Civil Procedure (Law 225)
Fall Term 2018

LECTURE NOTES NO. 2

III. PARTIES

'Status':

One must have **legal personality** to sue or be sued in Ontario, with some exceptions (e.g. the Crown, foreign states, 'Indian Bands', unions, statutory bodies, etc. – sometimes status for such actors is provided in another statute than the Rules).

'Standing':

One must have an interest in the dispute to have standing to participate in the litigation; i.e. a person's sufficient and protectable legal rights or interests are affected by the resolution of the dispute.

A person might have standing in a procedural aspect of the litigation but not in the outcome; e.g. whether a business record (like a bank record or a medical record) must be produced by a third party (like a bank or hospital) so that one of the parties may adduce it in evidence. The third party has standing in respect of the motion for production but not 'in the cause'.

(a) Corporations

Corporations have artificial personality and thus may bring or defend proceedings. Those doing Business Associations will recognize such esoteric subjects as 'the rule in *Foss v. Harbottle'* dealing with who may or may not bring litigation in the name of the corporation.

(b) Partnerships

The Partnerships Act, R.S.O. 1990, c. P.5, s.2 provides:

> Partnership is the relation that subsists between persons carrying on a business in common with a view to profit, but the relation between the members of a company or association that is incorporated by or under the authority of any special or general Act in force in Ontario or elsewhere, or registered as a corporation under any such Act, is not a partnership within the meaning of this Act.

Rule 8 of the Rules of Civil Procedure provides in part:

> 8.01 (1) **A proceeding by or against two or more persons as partners may be commenced using the firm name of the partnership.**

…

8.02 Where a proceeding is commenced against a partnership using the firm name, the partnership's defence shall be delivered in the firm name and no person who admits having been a partner at any material time may defend the proceeding separately, except with leave of the court.

…

8.06 (1) An order against a partnership using the firm name may be enforced against the property of the partnership.

Thus, a partnership may have status to sue or be sued in Ontario. This is useful in that it obviates the need to sue the partners individually. Depending on the circumstances one might prefer to bring the action against the names partners, or the partnership, or both – usually depending on what the assets are of the partners and the various individuals.

(c) Estates and Trusts

A dead person cannot sue or be sued because he or she is... well, dead. At the very least it would make oral examination for discovery quite unpleasant.

One can, however, sue the Estate Trustee and the Estate of the deceased, or, a person appointed to represent the Estate for the purposes of litigation. Thus **Rule 9 provides in part:**

9.01 (1) A proceeding may be brought by or against an executor, administrator or trustee as representing an estate or trust and its beneficiaries without joining the beneficiaries as parties.

…

9.02 (1) Where it is sought to commence or continue a proceeding against the estate of a deceased person who has no executor or administrator, the court on motion may appoint a **litigation administrator** to represent the estate for the purposes of the proceeding.

(d) Parties Under a Disability

(i) Relationship Between Lawyer and Client

Rules of Professional Conduct

Rule 3.2-9
When a client's ability to make decisions is impaired because of minority, mental disability, or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal lawyer and client relationship.

Commentary
[1] A lawyer and client relationship presupposes that the client has the requisite mental ability to make decisions about their legal affairs and to give

the lawyer instructions. A client's ability to make decisions, however, depends on such factors as their age, intelligence, experience, and mental and physical health, and on the advice, guidance, and support of others. Further, a client's ability to make decisions may change, for better or worse, over time.

[1.1] When a client is or comes to be under a disability that impairs their ability to make decisions, the impairment may be minor or it might prevent the client from having the legal capacity to give instructions or to enter into binding legal relationships. Recognizing these factors, the purpose of this rule is to direct a lawyer with a client under a disability to maintain, as far as reasonably possible, a normal lawyer and client relationship.

[2] [FLSC - not in use]

[3] A lawyer with a client under a disability should appreciate that if the disability of the client is such that the client no longer has the legal capacity to manage their legal affairs, the lawyer may need to take steps to have a lawfully authorized representative appointed, for example, a litigation guardian, or to obtain the assistance of the Office of the Public Guardian and Trustee or the Office of the Children's Lawyer to protect the interests of the client. In any event, the lawyer has an ethical obligation to ensure that the client's interests are not abandoned.

[4] [FLSC - not in use]

[5] When a lawyer takes protective action on behalf of a person or client lacking in capacity, the authority to disclose necessary confidential information may be implied in some circumstances. (See Commentary under rule 3.3-1 (Confidentiality) for a discussion of the relevant factors). If the court or other counsel becomes involved, the lawyer should inform them of the nature of the lawyer's relationship with the person lacking capacity.

The passage highlighted above means that there is an ethical obligation to accommodate intellectually disabled clients who have capacity to retain a lawyer and to take steps where the client loses capacity at some point thereafter.

(ii) What sort of disability?

Rule 1.03

"disability", where used in respect of a person, means that the person is,

(a) **a minor**,

(b) **mentally incapable** within the meaning of section 6 or 45 of the Substitute Decisions Act, 1992 in respect of an issue in the proceeding, whether the person has a guardian or not, or

(c) **an absentee** within the meaning of the Absentees Act;

(iii) Need for a Litigation Guardian

7.01 (1) Unless the court orders or a statute provides otherwise, a proceeding **shall** be commenced, continued or defended **on behalf of a party under disability by a litigation guardian**.

...

7.02 (1) **Any person who is not under disability may act, without being appointed by the court, as litigation guardian for a plaintiff or applicant who is under disability, subject to subrule (1.1).**

[(1.1) provides that disabled people with guardians, attorneys, etc already in place are presumptive litigation guardians absent the court ordering otherwise.]

(2) No person except the Children's Lawyer or the Public Guardian and Trustee shall act as litigation guardian for a plaintiff or applicant who is under disability until the person has filed an affidavit in which the person,

(a) consents to act as litigation guardian in the proceeding;
(b) confirms that he or she has given written authority to a named lawyer to act in the proceeding;
(c) provides evidence concerning the nature and extent of the disability;
(d) in the case of a minor, states the minor's birth date;
(e) states whether he or she and the person under disability are ordinarily resident in Ontario;
(f) sets out his or her relationship, if any, to the person under disability;
(g) states that he or she has no interest in the proceeding adverse to that of the person under disability; and
(h) acknowledges that he or she has been informed of his or her liability to pay personally any costs awarded against him or her or against the person under disability.

... and the Litigation Guardian's need to retain a lawyer:

15.01 (1) A party to a proceeding who is under disability or acts in a representative capacity **shall** be represented by a lawyer.

