



SUPREME COURT OF CANADA

CITATION: Patrick Street
Holdings Ltd. v. 11368 NL Inc.,
2026 SCC 15

APPEAL HEARD: October 15, 2025
JUDGMENT RENDERED: May 8,
2026
DOCKET: 41296

BETWEEN:

Patrick Street Holdings Limited
Appellant

and

11368 NL Inc.
Respondent

CORAM: Wagner C.J. and Karakatsanis, Côté, Rowe, Martin, Kasirer, Jamal,
O’Bonsawin and Moreau JJ.

**REASONS FOR
JUDGMENT:** Wagner C.J. (Rowe, Kasirer, Jamal, O’Bonsawin and Moreau
JJ. concurring)
(paras. 1 to 141)

**DISSENTING
REASONS:** Martin J. (Karakatsanis J. concurring)
(paras. 142 to 172)

**DISSENTING
REASONS:** Côté J.
(paras. 173 to 257)

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Patrick Street Holdings Limited

Appellant

v.

11368 NL Inc.

Respondent

Indexed as: Patrick Street Holdings Ltd. v. 11368 NL Inc.

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Present: Wagner C.J. and Karakatsanis, Côté, Rowe, Martin, Kasirer, Jamal, O’Bonsawin and Moreau JJ.

ON APPEAL FROM THE COURT OF APPEAL OF NEWFOUNDLAND AND LABRADOR

Civil procedure — Res judicata — Cause of action estoppel — Company defaulting on mortgage — Mortgagee purchasing property under power of sale — Accounting of sale proceeds prepared by mortgagee providing for payment of its mortgage ahead of other encumbrances — Accounting challenged by two encumbrancers — Application judge excluding mortgagee’s mortgage from accounting — Company bringing subsequent application for payment of residue from sale

proceeds on basis of application judge's previous decision on accounting — Mortgagee arguing that application judge in first proceeding had not definitively determined that it was not entitled to payment of its mortgage — Whether mortgagee barred by operation of cause of action estoppel from arguing in second proceeding that it is entitled to payment of its mortgage — Whether party has obligation to plead cause of action estoppel at first instance in order to rely on doctrine.

11368 NL Inc. owned property that was encumbered by numerous mortgages and other claims. In 2016, 11368 defaulted on a mortgage held by Patrick Street Holdings Limited. Patrick Street commenced power of sale proceedings, which were suspended when 11368 agreed to provide Patrick Street with a new collateral mortgage of \$4 million on the property. Several weeks later, Patrick Street reactivated power of sale proceedings under the defaulted mortgage and purchased the property. As the mortgagee, Patrick Street prepared an accounting regarding the sale, in which it set out allocations to pay out several of the mortgages on the property that it or its affiliates held, including \$4 million to pay out its new collateral mortgage. There were insufficient proceeds to pay out other encumbrancers' claims that ranked after the \$4 million mortgage.

In 2016, two encumbrancers commenced applications to challenge Patrick Street's accounting, and sought orders directing Patrick Street to pay out their claims ("2016 applications"). Patrick Street, as mortgagee, and 11368, as mortgagor, were listed as respondents. The application judge granted the applications. He reviewed the

claims Patrick Street included in and excluded from its accounting and reduced the amount Patrick Street claimed on several mortgages, excluded the \$4 million mortgage from the accounting, and ordered Patrick Street to pay out the two encumbrancers' claims. The Court of Appeal dismissed Patrick Street's appeal.

In 2019, 11368 filed an application seeking an order to be paid the residue of the proceeds from the sale of the property ("2019 application"). In response, Patrick Street asserted that, while the \$4 million mortgage was disallowed from the accounting in the 2016 applications, it remained a valid contract between Patrick Street and 11368. Further, Patrick Street argued that the 2016 applications did not deal with the situation as between Patrick Street and 11368. The same application judge rejected Patrick Street's argument, relying on his decision in the 2016 applications to do so, and ordered that the residue of the sale proceeds be paid to 11368. The Court of Appeal upheld this decision, finding that the doctrine of *res judicata* had been properly raised by 11368 before the application judge and that this doctrine, along with the doctrine of abuse of process by relitigation, applied so as to bar Patrick Street from relitigating its claim under the \$4 million mortgage.

Held (Karakatsanis, Côté and Martin JJ. dissenting): The appeal should be dismissed.

Per Wagner C.J. and Rowe, Kasirer, Jamal, O'Bonsawin and Moreau JJ.: There is a long-recognized obligation on parties to plead and raise *res judicata* at first instance. 11368 satisfied this obligation by properly pleading this doctrine in its written

submissions and raising it before the application judge in 2019. Cause of action estoppel precludes Patrick Street from challenging the application judge's original decision on its accounting by arguing its claim for entitlement to payment under the \$4 million mortgage. The cause of action at issue in the 2016 applications concerned the need to determine the validity, value, and priority of encumbrances on the property through a judicial accounting. This is the same cause of action that was at issue in 2019. Accordingly, Patrick Street's failure in 2016 to advance all reasonably available arguments in defence of its claim to be paid from the sale proceeds is fatal to its ability to raise those arguments in 2019.

Res judicata is one of several common law doctrines — along with abuse of process by relitigation — that exist to prevent abuse of the judicial decision-making process. The doctrine provides that a dispute, once decided finally between parties, is not subject to relitigation by those parties. There are two branches of *res judicata*: cause of action estoppel and issue estoppel. Cause of action estoppel bars the relitigation of a cause of action by either party, whereas issue estoppel precludes a litigant from rearguing an issue that was fundamental to the decision arrived at in a prior proceeding. The doctrine of *res judicata* is founded on two overarching principles of public policy: a litigant's interest in fairness, and society's interest in the conclusion of disputes and the finality of judicial decisions. With respect to fairness, *res judicata* seeks to prevent the economic and psychological hardship resulting from a litigant being twice vexed in the same cause: it is both unreasonable and unjust to permit a claim to be litigated afresh between parties to a dispute where the claim has been finally decided in a prior

proceeding. With respect to finality, *res judicata* plays an important societal function by limiting the ability of parties to reopen disputes. Finality is critical not only for the certainty of the parties, but also for the integrity of the judicial process, and *res judicata* thus also serves to maintain respect for and public confidence in the administration of justice by guarding against inconsistent results and inconclusive proceedings and by preventing duplicative litigation that drains resources.

There is an obligation to plead *res judicata* in order to rely on the doctrine. The obligation consists of a requirement to plead the material facts giving rise to the claim of estoppel. It is functional and grounded in the need to ensure that a responding party has notice of the case it must meet and is not taken by surprise by another party's reliance on the doctrine. A party need not explicitly reference the term "*res judicata*"; the inquiry into whether *res judicata* was properly pleaded should be focused on whether the pleadings were procedurally fair. In contexts where the parties do not provide written pleadings, or where each party submits only one pleading to the court before the matter is heard, a plaintiff or applicant may not have an opportunity to plead *res judicata* until the hearing takes place. For this reason, the obligation to plead *res judicata* has been characterized as an obligation to plead it where there is an opportunity to do so. As a matter of evidence, both the judgment and the pleadings may be relevant indicia of the subject matter of a judicial decision and may assist in illuminating the nature of the cause of action for the purposes of estoppel.

In the instant case, 11368 met its obligation to plead the material facts giving rise to *res judicata* in its 2019 application. It reproduced the application judge's list of the claims he retained and those he excluded from Patrick Street's initial accounting in the 2016 applications decision, along with their priority; it pleaded that Patrick Street's appeal from that decision had been dismissed; and it also appended the 2016 applications decisions of both the application judge and the Court of Appeal to its pleadings. 11368 also raised *res judicata* in oral submissions before the application judge, asserting several times that the matter Patrick Street sought to relitigate had already been decided. Further, Patrick Street's pleadings in the context of the 2019 application reflect that it was aware of 11368's position and understood its argument. The implication of Patrick Street's submissions was that the application judge had not exhaustively reviewed its accounting in the 2016 applications decision, and that the \$4 million mortgage remained a valid contract; yet this is essentially a reassertion of its claim for payment under that mortgage. As well, during the 2019 application hearing, Patrick Street's submissions directly addressed what was argued and what was decided in the 2016 applications. Patrick Street's assertion that 11368 did not raise *res judicata* because the 2019 application was not decided on that basis should be rejected, as it improperly treats the basis of a decision as being dispositive of the question of whether a particular matter was raised by the parties. How an application was decided and whether a matter was raised are distinct questions.

Since 11368 pleaded and raised *res judicata* at first instance, it is necessary to determine whether Patrick Street is barred by cause of action estoppel from rearguing

its claim under the \$4 million mortgage. There are four requirements for establishing cause of action estoppel: there must be a final decision of a court of competent jurisdiction in a prior action; the parties to the subsequent litigation must have been parties to the prior action; the cause of action in the prior action must not be separate and distinct from the cause of action in the subsequent proceeding; and the basis of the cause of action and of the subsequent action must have been argued or could have been argued in the prior action, if the parties had exercised reasonable diligence. The first and second prongs of the test have already been addressed in other jurisprudence. With respect to the third prong, a cause of action has been defined as a set of facts that provides the basis for an action or as a factual situation entitling a person to relief; thus, determining whether a cause of action raised in a prior proceeding is separate and distinct from the cause of action in the subsequent proceeding necessarily requires an assessment and comparison of the facts in the two actions. With respect to the fourth prong, cause of action estoppel furthers the principle of finality by ensuring that all legal theories arising out of the same facts are put forward in one proceeding; any theory that properly belonged to the first action and that was or could, with reasonable diligence, have been raised at that point is captured by cause of action estoppel.

In cases where a party has established all elements of the test for cause of action estoppel, courts maintain a narrow discretion to decline to apply estoppel where doing so would cause an injustice — for instance, where procedural unfairness tainted the first proceeding. *Res judicata* is meant to promote the orderly administration of justice but not at the cost of real injustice in a particular case. The underlying purpose

of the doctrine is to balance the public interest in the finality of litigation with the public interest in ensuring that justice is done. In particular, prudence may be required where the decision said to give rise to *res judicata* was rendered in the context of summary procedures, especially where the initial application addressed only a discrete element of a larger dispute, or where a matter was not within the contemplation of the parties at the time of the initial application. Such situations may present appropriate cases for courts to exercise discretion and decline to apply estoppel, although this discretion should be exercised only exceptionally. Ultimately, courts are well suited to recognize other situations where it may be appropriate to exercise discretion and decline to apply the doctrine.

The majority of the Court of Appeal was correct in concluding that cause of action estoppel applies in the instant case. The first requirement of the test is met: the application judge's decision on the 2016 applications is final, because it was upheld on appeal, and leave to appeal the decision of the Court of Appeal was not sought. The second requirement is also clearly met: 11368 and Patrick Street were parties in both the prior and subsequent litigation, notwithstanding that Patrick Street was a respondent in both sets of applications in 2016 and 2019, whereas 11368 was a respondent in one and an applicant in the other — the position of the parties on the record in the two cases is irrelevant.

The third requirement for cause of action estoppel is also satisfied. In the 2016 proceedings, the encumbrancers needed to demonstrate the validity, value, and

priority of their claims, and Patrick Street needed to demonstrate that various claims were properly included in and excluded from its accounting. Accordingly, the validity, value, and priority of the registered claims on the property formed the subject matter of the 2016 applications. The application judge's reasons substantiate this, and his conclusions were challenged and confirmed on appeal. In the 2019 application, Patrick Street again needed to demonstrate the validity, value, and priority of claims included in its accounting, such that there would not be sufficient proceeds to pay out 11368's residue. The causes of action in the two sets of proceedings — establishing the validity, value, and priority of the encumbrances on the property — were identical, and thus not separate and distinct. The final prong of the test is also met: Patrick Street could have argued the basis of its defence to the 2019 application in its defence to the 2016 applications. The basis of Patrick Street's defence is the theory supporting its accounting and its claim for entitlement to payment under the \$4 million mortgage, which was based on evidence that was before the application judge in 2016.

This is not an appropriate case in which to exercise discretion and decline to apply cause of action estoppel. In 2016, all parties presented arguments respecting the validity, value, and priority of the encumbrances on the property. Patrick Street was well aware that its claim under the \$4 million mortgage was challenged by the other parties, and it had the opportunity in 2016 to fully litigate the matter. Its failure to exercise reasonable diligence and present all arguments supporting that entitlement claim in the 2016 proceedings, and then again on appeal, is not evidence of any procedural unfairness. As well, this is not a case where the initial applications dealt

only with small parts of a larger picture; the 2016 applications were commenced to address, and did address, the correctness of Patrick Street's accounting. As such, the validity, the value, and the priority of the included claims were within the initial contemplation of the parties.

In light of the conclusion that cause of action estoppel applies in the instant case so as to bar Patrick Street's claim, and because this conclusion is dispositive of the present appeal, it is unnecessary to address the applicability of issue estoppel and abuse of process by relitigation.

Per Karakatsanis and **Martin JJ.** (dissenting): The appeal should be allowed. There is no reason to establish a special or specific bright-line rule barring a party from raising *res judicata* for the first time on appeal. In the instant case, 11368 did not argue or raise *res judicata* before the application judge, but it may do so on appeal. However, even if the test for *res judicata* were satisfied, discretion should be exercised to allow Patrick Street's claim to proceed on its merits and the matter should be remitted back to the application judge for decision.

It has never been held that *res judicata* can be raised only at first instance; the jurisprudence does not provide an answer to this question. Affording appellate courts the discretion to allow parties to raise it for the first time on appeal, when necessary, would harmonize the law of *res judicata* with the broader jurisprudence on civil procedure and promote the policy rationales of finality and fairness underpinning the doctrine. It would promote finality by putting an immediate end to duplicative

proceedings, preventing inconsistent results, and halting any further use of resources. It can also promote fairness by vindicating the right of all litigants to not be vexed twice, and can provide flexibility to ensure justice is done in each case.

