoppel in the present case can hardly be reconciled with the importance of deference to administrative decisions which underlies the judicial review jurisprudence of this Court. In so doing, our colleagues deny the value and importance of administrative adjudication, which this Court has so strongly emphasized on many occasions.

107 The court's residual discretion not to apply issue estoppel should not be used to impose a particular model of adjudication in a manner inconsistent with principles of deference that lie at the core of administrative law. Where the legislature has provided a tribunal with the requisite authority to make a decision, and that decision is judicial or quasi-judicial in nature, it would run counter to the principles of deference to broaden the court's discretion in a manner that would, in most cases, permit an unsuccessful party to circumvent judicial review and turn, instead, to the courts for a re-adjudication of the merits. As the Ontario Court of Appeal found in Schweneke, an overly broad application of discretion in the administrative context would "swallow whole the rule that makes the doctrine applicable to findings made by tribunals whose processes, although judicial, are less elaborate than those employed in civil litigation" (para. 39).
V. LIMITATIONS

**Some friendly advice:**

In future (when you are practicing), after a first client meeting, take careful note of when the cause of action arose and immediately diarize the termination of the limitation period. Failure to do so may result in omitting to bring proceedings in time, the client’s action becoming statute-barred, and you being held liable in negligence. Indeed, if you are consulted by a potential client and not retained, you should write the potential client to advise them that you met, that you aren’t retained, and that they ought to retain a lawyer or act to preserve their rights before the termination of the limitation period.

Please also note that some types of claims have strict notice periods – if the defendant is not notified within the time period the claim is barred. Your car was damaged travelling over the Causeway because the bridge hadn’t been de-iced properly? You have 10 days to notify the city of your claim; see *Municipal Act, 2001*, S.O. 2001, c. 25, s.44(10). As with the expiry of limitation period, be sure to warn potential clients who consult you of the notice period whether you are retained to act for the potential client or not.

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**a) Does the Limitations Act Apply?**

[See the Schedule to section 19 of the Limitations Act for a list of statutes not effected by the statute.]

**McConnell v. Huxtable**

**2014 ONCA 86**

Which governs a claim for a constructive trust over real property on grounds of unjust enrichment – the 10-year period set out in the *Real Property Limitations Act* or the 2-year period set out in the *Limitations Act*?

Rosenberg J.A.:

13 The most relevant parts of the *Real Property Limitations Act* are the following:

1. In this Act,

   "action" includes an information on behalf of the Crown and any civil proceeding;
"land" includes messuages and all other hereditaments, whether corporeal or incorporeal, chattels and other personal property transmissible to heirs, money to be laid out in the purchase of land, and any share of the same hereditaments and properties or any of them, any estate of inheritance, or estate for any life or lives, or other estate transmissible to heirs, any possibility, right or title of entry or action, and any other interest capable of being inherited, whether the same estates, possibilities, rights, titles and interest or any of them, are in possession, reversion, remainder or contingency;

4. No person shall make an entry or distress, or bring an action to recover any land or rent, but within ten years next after the time at which the right to make such entry or distress, or to bring such action, first accrued to some person through whom the person making or bringing it claims, or if the right did not accrue to any person through whom that person claims, then within ten years next after the time at which the right to make such entry or distress, or to bring such action, first accrued to the person making or bringing it.

21 This brings us to the central question at issue in this appeal: whether the respondent's claim for a constructive trust based on unjust enrichment is an action for recovery of land. The appellant's broad submission is that, as developed in Canada, a constructive trust is "merely" a remedy, not an independent claim. Therefore, the claim in this case is for unjust enrichment and not an action for recovery of land.

23 The motion judge held that the plain meaning of recover any land includes seeking an equitable interest in land through imposition of a constructive trust. As he said at para. 59, "a case in which someone asks the court to award them ownership of part or all of a piece of land held by somebody else is an action to recover land." The motion judge then considered the entire context of s. 4 of the Real Property Limitations Act, the scheme and object of the Act and the intention of the Legislature. This context included the Limitations Act, 2002, and the historical context of limitations law in the province. The motion judge reviewed at some length the historical context beginning with a 1969 Report on Limitation of Actions by the Ontario Law Reform Commission through various reports and iterations of proposed Bills that resulted in the 2002 legislation that came into force in 2004. The conclusion of his analysis is found in paras. 74-80. For present purposes it is sufficient to set out para. 77:

A party seeking an ownership interest by way of constructive trust must plead and then prove facts establishing entitlement to it. The fact that a claimant must prove enrichment of the other
party and a corresponding deprivation of the claimant, with no juristic reason for the enrichment in order to establish a constructive trust, and must also show that damages alone are insufficient and only a proprietary remedy is adequate, does not alter the fact that the claimant has asked the court from the beginning to award an interest in land. To me, all this means is that the claimant has to plead and prove those key elements, usually called "material facts" in litigation, to justify the order sought. It should not matter how many material facts there are or whether the entitlement to land requires a two step analysis, so long as the application makes a claim of entitlement to ownership of land.

26 The Legislature's inability to deal with real property claims unfortunately detracts from the clarity that was a paramount objective of the new approach to limitation periods as represented by the Limitations Act, 2002. However, the fact that the Legislature did retain Part I of the Old Limitations Act demonstrates that the Legislature has not wholly abandoned the field of claims for recovery of real property. And, in my view, the objective of clarity should not be abandoned by a narrow reading of s. 4 to place artificial limits on its scope when the plain words of the section cannot fairly bear that interpretation. There is nothing in s. 4 to suggest it is limited to claims for adverse possession. The fact that the section itself refers to recovery of rent, not just land, tells against a narrow interpretation of the provision to adverse possession claims.

27 The appellant also relies upon other parts of the Real Property Limitations Act, particularly s. 42, which is as follows:

42. Where land or rent is vested in a trustee upon an express trust, the right of the beneficiary of the trust or a person claiming through the beneficiary to bring an action against the trustee or a person claiming through the trustee to recover the land or rent, shall be deemed to have first accrued, according to the meaning of this Act, at and not before the time at which the land or rent has been conveyed to a purchaser for a valuable consideration, and shall then be deemed to have accrued only as against such purchaser and any person claiming through the purchaser.

28 The appellant argues that since the legislation only refers to express trusts, the Legislature could not have intended the Act to apply to other types of trusts, particularly constructive trusts. I do not accept this submission, primarily because of the legislative history. The Old Limitations Act dealt in Part II with trusts created by instrument and by legislation. When the new legislation repealed Part II (and Part III) of the Old Limitations Act, it left no express provision for real property held by trustees. The Legislature apparently believed that in the case of express trusts there was the need for some clarification. At this point it is impossible to know why the Legislature did not deal more broadly with all kinds of trust. One can only guess that given the consultation group's lack of expertise and the constant, indeed,
rapid evolution of equitable trusts, the Legislature was of the view that the area was not ripe for codification. I see nothing in the Real Property Limitations Act that suggests that the Legislature intended to exhaustively deal with trust cases involving land. To the contrary, the legislative history suggests that the Legislature intended to leave the area largely as it was. Thus, if s. 4 can fairly bear the interpretation of applying to recovery of real property through a constructive trust then I see no reason to impose an artificial and narrow interpretation on the section's very broad language.

In Hartman Estate, in dealing with s. 43 of the Old Limitations Act, Gillese J.A. speaking for the court did hold that the term "trust property" not only applies to express trusts but includes constructive trusts granted as a remedy for unjust enrichment as discussed in cases such as Becker v. Pettkus, [1980] 2 S.C.R. 834 (S.C.C.), which was the genesis of the modern principle of unjust enrichment discussed in Kerr v. Baranow, 2011 SCC 10, [2011] 1 S.C.R. 269 (S.C.C.), which I will discuss more fully below. In doing so, she adopted a plain reading of the section. She left open the broader question of application of statutory limitation periods for claims to land based on resulting or constructive trusts, at para. 85:

It is apparent that there is no clear, general answer to the question of whether claims to land based on resulting or constructive trust are subject to a statutory limitation period and, if so, whether the exceptions in s. 43(2) apply to all trustees who hold property by way of resulting or constructive trust. In the case at bar, however, if the statutory limitation period does apply to such claims, for the reasons already given, I am not bound to apply Taylor v. Davies. I would give a plain reading to s. 43(2) with the result that the proposed trust claims fall within the second exception.