Gronnerud (Litigation Guardians of) v. Gronnerud Estate
2002 SCC 38

This leading case deals with one of the main criteria for appointment, the litigation guardian's disinterest in the results of the litigation. It also considers whether the Court can, and should, fetter the discretion of the Public Guardian and Trustee when appointed as Litigation Guardian.

The context of this dispute is how the assets of the deceased husband of an incapable woman should be treated. Here the deceased was survived by his wife (an old woman who suffered from Alzheimer's Disease and was mentally incapable) and his children. The husband owned land upon which he and his wife farmed. She had made a Will 35 years before her husband's death (which was never revoked) and in which she expressed her wish that the farm land stayed together. In her husband's Will, the wife was beneficiary of only a $100,000 trust as she was already in long term care when that document was executed.

A question arose as to whether the wife's interests in her Husband's Estate were sufficient - should she apply for equalization of property in preference to the gifts given to her in the Will? Should she sue for dependant's support?

The trial court appointed two of her children, J and B, her Guardians. J and another child, G, were appointed to be her Litigation Guardians. On first appeal, the appointments were vacated in favour of the Public Trustee (as two of the children would inherit more after their mother died than if the farm was disposed of as set out in the husband's will) but that appointment was limited by the condition that a division of matrimonial property (which would cause the farm to be sold) should not be made. Was that restriction valid?

Per Major J:

> 18 A litigation guardian is responsible for commencing, maintaining or defending an action on behalf of a person... **The test to remove and replace a litigation guardian turns on the "best interests" of the dependent adult**.
>
> ...
>
> **18 A litigation guardian is responsible for commencing, maintaining or defending an action on behalf of a person**. Under The Queen's Bench Rules of Saskatchewan, the litigation guardian can be the property guardian appointed under The Dependent Adults Act or any other individual appointed by the court: Rules 46(2)(a) and 46(2)(f). Under Rule 49, the court can remove a litigation guardian and appoint a substitute, if it appears to the court that the guardian is not acting in the best interests of the disabled adult. The test to remove and replace a litigation guardian turns on the "best interests" of the dependent adult.
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> 19 The leading Saskatchewan case on the criteria to appoint a litigation guardian is Szwydky v. Magiera (1988), 71 Sask. R. 273 (Sask. Q.B.), at pp. 276-777... The six criteria are:

- the evidence must establish that the incompetent is unable to act for himself or herself;

- evidence should be verified under oath as to the incompetent's mental condition and his or her inability to act as plaintiff;

- evidence must demonstrate that the litigation guardian is both qualified and prepared to act, and in addition is indifferent as to the outcome of the proceedings;

- the applicant should provide some evidence to support the claim being made;

- the applicant should obtain the consents of the next-of-kin or explain their absence;

- if the applicant has a personal representative or power of attorney whose status is not being challenged in the proceedings, some explanation should be offered as to why the attorney or representative has not been invited to bring the claim.

20 The Szwydky criteria provide guidance in defining the "best interests" test set out in Rule 49. The third criterion, that of **"indifference" to the result of the legal proceedings, essentially means that the litigation guardian cannot possess a conflict of interest vis-à-vis the interests of the disabled person. Indifference by a litigation guardian requires that the guardian be capable of providing a neutral, unbiased assessment of the legal situation of the dependent adult and offering an unclouded opinion as to the appropriate course of action. In essence the requirement of indifference on the part of a litigation guardian is a prerequisite for ensuring the protection of the best interests of the dependent adult. A litigation guardian who does not have a personal interest in the outcome of the litigation will be able to keep the best interests of the dependent adult front and centre, while making decisions on his or her behalf. Given the primacy of protecting the best interests of disabled persons, it is appropriate to require such disinterest on the part of a litigation guardian.**

21 **It is acceptable in most cases, and perhaps desirable in some cases, to have a trusted family member or a person with close ties to the dependent adult act as litigation guardian... However, there are exceptions. One such exception is the situation currently presented by this appeal, in which there is a particularly acrimonious and long-standing dispute among the children concerning their dead parent's estate. In such cases, the indifference required to be a litigation guardian is clearly absent.**

22 In my opinion, the Court of Appeal was correct in removing Judy and Glenn as Cherie Gronnerud's litigation guardians and replacing them with the Public Trustee. Judy and Glenn could not act in their mother's best interests because... **they were not indifferent as to the outcome of the**

proceedings surrounding the estate of Harold Gronnerud... As residuary beneficiaries under Harold's will, Judy and Glenn have an interest in proceedings that could result in the movement of assets from Harold's estate to Cherie's estate. As Cherie's 1967 holograph will is not broad enough to cover all potential assets passing from Harold's estate, those new assets would be distributed to all four of Cherie's children equally in accordance with the laws of intestacy. If proceedings brought by Cherie's litigation guardian against Harold's estate are successful, Judy and Glenn could stand to gain more as beneficiaries with one-quarter interest each in Cherie's newly increased estate, as opposed to residuary beneficiaries under Harold's will. It is obvious that Judy and Glenn cannot be said to be disinterested in the results of the legal proceedings. The Court of Appeal was correct to remove them as litigation guardians.

...

29 It is my opinion that, in appointing the Public Trustee as litigation guardian for a disabled adult, the Court of Appeal for Saskatchewan has the jurisdiction to restrict the Public Trustee to litigating some types of claims and not others. This authority of the appellate court is apparent from the plain wording of the relevant statute...

...

35 **On my review, it appears that underlying the Court of Appeal's decision must be the implicit recognition that the best interests of Cherie Gronnerud are protected by the trust account in Harold's will.** This is supported by evidence of: Cherie's intentions regarding the family farm; Cherie's relationships with her children and her husband; Cherie's present physical and mental condition; and the fact that a public facility best suits Cherie's present needs. While none of these factors is determinative on its own, taken together they serve to illuminate the best interests of Cherie Gronnerud.

36 First, in terms of Cherie's intentions regarding the estate, the evidence shows that both Cherie and Harold wished to keep their assets together and also wanted to give the majority of their assets to their son Bud. If a claim under The Matrimonial Property Act was brought that resulted in an equal division of the matrimonial property, then the family farm and house would have to be sold to permit the payment to Cherie's estate. This would be antagonistic to the testamentary intention of Harold, who wanted to bequeath almost everything to Bud in part to ensure the farm land so labouriously acquired was retained. Harold's intentions are only relevant in that they may assist one in discerning Cherie's intentions, which in turn are useful in establishing her best interests.