To raise *res judicata* for the first time on appeal, a party must meet the test that applies whenever a party seeks to raise any new legal issue on appeal: an appellate court may consider a new issue of law on appeal where it is able to do so without procedural prejudice to the opposing party and where refusal to do so would risk an injustice. Applying that test in the instant case, 11368 should be allowed to raise *res judicata* on appeal. There is little risk of procedural prejudice to Patrick Street, since it did not object to the Court of Appeal considering *res judicata*. As well, refusing to consider *res judicata* on appeal would risk an injustice and undercut the policy reasons for the doctrine, it would permit Patrick Street to potentially undermine a final decision of a court, and it would risk undermining 11368's right not to be repeatedly vexed by the same legal arguments.

However, even if *res judicata* did apply, discretion should be exercised to let Patrick Street's claim proceed on its merits. A fair and just conclusion on what was decided on the 2019 application cannot be reached with confidence. The lack of clarity in the record calls into question the fairness of applying *res judicata* to end Patrick Street's ability to claim and prove any entitlement to funds that it may be owed. The 2016 applications represented a priority dispute between two encumbrancers, on the one hand, and Patrick Street on the other; 11368 brought no claim in those proceedings.

As such, Patrick Street had no reason to foresee that the 2016 applications would be completely dispositive of its claim for entitlement to its \$4 million mortgage, or would permanently disqualify that claim. Thus, relying on *res judicata* to bar Patrick Street's claim would be an improper mechanical application of the doctrine.

Per Côté J. (dissenting): The appeal should be allowed and Patrick Street's claim should be remitted for decision on its merits. If *res judicata* is not raised at first instance, it cannot be raised for the first time on appeal. In the instant case, *res judicata* was not pleaded, raised, or decided in the 2019 application; as a result, 11368 was estopped from arguing this issue on appeal. In addition, *res judicata* and abuse of process by relitigation have no application to Patrick Street's alleged entitlement under the \$4 million mortgage. Finally, even if Patrick Street were estopped from bringing its claim, discretion should be exercised so as to not apply these doctrines.

Res judicata and abuse of process by relitigation are doctrines that protect the administration of justice, safeguard the finality of decisions and promote fairness between the parties by ensuring that, once matters are finally adjudicated by a court, they are not relitigated. If found to apply, *res judicata* and abuse of process by relitigation allow courts to dispose of a case or issue without assessing its merits. These doctrines emerge from two primary concerns: finality and fairness. The finality of decisions is essential, as relitigating issues outside the appeal process opens up the possibility of inconsistent findings of fact and the inconsistent application of the law to these facts. Fairness is no less important, as no one should be twice vexed by the same

cause or issue; successful and unsuccessful parties should be able to move on, and not expend time, energy, and money to rehash completed disputes.

These doctrines are essential, but their application is not without risk. When the matter disposed of was previously within the contemplation of the parties as being before the court for decision, applying these doctrines supports the administration of justice. If, however, the matter was not so decided or the parties were unclear about what was to be decided, a finding of *res judicata* or abuse of process can result in a grievous injustice. This risk is heightened in the context of summary proceedings such as applications, which are often conducted quickly, with minimal pleadings, without discovery, and on a primarily paper record. Courts must neither lose sight of the importance of ensuring justice in each case nor forget that, in certain circumstances, relitigation may benefit the administration of justice. The public interest in the finality of litigation must be balanced with the public interest in justice. Finding that *res judicata* applies where the matter said to be estopped was not in the contemplation of the parties in the prior proceeding could discourage the use of efficient legal procedures. At the same time, not finding that *res judicata* applies where the matter was fully contemplated and decided upon could encourage the use of unnecessary and cumbersome actions. Courts must be cautious, closely scrutinizing the causes of action in both proceedings.

A party seeking to raise *res judicata* must do so in its pleadings. If this is not possible, *res judicata* must be raised at the earliest opportunity, even if this is at the

hearing itself. In the absence of a sufficient pleading or raising of *res judicata*, it is deemed to be waived. There is a related obligation to raise *res judicata* at first instance; if the doctrine must be pleaded or raised as soon as possible, it follows that it must be raised at first instance, and cannot be raised for the first time on appeal. There are several policy reasons for this. First, raising *res judicata* only on appeal leaves the appellate court to decide the factually anchored requirements of *res judicata* without the benefit of lower court findings. Second, if *res judicata* is not raised at first instance in the subsequent proceeding, the parties once more present their case in full and a judge once more decides the case on its merits — thus, a party who was vexed once is vexed again. Third, if *res judicata* is raised for the first time on appeal and found to apply, then the judicial resources expended in deciding the merits at first instance are wasted. Fourth, not raising *res judicata* at first instance ignores a binding court decision, thus flouting the administration of justice and risking inconsistent findings of fact and law. As such, fairness and finality are undermined when *res judicata* is only raised on appeal. These negative consequences are best avoided by refusing to allow parties to raise *res judicata* late, when it could and should have been raised as soon as possible.

In the present case, *res judicata* was not raised in due time, as 11368 did not plead or properly raise it in the 2019 application. Neither the pleadings, nor the hearing transcript, nor the application judge’s reasons suggest that the issue was raised and decided then. These documents note the prior decision on the 2016 applications, but they do not contain any reference to *res judicata* or to the relevant tests or case law,

nor any analysis of the similarities or differences between the 2016 and 2019 applications; nor do they suggest that Patrick Street's claim should not be addressed because it is barred by estoppel. Rather, the 2019 application documents indicate that Patrick Street's claim was being argued on its merits and that it was being decided on substantially the same basis as in the 2016 applications. As well, the application judge's reasons for decision in the 2019 application strongly suggest that he did not decide the matter based on *res judicata*, and that *res judicata* had not been raised. Instead, he was addressing Patrick Street's alleged entitlement on its merits and merely using the rationale he provided in the 2016 applications as the basis for his decision. Even if *res judicata* was raised in the decision on the 2019 application, there would be no way to determine whether the application judge's analysis was based on issue estoppel, cause of action estoppel, or abuse of process by relitigation, as he provided no analysis of these doctrines nor any of the necessary factual and legal determinations. Having not been raised or decided at first instance, *res judicata* cannot be raised on appeal. It was thus an error of law for the Court of Appeal to address *res judicata*; 11368 is barred from raising it on appeal, and Patrick Street's claim should be addressed on its merits.

In addition, 11368's other arguments must also fail. First, cause of action estoppel does not apply, as the cause of action underlying Patrick Street's claim under the \$4 million mortgage is separate and distinct from the causes of action brought by the encumbrancers in 2016 and by 11368 in 2019, based on the material facts and relationships in each proceeding. In addition, it is unclear whether cause of action estoppel could apply at all, since Patrick Street only advanced a claim for payment for

the first time in the 2019 application; it cannot be estopped from bringing forward a cause of action when it has never brought that claim before. Second, issue estoppel does not apply either, since Patrick Street's claim was not adjudicated in the 2016 applications; and, even it had been, that adjudication would not have been essential or necessary to decide the encumbrancers' claims. Third, because there has been no relitigation of its claim, Patrick Street's actions do not amount to abuse of process by relitigation, a doctrine which should be applied sparingly and only in the clearest of cases; in the present case, there is no basis for concluding that judicial economy, consistency, finality, or the integrity of the administration of justice would be harmed.

Cause of action estoppel, like issue estoppel and abuse of process by relitigation, is discretionary — even where its test is met, a judge retains the discretion to not apply it. This provides courts with the flexibility necessary to ensure that justice is done in each case, as there may be instances where relitigation will enhance, rather than impeach, the integrity of the judicial system, where the bar against relitigation would create unfairness. However, the discretion is not unlimited; it must be constrained, understood narrowly, and used only in rare cases. It is necessarily case specific and depends on the circumstances and realities of each case. In the instant case, even if cause of action estoppel, issue estoppel, or abuse of process by relitigation had applied, discretion should be exercised so as to not apply any of those doctrines. A lack of clarity surrounding what was decided in the 2016 and 2019 applications increases the potential for injustice, raises questions of procedural fairness, and raises a significant doubt as to the justice of barring Patrick Street's claim. There would also be

an apparent windfall for 11368: if Patrick Street's claim were barred, not only would it receive nothing for its \$4 million mortgage, but 11368 would gain \$4 million. Balancing the public interest in finality with the public interest in justice justifies allowing Patrick Street's claim to proceed on its merits.

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By Wagner C.J.

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177, 13 B.C.L.R. (6th) 350; *Catalyst Capital Group Inc. v. VimpelCom Ltd.*, 2019 ONCA 354, 145 O.R. (3d) 759; *John Doe v. Roman Catholic Episcopal Corp. of St. John's*, 2013 NLCA 62, 343 Nfld. & P.E.I.R. 68; *David v. Loblaw Companies Limited*, 2025 ONCA 830; *Grant McLeod Contracting Ltd. v. Forestech Industries Ltd.*, 2008 BCSC 756, 294 D.L.R. (4th) 290; *M. Saarnok-Vuus, Executrix of the will of J.L. Saarnok v. G. Neufeld*, 2003 BCSC 937; *420093 B.C. Ltd. v. Bank of Montreal*, 1995 ABCA 328, 128 D.L.R. (4th) 488; *Hall v. Hall and Hall's Feed & Grain Ltd.* (1958), 15 D.L.R. (2d) 638; *Erschbamer v. Wallster*, 2013 BCCA 76, 356 D.L.R. (4th) 634; *Canadian Shredded Wheat Co. Ltd. v. Kellogg Co. of Canada Ltd.*, [1939] S.C.R. 329; *Carl Zeis Stiftung v. Rayner & Keeler Ltd. (No. 2)*, [1967] 1 A.C. 853; *Arnold v. National Westminster Bank Plc.*, [1991] 2 A.C. 93; *Johnson v. Gore Wood & Co. (a firm)*, [2002] 2 A.C. 1; *Buschau v. Rogers Communications Inc.*, 2003 BCSC 1718, 38 C.C.P.B. 16, rev'd 2004 BCCA 142, 237 D.L.R. (4th) 260; *Young v. Young*, [1993] 4 S.C.R. 3; *Groia v. Law Society of Upper Canada*, 2018 SCC 27, [2018] 1 S.C.R. 772; *Schwisberg v. Perry Krieger & Associates* (1997), 33 O.R. (3d) 256.

By Martin J. (dissenting)

Performance Industries Ltd. v. Sylvan Lake Golf & Tennis Club Ltd., 2002 SCC 19, [2002] 1 S.C.R. 678; *Guindon v. Canada*, 2015 SCC 41, [2015] 3 S.C.R. 3; *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44, [2001] 2 S.C.R. 460; *British Columbia (Workers' Compensation Board) v. Figliola*, 2011 SCC 52, [2011] 3 S.C.R. 422; *Dhillon v. Dhillon*, 2006 BCCA 524, 232 B.C.A.C. 249; *Davies v. McMillan*

(1892), Cameron 306; *Cooper v. The Molsons Bank* (1896), 26 S.C.R. 611; *Merck & Co., Inc. v. Apotex Inc.*, 2006 FCA 323, [2007] 3 F.C.R. 588; *Quadrangle Holdings Ltd. v. Coady*, 2015 NSCA 13, 355 N.S.R. (2d) 324; *Davis v. Her Majesty the Queen in Right of the Province of Manitoba*, 2019 MBCA 78, [2019] 8 W.W.R. 567; *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63, [2003] 3 S.C.R. 77; *Angle v. M.N.R.*, [1975] 2 S.C.R. 248; *Penner v. Niagara (Regional Police Services Board)*, 2013 SCC 19, [2013] 2 S.C.R. 125.

By Côté J. (dissenting)

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& Co., Inc. v. Apotex Inc., 2006 FCA 323, [2007] 3 F.C.R. 588; *Boyd v. Cook*, 2016 BCCA 424, 62 B.L.R. (5th) 196; *Bailey v. Guaranty Trust Co. of Canada*, 1987 ABCA 95, 39 D.L.R. (4th) 111; *Dhillon v. Dhillon*, 2006 BCCA 524, 232 B.C.A.C. 249; *Canada v. MacDonald*, 2021 FCA 6, 456 D.L.R. (4th) 536; *Mann v. Mann* (1974), 1 O.R. (2d) 416; *Quadrangle Holdings Ltd. v. Coady*, 2015 NSCA 13, 355 N.S.R. (2d) 324; *Davis v. Her Majesty the Queen in Right of the Province of Manitoba*, 2019 MBCA 78, [2019] 8 W.W.R. 567; *R. v. Sheppard*, 2002 SCC 26, [2002] 1 S.C.R. 869; *Catalyst Capital Group Inc. v. VimpelCom Ltd.*, 2019 ONCA 354, 145 O.R. (3d) 759; *Glenko Enterprises Ltd. v. Keller*, 2008 MBCA 24, 290 D.L.R. (4th) 712; *Pennyfeather v. Timminco Ltd.*, 2017 ONCA 369; *Henderson v. Henderson* (1843), 3 Hare 100, 67 E.R. 313; *Grandview v. Doering*, [1976] 2 S.C.R. 621; *Cliffs Over Maple Bay Investments Ltd., Re*, 2011 BCCA 180, 17 B.C.L.R. (5th) 60; *Furlong v. Avalon Bookkeeping Services Ltd.*, 2004 NLCA 46, 243 D.L.R. (4th) 153; *Sherwood Steel Ltd. v. Odyssey Construction Inc.*, 2014 ABCA 320, 5 Alta. L.R. (6th) 268; *Dosen v. Meloche Monnex Financial Services Inc. (Security National Insurance Company)*, 2021 ONCA 141, 457 D.L.R. (4th) 530; *Lehndorff Management Ltd. v. L.R.S. Development Enterprises Ltd.* (1980), 19 B.C.L.R. 59; *Canadian Imperial Bank of Commerce v. Green*, 2015 SCC 60, [2015] 3 S.C.R. 801; *Markevich v. Canada*, 2003 SCC 9, [2003] 1 S.C.R. 94; *Air Canada v. McDonnell Douglas Corp.*, [1989] 1 S.C.R. 1554; *Hall v. Hall and Hall's Feed & Grain Ltd.* (1958), 15 D.L.R. (2d) 638; *Smode v. Deveaux* (1996), 216 A.R. 20; *McIntosh v. Parent*, [1924] 4 D.L.R. 420; *Angle v. M.N.R.*, [1975] 2 S.C.R. 248; *Gough v. Newfoundland and Labrador*, 2006 NLCA 3, 253 Nfld. & P.E.I.R. 1; *Fieldbloom v. Olympic Sport Togs Ltd.* (1955), 63 Man. R. 47;

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APPEAL from a judgment of the Newfoundland and Labrador Court of Appeal (Hoegg, O’Brien and Butler JJ.A.), 2024 NLCA 11, [2024] N.J. No. 85 (Lexis), 2024 CarswellNfld 102 (WL), affirming a decision of Handrigan J., 2020 NLSC 99, [2020] N.J. No. 152 (Lexis), 2020 CarswellNfld 180 (WL). Appeal dismissed, Karakatsanis, Côté and Martin JJ. dissenting.

