

Issue Estoppel

The *Res Judicata* Test



Is Going to Court Actually Going Back to Court?

Laypeople and lawpeople can be confused regarding the *res judicata* principle, also known as 'issue estoppel', when determining whether an issue is barred from being revisited by the court. For various reasons, the judicial process both requires, and expects, finality. The administration of justice may fall into disrepute if parties to proceedings were able to relitigate matters over and over again on an endless basis. Additionally, the court system including judicial resources, as paid for by the taxpayer, would be wasted.

This 'confusion' is stated as so whereas the question of whether a matter is subject to the principle of *res judicata* arises so frequently that the Supreme Court precedent on the subject, *Danyluk v. Ainsworth Technologies Inc.*, [\[2001\] 2 S.C.R.](#)

[460](#), is cited more than 1,000 times on CanLII.org. The criteria for what constitutes as a matter barred by the principle of *res judicata* was stated by the Supreme Court in *Danyluk*:

24 Issue estoppel was more particularly defined by Middleton J.A. of the Ontario Court of Appeal in *McIntosh v. Parent*, [1924 CanLII 401](#) (ON CA), [1924] 4 D.L.R. 420, at p. 422:

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

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

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

(1) that the same question has been decided;

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

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

This was well summarized as stated within *Roumanes v. Dalron et al.*, [2010 ONSC 2891](#) as:

[10] In the case of *Danyluk v. Ainsworth Technologies Inc.* [2001] 2 S.C.R. No. 460, the Supreme Court of Canada determined that the application of issue estoppel requires a balancing of 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. Its application involves a two step process: firstly, the determination of whether the three preconditions of issue estoppel have been met, and secondly, if they have been met, the determination of whether it ought to apply in the particulars circumstances of the case.

[11] The three preconditions of issue estoppel were stated as follows: (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.

Accordingly, the test of whether 'issue estoppel' exists and whether a matter should be heard essentially comes down to three simple factors, all of which must met, and being whether:

1. The same legal question was previously decided;

2. The judicial decision was a final decision; and

3. The parties to that decision were the same parties as within the new proceeding.

Summary Comment

Accordingly, if the previous decision addressed a different question of fact or law, if the previous decision was without finality, or if the previous decision involved different parties to the proceeding, the fresh proceeding is other than subject to the *res judicata* doctrine and should proceed as a separate matter, even if stemming from - and perhaps especially as stemming from, the previous matter.