37 That Cherie shared her husband's view is evident in her holograph will. Although this will was drafted a number of years ago, it nevertheless indicates Cherie's desire that Bud have the bulk of the family assets primarily to ensure protecting the family farm...

38 It is also significant that Harold Gronnerud drafted his will in 1999, after Cherie had been diagnosed with Alzheimer's disease in 1997. Given their lengthy and satisfactory marriage, it is likely that had Cherie been competent in 1999, Harold would not have drafted his will in the manner that he did. It is apparent that he knew Cherie was terminally ill and permanently disabled mentally by Alzheimer's disease. In the result, it was pointless to provide for her in any other way. His will not only expressed his intentions but reflected those of his wife expressed in her holograph will some 35 years ago. We do not know if or how Cherie would have changed her original will had she not become medically incompetent. While not significant on its own, the evidence of the testamentary intentions of Cherie and Harold Gronnerud is relevant in that it provides additional clues as to what would be in Cherie's best interests, the latter being the central inquiry.

39 At present, Cherie's condition, both mental and physical, is dire. As noted above, the Court of Queen's Bench has twice found that Cherie's needs are best met in the publicly funded facility in Regina, rather than in a private home or in an expensive private facility. She has no chance of recovery, she suffers from dementia, and she requires assistance with most basic activities. It is reasonable to assume that, in deciding to leave a $100,000 trust fund to his wife of 57 years, Harold had in mind the fact that Cherie is suffering from a debilitating and incurable disease, and believed that the trust fund would provide for her particular needs. This appears to be supported by the findings of the Court of Queen's Bench that Cherie's needs as an Alzheimer's patient are best met in a publicly funded facility. We believe that, given this factual record, the Court of Appeal must have recognized this as well.

Per Arbour J. (dissenting):

49 One of the main difficulties with this case is that there is not much of a record constructed around that critical issue. The most there is to ascertain what would be the wishes of Mrs. Gronnerud were she capable of formulating any such wishes is essentially a holographic will dating back some 35 odd years, and the fact that nothing since shows a change of heart on her part. In the absence of reasons by the Court of Appeal, I cannot say how the court felt that this was sufficient to dispose of the issue of her best interests. **For myself, I cannot be persuaded, again on this record, that I am in a better position than the Public Trustee to make that determination. It is obviously rarely in a person's best interests to forgo a statutory entitlement to as much as possibly half a million dollars. I cannot say that this is not such an unusual case. However, considerably more investigation should be done, as the Public Trustee is fully ready, able and willing to do, to ascertain whether this is in fact the case...** In the circumstances I think it would be far preferable to leave the decision as to whether an action for division of assets under The Matrimonial Property Act should proceed to those who are better placed to make that decision.

One would think that the Public Trustee would not make an equalization election in the circumstances of this case. I think Arbour J.'s criticism more strongly sounds in ensuring that spousal entitlements are not easily abandoned by third parties on behalf of a surviving spouse. See also the dicta of Cullity J. in *Dolmage v. Ontario*, 2010 ONSC 1726 on 'indifference'.

For an example of a motion to oust the PGT in favour a family member, see ***Lochner v Callanan,* 2016 ONSC 1705 (Ont. S.C.J.)**.

(e) Intervenors

Rule 13.01

13.01 (1) A person who is not a party to a proceeding may move for leave to intervene as an added party if the person claims,

(a) an interest in the subject matter of the proceeding;

(b) that the person may be adversely affected by a judgment in the proceeding; or

(c) that there exists between the person and one or more of the parties to the proceeding a question of law or fact in common with one or more of the questions in issue in the proceeding.

(2) On the motion, the court shall consider whether the intervention will unduly delay or prejudice the determination of the rights of the parties to the proceeding and the court may add the person as a party to the proceeding and may make such order as is just.

13.02 Any person may, with leave of a judge or at the invitation of the presiding judge or master, and without becoming a party to the proceeding, intervene as a friend of the court for the purpose of rendering assistance to the court by way of argument.

Hollinger Inc. v. Ravelston Corp.
2008 ONCA 207

Lord Black of Crossharbour faced criminal charges in the United States. A number of pre-trial proceedings arose and the court records were sealed. *The Globe & Mail* sought to intervene to challenge the sealing order.

Jurianz J.A.:

36 While the decision to recognize an intervenor is largely discretionary, in my view the motion judge erred in principle in refusing to grant the Globe intervenor status. He failed to give sufficient weight to the Globe's constitutionally guaranteed freedom of the press and to the fact the Globe

> sought standing to assert a position coincident with the public's interest that would not be raised otherwise.
>
> 37 Public access to the court system promotes confidence in the judicial system and enables oversight of the functioning of the courts. In this case, the parties to the action asked the motion judge for an order that the protective order continue. The public had an interest in whether it was continued or set aside, but that interest was not represented. Except for the Globe, there was no one, first to raise the issue whether the protective order should be set aside and then to advocate the position that it unnecessarily violated the open court principle.
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> ...
>
> 40 Given these factors and their importance, the motion judge erred by refusing the Globe intervenor status for the purpose of dealing with the question whether the protective order should be continued or set aside.
>
> 41 It may be suggested that the error was one of form rather than substance since the motion judge did allow the Globe to make submissions. I do not accept the suggestion. In my view, the motion judge's perception that the Globe lacked sufficient connection to challenge the sealing order would have undermined the force of the Globe's position. The procedure he adopted and the conclusions he reached might have been different had he appreciated the Globe's status. It might have been less likely that he would have lost sight of the fact the onus was on the respondents. The Globe, as an intervenor, would have had a stronger claim to review the material for the limited purpose of making informed argument. If the rights of an intervening party were at stake, the judge might have been persuaded to undertake a review of the material. If the judge had undertaken a review, he may have concluded that some or all of it could be released.
>
> 42 I would conclude that the motion judge's refusal to accord intervenor status to the Globe was not merely an error of form, and must be set aside.

[cf. ***CUPW v. A.G. Canada*, 2013 ONSC 7532 (Ont. S.C.J.)** where the proposed intervention was denied on the basis that the proposed intervenor would not be able to make a “useful contribution to the resolution” of the dispute before the Court (the constitutionality of back-to-work legislation to end a postal strike.]

Gligorevic v. McMaster
2010 ONSC 3842 (Ont. S.C.J.)

Can a lawyer intervene on an appeal where the appellant, whom she acted for at the hearing, alleges lack of competent and effective representation? Yes.

Brown J.