I adopt a similar approach to the interpretation of s. 4. Its plain language is broad enough to encompass an equitable claim for property based on the remedy of constructive trust. Thus I agree with the motion judge's conclusion on this point, at para. 79:

It seems odd, more than a century after the abolition of the common law forms of action and the merger of common law and equitable jurisdiction, more than 40 years after the debate on limitations reform began in Ontario and more than a decade since the enactment of a new limitations scheme, that we would be constrained to adopt the "traditional" approach of limiting section 4 of the Real Property Limitations Act to adverse possession claims. The plain words of the section, "action to recover any land", seem to apply comfortably to the applicant's claim in this case. The rest of the Real Property Limitations Act talks about various kinds of claims other than trust claims but does not indicate any intention that constructive trust claims are not properly within the meaning of section 4. The repeal of the former Parts II and III of the old Limitations Act, RSO 1990, c L.15, does not shed light on the meaning of section 4. A ten year period for constructive trust claims seeking ownership of land is not
inconsistent with the rest of the Real Property Limitations Act or with the general scheme of the Limitations Act, 2002, which expressly defers to the Real Property Limitations Act.

31 The appellant also relies heavily on the judicial history of the treatment of constructive trust in Canadian courts and particularly on the most recent Supreme Court decision on the issue, Kerr, which emphasizes the nature of the constructive trust as a remedy and the preference for a monetary award for all unjust enrichment claims, even those where the claimant is seeking a constructive trust in identified property.

32 Kerr was decided after this court's decision in Hartman Estate. It deals with some issues that are not germane to this appeal, such as the common intention resulting trust. The court held at para. 24 that the common intention resulting trust no longer has a role in resolving domestic cases. The respondent originally brought a claim based on resulting trust. The parties agreed that the respondent did not have the evidence to support a claim for resulting trust and that claim was dismissed.

33 In Kerr, the court dealt at length with unjust enrichment. At para. 33, Cromwell J. held that there is no separate line of authority for family cases developed within the law of unjust enrichment and reaffirmed the statement in Peter v. Beblow, [1993] 1 S.C.R. 980 (S.C.C.), at p. 997, that "the basic principles governing the rights and remedies for unjust enrichment remain the same for all cases." I refer to this point because, although this is a family law case, the determination of the limitation period issue will have ramifications beyond family law. The resolution of the limitation period issue cannot turn on the fact that this is a family law case. Thus, in my view, the fact that the Family Law Act prescribes a limitation period for claims under that Act cannot be determinative of the limitation period issue.

34 I recognize that Cromwell J. went on to hold at para. 34, again referring to Peter, at p.997, that the courts must "exercise flexibility and common sense applying equitable principles to family law issues with due sensitivity to the special circumstances that can arise in such cases". Indeed, the family law context was front and centre when considering the remedy for unjust enrichment in such cases. But, in my view, the resolution of the strictly legal question as to the application of the Limitations Act, 2002 and the Real Property Limitations Act turns on the interpretation of the relevant provisions of those Acts. The issue of whether the Real Property Limitations Act applies to a claim for a constructive trust will be the same whether the equitable claim for an interest in land arises out of a domestic relationship or a purely business transaction.

35 In Kerr, at para. 32, the court reiterated the by now well-known elements of a claim for unjust enrichment as developed in Canadian law: an enrichment of or benefit to the defendant, a corresponding deprivation of the plaintiff and the absence of a juristic reason for the enrichment. At this stage of the proceeding, those elements are not in issue. The motion judge was asked to deal with the legal issue on the assumption that the respondent could make out those elements: see para. 13 of the motion judge's reasons.
This case turns rather on the remedy for the unjust enrichment and how the remedies should be characterized.

36 Remedies for unjust enrichment are restitutionary and the court in Kerr affirmed that proprietary and monetary remedies are available for unjust enrichment. At para. 46, Cromwell J. described the two available remedies in these terms:

A successful claim for unjust enrichment may attract either a "personal restitutionary award" or a "restitutionary proprietary award". In other words, the plaintiff may be entitled to a monetary or a proprietary remedy (Lac Minerals Ltd. v. International Corona Resources Ltd., [1989] 2 S.C.R. 574, at p. 669, per La Forest J.).