Ellen Vandergrift and *Thomas W. Fraize, K.C.*, for the appellant.

Sarah J. Clarke, for the respondent.

The judgment of Wagner C.J. and Rowe, Kasirer, Jamal, O’Bonsawin and Moreau JJ. was delivered by

THE CHIEF JUSTICE —

I. Overview

[1] This appeal affords an opportunity to examine the contours of cause of action estoppel. Cause of action estoppel prevents the relitigation of a cause of action that was or should have been argued in a prior proceeding. This doctrine has individual and societal purposes; it guards against abuse of the judicial decision-making process and protects parties from duplicative litigation (*Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44, [2001] 2 S.C.R. 460, at para. 20). In these ways, cause of action estoppel plays a vital role in the Canadian legal system.

[2] In this case, cause of action estoppel arises in the context of several interrelated proceedings dealing with the proceeds from the exercise of a power of sale under a defaulted mortgage. The main question before us is whether the appellant, Patrick Street Holdings Limited, is barred by operation of cause of action estoppel from arguing that it is entitled to be paid \$4 million out of the proceeds from the power of sale of a property encumbered by several mortgages and other claims. Patrick Street claims that this amount is payable under a mortgage it held on the property. A preliminary question relates to the obligation to plead cause of action estoppel at first instance.

[3] In 2016, two parties holding encumbrances on the property applied for a review of Patrick Street’s accounting of the sale proceeds (“2016 applications”). The application judge rendered a decision in 2017, in which he excluded several claims from the accounting, notably a \$4 million mortgage held by Patrick Street. In 2019, the mortgagor of the property sold under the power of sale, the respondent, 11368 NL Inc., brought an application seeking an order that an unrelated encumbrance be paid out and that 11368 receive the surplus from the sale proceeds (“2019 application”). Patrick Street argued that the application judge in 2017 had not definitively determined that it was not entitled to payment from the sale proceeds under the \$4 million mortgage.

[4] The same application judge rejected Patrick Street’s argument and relied on his findings from 2017 to do so. A majority of the Newfoundland and Labrador Court of Appeal upheld his decision, finding that the doctrine of *res judicata* had been properly raised before the application judge and that the same doctrine, along with the doctrine of abuse of process by relitigation, applied to bar Patrick Street from relitigating its claim for entitlement to payment from the sale proceeds under the \$4 million mortgage.

[5] In my view, the majority of the Court of Appeal was correct to uphold the application judge’s decision on the 2019 application. This Court has long recognized an obligation on parties to plead and raise *res judicata* at first instance (*Davies v. McMillan* (1892), Cameron 306 (S.C.C.), at p. 317; *Cooper v. The Molsons Bank* (1896), 26 S.C.R. 611, at p. 620). 11368 satisfied this obligation, properly pleading *res*

judicata in its written submissions and raising the doctrine before the application judge in 2019.

[6] Moreover, the majority of the Court of Appeal was correct to conclude that cause of action estoppel precludes Patrick Street from challenging the application judge's original decision on Patrick Street's accounting by raising a new argument to support its claim for entitlement to payment under the \$4 million mortgage. The cause of action at issue in the 2016 proceedings concerned the need to determine the validity, value, and priority of encumbrances on the property through a judicial accounting. This is the same cause of action that was at issue in 11368's 2019 application. Accordingly, Patrick Street's failure in 2016 to advance all reasonably available arguments in defence of its claim for entitlement to be paid from the sale proceeds is fatal to its ability to raise those arguments in defence of this position in 2019.

[7] Because cause of action estoppel provides a full answer to this appeal, it is unnecessary to address 11368's arguments respecting the applicability of issue estoppel and abuse of process by relitigation to the facts of this case. I would accordingly dismiss the appeal.

II. Relevant Statutory Provisions

[8] The Newfoundland and Labrador *Conveyancing Act*, R.S.N.L. 1990, c. C-34, provides the statutory backdrop to the proceedings in this case. Section 5 of the

Conveyancing Act permits a mortgagee to sell a mortgaged property under a power of sale where the mortgage money has become due:

5. (1) A mortgagee, where the mortgage is made by deed, shall have the following powers to the same extent as if they had been conferred by the mortgage deed:

(a) a power, where the mortgage money, whether principal or interest, has become due, to sell or to concur with another person in selling the mortgaged property, or a part of the mortgaged property, either subject to prior charges or not, and either together or in lots by public auction or by private contract, subject to the conditions respecting title, or evidence of title or other matter, that the mortgagee thinks appropriate, with power to vary a contract for sale, and to buy in at an auction, or to rescind a contract for sale, and to resell without being answerable for a loss occasioned by the resale;

[9] Section 14 of the *Conveyancing Act* provides direction on the order in which the proceeds of a power of sale are to be distributed. Of particular relevance to this appeal is s. 14(3), which provides that the residue of money received pursuant to a power of sale shall be paid to the person entitled to the mortgaged property:

(3) The money that is received by the mortgagee arising from the sale, after the discharge of prior encumbrances to which the sale is not made subject, shall be held by him or her in trust to be applied

(a) 1st, in payment of all costs, charges and expenses properly incurred as incident to the sale or an attempted sale, or otherwise;

(b) secondly, in discharge of the mortgage money, interest and costs, and other money due under the mortgage; and

(c) the residue of the money received shall be paid to the person entitled to the mortgaged property, or authorized to give receipts for the proceeds of the sale of the mortgaged property.

[10] Section 10 provides that, after a power of sale has been exercised, the mortgagee must prepare an accounting of the sale of the mortgaged property:

10. A mortgagee shall prepare an accounting of the sale of a mortgaged property, whether by way of public auction or public tender or at a sale by private contract, including a copy of the appraisal of the property and shall send a copy to the mortgagor and another registered encumbrancer or guarantor within 30 days from the date of the completion of the sale.

An accounting provides a breakdown of the money received from the power of sale. It demonstrates how the sale proceeds were distributed and whether there were proceeds remaining after payments were made. As section 10 of the *Conveyancing Act* indicates, a copy of the accounting must be sent to the mortgagor as well as to any other registered encumbrancers on the mortgaged property.

[11] A mortgagor or other registered encumbrancer who is dissatisfied with the accounting the mortgagee prepared may apply to a judge for relief under s. 11 of the *Conveyancing Act*:

11. A mortgagor and another registered encumbrancer or guarantor who is dissatisfied with an accounting given by a mortgagee under section 10 may apply to a judge for whatever relief that the judge may think appropriate in the circumstances to grant.

III. Background

[12] 11368 owned property in a real estate development called Kenmount Terrace. Its property was encumbered by numerous mortgages and other claims, a few of which bear mentioning:

- (a) A company called J-3 Consulting and Excavating Ltd. held a mechanic's lien worth roughly \$705,000 from work done on the Kenmount Terrace property;
- (b) An individual named John Cook held two collateral mortgages collectively worth \$225,000 on the property; and
- (c) An individual named Deanna Cheeke held a mortgage worth \$150,000 on the property.

[13] Patrick Street or a person affiliated with Patrick Street claimed other encumbrances on 11368's property, including five "directions to pay", directing a total of over \$1.1 million to be paid to Patrick Street or its affiliates from the proceeds of any sale of the Kenmount Terrace property. Patrick Street or an affiliate of Patrick Street also held several mortgages on the property.

[14] Among these mortgages was one granted by 11368 to provide collateral security for an amount of \$1.875 million that Patrick Street had advanced to 11368. In early 2016, 11368 defaulted on this mortgage. Patrick Street commenced power of sale proceedings under s. 5 of the *Conveyancing Act*, but later reached an agreement with

11368 to suspend the proceedings. Under this agreement, 11368 would provide Patrick Street with a collateral mortgage “to the limit of” \$4 million on the Kenmount Terrace property (A.R., vol. II, at p. 415). This mortgage secured 11368’s guarantee of an unrelated mortgage worth roughly \$10 million over other properties, which was also held by Patrick Street and its affiliates.

[15] Several weeks after this agreement was reached, Patrick Street reactivated the power of sale proceedings under the \$1.875 million mortgage. At a public auction conducted pursuant to the power of sale, Patrick Street purchased the Kenmount Terrace property. As the mortgagee of the property, Patrick Street was required by s. 10 of the *Conveyancing Act* to prepare an accounting regarding the sale and to provide a copy to all registered encumbrancers on the property and to 11368 as the mortgagor of the \$1.875 million mortgage.

[16] In its accounting, Patrick Street included allocations to pay out several of the mortgages it or its affiliates held on the Kenmount Terrace property, along with allocations for the five directions to pay. It also included \$4 million to pay out the \$4 million mortgage. Accordingly, there were insufficient proceeds to pay out the encumbrancers’ claims that ranked after the \$4 million mortgage in Patrick Street’s accounting. In particular, the claims held by J-3, Mr. Cook, and Ms. Cheeke could not be paid out. For the same reason, there was no residue.

[17] J-3 and Mr. Cook commenced applications under s. 11 of the *Conveyancing Act*, challenging Patrick Street's accounting and seeking orders directing Patrick Street to pay out their claims.

IV. Judicial History

[18] Following Patrick Street's accounting, J-3 and Mr. Cook commenced applications under s. 11 of the *Conveyancing Act*. J-3 and Mr. Cook argued that their claims ranked higher in priority than other claims Patrick Street planned to pay out from the sale proceeds and sought orders directing Patrick Street to pay out their claims. Patrick Street, the mortgagee, and 11368, the mortgagor, were both listed as respondents to these applications.

A. *Supreme Court of Newfoundland and Labrador, 2017 NLTD(G) 167, 79 C.L.R. (4th) 127 (Handrigan J.)*

[19] The application judge granted J-3's and Mr. Cook's applications. In reaching this decision, the judge reviewed Patrick Street's accounting, including the validity, the value, and the priority of the claims Patrick Street included in and excluded from the accounting. The application judge reduced the amount Patrick Street claimed on several mortgages it or its affiliates held. He excluded all five directions to pay from the accounting, finding that they were not "encumbrances" as defined in s. 2 of the *Conveyancing Act*. He also excluded the \$4 million mortgage from the accounting. According to the application judge, the \$4 million mortgage acted as collateral security

for up to \$4 million for 11368's guarantee of the \$10 million mortgage, meaning that a lesser amount of money could actually be owing under the \$4 million mortgage. Given that Patrick Street failed to complete any analysis of the amount, if any, owing under the mortgage, it could not pay itself out from the sale proceeds under this mortgage.

[20] After the application judge excluded these claims from Patrick Street's accounting, there were sufficient funds to pay out J-3's and Mr. Cook's claims. He ordered Patrick Street to pay out J-3's claim and Mr. Cook's two collateral mortgages. He also made an order for costs.

B. *Court of Appeal of Newfoundland and Labrador, 2019 NLCA 69, 94 C.L.R. (4th) 230 (White, Hoegg and O'Brien JJ.A.)*

[21] Patrick Street appealed the application judge's decision and challenged the exclusion of the \$4 million mortgage from its accounting. Patrick Street relied on the Nova Scotia Court of Appeal's decision in *Glasswall Ltd. v. 2009861 Nova Scotia Ltd.* (1994), 119 D.L.R. (4th) 713, to argue that a collateral mortgage (like the \$4 million mortgage) could be a valid claim entitled to priority in the distribution of the proceeds from a power of sale. On this basis, it argued that the application judge should not have excluded the \$4 million mortgage from the accounting.

[22] A panel comprising Justices White, Hoegg and O'Brien unanimously dismissed Patrick Street's appeal. The court rejected Patrick Street's argument, noting that the facts of *Glasswall* were distinct given that the parties in that case had agreed

on the amount owing under the collateral mortgage. In this case, the court observed that the registration cost of the mortgage was “not determinative of the amount actually owing under” it (para. 62). Accordingly, it affirmed the application judge’s conclusion that the amount owing under the mortgage was not established and that the mortgage should be disallowed from the accounting. Leave was not sought to appeal this decision.