A. Has the proposed intervenor met one of the conditions in Rule 13.01(1)?

11 What is the subject-matter of this proceeding, and what interest might Ms. McCullough have in it? As to the subject-matter, Mr. Gligorevic appeals from the September 29, 2005, decision of the CCB which found him incapable in respect of psychiatric treatment by antipsychotic medication. Although he advanced several grounds of appeal, the one of concern on this motion is his allegation that Ms. McCullough failed to provide him with effective representation at the hearing before the CCB.

12 Counsel advised that they were not aware of a Canadian case in the mental health context in which an allegation of ineffective representation was made on an appeal from a finding of incapacity in respect of treatment. Amicus pointed to the jurisprudence from criminal appeals as providing guidance as to the nature of the issues raised on an appeal involving an ineffective representation claim. I would note that the jurisprudence in the criminal context has been informed by the common law, the statutory obligation in section 686(1)(a)(iii) of the Criminal Code to quash convictions which are the product of a miscarriage of justice, and the fair trial (s. 11(d)) and fundamental justice (s. 7) requirements of the Canadian Charter of Rights and Freedoms: R. v. Joanisse (1995), 102 C.C.C. (3d) 35 (Ont. C.A.), at p. 57. The scope and content of a successful inadequate legal representation claim in the context of an appeal from a decision of the CCB will be a matter for the appeal judge to determine in this case.

13 That said, for the purposes of this motion **I think it reasonable to draw on the criminal appeals jurisprudence to glean the essential subject-matter of an inadequate representation claim. To establish a claim of ineffective representation in a criminal proceeding, an appellant must demonstrate that (i) counsel's acts or omissions constituted incompetence, and (ii) a miscarriage of justice resulted. The object of an ineffectiveness claim is not to grade counsel's performance or professional conduct, but to ascertain whether a miscarriage of justice occurred in the sense that counsel's performance might have resulted in procedural unfairness, or the reliability of the trial's result might have been compromised**: R. v. B. (G.D.), [2000] 1 S.C.R. 520 (S.C.C.), at paras. 26 to 29.

14 **Amicus submitted that since assessing counsel's competence is not the ultimate objective when considering a claim of ineffective representation, the lawyer against whom such an allegation is made has no interest in the subject-matter of the appeal. I disagree. In Butty v. Butty (2009), 98 O.R. (3d) 713 (Ont. C.A. [In Chambers]), leave to**

intervene as an added party was granted to former trial counsel on the appeal from the trial judgment. The trial judge had been highly critical of trial counsel in his judgment, writing that trial counsel had attempted to mislead opposing counsel and the court. In granting leave to intervene, LaForme J.A. accepted that the trial counsel's reputational interests were at stake on the appeal and that neither party to the appeal was likely to represent trial counsel's interests adequately on the appeal: Butty, at para. 9.

15 In an earlier decision in W. (D.) v. White [2003 CarswellOnt 5199 (Ont. C.A.)], 2003 CanLII 24622, the Court of Appeal afforded trial counsel an opportunity to make written or oral submissions on the appeal from a trial judgment in which the appellant contended that trial counsel had been incompetent.

16 These two decisions of the Court of Appeal indicate that trial counsel against whom allegations of ineffective representation are made by his former client on appeal possess an interest in the subject-matter of the appeal sufficient to meet the condition contained in Rule 13.01(1)(a). Although intervention by former trial counsel is not the practice under the Court of Appeal's 2000 Procedural Protocol Regarding Allegations of Incompetence of Trial Counsel in Criminal Cases, Rule 13.01 is available in civil appeals, whereas it is not in criminal appeals. I therefore conclude that Ms. McCullough has satisfied the criterion in Rule 13.01(1)(a).

B. Consideration of the factors set out in Rule 13.01(2)

17 Let me turn, then, to consider whether Ms. McCullough's intervention would unduly delay or prejudice the determination of the rights of the parties to this appeal. In her factum Ms. McCullough submitted that if granted leave to intervene, she would limit her submissions at the hearing of the appeal to 15 minutes, limit any factum to 5 pages, file no further material on the appeal, rely on her previously filed affidavit, and seek no costs of the appeal.

18 As I noted in my Appeal Management Memorandum No. 1, in her November 5, 2007, order Mesbur J. directed that the preparation of the ineffective representation allegations in the appeal roughly follow the 2000 Court of Appeal Procedural Protocol Regarding Allegations of Incompetence of Trial Counsel in Criminal Cases. As a result, Ms. McCullough filed an affidavit giving her version of events and she was examined on that affidavit. That process strikes me as a reasonable and practical one to follow on appeals to this Court from decisions of the CCB where ineffective legal representation before the CCB is raised as a ground of appeal.

19 Against that background, I consider the additional participation sought by Ms. McCullough on this appeal to be proportionate and unlikely to cause undue delay or prejudice to the determination of the rights of the parties to this appeal.

C. Conclusion

> 20 Consequently, **I grant Ms. McCullough leave to intervene on this appeal as an added party with the following specific rights: (i) she may deliver a factum of no more than 5 pages on or before November 15, 2010, and (ii) she may make oral submissions of up to 15 minutes in length at the hearing of the appeal scheduled for November 25, 2010. Ms. McCullough must take the Appeal Record as it stands, subject to the inclusion of her affidavit sworn December 13, 2007; she may not bring any further motions on this appeal; she may not seek her costs of the appeal; and, she does not possess the right to appeal the decision of this Court disposing of the appellant's appeal.**

Note the limitations on the intervention allowed.

Papasotiriou v. Manufacturer's Life Insurance Co.
2012 ONSC 6473

A husband was charged with murdering his husband. The accused was named the beneficiary of the deceased's life insurance and claimed the proceeds. The insurer refused the claim. The beneficiary and the insurance company both accepted that a conviction would disentitled the beneficiary to the proceeds. The parents of the deceased sought to intervene in the insurance litigation under r.13.01 and were successful. As explained, the motion did not require adjudication on the nature of the interest, merely that it be asserted and be a reasonable claim.