Further, Cromwell J. also noted that the court should first consider whether a monetary award is sufficient; in most cases it is: para. 47. Most of Kerr is concerned with calculating the monetary award. The case does, however, refer to the proprietary award in several contexts. The first context is where the plaintiff, like this respondent, seeks a constructive trust. Justice Cromwell explains as follows at para. 50:

The Court has recognized that, in some cases, when a monetary award is inappropriate or insufficient, a proprietary remedy may be required. Pettkus is responsible for an important remedial feature of the Canadian law of unjust enrichment: the development of the remedial constructive trust. Imposed without reference to intention to create a trust, the constructive trust is a broad and flexible equitable tool used to determine beneficial entitlement to property (Pettkus, at pp. 843-44 and 847-48). Where the plaintiff can demonstrate a link or causal connection between his or her contributions and the acquisition, preservation, maintenance or improvement of the disputed property, a share of the property proportionate to the unjust enrichment can be impressed with a constructive trust in his or her favour (Pettkus, at pp. 852-53; Sorochan, at p. 50). Pettkus made clear that these principles apply equally to unmarried cohabitants, since "[t]he equitable principle on which the remedy of constructive trusts rests is broad and general; its purpose is to prevent unjust enrichment in whatever circumstances it occurs" (pp. 850-51).

[Emphasis added.]

37 Kerr also makes the point that there must be a significant link between the plaintiff's contribution and the property that she seeks to have impressed with the trust. As Cromwell J. said at para. 51:

As to the nature of the link required between the contribution and the property, the Court has consistently held that the plaintiff must demonstrate a "sufficiently substantial and direct" link, a "causal connection" or a "nexus" between the plaintiff's contributions and the property which is the subject matter of the trust (Peter, at pp. 988, 997 and 999; Pettkus at p. 852; Sorochan, at pp. 47-50; Rathwell, at p.
As Dickson C.J. put it in Sorochan, the primary focus is on whether the contributions have a "clear proprietary relationship" (p. 50, citing Professor McLeod's annotation of Herman v. Smith (1984), 42 R.F.L. (2d) 154, at p. 156). Indirect contributions of money and direct contributions of labour may suffice, provided that a connection is established between the plaintiff's deprivation and the acquisition, preservation, maintenance, or improvement of the property (Sorochan, at p. 50; Pettkus, at p. 852).

With that background I return to the interpretive issue and specifically to the question of whether an application for the equitable remedy of a constructive trust in real property is an application for recovery of any land. In my view, the respondent is making a claim for recovery of land in the sense that she seeks to obtain land by judgment of the Court. That the court might provide her with the alternative remedy of a monetary award does not take away from the fact that her claim is for a share of the property. The repeated references to constructive trust as a remedy for unjust enrichment in Kerr demonstrate that a proprietary remedy is a viable remedy for unjust enrichment where there is a link or causal connection between her contributions and the acquisition, preservation, maintenance or improvement of the property.

In sum, I agree with the motion judge's conclusion at para. 80 of his reasons:

From the plain meaning of the words "action to recover any land" in section 4 of the Real Property Limitations Act, in their "entire context" as described above, I find that the applicant's claim in this case for an ownership interest in the house in question is an "action to recover any land" within the meaning of section 4 of the Real Property Limitations Act. It is subject to a ten year limitation period. Based on the record before me, it is not possible for me to conclude that the applicant's claim in this case is barred by the ten year limitation. Accordingly, this part of her claim is entitled to proceed.

(b) The Statute


Basic limitation period

4. Unless this Act provides otherwise, a proceeding shall not be commenced in respect of a claim after the second anniversary of the day on which the claim was discovered.
(b) “Discoverability”

Discovery

5. (1) A claim is discovered on the earlier of,

(a) the day on which the person with the claim first knew,
   (i) that the injury, loss or damage had occurred,
   (ii) that the injury, loss or damage was caused by or contributed to by an act or omission,
   (iii) that the act or omission was that of the person against whom the claim is made, and
   (iv) that, having regard to the nature of the injury, loss or damage, a proceeding would be an appropriate means to seek to remedy it; and

(b) the day on which a reasonable person with the abilities and in the circumstances of the person with the claim first ought to have known of the matters referred to in clause (a).

Presumption

(2) A person with a claim shall be presumed to have known of the matters referred to in clause (1) (a) on the day the act or omission on which the claim is based took place, unless the contrary is proved.

Of prime importance to the question of limitations is when the facts upon which the claim is based were discoverable by the plaintiff. In normal circumstances, we presume the claim was discoverable on the day that the facts supporting it came into being but there are exceptions.