C. *Supreme Court of Newfoundland and Labrador, 2020 NLSC 99 (Handrigan J.)*

[23] Following the 2019 appeal, 11368 filed an interlocutory application in the same action as the first two applications filed by Mr. Cook and J-3. 11368 asked the court to order Patrick Street to pay Ms. Cheeke the amount owing under her mortgage, plus interest, and sought an order for the residue of the sale proceeds. In its application, it reproduced the 2017 decision on Patrick Street’s accounting, asserting that since there were no further encumbrances on 11368’s Kenmount Terrace property after Ms. Cheeke’s, it was entitled to the remaining balance of the sale proceeds. In response, Patrick Street acknowledged that the \$4 million mortgage was disallowed by the application judge’s decision on its accounting, but asserted that it remained a valid contract between Patrick Street and 11368. Further, it argued that the application judge in 2017 and the Court of Appeal in 2019 did not deal with the “situation” between Patrick Street and 11368.

[24] The application judge reaffirmed the conclusion he reached in the 2017 decision — that the \$4 million mortgage should be disallowed from Patrick Street’s

accounting. He noted that the Court of Appeal had accepted his conclusion in the 2019 appeal, and he confirmed that he had been “shown nothing to cause [him] to change [his] mind on [the] issue” (para. 25).

[25] The application judge went on to order that sale proceeds in the amount owing under Ms. Cheeke’s mortgage be paid to Ms. Cheeke and that the residue of the proceeds be paid to 11368.

D. *Court of Appeal of Newfoundland and Labrador, 2024 NLCA 11 (O’Brien and Butler J.J.A., Hoegg J.A. Dissenting)*

[26] Patrick Street appealed. Previously, Patrick Street had argued that a collateral mortgage could be a valid claim entitled to priority in distributing the proceeds from the power of sale. On this basis, given that its \$4 million mortgage was a valid collateral mortgage, it was entitled to include the value of the mortgage in its accounting.

[27] Patrick Street advanced a new argument before the Court of Appeal supporting why it was entitled to have the \$4 million mortgage paid out from the sale proceeds: that the sale of the Kenmount Terrace property under the power of sale was a “legal action” under clause (h) of the \$4 million mortgage document, the relevant portions of which state:

. . . in the event of any legal action being taken against the said lands and premises such that the security given herein may be put in jeopardy . . .

then, and in every such case, the entire principal sum and all other monies outstanding under the documents evidencing the indebtedness and hereunder shall, at the option of the Mortgagee, become immediately due and payable

(A.R., vol. II, at p. 417)

[28] Patrick Street argued that the sale of the property constituted a legal action jeopardizing the security that 11368 had provided to Patrick Street and thus constituted a default under clause (h), rendering the \$4 million payable by 11368 to Patrick Street. To support the argument that the full \$4 million under the mortgage was owed, Patrick Street pointed to unchallenged affidavit evidence that was before the application judge in 2016 establishing that the amount outstanding on the loan that 11368 guaranteed was well over \$4 million and thus that the full amount of the \$4 million mortgage guaranteeing that amount was owed.

[29] A majority of the court dismissed the appeal. In separate reasons, Justices Butler and O'Brien held that the doctrines of *res judicata* and abuse of process by relitigation were fatal to the success of Patrick Street's appeal. Both found that the doctrines of cause of action estoppel, issue estoppel, and abuse of process by relitigation applied to prevent Patrick Street from rearguing its claim for entitlement to payment from the sale proceeds under the \$4 million mortgage. Neither would have exercised discretion to decline to apply these doctrines. Further, both held that 11368 had properly pleaded and raised cause of action estoppel and issue estoppel before the application judge.

[30] Justice Hoegg dissented, finding that the application judge had erred in not finding that the \$4 million mortgage became payable, in full, upon the sale of the Kenmount Terrace property. She further held that issue estoppel and abuse of process by relitigation could not be raised for the first time on appeal and that neither doctrine was met even if they could have been raised. Even if the preconditions to establish the applicability of the doctrines were met, Justice Hoegg would have exercised her discretion to decline their application. She did not address whether cause of action estoppel applied to bar Patrick Street from rearguing its claim for entitlement to payment from the sale proceeds under the \$4 million mortgage.

V. Issues

[31] The main issue in this appeal is whether Patrick Street is barred from relitigating its claim for entitlement to payment from the sale proceeds under the \$4 million mortgage. This raises three questions. First, did 11368 properly plead *res judicata* in 2019? Second, did 11368 properly raise *res judicata* before the application judge in 2019? Third, was Patrick Street barred by cause of action estoppel, issue estoppel, or abuse of process by relitigation from arguing that it was entitled to payment under the \$4 million mortgage before the application judge in 2019? I will address each question in turn.

VI. Analysis

[32] *Res judicata* is one of several common law doctrines — including the doctrine of collateral attack and the doctrine of abuse of process by relitigation — that exist to prevent abuse of the judicial decision-making process (*Danyluk*, at para. 20; *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63, [2003] 3 S.C.R. 77, at para. 22). The doctrine provides that a dispute, once decided finally between parties, is not subject to relitigation by those parties (*Danyluk*, at para. 20; *Hoque v. Montreal Trust Co.*, 1997 NSCA 153, 162 N.S.R. (2d) 321, at para. 21).

[33] There are two branches of *res judicata*: cause of action estoppel and issue estoppel (*Angle v. M.N.R.*, [1975] 2 S.C.R. 248, at p. 254; *Toronto (City)*, at para. 23). Cause of action estoppel bars the relitigation of a cause of action by either party, whereas issue estoppel precludes a litigant from rearguing an issue that was “fundamental to the decision arrived at” in a prior proceeding (*Angle*, at p. 255, citing *Hoystead v. Commissioner of Taxation*, [1926] A.C. 155 (P.C.), at p. 165).

[34] *Res judicata* is and has long been a rule of evidence (S. N. Lederman, M. K. Fuerst and H. C. Stewart, *Sopinka, Lederman & Bryant: The Law of Evidence in Canada* (6th ed. 2022), at ¶19.86). Historically, when *res judicata* became part of English law in the 12th century, it was referred to as estoppel by matter of record — that is, estoppel arising from the written record of a court (*Angle*; W. S. Holdsworth, *A History of English Law* (3rd ed. 1944), vol. IX, at p. 147; W. Freedman, *Res Judicata and Collateral Estoppel: Tools for Plaintiffs and Defendants* (1988), at p. 7). Matters “solemnly recorded” by the court had to be “accepted as proof, so that no averment to

contradict them [could] be received” (Holdsworth, at p. 147). In this sense, estoppel by matter of record permitted the admission of a court’s decision as proof of the findings contained therein (p. 147). A plea of estoppel involved producing the decision said to give rise to the estoppel in the subsequent proceeding to allow a court to conclude that the matters at issue in the prior proceeding were the same matters at issue in that proceeding (A. Caspersz, *Estoppels and the Substantive Law* (4th ed. 1915), at p. 460).

[35] While now referred to as *res judicata*, the doctrine remains a rule of evidence that applies to estop a party from introducing evidence to contradict a result that has been decided in a prior proceeding (Lederman, Fuerst and Stewart, at ¶19.86).

[36] While *res judicata* is a rule of evidence, it is designed to advance the interests of justice (*Danyluk*, at para. 19). The doctrine is founded on two overarching principles of public policy: a litigant’s interest in fairness, and society’s interest in the conclusion of disputes and the finality of judicial decisions (*Toronto (City)*, at para. 38; *Grandview v. Doering*, [1976] 2 S.C.R. 621, at p. 636, citing *Fenerty v. The City of Halifax* (1920), 50 D.L.R. 435 (N.S.S.C.), at pp. 437-38; K. R. Handley, *Spencer Bower and Handley: Res Judicata* (5th ed. 2019), at p. 4).

[37] With respect to the first principle, *res judicata* seeks to prevent the economic and psychological hardship resulting from a litigant being “twice vexed in the same cause” (*Toronto (City)*, at para. 50, citing G. D. Watson, “Duplicative Litigation: Issue Estoppel, Abuse of Process and the Death of Mutuality” (1990), 69 *Can. Bar Rev.* 623, at p. 633; see also *Penner v. Niagara (Regional Police Services*

Board), 2013 SCC 19, [2013] 2 S.C.R. 125, at para. 28). It is both unreasonable and unjust to permit a claim to be litigated afresh between parties to a dispute where the claim has been finally decided in a prior proceeding (*Handley*, at p. 4, citing *New Brunswick Ry. Co. v. British and French Trust Corporation*, [1939] A.C. 1 (H.L.)). In this way, *res judicata* focuses on the interests of the parties (*Toronto (City)*, at para. 32).

[38] In addition to the individual focus of *res judicata*, the doctrine plays an important societal function. Our legal system places a high value on the finality of judicial decisions, an objective achieved by limiting the ability of parties to reopen disputes (*Danyluk*, at para. 18; *British Columbia (Workers' Compensation Board) v. Figliola*, 2011 SCC 52, [2011] 3 S.C.R. 422, at para. 34; *Tsaoussis (Litigation Guardian of) v. Baetz* (1998), 41 O.R. (3d) 257 (C.A.), leave to appeal refused, [1999] 1 S.C.R. xiv). Finality is critical not only for the certainty of the parties, but also for the integrity of the judicial process (*Hoque*, at para. 77). *Res judicata* also serves to maintain respect for and public confidence in the administration of justice by guarding against inconsistent results and inconclusive proceedings (*Danyluk*, at para. 18). Indeed, *res judicata* gives judicial decisions an authority they would not have if they were subject to constant reassessment and variation (*Tsaoussis*).

[39] To advance the objective of finality, *res judicata* “requires litigants to put their best foot forward to establish the truth of their allegations when first called upon to do so” (*Danyluk*, at para. 18). As I will explain below, in the context of cause of action estoppel, *res judicata* requires a litigant to have advanced all arguments at the

first proceeding that it could have had it exercised reasonable diligence. In this sense, a litigant is entitled only to one kick at the can (para. 18).

[40] Importantly, *res judicata* advances the objective of finality regardless of the correctness in law or fact of the prior decision that gives rise to the estoppel (Handley, at p. 6). This gives effect to the principle that a judicial decision made by a competent court is final and conclusive unless corrected on appeal (p. 6). For this reason, the correctness of a prior decision is not a relevant factor in determining whether *res judicata* applies to bar relitigation.

[41] While not its primary purpose, *res judicata* performs an additional societal function in facilitating access to justice. It does so by preventing duplicative litigation that drains court resources and the resources of the litigants (*Danyluk*, at para. 18).

[42] Closely related to the doctrine of *res judicata* is the doctrine of abuse of process by relitigation. Both *res judicata* and abuse of process by relitigation advance the policy grounds of finality and fairness (*Toronto (City)*, at para. 38). However, abuse of process “transcends the interests of litigants and focuses on the integrity of the entire system” (*Ontario v. O.P.S.E.U.*, 2003 SCC 64, [2003] 3 S.C.R. 149, at para. 12).

[43] The doctrine of abuse of process derives from a court’s inherent jurisdiction to manage its own procedures, and it applies based on a judge’s appreciation of the impact of relitigation on the repute of the administration of justice. Abuse of process by relitigation is often invoked where the strict preconditions to apply

one of the branches of *res judicata* are not met, but where permitting relitigation of an issue or cause of action would nonetheless constitute a misuse of a court's procedures (*Toronto (City)*, at para. 37). In this sense, while abuse of process is “unencumbered” by the technical requirements of *res judicata*, it should be applied as a last resort to protect the repute of the administration of justice (para. 37, citing *Canam Enterprises Inc. v. Coles* (2000), 51 O.R. (3d) 481 (C.A.), at para. 55, per Goudge J.A., dissenting). It is “only when the rules of *res judicata* run out that it is useful to turn to” the doctrine of abuse of process (A. Zuckerman, *Zuckerman on Civil Procedure: Principles of Practice* (3rd ed. 2013), at p. 1244).

[44] These principles provide context for the following analysis of the three issues on appeal. I will treat the first and second issues together, before proceeding to address the third.

A. *11368 Pleaded and Raised Res Judicata at First Instance*

[45] The first question before us is whether 11368 pleaded *res judicata* before the application judge in 2019. This involves assessing whether 11368 pleaded the necessary facts in its written submissions to support a claim of *res judicata*. Patrick Street argues that 11368 did not plead *res judicata*. It suggests that this is contrary to the well-founded obligation to plead *res judicata* at first instance. In contrast, 11368 submits that it satisfactorily pleaded *res judicata* before the application judge. On the second question, Patrick Street argues similarly that 11368 did not raise *res judicata* before the application judge at the 2019 hearing, instead doing so for the first time

before the Court of Appeal. For the reasons I set out below, I do not accept Patrick Street’s submissions. I am satisfied that 11368 pleaded and raised *res judicata* before the application judge in 2019. I thus find it unnecessary to address the question that divides my colleagues, Justice Côté and Justice Martin, as to whether *res judicata* can be raised for the first time on appeal.

(1) Governing Principles

[46] Since the late 1800s, courts have shifted away from the “technical and complex” rules that historically applied to pleadings, under which parties had to plead a specific form of common law action, each with its own pleading rules (L. S. Abrams and K. P. McGuinness, *Canadian Civil Procedure Law* (2nd ed. 2010), at §10.15). Canadian provinces abolished this form of pleading in favour of “fact pleading” toward the end of the 19th century (J. A. Jolowicz, “‘General ideas’ and the reform of civil procedure” (1983), 3 *Legal Stud.* 295, at p. 301; see also Abrams and McGuinness, at §10.15). This shift removed the “straight-jacket” of the forms of action approach to pleadings (Jolowicz, at p. 301).

[47] Modern pleadings must contain a statement of the material facts on which a party relies to make out its claim for relief, rather than precisely identify all causes of action or rules of law pleaded (Jolowicz, at p. 301; see also *Alberta Rules of Court*, Alta. Reg. 124/2010, r. 13.6(2)(a); *Court of King’s Bench Rules*, Man. Reg. 553/88, r. 25.06; *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, r. 25.06; *Rules of the Supreme Court*, 1986, S.N.L. 1986, c. 42, Sch. D, r. 14.03; *Rules of Court*, N.B. Reg. 82-73, r.