Master Dash:

> [5] The three subsections of rule 13.01(1) are to be read disjunctively rather than conjunctively. A party is only required to fit within one of them to satisfy the first part of the test and cross the threshold. The onus is on the proposed intervenors to satisfy the court that they fit within subsection (a), (b) or (c).[1] The court must then consider the issue of delay and prejudice as mandated by rule 13.01(2). ...
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> [7] Rosaline claims to have an "interest in the subject matter of the proceeding", namely the insurance proceeds, within the meaning of rule 13.01(1)(a). Her rationale is as follows. Demitry, if he is convicted of murdering Allan, may be disqualified from receiving payment of the life insurance proceeds. As there is no other beneficiary designated in either policy, the proceeds fall into the estate of Allan. Allan died without a will and so the estate would be distributed pursuant to the laws of intestacy. The laws of intestacy provide that the estate would pass entirely to Allan's spouse, Demitry, since Allan had no children. If Demitry is convicted of Allan's murder, he may be disqualified from receiving any benefit from the estate. In that case Allan's estate would pass to his mother, who is his only surviving parent.[4] As a result Rosaline has a direct financial interest in the insurance policies which are the subject matter of the actions, and in the issues raised in the plaintiff's claims.
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> [8] Similarly Rosaline claims that she "may be adversely affected by a judgment in the actions" within the meaning of rule 13.01(1)(b) since if the

> court agrees that Demitry ought to succeed on his claims under the policies, then her right to inherit under Allan's intestacy will be extinguished and she will not have had a forum to advance her arguments as to the proper distribution of Allan's estate.
>
> [9] Rosaline also asserts that there exists a common question of fact and law within the meaning of rule 13.01(1)(c) as between her claims against the insurers for distribution of the insurance proceeds to the estate (and ultimately to her) and Demitry's claims in the actions for distribution of the insurance proceeds to him. The common issue is whether Demitry is entitled to the proceeds, and if not to whom should they be paid. Both claims involve the application of the same public policy concerns.

[Papasotiriou was convicted in June, 2018.]

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.

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 alleged to have committed a 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 underline the interest of the accused in a fair trial. But the doctrine evokes as well the public interest in a fair and just trial process and the proper administration of justice. The 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.
>
> ...
>
> 56 I am of the view that the facts in this appeal point to the blatant abuse of process that results when relitigation of this sort is permitted. The grievor 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...

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.

34 The public complaints process incorporates a number of features to enhance public participation and accountability. For instance, pursuant to Part II of the PSA, the Commission, as an agency comprised of civilian members, provides independent oversight of police services in Ontario to ensure fairness and accountability to the public. Part V sets out a comprehensive public complaints process by which members of the public can file official complaints against policies or services. Judicial oversight of disciplinary hearings under the PSA is available by statutory right of appeal to the Commission and then to the Divisional Court: see ss. 70(1) and 71(1).

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

C. Discretionary Application of Issue Estoppel

(1) Approach to the Exercise of Discretion

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

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

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

39 Broadly speaking, the factors identified in the jurisprudence illustrate that unfairness may arise in two main ways which overlap and are not mutually exclusive. First, the unfairness of applying issue estoppel may arise from the unfairness of the prior proceedings. Second, even where the prior proceedings were conducted fairly and properly having regard to their

purposes, it may nonetheless be unfair to use the results of that process to preclude the subsequent claim.

(a) Fairness of the Prior Proceedings

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

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

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

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

43 Two factors discussed in Danyluk — the "wording of the statute from which the power to issue the administrative order derives" (paras. 68-70) and "the purpose of the legislation" (paras. 71-73), including the degree of

financial stakes involved — are highly relevant here to the fairness analysis in this second sense. They take into account the intention of the legislature in creating the administrative proceedings and they shape the reasonable expectations of the parties about the scope and effect of the proceedings and their impact on the parties' broader legal rights: Minott, at pp. 341-42.

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

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

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

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

48 These considerations are also relevant to weighing another factor identified in Danyluk: the procedural safeguards available to the parties in the prior administrative process. The consideration of a party's decision whether

to take advantage of procedural protections available in the prior proceeding cannot be divorced from the consideration of the party's reasonable expectations about what is at stake in those proceedings or the fundamentally different purposes of the two proceedings. The connections between the relevant considerations must be viewed as a whole.

(2) Fairness of Using the Disciplinary Finding to Preclude a Civil Action in this Case

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

(a) The Legislation Establishing the Disciplinary Hearing

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

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

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

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

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

54 The police disciplinary hearing is part of the process through which the officers' employer decides whether to impose employment-related discipline on them. By making the complainant a party, the PSA promotes transparency and public accountability. However, this process provides no remedy or costs for the complainant. A civil action, on the other hand, provides a forum in which a party that has suffered a wrong may obtain compensation for that wrong.

55 In addition to the legislative text, several other facts point to the same conclusion about the parties' reasonable expectations about the impact of the disciplinary hearing on the civil action.

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

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

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

(c) Financial Stake in the Disciplinary Hearing

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

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

60 In our view, this analysis is flawed. It cannot necessarily be said that issue estoppel "works both ways" here. As the Court of Appeal recognized, because the PSA requires that misconduct by a police officer be "proved on clear and convincing evidence" (s. 64(10)), it follows that such a conclusion

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

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

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

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

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

(e) The Role of the Chief of Police

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

65 It has been recognized that these arrangements are not objectionable for the purposes of a disciplinary hearing (as in Sharma). However, in our view, the fact that this decision was made by the designate of the Chief of Police should be taken into account is assessing the fairness of using the results of the disciplinary process to preclude Mr. Penner's civil claims. While this point was not clearly placed before the Court of Appeal, we think it is an important one.

66 Applying issue estoppel against the complainant here had the effect of permitting the Chief of Police to become the judge of his own case, with the result that his designate's decision had the effect of exonerating the Chief and his police service from civil liability. In our view, applying issue estoppel here is a serious affront to basic principles of fairness.

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

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

VI. Conclusion

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

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

71 Applying issue estoppel against Mr. Penner to preclude his civil claim for damages in the circumstances of this case was fundamentally unfair.

V. LIMITATIONS

Limitations terminate the potential liability of a defendant, and the beginning of the time when one "should be secure in his reasonable expectation that he will not be held to account for ancient obligations;" *M.(K.) v. M.(H.)*, [1992] 3 S.C.R. 6 at para. 22. The prospect of a time bar to commence proceedings also acts to encourage litigants to move with reasonable dispatch in bringing their claims; this in turn allows for the collection and preservation of evidence as it is relatively fresh for the eventual trial. The principles rationalizing the limitations rules are thus easy to understand and to state, but difficult to apply due to those balancing mechanisms that may be present in a given context - such as 'discoverability') or context-specific complications (like disability) - that ensure that a party is not unfairly and unjustly deprived of his or her right to seek redress before the courts.

Limitations are now largely statutory law. Originally this was governed by an equitable doctrine, The equitable maxim *vigilantibus et non dormientibus jura subveniunt* (the laws aid those who are vigilant, not those who sleep) and gave rise to the doctrine of *laches*. The doctrine is not a defence and does not rely on merely the passage of time, but rather looks to acquiesce on the part of the claimant and detrimental reliance on the part of the defendant so as to recognize what is in essence a waiver or set up an estoppel.