Note: Not all statutes that prescribe limitations periods admit of a postponement based on discoverability; i.e. the limitation in question may be strict.

(i) A Principled Approach

M.(K.) v. M.(H.)

The plaintiff was sexually assaulted from the age of 10 by her father. She brought a claim for assault and breach of fiduciary duty at age 28, after she entered psychological counseling and therapy. The therapists gave evidence that she could not deal rationally with the fact of the incest until she entered therapy. The issue was whether the claim was statute barred. The plaintiff lost at trial and appeal on the point but won in the Supreme Court of Canada. The modified rule is now codified as s.10 of the Limitation Act – “[t]he limitation period established by section 4 does not run in respect of a claim based on assault or sexual assault during any time in which the person with the claim is incapable of commencing the proceeding because of his or her physical, mental or psychological condition.” Moreover, we presume incapacity until the date the proceeding was commenced; s.10(2).
Per LaForest J.:

The Limitations Act and Reasonable Discoverability

21 ... During the hearing, counsel for the respondent conceded that the doctrine of reasonable discoverability had application to an action grounded in assault and battery for incest. He submitted, however, that the appellant was aware of her cause of action no later than when she reached the age of majority. In order to determine the time of accrual of the cause of action in a manner consistent with the purposes of the Limitations Act, I believe it is helpful to first examine its underlying rationales. There are three, and they may be described as the certainty, evidentiary, and diligence rationales; see Rosenfeld, "The Statute of Limitations Barrier in Childhood Sexual Abuse Cases: The Equitable Estoppel Remedy" (1989), 12 Harv. Women's L.J. 206, at p. 211.

22 Statutes of limitations have long been said to be statutes of repose; see Doe v. Duroure v. Jones (1791), 4 Term Rep. 300, 100 E.R. 1031, and A'Court v. Cross (1825), 3 Bing. 329, 130 E.R. 540. The reasoning is straightforward enough. There comes a time, it is said, when a potential defendant should be secure in his reasonable expectation that he will not be held to account for ancient obligations. In my view this is a singularly unpersuasive ground for a strict application of the statute of limitations in this context. While there are instances where the public interest is served by granting repose to certain classes of defendants, for example the cost of professional services if practitioners are exposed to unlimited liability, there is absolutely no corresponding public benefit in protecting individuals who perpetrate incest from the consequences of their wrongful actions. The patent inequity of allowing these individuals to go on with their life without liability, while the victim continues to suffer the consequences, clearly militates against any guarantee of repose.

23 The second rationale is evidentiary and concerns the desire to foreclose claims based on stale evidence. Once the limitation period has lapsed, the potential defendant should no longer be concerned about the preservation of evidence relevant to the claim... However, it should be borne in mind that in childhood incest cases the relevant evidence will often be "stale" under the most expedient trial process. It may be ten or more years before the plaintiff is no longer under a legal disability by virtue of age, and is thus entitled to sue in her own name... In any event, I am not convinced that in this type of case evidence is automatically made stale merely by the passage of time. Moreover, the loss of corroborative evidence over time will not normally be a concern in incest cases, since the typical case will involve direct evidence solely from the parties themselves.

24 Finally, plaintiffs are expected to act diligently and not "sleep on their rights"; statutes of limitation are an incentive for plaintiffs to bring suit in a timely fashion... in Cholmondeley (Marquis) v. Clinton (Lord) (1820), 2 Jac. & W. 1, 37 E.R. 527 (Ch.) , the Master of the Rolls had this to say in connection with limitation periods for real property actions, at p. 140 and p. 577, respectively:
The statute is founded upon the wisest policy, and is consonant to the municipal law of every country. It stands upon the general principle of public utility. Interest reipublicae ut sit finis litium, is a favorite and universal maxim. The public have a great interest, in having a known limit fixed by law to litigation, for the quiet of the community, and that there may be a certain fixed period, after which the possessor may know that his title and right cannot be called in question. It is better that the negligent owner, who has omitted to assert his right within the prescribed period, should lose his right, than that an opening should be given to interminable litigation, exposing parties to be harassed by stale demands, after the witnesses of the facts are dead, and the evidence of the title lost. The individual hardship will, upon the whole, be less, by withholding from one who has slept upon his right ...