27.06(1)). This approach to pleadings is functional and favours the substance of what is pleaded over its form (Jolowicz, at p. 301). In this way, pleadings serve to define the points at issue in a proceeding and to give “opposing parties fair notice of the case to meet” (*Lax Kw’alaams Indian Band v. Canada (Attorney General)*, 2011 SCC 56, [2011] 3 S.C.R. 535, at para. 43). The overarching consideration when determining whether a matter has been properly pleaded is thus functional and seeks to ensure that parties are not taken by surprise.

[48] There is an obligation to plead *res judicata*. One of this Court’s first affirmations of this obligation arose in *Davies*, where this Court remarked that:

. . . the plea [of estoppel] should contain suitable averments of what was the precise matter in contestation in such interpleader issue and of what is the precise matter in contestation in the present action so as to raise for adjudication the question of estoppel relied upon by the defendant. [p. 317]

A few years later, in *Cooper*, this Court reiterated the obligation to plead *res judicata*, remarking that “*res judicata* as a defence, or as a reply to a counter claim, must be specially pleaded” (p. 620).

[49] The obligation to plead *res judicata* flows from the principles of civil litigation outlined above. The pleading obligation consists in a requirement to plead the material facts giving rise to the claim of estoppel. A party need not explicitly reference the term “*res judicata*”. While evidentiary rules, like other rules of law, are generally not pleaded, the requirement to plead *res judicata* is grounded in the need to ensure that

a responding party has notice of the case it must meet and is not taken by surprise by another party's reliance on the doctrine. The pleading requirement is functional and grounded in the notion of procedural fairness, irrespective of the procedural vehicle — action or application — in which *res judicata* arises. The inquiry into whether *res judicata* was properly pleaded should thus remain focused on whether the pleadings were procedurally fair for the parties involved (*Anderson v. Township of Ameliasburg* (1931), 66 O.L.R. 583, at p. 584).

[50] Just as in *Davies* and *Cooper*, cases in which the obligation to plead *res judicata* was considered have generally focused on the applicability of this obligation to defendants to an action or respondents to an application (see, e.g., *Baxter v. Derkasz* (1929), 2 D.L.R. 443 (Sask. C.A.), at p. 449; *Bailey v. Guaranty Trust Co. of Canada*, 1987 ABCA 95, 39 D.L.R. (4th) 111, at p. 121; *Dhillon v. Dhillon*, 2006 BCCA 524, 232 B.C.A.C. 249, at para. 21; *Canada v. MacDonald*, 2021 FCA 6, 456 D.L.R. (4th) 536, at para. 30). There is good reason for this. A defendant or respondent will in most cases become aware of the need to plead *res judicata* when it receives the plaintiff's or applicant's pleadings. Upon receipt of these pleadings, the defendant or respondent will be in a position to plead *res judicata* in response to the claim alleged against it.

[51] This is not to say that a plaintiff or applicant never has an obligation to plead *res judicata*. However, and in contrast to a defendant or respondent, a plaintiff or applicant bringing an action or application is not expected to know what defences a defendant or respondent will raise, and whether those defences will give rise to a claim

that *res judicata* applies, when it files its originating process. Typically, “the facts that are pleaded by a party must be material at the time when they are pleaded, which means that a plaintiff should not anticipate possible defences in [the] statement of claim” (Abrams and McGuinness, at §10.17 (emphasis added)).

[52] For this reason, the obligation to plead *res judicata* has been characterized as an obligation to plead it where there is an opportunity to do so (*Brown v. Yates* (1877), 1 O.A.R. 367 (Ont. C.A.); *Miller v. Weldon* (1870), 13 N.B.R. 188 (S.C.); *Mann v. Mann* (1974), 1 O.R. (2d) 416 (H.C.J.)). This characterization is particularly important in the context of applications, some of which may not involve a formal exchange of pleadings between the parties and a formal submission of pleadings to the court. In contexts where the parties do not provide written pleadings, or where each party submits only one pleading to the court before the matter is heard, a plaintiff or applicant may not have an opportunity to plead *res judicata* until the hearing takes place. In such circumstances, the question then becomes whether it raised *res judicata* at the earliest opportunity, even if the only opportunity to do so was at the hearing of the application.

[53] As a matter of evidence, parties pleading *res judicata* should put both the decision from the prior proceeding, along with any pleadings exchanged, before the court in the subsequent proceeding in which *res judicata* is raised. Both the formal judgment and the pleadings may be relevant indicia of the subject matter of a judicial decision and may assist in illuminating the nature of the cause of action for the purposes

of cause of action estoppel (Handley, at p. 106). Further, the fact that a party has put the formal judgment or the pleadings before the subsequent court may support a conclusion that a party pleaded *res judicata*.

(2) Application to This Case

[54] Applying the principles discussed above to this case, I am satisfied that 11368 pleaded *res judicata* in its 2019 application.

[55] This appeal arises from an interlocutory application filed in the actions that J-3 and Mr. Cook commenced under s. 11 of the *Conveyancing Act*. 11368 and Patrick Street exchanged only one set of pleadings. As the applicant, 11368 would not have been required to anticipate in its pleadings what Patrick Street would respond to its application. Nevertheless, a review of 11368's application reveals that it pleaded the material facts giving rise to its claim that *res judicata* applied. In its application, it reproduced the application judge's decision on which claims he retained (and, necessarily, those he excluded) from Patrick Street's initial accounting, along with their priority (A.R., vol. II, at p. 7). It pleaded that Patrick Street's appeal from this accounting had been dismissed (p. 8). In addition, 11368 appended both the 2017 decision of the application judge and the 2019 decision of the Court of Appeal to its pleadings (p. 5). These facts were sufficient to give rise to the plea of *res judicata*.

[56] Further, Patrick Street must have understood 11368's argument — that the claims entitled to be paid from the sale proceeds had already been decided — because

it argued several times in its written response to 11368 that the application judge and the Court of Appeal “did not deal with the situation between” Patrick Street and 11368, and it reproduced excerpts of both decisions in support of this position (A.R., vol. II, at pp. 63-64). It continued, arguing that the application judge “did not deal” with the mortgage granted to Ms. Cheeke in the 2017 decision because there was no information before him about that mortgage (p. 65). The implication of this submission was that *res judicata* did not apply because the application judge had not exhaustively reviewed the accounting in the 2017 decision. Patrick Street also argued that the \$4 million mortgage remained “a valid contract and agreement” between itself and 11368 (p. 61). This argument is essentially a reassertion of its claim for entitlement to payment under the \$4 million mortgage.

[57] I am unpersuaded by the suggestion that 11368 must not have pleaded *res judicata* because it did not reference the doctrine by name. As discussed above, the obligation to plead *res judicata* is functional. Parties must plead facts and are not required to precisely identify causes of action or rules of law. For this reason, the failure to explicitly reference the terms “*res judicata*” or “estoppel” is not fatal to 11368’s position that it properly pleaded the necessary facts in 2019 to raise the doctrine.

[58] In sum, I am satisfied that 11368 met its obligation to plead the material facts giving rise to *res judicata*. Patrick Street’s pleadings reflect that it was aware of 11368’s position.

[59] I turn now to the second question. In addition to arguing that 11368 did not properly plead *res judicata*, Patrick Street argues that 11368 impermissibly raised *res judicata* for the first time in 2024, before the Newfoundland and Labrador Court of Appeal. I reject this submission. The transcript of the hearing of the 2019 application reveals that 11368 raised *res judicata* in oral submissions before the application judge.

[60] 11368 asserted several times during the oral hearing that the matter Patrick Street sought to relitigate had already been decided:

As you noted, Justice, this is an application by 11368 . . . for confirmation of monies owed to the . . . mortgagor from the power of sale proceeds and, Justice, you heard this matter previously, so I'm not going to belabour the facts. You've heard them all; you've decided on them.

. . .

Our position with respect to that is that you considered these arguments at trial already, the Court of Appeal has also heard these arguments and agreed with you that [the \$4 million] mortgage . . . should not be considered in account whatsoever.

. . .

You have already ruled on this matter before and the Court of Appeal ruled on it as well. These arguments were made in front of the Court of Appeal.

(A.R., vol. II, at pp. 518, 523 and 534)

[61] During the hearing, the application judge asked Patrick Street to respond to these submissions, and Patrick Street did so (A.R., vol. II, at p. 530). It argued that the application judge, in his 2017 decision, had found only that the \$4 million mortgage

lost priority to J-3's and Mr. Cook's claims (p. 530). As Patrick Street's counsel explained:

We weren't talking about the relationship between 11368 and Patrick Street Holdings Limited; we talking [*sic*] about their priorities of the J-3, the — and the Cook mortgages. That's what we were talking [*sic*]. Now, that issue of the obligations and the contracts that were entered into between 11368 and Patrick Street Holding Limited was not the issue. There was no decision saying that these agreements were not effective and that 11368 didn't owe the money. (p. 530)

These submissions are quite clearly directed at addressing what was argued in the 2016 proceedings and what was decided in the 2017 decision arising from those proceedings.

[62] In support of its assertion that 11368 did not raise *res judicata*, Patrick Street argues that the 2019 application was not *decided* on the basis of the doctrine. In my view, this submission improperly treats the basis on which the application judge *decided* the 2019 application as being dispositive of the question of whether a particular matter was *raised* by the parties. How an application was *decided* and whether a matter was *raised* are distinct questions. As I have set out above, I am satisfied, based on my review of the transcript of the hearing of the application, that the doctrine was *raised* by 11368 and discussed by both parties at the hearing.

[63] For these reasons, I do not accept Patrick Street's argument that 11368 raised *res judicata* for the first time on appeal.

B. *Cause of Action Estoppel Applies to Bar Patrick Street From Relitigating Its Claim for Entitlement to Payment Under the \$4 Million Mortgage*

[64] Having concluded that 11368 raised *res judicata* at first instance, I turn now to the third question on appeal: whether Patrick Street is barred by *res judicata* or the doctrine of abuse of process by relitigation from rearguing its claim for entitlement to payment from the sale proceeds under the \$4 million mortgage. A majority of the Court of Appeal found that the doctrines of cause of action estoppel, issue estoppel, and abuse of process all applied to prevent Patrick Street from relitigating its claim for entitlement to payment under the \$4 million mortgage.

[65] As I explain below, I agree with the conclusion of the majority of the Court of Appeal that cause of action estoppel applies in this case. In light of this conclusion, it is unnecessary to address the applicability of the other two doctrines that 11368 raises on appeal. As discussed above, cause of action estoppel and issue estoppel are two branches of the overarching doctrine of *res judicata*; where one provides a full answer, addressing the other is unnecessary. While the majority of the Court of Appeal also applied the doctrine of abuse of process by relitigation, I decline to do so, noting as I did above that the doctrine should be applied sparingly and is relevant only where the technical requirements of *res judicata* are not made out.

(1) Governing Principles

[66] The seminal case on cause of action estoppel is the English decision of *Henderson v. Henderson* (1843), 3 Hare 100, 67 E.R. 313. In an oft-cited passage, Vice Chancellor Wigram of the English Court of Chancery explained that:

... where a given matter becomes the subject of litigation in, and of adjudication by, a Court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case . . . The plea of *res judicata* applies, except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of the litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time. (Emphasis added; p. 319.)

This description of *res judicata* — as barring the relitigation of points raised in a prior proceeding, along with points that the parties might have raised had they exercised reasonable diligence — formed the basis of the doctrine of cause of action estoppel when it was first applied by this Court in *Farwell v. The Queen* (1894), 22 S.C.R. 553, at p. 558:

Where the parties (themselves or privies) are the same, and the cause of action is the same, the estoppel extends to all matters which were, or might properly have been, brought into litigation. [Emphasis added.]

[67] The leading authority from this Court on cause of action estoppel is the case of *Grandview*. In 1969, Arthur Doering sued the City of Grandview in nuisance. In this first action, Mr. Doering alleged that the municipality's replacement of a dam raised river water levels, causing the river to flood his land. Mr. Doering was unsuccessful in this action. Nine months later, he commenced a new action in nuisance,

alleging that the dam caused his land to become saturated with water through an underground aquifer. This theory was based on an expert opinion Mr. Doering sought after the dismissal of the first action.

[68] Writing for a majority of this Court, Justice Ritchie held that Mr. Doering's second claim was barred by cause of action estoppel. Justice Ritchie concluded that the facts Mr. Doering alleged as constituting the tortious conduct in the second action existed when the first action went to trial. The only change between the first and second action was the expert opinion about the flow of water from the dam through the aquifer. However, Justice Ritchie found that the aquifer theory of liability properly belonged to the first action. Justice Ritchie drew on several English authorities in reaching this conclusion, ultimately endorsing the rule in *Henderson* that cause of action estoppel applies not only to matters which were brought forward in the prior proceeding, but also to matters which properly belonged to that proceeding (see *Henderson*; *New Brunswick Ry.; Phosphate Sewage Company v. Molleson* (1879), 4 App. Cas. 801 (H.L.); *Fidelitas Shipping Co., Ltd. v. V/O Exportchleb*, [1965] 2 All E.R. 4 (C.A.)).

[69] The rule flowing from *Grandview* is that cause of action estoppel bars the relitigation of a cause of action that is not separate and distinct from one raised in a prior proceeding. The estoppel bars both matters raised in the prior proceeding and matters that properly formed part of the proceeding and which the parties might have brought forward at the time had they exercised reasonable diligence. The breadth of

cause of action estoppel reflects that the doctrine is geared toward preventing litigation in installments (Lederman, Fuerst and Stewart, at ¶19.116).