Some friendly advice:

After a first client meeting on a litigation file, 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.

***(i) Limitations Act 2002*, S.O. 2002, c.24**

Limitations statutes are not predicated on fault encourage timely resolution of claims on an evidential record that is not inherently unfair to the defendant. We manage the applicable time period, depending on the statute, based on discoverability and postponement principles in addition to fraudulent concealment. The *Limitations Act 2002* is the default limitations statute and applies a 2-year limitation period with a 15-year maximum subject to certain statutory provisions that provide for atypical treatment. The limitations statute does not apply to statutes explicitly excluded or excepted from its operation, but does encompass all other claims be they in law and equity.

Thus, the basic provisions provides:

> **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.
>
> **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.
>
> …
>
> **Ultimate Limitation Periods**
>
> 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.

(ii) Does the Limitations Act 2002 Apply?

[See the Schedule to section 19 of the *Limitations Act 2002* for a list of statutes not effected by the statute.]

McConnell v. Huxtable
2014 ONCA 86

In this case the question posed was which statute 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 2002*? The former. Read the case to understand that the choice becomes formally an interpretive question, but is really one bound up with public policy. That is, how the law wishes to institutionalize liability in certain types of actions. The rationale for the distinction in this case is that the law deals atypically with land as it is a unique asset and that monetary compensation may not be an adequate remedy for a successful claim.

Rosenberg J.A.:

> 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.
>
> …

38 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.

39 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.

(iii) “Discoverability”

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

M.(K.) v. M.(H.)
[1992] 3 S.C.R. 6

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 clim 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 d. 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* ... [Emphasis added.]

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 ‘tolled’ 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.**

Brown v. Baum
2016 ONCA 325

A surgeon operated to deal with problems experienced in an early surgery that he performed. From when does the limitation period run? The Court of Appeal accepted that section 5(a)(iv) of the statute ["that, having regard to the nature of the injury, loss or damage, a proceeding would be an appropriate means to seek to remedy it"] supported the view that the cause of action was not discoverable until it was known that the second surgery was unsuccessful in curing the problem.

Feldman J.A.:

> [15] On this appeal, the appellant challenges the finding by the motion judge that although by July 2009 Ms. Brown knew that an injury, loss or damage had occurred (undergoing breast reduction surgery without having been informed of the risks) and that the injury, loss or damage had been caused or contributed to by an act of Dr. Baum (his failure to inform her), she did not know that bringing a legal action would be an appropriate remedy. The appellant points to the fact that Ms. Brown was taking photographs of her breasts for months following the initial surgery "just in case [she] ended up in a lawsuit like this one."
>
> [16] The appellant cites two errors it alleges Justice Mew made in his analysis. First, the appellant says that the motion judge erred in his interpretation of s. 5(1)(a)(iv) in stating, at para 50 of his reasons, that the point of the subsection "is to delay the commencement of the limitation period until such time as initiating a proceeding is an appropriate remedy." The appellant argues that the motion judge erred by conflating a claim to a legal right with taking legal proceedings to pursue that right.
>
> [17] I do not agree that the motion judge erred in his interpretation of the section. I agree with the motion judge that the fourth condition of discoverability under the Act is met at the point when the claimant not only knows the factual circumstances of the loss she has suffered, but also knows that "having regard to the nature of the injury, loss or damage", an action is an appropriate remedy. Once she knows that, she has two years to initiate that action.
>
> [18] The motion judge's application of the subsection to the facts on this record was particularly apt: he concluded that because the doctor was continuing to treat his patient to try to fix the problems that arose from the initial surgery, that is, to eliminate her damage, it would not have been appropriate for the patient to sue the doctor then, because he might well have been successful in correcting the complications and improving the outcome of the original surgery. On the evidence of Dr. Brown, the specialist who provided Ms. Brown with a second opinion, by September 2010, Dr. Baum in fact was successful in ameliorating Ms. Brown's damage.
>
> [19] Second, the appellant submits that the motion judge gave the term "appropriate" an "evaluative gloss" rather than applying the meaning of

"legally appropriate", contrary to this court's decision in Markel. Again I do not agree. The motion judge was entitled to conclude on the facts of the case that Ms. Brown did not know that bringing an action against her doctor would be an appropriate means to remedy the injuries and damage she sustained following her breast reduction surgery until June 16 2010, after Dr. Baum performed the last surgery.

[20] Further, I am satisfied that the test in s. 5(1)(b) is met. A reasonable person in Ms. Brown's circumstances would not consider it legally appropriate to sue her doctor while he was in the process of correcting his error and hopefully correcting or at least reducing her damage. Where the damages are minimized, the need for an action may be obviated.

…

[24] In my view, the motion judge made no error in his approach to this issue. He considered all of the relevant case law, and applied it to the facts. He was entitled to find that Ms. Brown did not know that it was appropriate to sue Dr. Baum until after the last surgery he performed to try to correct the complications and improve the outcome of the original surgery. As the motion judge observed, it is not simply an ongoing treatment relationship that will prevent the discovery of the claim under s. 5. In this case, it was the fact that the doctor was engaging in good faith efforts to remediate the damage and improve the outcome of the initial surgery. This could have avoided the need to sue.

Presidential MSH Corporation v. Marr Foster & Co. LLP
2017 ONCA 325

A client sued his accountant. The defendant moved successfully for summary judgment on limitations arguing that the limitations period had commenced when the CRA denied him certain tax credits. The question was whether the limitation commenced when the Notice of Assessment was received or, later, when the CRA confirmed its position in its final assessment after receiving the client's submissions that his objections to the initial assessment. How did the principle in *Brown v. Baum* respecying discoverability apply in this context?

Pardu. J.A.:

(1) The purpose of s. 5(1)(a)(iv) of the Act

[17] The motion judge did not have the benefit of this court's decision in *407 ETR Concession Company Limited v. Day*, 2016 ONCA 709 (CanLII), 403 D.L.R. (4th) 485. In that case, Laskin J.A. discussed the purpose of s. 5(1)(a)(iv) of the Act. He noted, at para. 48:

[I]t seems to me one reason why the legislature added "appropriate means" as an element of discoverability was to enable courts to function more efficiently by deterring needless litigation. As my colleague Juriansz J.A. noted in his dissenting reasons in *Hare v. Hare*, courts take a dim view of unnecessary litigation. [Citation omitted.]