There are, however, several reasons why this rationale for a rigorous application of the statute of limitations is particularly inapposite for incest actions.

... Application of the Discoverability Rule to Incest

30 In my view the only sensible application of the discoverability rule in a case such as this is one that establishes a prerequisite that the plaintiff have a substantial awareness of the harm and its likely cause before the limitations period begins to toll. It is at the moment when the incest victim discovers the connection between the harm she has suffered and her childhood history that her cause of action crystallizes...

These passages show that the Court may interpret the statute and the discoverability principle in light of its foundational principles – in this case, first principles supporting the position that the limitations period ought not to have "tollled" based merely on the plaintiff's age.

A claim may also not be discoverable based on the defendant's fraud or deception of the plaintiff. This is the doctrine of fraudulent concealment which was explained by LaForest J.:

63 The leading modern authority on the meaning of fraudulent concealment is Kitchen v. Royal Air Forces Assn., [1958] 2 All E.R. 241 (C.A.) where Lord Evershed, M.R., stated, at p. 249:

It is now clear ... that the word "fraud" in s. 26(b) of the Limitation Act, 1939, is by no means limited to common law fraud or deceit. Equally, it is clear, having regard to the decision in Beaman v. A.R.T.S., Ltd., [1949] 1 All E.R. 465, that no degree of moral turpitude is necessary to establish fraud within the section. What is covered by equitable fraud is a matter which Lord Hardwicke did not attempt to define two hundred years ago, and I certainly shall not attempt to do so now, but it is, I think, clear that the
phrase covers conduct which, having regard to some special relationship between the two parties concerned, is an unconscionable thing for the one to do towards the other. [Emphasis added.]

While stated in the context of statutory "fraud", I have no doubt that this formulation is drawn from the ancient equitable doctrine and is applicable to today's common law concept of fraudulent concealment. I note also that Lord Evershed's formulation has been adopted by this court; see Guerin v. R., [1984] 2 S.C.R. 335. What is clear from Kitchen and Guerin is that "fraud" in this context is to be given a broad meaning, and is not confined to the traditional parameters of the common law action.

64 The factual basis for fraudulent concealment is described in Halsbury's, 4th ed., vol. 28, para. 919, at p. 413, in this way:

It is not necessary, in order to constitute fraudulent concealment of a right of action, that there should be active concealment of the right of action after it has arisen; the fraudulent concealment may arise from the manner in which the act which gives rise to the right of action is performed. [Emphasis added.]

In my view incest falls within the second category outlined in this passage, i.e., concealment arising at the time the right of action arises. As I have stated, it is the very nature of an incestuous assault that tends to conceal its wrongfulness from the victim.

65 There is an important restriction to the scope of fraudulent concealment, which Halsbury's, 4th ed., vol. 28, para. 919, at p. 413, describes as follows:

In order to constitute such a fraudulent concealment as would, in equity, take a case out of the effect of the statute of limitation, it was not enough that there should be merely a tortious act unknown to the injured party, or enjoyment of property without title, while the rightful owner was ignorant of his right; there had to be some abuse of a confidential position, some intentional imposition, or some deliberate concealment of facts.

(c) Ultimate Limitation Periods

Ontario Limitations Act

15. (1) Even if the limitation period established by any other section of this Act in respect of a claim has not expired, no proceeding shall be commenced in respect of the claim after the expiry of a limitation period established by this section.
General

(2) No proceeding shall be commenced in respect of any claim after the 15th anniversary of the day on which the act or omission on which the claim is based took place.

Period not to run

(4) The limitation period established by subsection (2) does not run during any time in which,

(a) the person with the claim,
   (i) is incapable of commencing a proceeding in respect of the claim because of his or her physical, mental or psychological condition, and
   (ii) is not represented by a litigation guardian in relation to the claim;

(b) the person with the claim is a minor and is not represented by a litigation guardian in relation to the claim; or

(c) the person against whom the claim is made,
   (i) wilfully conceals from the person with the claim the fact that injury, loss or damage has occurred, that it was caused by or contributed to by an act or omission or that the act or omission was that of the person against whom the claim is made, or
   (ii) wilfully misleads the person with the claim as to the appropriateness of a proceeding as a means of remedying the injury, loss or damage.

Burden

(5) Subject to section 10, the burden of proving that subsection (4) applies is on the person with the claim.