[70] With these principles in mind, I turn now to the relevant considerations when determining whether litigation of a matter is barred by cause of action estoppel. This Court's decision in *Grandview* did not formalize a test, but courts interpreting the decision have gleaned four requirements from Justice Ritchie's analysis (*Bjarnarson v. Government of Manitoba* (1987), 38 D.L.R. (4th) 32 (Man. K.B.), at p. 34; see also *Glenko Enterprises Ltd. v. Keller*, 2008 MBCA 24, 290 D.L.R. (4th) 712; *Cliffs Over Maple Bay Investments Ltd., Re*, 2011 BCCA 180, 17 B.C.L.R. (5th) 60; *Kasperson v. Halifax (Regional Municipality)*, 2012 NSCA 110, 357 D.L.R. (4th) 275; *Furlong v. Avalon Bookkeeping Services Ltd.*, 2004 NLCA 46, 243 D.L.R. (4th) 153; *Sherwood Steel Ltd. v. Odyssey Construction Inc.*, 2014 ABCA 320, 5 Alta. L.R. (6th) 268; *Dosen v. Meloche Monnex Financial Services Inc. (Security National Insurance Company)*, 2021 ONCA 141, 457 D.L.R. (4th) 530). As outlined in Lederman, Fuerst and Stewart, at ¶19.116, the four requirements for establishing cause of action estoppel are:

There is a final decision of a court of competent jurisdiction in a prior action;

The parties to the subsequent litigation were parties to, or in privity with the parties to the prior action;

The cause of action in the prior action is not separate and distinct; and

The basis of the cause of action and the subsequent action were argued or could have been argued in the prior action, if the parties had exercised reasonable diligence.

The first and second prongs of the test are common to cause of action estoppel and issue estoppel and have thus been addressed in other jurisprudence of this Court (see *Toronto (City)*; *Danyluk*; *Angle*). The latter two prongs merit additional explanation.

(a) *Defining a “Cause of Action”*

[71] A cause of action has been variously defined as a set of facts that provides the basis for an action or as a factual situation entitling a person to relief (*Markevich v. Canada*, 2003 SCC 9, [2003] 1 S.C.R. 94, at para. 27, citing *Letang v. Cooper*, [1964] 2 All E.R. 929 (C.A.); *Cahoon v. Franks*, [1967] S.C.R. 455, at p. 459; *Air Canada v. McDonnell Douglas Corp.*, [1989] 1 S.C.R. 1554, at p. 1564). In *Danyluk*, this Court defined a cause of action as “every fact which it would be necessary for the plaintiff to prove, if disputed, in order to support his or her right to the judgment of the court” (para. 54, citing *Poucher v. Wilkins* (1915), 33 O.L.R. 125 (C.A.)).

[72] Thus, determining whether a cause of action raised in a prior proceeding is “separate and distinct” necessarily requires an assessment and comparison of the facts in the first action and the subsequent action, given that these facts “form the ‘cause’ of the ‘action’” (*Sherwood Steel Ltd.*, at para. 23, citing *Madill v. Alexander Consulting Group Ltd.*, 1999 ABCA 231, 176 D.L.R. (4th) 309, at para. 27).

[73] Cause of action estoppel bars subsequent proceedings covering the same subject matter and arising out of the same relationship between the parties, even if the subsequent action is based on a different legal description or conception of the issues

(*Air Palace Co., Ltd. v. Rotor Maxx Support Limited*, 2023 BCCA 393, 488 D.L.R. (4th) 110, at para. 27, citing *Lehndorff Management Ltd. v. L.R.S. Development Enterprises Ltd.* (1980), 19 B.C.L.R. 59 (C.A.); *Berthin v. Berthin*, 2018 BCCA 177, 13 B.C.L.R. (6th) 350, at para. 9). Cause of action estoppel can arise anytime a substantive claim is granted or refused (Handley, at p. 98).

[74] The basis of a cause of action can be understood as the theory that explains how the cause of action — that is, the set of facts — entitles a party to relief (Lederman, Fuerst and Stewart, at ¶19.120; see also *Catalyst Capital Group Inc. v. VimpelCom Ltd.*, 2019 ONCA 354, 145 O.R. (3d) 759). In this way, cause of action estoppel furthers the principle of finality by ensuring that all legal theories arising out of the same facts are put forward in one proceeding. Any theory that properly belonged to the first action and that was or could, with reasonable diligence, have been raised at that point is captured by cause of action estoppel (Lederman, Fuerst and Stewart, at ¶19.116).

[75] As the fourth prong of the test was initially conceptualized, cause of action estoppel would bar the relitigation of any matters that *were* raised or *could* have been raised with reasonable diligence in the prior proceeding. Generally, courts have applied this prong of the test as written (see, e.g., *Cliffs Over Maple Bay*; *Avalon*; *Glenko Enterprises Ltd.*; *Sherwood Steel Ltd.*). However, in *Hoque*, Justice Cromwell (as he then was) suggested that the word “could” was too broad, writing that “[t]he better

principle is that those issues which the parties had the opportunity to raise and, in all the circumstances, should have raised, will be barred” (para. 37 (emphasis in original)).

[76] In my respectful view, the reasonable diligence qualifier is sufficient to ensure that litigants are not held to an unrealistic standard and ultimately barred from raising an argument in a second proceeding that they could not have reasonably been expected to raise in the prior proceeding. For example, as I explain below, the reasonable diligence qualifier will preclude the application of cause of action estoppel where circumstances such as fraud, dishonesty, or the discovery of new evidence explain why a party did not raise a matter in a first proceeding.

[77] In summary, then, the test for cause of action estoppel is as follows:

- (a) There is a final decision of a court of competent jurisdiction in the prior action;
- (b) The parties to the subsequent litigation were parties to or in privity with parties to the prior action;
- (c) The cause of action in the prior action is not separate and distinct; and
- (d) The basis of the cause of action and the subsequent action was argued or could have been argued in the prior action if the parties had exercised reasonable diligence.

(b) *Discretion*

[78] In cases where a party has established all elements of the test for applying cause of action estoppel, there remains the question of whether a court has discretion to decline to apply the doctrine. In the court below, Justice Butler held that there is discretion to not apply cause of action estoppel (para. 122). Justice O’Brien, concurring in the result, was more equivocal about the existence of discretion, but concluded regardless that this case did not present an appropriate context in which to exercise it (paras. 370-73).

[79] As I alluded to above, the fourth prong of the test for cause of action estoppel guards against the application of the doctrine in cases where a party could not reasonably have advanced a particular theory, for instance, because new evidence did not exist or could not reasonably have been discovered at the time of the first proceeding. With that said, I accept that courts maintain a narrow discretion to decline to apply cause of action estoppel where the formal prerequisites are made out but where applying it would nonetheless cause an injustice.

[80] *Res judicata* is meant to “promot[e] the orderly administration of justice but not at the cost of real injustice in the particular case” (*Danyluk*, at para. 67). With this in mind, this Court has previously addressed the circumstances in which, notwithstanding that the preconditions to apply issue estoppel are made out, the doctrine should not be applied. In *Danyluk*, this Court cautioned against applying issue estoppel “mechanically”, explaining that the underlying purpose of the doctrine 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” (para. 33). To this end, this Court held that issue estoppel requires a two-step analysis: first, a court must ask whether the test for issue estoppel is satisfied, and then it must assess whether the estoppel *ought* to apply (see para. 33). This Court went on to set out a non-exhaustive series of factors governing the exercise of discretion as it applies to issue estoppel where the prior decision was made by an administrative tribunal (see para. 67 et seq.).

[81] This Court’s jurisprudence does not provide as clear an answer to the question of whether there is a discretion to not apply cause of action estoppel in the context of court proceedings. In *Grandview*, Justice Ritchie cited a passage from *New Brunswick Ry.*, at pp. 20-21, explaining when “exceptional circumstances” may warrant not applying cause of action estoppel (p. 639):

In my view not all estoppels are “odious”; but the adjective might well be applicable if a defendant, particularly if he is sued for a small sum in a country distant from his own, is held to be estopped not merely in respect of the actual judgment obtained against him, but from defending himself against a claim for a much larger sum on the ground that one of the issues in the first action (issues which he never saw, though they were doubtless filed) had decided as a matter of inference his only defence in the second action.

On the facts of *Grandview*, Justice Ritchie held that there were no “exceptional circumstances” because the question of whether the City of Grandview’s maintenance of the dam caused flooding on Mr. Doering’s land was “thoroughly explored” in the first proceeding (p. 639).

[82] While this passage from *Grandview* would seem to support the existence of discretion to not apply cause of action estoppel, Justice Ritchie did not specify whether the circumstances identified by the House of Lords in *New Brunswick Ry.* represented a situation where cause of action estoppel did not apply by virtue of the exercise of discretion, or where it did not apply because its prerequisites were simply not made out.

[83] Several appellate courts have interpreted *Grandview* as supporting the latter possibility (see, e.g., *John Doe v. Roman Catholic Episcopal Corp. of St. John's*, 2013 NLCA 62, 343 Nfld. & P.E.I.R. 68, at para. 56; *Avalon*, at paras. 40-44). To the description of “exceptional circumstances” in *Grandview* that justify not applying cause of action estoppel, these courts have added situations where fraud or dishonesty tainted the first proceeding, or where new evidence was discovered following the first proceeding (*John Doe*, at para. 52; see also *Canam Enterprises Inc.*, at para. 33). However, these courts explained that these considerations were not exceptions to cause of action estoppel and instead “define[d] the parameters for its operation” (*John Doe*, at para. 56). In other words, cause of action estoppel simply does not apply in these circumstances — not because a judge has exercised discretion to not apply the doctrine, but because the doctrine’s prerequisites are not made out.

[84] In addition to *Grandview*, this Court’s decision in *General Motors of Canada Ltd. v. Naken*, [1983] 1 S.C.R. 72, at p. 101, rendered almost a decade later, is often cited as an authority for the existence of discretion. In *Danyluk*, Justice Binnie

relied on the decision to conclude that there was “no doubt” that discretion existed to not apply issue estoppel (para. 62). Ultimately, though, *Naken* was not a case about issue estoppel or cause of action estoppel. The question on appeal was whether an action against a car manufacturer could proceed as a class action under the rules of practice in place at that time for the Supreme Court of Ontario. Discussing the implications of allowing the action to proceed as a class action, this Court remarked on the possibility that *res judicata* could be raised to affect the rights of other individuals who sustained injuries from the car in question. In this context, this Court stated that “there is a discretion in the courts where the defence of *res judicata* is raised”, but it cautioned that such discretion was “very limited in application” (p. 101 (emphasis added)).

[85] Some appellate and trial courts have since relied on *Naken* and *Danyluk* for the proposition that there is discretion to decline to apply cause of action estoppel (*David v. Loblaw Companies Limited*, 2025 ONCA 830, at para. 33, fn. 8, and paras. 45 and 53; *Glenko Enterprises Ltd.*, at para. 52; *Grant McLeod Contracting Ltd. v. Forestech Industries Ltd.*, 2008 BCSC 756, 294 D.L.R. (4th) 290, at para. 56; *M. Saarnok-Vuus, Executrix of the will of J.L. Saarnok v. G. Neufeld*, 2003 BCSC 937, at para. 29).

[86] In the years after *Grandview* and *Naken* were decided, trial and appellate courts formalized a test for cause of action estoppel. As discussed above, the fourth prong of this test asks whether a party should have argued the basis for a cause of action

at the first proceeding. In my view, this prong of the test guards against the application of cause of action estoppel in circumstances like those identified by appellate courts — that is, where the first proceeding was tainted by fraud or dishonesty, or where new evidence was discovered after the first proceeding. These are non-exhaustive examples of situations where the fourth prong of the test for cause of action estoppel may not be met.

[87] With that being said, I accept that courts maintain a limited discretion to decline to apply cause of action estoppel where the preconditions to apply the doctrine are met but where applying it would nonetheless cause an injustice. For instance, it might be appropriate to decline to apply cause of action estoppel if the stakes in the first proceeding were “too minor to generate a full and robust response” (*Toronto (City)*, at para. 53). It might also be appropriate to decline to apply estoppel where procedural unfairness tainted the first proceeding (*Avalon*, at para. 42).

[88] My colleague Justice Côté points to the importance of exercising caution when applying *res judicata* in the context of applications. I agree that prudence may be required where the decision said to give rise to *res judicata* was rendered in the context of summary procedures. Courts must exercise caution to ensure that parties had a full opportunity to argue the issues in the prior proceeding. Particular caution may be required where the initial application addressed only a discrete element of a larger dispute, or where a matter was not within the contemplation of the parties at the time of the initial application. These situations may present appropriate cases for courts to

exercise discretion to decline to apply estoppel if the preconditions to apply the doctrine are otherwise made out. Ultimately, courts are well suited to recognize other situations where it may be appropriate to exercise discretion and decline to apply the doctrine.

[89] As this Court observed in *Naken*, the discretion to decline to apply *res judicata* is “limited in application” (p. 101). To this, I would add that the discretion to decline to apply cause of action estoppel should be exercised only exceptionally and is narrower than the discretion to decline to apply issue estoppel. This is justified for two reasons. First, the considerations that might justify exercising the discretion to decline to apply issue estoppel are often captured by the fourth prong of the test for cause of action estoppel, leaving only narrow circumstances where the preconditions to apply cause of action estoppel are met but where applying the doctrine would nevertheless be unjust. Indeed, the test for issue estoppel does not incorporate a similar consideration. Second, cause of action estoppel is a more encompassing doctrine than issue estoppel because it precludes the relitigation of an entire cause of action instead of a single issue. For this reason, greater harm is done to the public policy principles of fairness and finality that underlie *res judicata* when a court permits the relitigation of a cause of action, as opposed to a single issue.