Laskin J.A. also noted, at para. 33, that the appropriateness criterion in s. 5(1)(a)(iv) was not an element of the former limitations statute or the common law discoverability rule, and that this added element "can have the effect … of postponing the start date of the two-year limitation period beyond the date when a plaintiff knows it has incurred a loss because of the defendant's actions."

[18] Laskin J.A. stated, at para. 34, that whether an action is appropriate depends on the specific factual or statutory setting of each individual case. Because of this, case law applying s. 5(1)(a)(iv) is of limited assistance. And in *Brown*, Feldman J.A. noted that "there any many factual issues that will influence the outcome": at para. 21. Further, when s. 5(1)(b) of the Act is applied, the determination whether legal action would be appropriate takes into account what a reasonable person with the abilities and in the circumstances of the plaintiff ought to have known. Section 5(1)(b) is described as a modified objective test in *Ferrera v. Lorenzetti, Wolfe Barristers and Solicitors*, 2012 ONCA 851 (CanLII), 113 O.R. (3d) 401, at para. 70.

[19] While I agree that whether a plaintiff ought to have known whether a proceeding would have been an appropriate means to seek to remedy damage, injury or loss will turn on the facts of each case and the abilities and circumstances of the particular plaintiff, prior case law can assist in identifying certain general principles. I turn now to certain of those principles.

…

[49] In the present case, I conclude that the motion judge erred in holding that the appellant knew or ought to have known that its proceeding was appropriate as early as April 2010, when it received the CRA's Notices of Assessment disallowing its tax credits. In my view, the proceeding was not appropriate, and the plaintiff's underlying claim was not discovered, until May 2011, when the CRA responded to the appellant's Notice of Objection and advised that it intended to confirm its initial assessments. The motion judge erred at para. 67 of his reasons by equating knowledge that the defendants had caused a loss with a conclusion that a proceeding would be an appropriate means to seek a remedy for the loss. I say this for the following reasons.

[50] First, the motion judge erred in distinguishing the present case from *Brown* when applying the appropriateness criterion under s. 5(1)(a)(iv) of the Act. The appellant looked to its professional advisors, the respondents, to provide accounting and tax advice. It relied on the respondents' advice to retain a tax lawyer to object to the CRA's Notices of Assessment. As did the doctor in *Brown,* Himmelfarb attempted to ameliorate the loss to the appellant that the respondents caused in failing to file the appellant's tax returns in time.

[51] Himmelfarb's involvement in the appellant's appeal to the CRA was not trivial. The motion judge held at para. 78 of his reasons that Himmelfarb's

> role "was of a supporting nature only" and that "he was not directing the case." While this may be true, it unduly discounts Himmelfarb's role in attempting to resolve the appellant's dispute with the CRA. Himmelfarb recommended that the appellant obtain a tax lawyer's advice. He drafted the application for discretionary relief. He helped the appellant and its lawyer with whatever else they needed.
>
> [52] Had Himmelfarb, together with the tax lawyer that he advised the appellant to enlist in aid, prosecuted the CRA appeal successfully, the appellant's loss would have been substantially eliminated, and it would have been unnecessary to resort to court proceedings to remedy it. The fact that the appellant would have been unable to recover the fees it paid the tax lawyer, except through litigation, is in my view inconsequential. It is the claim that is discoverable, not the full extent of damages the plaintiff may be able to recover. It would not have been appropriate under s. 5(1)(a)(iv) of the Act for the appellant to commence a proceeding until Himmelfarb's ameliorative efforts concluded.
>
> [53] Similarly, the CRA appeal process had the potential to eliminate the appellant's loss. As an alternative process to court proceedings, it could have resolved the dispute between the appellant and the respondents. These results would have made a proceeding unnecessary. It would not have been appropriate for the appellant to commence a proceeding until the CRA appeal process was exhausted in May 2011.
>
> [54] Likewise, this court's decision in Markel, as interpreted in 407 ETR Concession Company, about the meaning of the concept of a proceeding being "legally appropriate" under s. 5(1)(a)(iv) of the Act supports rather than undermines the appellant's position in this case. This is not a case where the claimant sought to toll the operation of the limitation period by relying on the continuation of an alternative process whose end date was uncertain or not reasonably ascertainable. It was clear that the end date of the CRA appeal in this case was May 16, 2011, when the CRA responded to the appellant's Notice of Objection advising that it intended to confirm the assessments. In my view, the motion judge erred in invoking Markel to dismiss the appellant's claim as time barred.

Thus, a proceeding against a professional may not be appropriate if the claim arose out of the professional's negligence but may be resolved by the professional himself or herself without recourse to the courts, rendering the proceeding unnecessary. A pragmatic and principled result.

(iv) "Absolute" Limitation Period

Mega International Commercial Bank (Canada) v. Yung
2018 ONCA 429

The facts in this case don't matter as a pure question of law was proposed – was an action for contribution and indemnity subject to a 2-year limitation period from the time that the plaintiff's statement of claim was served on the defendant (who later seeks to sue a joint tortfeasor for contribution and indemnity)?

Paciocco J.A.:

> 54 In my view, the motion judge erred in law in holding that the *Limitations Act, 2002*, s. 18 creates an absolute limitation period of two years for the commencement of contribution and indemnity claims. Properly interpreted, s. 18 works with other provisions of the *Limitations Act, 2002* to create a presumed start date for the running of the limitation period. That presumed limitation period start date will result in a claim for contribution or indemnity being statute-barred two years after the party seeking contribution or indemnity is served with a claim in the proceeding in which contribution or indemnity is sought, unless that party proves that the claim for contribution or indemnity was not discovered and was not capable of being discovered through the exercise of due diligence until some later date.
>
> 55 The scheme of the *Limitations Act, 2002* is important to this conclusion. Subject to a few exceptions, s. 4 creates a "basic limitation period" of two years commencing on the date the claim was discovered. Section 5(1) goes on to define when a claim was discovered, and s. 5(2) creates a rebuttable presumption to assist in applying discoverability principles. If a claim is not commenced within 15 years of the day on which the wrong occurred, the ultimate limitation period defined in s. 15(2) will expire. Section 18 operates within this general scheme. These are the material provisions:
>
> 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.
>
> > 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 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.

Ultimate limitation periods

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.

56 Section 18 of the Limitations Act, 2002, the section directly in issue in this appeal, provides:

Contribution and indemnity

18(1) For the purposes of subsection 5(2) and section 15, in the case of a claim by one alleged wrongdoer against another for contribution and indemnity, the day on which the first alleged wrongdoer was served with the claim in respect of which contribution and indemnity is sought shall be deemed to be the day the act or omission on which that alleged wrongdoer's claim is based took place.