[90] To be clear, my comments above centre on the applicability of cause of action estoppel in the context of court proceedings. As this Court recognized in *Danyluk*, the operation of *res judicata* in the administrative context differs from its operation in the context of court proceedings because of the “enormous range and

diversity of the structures, mandates and procedures of administrative decision makers” (para. 62). Accordingly, *Danyluk* recognized that the discretion to decline to apply issue estoppel is “necessarily broader” when the proceeding giving rise to the estoppel is administrative, and it outlined a series of factors to guide the exercise of discretion.

[91] In this case, cause of action estoppel arises in the context of two interrelated sets of court proceedings. In the absence of a relevant factual backdrop like that which existed in *Danyluk*, this is not an appropriate case in which to consider how the exercise of discretion to decline to apply cause of action estoppel operates in the administrative context.

(c) *Reciprocity*

[92] Despite what the name “cause of action estoppel” suggests, the doctrine applies equally to the party defending against an action as it does to the party advancing it. Put differently, cause of action estoppel can apply to bar either a claim *or a defence* from being raised in a subsequent proceeding where it was raised or could have been raised in the prior proceeding.

[93] Support for the reciprocal nature of cause of action estoppel is long-standing and well-founded. In *Fidelitas*, an English decision this Court referenced affirmatively in *Grandview*, the Court of Appeal described cause of action estoppel in terms that make this clear:

. . . there may be several points available which go to aid one party or the other in his efforts to secure a determination of the issue in his favour. The rule then is that each party must use reasonable diligence to bring forward every point which he thinks would help him. If he omits to raise any particular point . . . he may find himself shut out from raising that point again, at any rate in any case where the self-same issue rises in the same or subsequent proceedings. [Emphasis added; p. 9.]

[94] The reciprocity of cause of action estoppel is also uncontroversial in Canadian authorities. Justice Cromwell described cause of action estoppel as requiring parties to “bring forward all of the claims and defences with respect to the cause of action at issue” (*Hoque*, at para. 21 (emphasis added)). Similarly, in *420093 B.C. Ltd. v. Bank of Montreal*, 1995 ABCA 328, 128 D.L.R. (4th) 488, at p. 494, the Alberta Court of Appeal explained that cause of action estoppel “applies equally to a defendant who must put forward all defences which will defeat the plaintiffs action, and the defendant who does not will be debarred from raising them subsequently” (see also *Hall v. Hall and Hall’s Feed & Grain Ltd.* (1958), 15 D.L.R. (2d) 638 (Alta. C.A.), at p. 645; *Erschbamer v. Wallster*, 2013 BCCA 76, 356 D.L.R. (4th) 634, at para. 16).

[95] Accordingly, under the fourth prong of the test, a plaintiff or applicant who does not raise all theories arising from the cause of action — that is, the set of facts — that it should have in order to demonstrate its entitlement to relief may be estopped from raising them in a subsequent proceeding. There is a reciprocal obligation on a defendant or responding party, who may be barred by cause of action estoppel where that party fails in the first proceeding to raise all theories that could defeat the plaintiff or applicant’s claim.

(2) Application to This Case

[96] With these principles in mind, I now turn to the question of whether cause of action estoppel applies to bar Patrick Street from rearguing its claim for entitlement to payment under the \$4 million mortgage.

(a) *The 2017 Decision, as Upheld on Appeal, Is a Final Decision of a Court of Competent Jurisdiction*

[97] The first part of the test for cause of action estoppel asks whether the decision said to create the estoppel is final. A judgment is final even if it could have been appealed but was not, provided that the court issuing the judgment could not reconsider it after it was rendered (Lederman, Fuerst and Stewart, at ¶19.102).

[98] Patrick Street does not dispute that this requirement is met. The application judge's 2017 decision is final, because it was upheld on appeal in 2019. Leave was not sought to appeal the decision of the Newfoundland and Labrador Court of Appeal.

(b) *The Parties to the 2019 Application Were Parties to the 2016 Applications*

[99] This requirement, dealing with mutuality, asks whether the parties to the decision said to create the estoppel were the same as the parties in the present litigation. In my view, this requirement is clearly met. The parties to the 2016 applications were J-3 and Mr. Cook, as applicants, and Patrick Street and 11368, as respondents. The parties to the 2019 application were 11368, as an applicant, and Patrick Street, as a

respondent. 11368 and Patrick Street were thus parties in both the prior and subsequent litigation.

[100] Mutuality exists notwithstanding that Patrick Street was a respondent in both sets of applications, whereas 11368 was a respondent in one and an applicant in the other. Provided that both parties in the subsequent litigation were parties in the previous litigation, “[t]he position of the parties on the record in the two cases is irrelevant” (Handley, at p. 130; see also *Canadian Shredded Wheat Co. Ltd. v. Kellogg Co. of Canada Ltd.*, [1939] S.C.R. 329).

[101] On appeal, Patrick Street argues that 11368 had “limited participation” in the 2016 applications and subsequent appeal. Similarly, in the context of her analysis of issue estoppel, the dissenting justice in the Court of Appeal acknowledged that Patrick Street and 11368 were both involved in the 2016 and 2019 applications, but held that 11368’s “roles were different” (para. 636).

[102] In my respectful view, these perspectives are misplaced. The primary concern at this stage of the test is ensuring that a party is not bound to an outcome it did not have a reasonable chance to advocate for in the same capacity as the one in which it is estopped. It is true that the mutuality requirement will not be met where parties or their privies brought or defended a previous proceeding in respect of a different right, which may arise where a party brings a first action as a personal representative and is then subsequently sued in its personal capacity (Lederman, Fuerst and Stewart, at ¶19.137). However, 11368 and Patrick Street appeared in their own

capacity in both sets of proceedings. I thus conclude that the mutuality requirement is met in this case.

(c) *The Cause of Action in the 2019 Application Is Not Separate and Distinct From the Cause of Action in the 2016 Applications*

[103] The third requirement to establish cause of action estoppel is that the cause of action in the prior proceeding not be separate and distinct from the cause of action in the subsequent proceeding. Recall that a cause of action is a set of facts providing the basis for an action, or a factual situation entitling a person to relief. Cause of action estoppel applies where the subsequent action arises out of the same relationship between the parties and the same subject matter as the initial litigation. It is thus necessary to closely examine the factual basis for J-3's and Mr. Cook's applications in 2016, along with the relationship between Patrick Street and 11368 at that stage.

[104] After the Kenmount Terrace property was sold under the power of sale, Patrick Street was statutorily obliged under s. 10 of the *Conveyancing Act* to provide an accounting to 11368, the mortgagor of the property, and to all persons with registered encumbrances on the property. In this accounting, Patrick Street listed the claims on the property it intended to pay out from the proceeds of the sale. More specifically, Patrick Street included five directions to pay that it or its affiliates held, along with several mortgages it or its affiliates held, including the \$4 million mortgage. In light of its plan to pay out these claims, Patrick Street maintained that there were not

sufficient sale proceeds to pay out other claims on the property, including J-3's mechanic's lien and Mr. Cook's two collateral mortgages.

[105] The 2016 proceedings were commenced by J-3 and Mr. Cook as applications under s. 11 of the *Conveyancing Act* to challenge Patrick Street's accounting. More specifically, J-3 and Mr. Cook sought an order that Patrick Street be directed to pay out their claims — a mechanic's lien and two collateral mortgages, respectively — from the proceeds of the sale of the Kenmount Terrace property.

[106] In order to have their claims included in the accounting and paid from the sale proceeds, J-3 and Mr. Cook needed to demonstrate the validity and value of their claims and either that their claims ranked in priority to other claims Patrick Street included in its accounting or that other claims Patrick Street included were invalid. This was because there were not enough proceeds from the sale of the property to pay out all of the claims registered on the property.

[107] Conversely, to prevent J-3's and Mr. Cook's claims from being paid out to the detriment of some or all of the claims Patrick Street included in its accounting, Patrick Street needed to demonstrate that the claims it included in its accounting were properly valued and properly included because of their validity and priority and that the claims it excluded were also properly excluded, either because of their invalidity or lack of priority. Accordingly, the validity, value, and priority of the registered claims on the Kenmount Terrace property formed the subject matter of the 2016 applications, providing the basis for J-3's and Mr. Cook's claims and for Patrick Street's defence.

[108] My colleague Justice Côté suggests that the relationships between the parties in the 2016 and 2019 applications were distinct. However, and with great respect to her contrary view, I am concerned that she favours the formal titles applying to the parties over the nature of how they were connected in the two sets of applications. Importantly, Patrick Street and 11368 were adverse in interest in both sets of applications, even if they occupied formally different roles in the 2016 and 2019 applications. It was in Patrick Street’s interest to defend the claims it set out in its accounting because it or one of its affiliates held most of these claims. Among these were the five directions to pay, along with several mortgages, including the \$4 million mortgage. Thus, Patrick Street was not a passive observer or limited participant in the 2016 applications — its interest in payment under the \$4 million mortgage was engaged by J-3’s and Mr. Cook’s claims, and by its defence to them. Conversely, as the mortgagor and thus the party potentially entitled to the sale proceeds under s. 14(3) of the *Conveyancing Act* upon the satisfaction of all other encumbrances, it was in 11368’s interest to argue the opposite — that Patrick Street’s claims were invalid — in order to maximize the residue of sale proceeds to which it could be entitled after the other claims were paid out.

[109] The 2019 application arose out of the same facts and subject matter, and the relationship between Patrick Street and 11368 was unchanged. In 2019, 11368 sought an order that Patrick Street pay out Ms. Cheeke’s mortgage and that Patrick Street pay the residual sale proceeds to 11368. To defend against this application, Patrick Street again needed to defend its accounting, demonstrating the validity, value,

and priority of the claims it included therein, such that there would not be sufficient proceeds to pay out Ms. Cheeke's claim and 11368's residue. 11368 and Patrick Street were again adverse in interest.

[110] The causes of action in the two sets of proceedings — establishing the validity, value, and priority of the encumbrances on the Kenmount Terrace property — were identical. So too was what Patrick Street needed to demonstrate in order to defend against J-3's and Mr. Cook's claims and, subsequently, 11368's claim.

[111] By 2019, when 11368 brought its application, these matters had been decided by the application judge in 2017. His reasons in 2017 indicate that the 2016 applications required him to “examine the priorities between the various charges affecting” the mortgaged property (para. 3 (emphasis added)). To this end, in order to determine whether J-3 and Mr. Cook were entitled to have their claims paid out from the sale proceeds, the application judge undertook a full review of the accounting, examining the validity, value, and priority of not only J-3's and Mr. Cook's claims, but also of the other claims Patrick Street included. In doing so, the application judge made a series of findings. He concluded that J-3's mechanic's lien and Mr. Cook's collateral mortgages were valid encumbrances on the Kenmount Terrace property and that the order in which they would be paid out would depend on their order of registration. He excluded the five directions to pay from Patrick Street's accounting, having found that they were not “encumbrances” as defined in the *Conveyancing Act* (para. 54). He reduced the amounts Patrick Street could claim on several mortgages it or its affiliates

held. Finally, the application judge excluded Patrick Street's \$4 million mortgage from the accounting. He concluded that 11368 had given Patrick Street a mortgage of "up to" \$4 million, and he accepted 11368's argument that Patrick Street failed to prove the amount actually owing under the mortgage:

In 11368 NL's estimation, no money or a lesser amount than \$4,000,000.00 may actually be owing under the mortgage. 11368 NL Inc. says Patrick Street Holdings should have done a proper analysis if it wished to include any amount from this mortgage to be paid from the power of sale proceedings. I accept this analysis and make no allowance for this mortgage in the accounting. [Emphasis added; para. 62.]

[112] At the end of his reasons, the application judge set out in a table the complete list of claims he determined were valid, their value, and the priority in which they would be paid out from the sale proceeds. The directions to pay and the \$4 million mortgage were not included in this table. Having completed a full accounting of the claims on the Kenmount Terrace property, the application judge could conclude that there were sufficient proceeds to pay out J-3's and Mr. Cook's claims. He accordingly ordered that Patrick Street pay out both of them from the proceeds. In short, the application judge's reasons were focused on not only the priorities between the charges on Kenmount Terrace, but also their value and validity.

[113] Importantly, the application judge's conclusions to this effect were challenged *and confirmed* on appeal. The Court of Appeal held, in its 2019 decision, that the effect of the application judge's decision in 2017 was to *exclude* the \$4 million mortgage from the accounting, observing that "the Applications Judge did not find that

there was sufficient evidence to conclude that 11368 NL as guarantor was liable to make payment at the time of the sale” (para. 62).

[114] In bringing an application in 2019 for payment under Ms. Cheeke’s mortgage and for the residue of the sale proceeds, 11368 could rely entirely on the application judge’s 2017 determination of the validity, value, and priority of the encumbrances on the property and on the fact that this determination was upheld on appeal. Similarly, in arguing in the 2019 application that it was entitled to payment under the \$4 million mortgage, Patrick Street was in substance relitigating the same cause of action as that in the 2016 applications that were decided against it. This further demonstrates that the causes of action in the 2016 and 2019 applications were not separate and distinct. To the extent Patrick Street disagreed with the application judge’s decision to exclude the \$4 million mortgage from the accounting, the proper forum for Patrick Street to challenge this decision was on appeal, in 2019.

[115] In summary, the proceedings in 2016 and in 2019 both required a judicial determination of the validity, value, and priority of the encumbrances on the property. In both sets of applications, the material facts Patrick Street needed to establish to defend against the claim were the same. And in both sets of applications, 11368 and Patrick Street were adverse in interest. The subject matter of the proceedings and the relationship between the parties were the same in the 2016 and 2019 applications.