Application

(2) Subsection (1) applies whether the right to contribution and indemnity arises in respect of tort or otherwise.

…

61 The words in s. 18, interpreted in their grammatical and ordinary sense, do not establish an absolute limitation period. The provisions in the Limitations Act, 2002 that do establish finite limitation periods, such as ss. 4, 15(1), 15(2), and 15(3), direct that "a proceeding shall not be commenced" or "no proceeding shall be commenced" after a described limitation period. Section 18, on the other hand, does not use such language or speak in any other terms that can be read as imposing an absolute limitation period, nor does it even identify a time span that could serve as a limitation period.

62 On its face, s. 18 does no more than deem a fact without disclosing the significance of that deemed fact. Specifically, it directs that the day on which a party is served with the claim in respect of

which they seek contribution or indemnity, is deemed to be the day the act or omission on which that alleged claim is based took place. As this court similarly described in Levesque, at para. 39, s. 18 is obviously intended to work harmoniously along with other provisions of the Limitations Act, 2002 to give this deemed fact meaning.

63 In my view, s. 18 takes on meaning when it is linked to the Limitations Act, 2002, s. 5(2). Subject to the absolute 15-year limitation period in s. 15(2), ss. 5(2) and 18 together establish the presumptive limitation period for contribution and indemnity claims — a presumptive limitation period that incorporates the discoverability principles outlined in ss. 4 and 5(1). I emphasize the interaction between ss. 5(2) and 18 for two reasons.

64 First, s. 18 is linked expressly to s. 5(2) in its opening phrase, "For the purposes of subsection 5(2) and section 15". In my view, this opening phrase cannot be read as a direction to exclude contribution and indemnity claims from the operation of ss. 5(2) and 15, as was suggested in Hughes v. Dyck, 2016 ONSC 901, 129 O.R. (3d) 495 (Ont. S.C.J.), at para. 37. The clause "for the purposes of" invokes these provisions. It simply cannot properly be read as dispensing with these provisions as if it said, "Notwithstanding subsection 5(2) and section 15".

65 Second, the thing or fact that s.18 deems to have occurred is the same thing or fact that is used in s. 5(2) as the trigger for the presumptive limitation period in ss. 4 and 5. Section 18 deems "the day on which the first alleged wrongdoer was served with the claim in respect of which contribution or indemnity is sought [to be] the day the act or omission on which the alleged wrongdoer's claim is based took place." Meanwhile, s. 5(2) treats "the day the act or omission on which the claim is based took place" to be the day on which a person with a claim is presumed to know that they have a claim within the meaning of s. 5(1). Section 5(2) is the only other provision in the Limitations Act, 2002 apart from s. 18 that uses the operative phrase that I have underlined in the preceding sentences. The two sections are clearly meant to intersect and work together. In effect, s. 18 provides the variable used in s. 5(2) as the trigger for the presumed limitation period for contribution and indemnity claims.

66 Put more directly, and incorporating s. 18's deemed fact into the text of s. 5(2):

A person with a claim [for contribution and indemnity] shall be presumed to have known of the matters referred to in clause (1)(a) on the day [on which that person was served with the claim in respect of which contribution or indemnity is sought], unless the contrary is proved.

67 Sections 18 and 5(2), in my view, work hand in glove in contribution or indemnity claims. Together, these two provisions

identify the presumptive limitation period that applies in contribution and indemnity claim cases.

68 In this way, s. 18 works not as an exception to the "basic limitation period" in s. 4 of the Limitations Act, 2002, but as part of the integrated scheme established by ss. 4 and 5.

…

72 I appreciate that the Limitations Act, 2002 was passed to promote certainty and finality, and that certainty and finality could better be achieved by a fixed limitation period in s. 18: Miaskowski, at para. 95; and Hughes, at para. 37. **As Sharpe J.A. pointed out in Canaccord Capital, at para. 17, however, the reform of the law of limitations in Ontario was "aimed at creating a clear and cohesive scheme for addressing limitation issues, one that balances the plaintiff's right to sue with the defendant's need for certainty and finality." As the "basic limitation period" in s. 4, combined with the discoverability principles in s. 5 demonstrate, that balance is generally achieved in the Limitations Act, 2002 by adopting short limitations periods triggered by presumed knowledge of a claim, but subject to rebuttal based on the discoverability principles. There is no reason why a similar balance would not have been intended for contribution and indemnity claims.**

73 Indeed, I agree with the observations of Leach J. in Demide, at para. 88. There is an element of injustice in using a limitation period to deny a claim that could not have been discovered with reasonable diligence, and "the court should be reluctant to adopt a legislative interpretation that permits the possibility of such an injustice, unless that is the outcome clearly dictated by the legislation." In my view, that outcome is not clearly dictated by s. 18. On the contrary, the opposite outcome is indicated.

74 I would therefore hold that the motion judge erred in his interpretation of s. 18. The two-year limitation period prescribed by ss. 4, 5(2), and 18 for contribution and indemnity claims presumptively begins on the date of service of a claim in respect of which contribution and indemnity is sought. That presumptive limitation period start date, however, can be rebutted by the discoverability principles prescribed in s. 5 of the Limitations Act, 2002.

[Emphasis added.]

Thus, Section 18 only creates a presumptive 2-year limitation period subject to discoverability.

(v) Pleading Limitation is a Defence

Collins v. Cortez
2014 ONCA 685 (Ont. C.A.)

This case dealt with the application of the *Limitations Act 2002* within the context of the new summary judgment motion regime under the 2010 amendments to the *Rules of Civil Procedure*. Here the plaintiff discovered serious injuries that would allow her to sue for damages outside the statutory benefits regime two weeks after the original injury was sustained. The action itself was brought two years and two days after the accident and dismissed based on limitations on a summary judgment motion. In allowing the appeal, van Rensburg J.A. held for the Court of Appeal:

> [9] This motion was for summary judgment dismissing a claim against an existing defendant, and not a motion to amend a claim after the expiry of a limitation period. It was a motion for judgment, not a pleadings motion.
>
> [10] In the normal course, if a limitations defence is raised, as here, in a statement of defence, and the plaintiff relies on the discoverability principle, the material facts relevant to discoverability should be pleaded in reply. I disagree with the conclusion of the motion judge that the appellant was required to plead the facts relevant to discoverability in her statement of claim. The expiry of a limitation period is a defence to an action that must be pleaded in a statement of defence... As such, discoverability, which is relevant to the limitations defence, need not be anticipated by a plaintiff and addressed in her statement of claim…