[116] On appeal to this Court, Patrick Street argues that the cause of action in the two sets of proceedings was not the same. It submits that the cause of action in 2016

was a claim for relief by J-3 and Mr. Cook and that the application judge's decision merely resulted in Patrick Street losing priority to J-3's and Mr. Cook's claims because of an insufficient accounting of the amount owing under the \$4 million mortgage. Patrick Street argues that in 2019, 11368 could not simply rely on a finding that the amount owing under the \$4 million mortgage was unknown — it had to establish that the amount owing under the mortgage was nil.

[117] I do not accept this argument for two reasons. First, the argument proceeds on an overly narrow view of the meaning of a cause of action — one that focuses on the order or relief granted at the end of a judgment as opposed to the substance of what Patrick Street needed to establish and the parties in whose presence it did so. As I have explained above, cause of action estoppel focuses on the material facts the parties needed to prove in order to establish or defend against a claim. It is helpful to recall that J-3's and Mr. Cook's applications were brought because of their disagreements with Patrick Street's accounting. While the order they sought was for them to be paid from the sale proceeds, their claims were grounded in s. 11 of the *Conveyancing Act*, which provides that “[a] mortgagor and another registered encumbrancer or guarantor who is dissatisfied with an accounting given by a mortgagee under section 10 may apply to a judge for . . . relief”. Thus, for both J-3 and Mr. Cook, and for Patrick Street, the applications involved demonstrating the validity and value of their claims and the priority of their claims relative to others included in or excluded from the initial accounting. This was the cause of action at issue in the 2016 proceedings, and the application judge's decision settled both the priority and the amounts of the charges on

Kenmount Terrace. Come 2019, 11368’s claim for relief and Patrick Street’s defence rested upon the same determinations.

[118] Further to this point, I would note the importance of finality in the context of a judicial accounting. English courts have found that a judicial accounting creates cause of action estoppel for all persons party to the accounting (see, e.g., *Henderson; Carl Zeis Stiftung v. Rayner & Keeler Ltd. (No. 2)*, [1967] 1 A.C. 853 (H.L.); *Arnold v. National Westminster Bank Plc.*, [1991] 2 A.C. 93 (H.L.); *Johnson v. Gore Wood & Co. (a firm)*, [2002] 2 A.C. 1 (H.L.); see also Handley, at pp. 104-5). A judicial accounting requires the “netting off of all relevant claims” (Handley, at p. 104). The finality of such an accounting, once completed, is critical to ensuring that parties can rely on the validity, value, and priority of claims established therein in paying out those claims. In this case, allowing Patrick Street to relitigate aspects of the application judge’s initial accounting would risk upending the judge’s determination of priorities. At a minimum, this could produce inconsistent judicial findings. At worst, it could result in a conflict in the paying out of claims, given that some parties have already been paid out in reliance on the accounting in the 2017 decision.

[119] Second, I cannot accept that 11368 was unable to rely on the application judge’s finding that the amount owing under the \$4 million mortgage was unknown, because the application judge’s finding went much further than Patrick Street suggests. The application judge’s reasons are unambiguous that the \$4 million mortgage did not merely “lose priority” vis-à-vis J-3’s and Mr. Cook’s claims — it was disallowed from

the accounting. At para. 62 of the application judge’s reasons, the judge stated explicitly that he made “no allowance for this mortgage in the accounting”. One paragraph later, in a table setting out “the allowances for the accounting from the power of sale proceedings”, the \$4 million mortgage is not listed (para. 63). Then, the Court of Appeal confirmed in 2019 that “[t]he Applications Judge disallowed this mortgage entirely from the accounting” (para. 55).

[120] The question of whether the application judge was correct to disallow the mortgage from the accounting was the subject of Patrick Street’s unsuccessful appeal of the application judge’s decision. 11368 was thus entitled to rely on this finding — it had nothing further to prove in order to be entitled to the relief it sought.

[121] My colleague Justice Côté acknowledges that the application judge addressed the \$4 million mortgage in his 2017 decision but suggests that the 2016 and 2019 applications dealt with distinct causes of action because Patrick Street did not “claim” its entitlement until 2019.

[122] With great respect, I am of a different view. Patrick Street’s claim for entitlement under the \$4 million mortgage was necessarily put in issue by J-3’s and Mr. Cook’s applications in 2016 and thus was properly part of those proceedings. Patrick Street sought to establish that same entitlement in 2019. In both sets of proceedings, Patrick Street appeared in a responding role and sought to rely on the same entitlement to answer each claim.

[123] For this same reason, I reject Patrick Street’s concern that the cause of action estoppel analysis does “not easily fit” this case given that Patrick Street has not advanced a claim itself (A.F., at para. 122). Cause of action estoppel can apply both to a plaintiff bringing a claim and to a respondent defending against one.

- (d) *The Basis of the Cause of Action in the 2019 Application Was Argued or Could Have Been Argued in the 2016 Applications if Patrick Street Had Exercised Reasonable Diligence*

[124] The final prong of the test asks whether the basis of the cause of action in the 2019 application was or should have been argued in 2016. As discussed above, this prong of the test is designed to prevent litigation in installments, whereby one party withholds a theory from the first action and attempts to use it to ground the second. In my view, this requirement is met. Patrick Street should have argued the basis of its defence to the 2019 application in 2016.

[125] The basis of a cause of action can be understood as the theory explaining how the cause of action — that is, the set of facts — entitles a party to relief. In this case, the basis of Patrick Street’s defence is the theory supporting its accounting (and, thus, its claim for entitlement to payment under the \$4 million mortgage).

[126] In order to demonstrate an entitlement to be paid under the \$4 million mortgage, Patrick Street needed to show the amount owing under it, along with the mortgage’s validity and priority. Thus, the basis of the cause of action encompassed

the arguments Patrick Street raised or should have raised in order to show the validity, value, and priority of the \$4 million mortgage.

[127] In proceedings arising from the 2019 application, the basis for Patrick Street's defence was that a clause in the \$4 million mortgage document providing for various instances of default was triggered when the mortgaged property was sold. In its view, this resulted in the mortgage becoming due immediately upon the exercise of the power of sale. Along with this, it pointed to unchallenged affidavit evidence that was before the application judge in 2016 establishing that the amount outstanding on the loan 11368 guaranteed was well over \$4 million and thus that the full amount of the \$4 million mortgage guaranteeing that amount was owed. This is the theory Patrick Street advanced to support its defence to 11368's application.

[128] Patrick Street did not advance this argument in 2016 in response to J-3's and Mr. Cook's applications. However, Patrick Street should have done so. The argument was based in part on the text of the mortgage document and in part on unchallenged affidavit evidence — both of which were before the application judge in 2016. Properly characterized, Patrick Street's argument was not advanced to support a new cause of action, but rather represented a different theory that was properly part of the 2016 proceedings.

(e) *Discretion*

[129] I am similarly satisfied that this is not an appropriate case in which to exercise discretion to not apply cause of action estoppel. In the 2016 proceedings, all parties presented arguments respecting the validity, value, and priority of the encumbrances on the property, including specifically the \$4 million mortgage. Patrick Street was well aware that its claim for entitlement to payment under the \$4 million mortgage was challenged by the other parties to the 2016 applications. It had the opportunity in 2016 to fully litigate the matter. Its failure to exercise reasonable diligence and present all arguments supporting that entitlement claim in the 2016 proceedings, and then again on the appeal of the decision arising from those proceedings, is not a consequence of any deprivation of procedural fairness. And the correctness of the application judge’s decision on the 2016 applications is not a relevant consideration in determining whether to exercise discretion to allow relitigation.

[130] I very respectfully part ways with my colleagues when it comes to their view that this case raises concerns about applying *res judicata* in the context of applications. It is useful to recall that the 2016 applications were commenced under s. 11 of the *Conveyancing Act* — a provision that allows an encumbrancer to challenge a mortgagee’s accounting of the proceeds from a power of sale. Here, J-3’s and Mr. Cook’s applications challenging Patrick Street’s accounting put into issue the entirety of the accounting. This included the validity, value, and priority of each of the claims therein. For this reason, the case before us is not one where the initial applications dealt only with “small parts of a larger picture” (*Buschau v. Rogers Communications Inc.*, 2003 BCSC 1718, 38 C.C.P.B. 16, at para. 36, rev’d on other grounds 2004 BCCA 142,

237 D.L.R. (4th) 260). Instead, the 2016 applications were commenced to address — *and indeed did address* — the correctness of Patrick Street’s accounting of the sale proceeds. I thus do not accept that the validity, the value, and the priority of the claims included in the accounting were not within the initial contemplation of the parties when a judicial assessment of these matters is precisely the reason the present application was commenced.

[131] My colleague Justice Martin states that exercising discretion in this case is appropriate because the claims on Kenmount Terrace held by Patrick Street and its affiliates totalled over \$13 million, whereas the claims held by other parties amounted to just over \$1 million. On this basis, she states that, even if the other individuals were successful in proving the validity, value, and priority of their claims, Patrick Street could nonetheless have expected to receive the entire remaining balance, which would have been enough to cover the \$4 million mortgage (Justice Martin reasons, at para. 170).

[132] I cannot agree. My colleague seems to presume the validity of all of the encumbrances held by Patrick Street and its affiliates and relies on that presumed validity to conclude that Patrick Street could have expected at the outset of the 2016 applications to receive payment under the \$4 million mortgage (and thus did not need to defend this claim). But Patrick Street could not simply assert unproven claims on Kenmount Terrace in its accounting and rely on the fact that these claims totalled more than \$4 million to avoid defending the \$4 million mortgage. Quite the contrary. The

validity and value of each individual encumbrance needed to be proven by Patrick Street before it could expect to receive *any* of the sale proceeds. In the event Patrick Street failed to defend the validity and value of its claims, s. 14(3)(c) of the *Conveyancing Act* directs that the residual sale proceeds be paid to the person entitled to the mortgaged property — in this case, 11368.

[133] It thus does not matter what amount of the sale proceeds was theoretically tied up in the claims Patrick Street asserted in its accounting. At the outset of the 2016 applications, it had not proven any of these claims. And because there were insufficient sale proceeds to pay out all of the encumbrances on Kenmount Terrace, the validity, the value, and the priority of each encumbrance on Kenmount Terrace — including the \$4 million mortgage — were put into issue during the 2016 applications.

(f) *Conclusion*

[134] In summary, cause of action estoppel applies in this case. My conclusion that cause of action estoppel applies is dispositive of this appeal. In view of this, I find it unnecessary to go on to consider the applicability of issue estoppel, along with the question of whether Patrick Street's efforts at relitigation constitute an abuse of process.

VII. Disposition and Costs

[135] Before this Court, and for the first time in these proceedings, 11368 sought an order for solicitor-client costs, to be paid personally by Patrick Street's counsel.

11368 argued that because Patrick Street’s counsel facilitated its litigation of the same matter on four previous occasions, its counsel should share responsibility for indemnifying 11368.

[136] Costs on a solicitor-client basis are generally awarded only in the most exceptional circumstances, where there is “reprehensible, scandalous or outrageous conduct on the part of one of the parties” (*Young v. Young*, [1993] 4 S.C.R. 3, at p. 134). Furthermore, courts must be exceedingly cautious in awarding costs personally against counsel. Lawyers have professional and ethical obligations to keep strictly confidential the instructions they receive from their client. They have further professional and ethical obligations to zealously and courageously advance arguments on behalf of their client where they believe such an argument will help their client’s case (pp. 135-36; see also *Groia v. Law Society of Upper Canada*, 2018 SCC 27, [2018] 1 S.C.R. 772, at para. 73).

[137] Ordering costs personally against counsel raises concern that fear of an adverse costs order or the ability to defend against it could come into tension with these obligations (*Young*, at p. 136). For this reason, costs should be ordered personally against counsel only exceptionally, where “repetitive and irrelevant material, and excessive motions and applications, characterized the proceedings in which they were involved, and that the lawyer acted in bad faith in encouraging this abuse and delay” (pp. 135-36; see also *Schwisberg v. Perry Krieger & Associates* (1997), 33 O.R. (3d) 256 (C.A.), at p. 260).

[138] In arguing that Patrick Street’s counsel should personally bear 11368’s costs, 11368 relies on a 1992 decision of the Ontario Superior Court of Justice, *Donmor Industries Ltd. v. Kremlin Canada Inc. (No. 2)* (1992), 6 O.R. (3d) 506, where solicitor-client costs were ordered to be paid on a joint and several basis by the plaintiffs and their solicitor. The facts in *Donmor Industries Ltd.* were exceptional. Counsel for the plaintiffs drafted a 25-page statement of claim containing allegations of conduct that, if proven, would constitute crimes. The Court also found as fact that counsel *knew* advancing certain claims would run contrary to the doctrine of *res judicata*. Even after making these findings, the court did not go so far as to order solicitor-client costs to be borne solely by the plaintiffs’ counsel.

[139] In this case, there is no basis for an order of solicitor-client costs. Nothing in Patrick Street’s conduct as a litigant can be said to rise to the level of “reprehensible, scandalous or outrageous conduct”. In my view, it is not enough that Patrick Street has attempted to relitigate its claim for entitlement to payment under the \$4 million mortgage despite the same cause of action having already been argued in 2016. If it were enough, solicitor-client costs would arise in every case where *res judicata* was found to apply. This cannot be the case; something more is required.

[140] Neither is there any basis to order costs payable by Patrick Street’s counsel personally. Such an order requires a finding that counsel acted in bad faith. The trial judge made no such finding, and there is nothing on the record before this Court that supports such a finding. It also bears repeating that 11368 has only now argued for

costs to be payable on a solicitor-client basis and, similarly, has only now requested costs payable by Patrick Street’s counsel personally. In the courts below, 11368 was content to receive costs on a party-and-party basis payable by Patrick Street, as is standard. The conduct with which 11368 takes issue — the relitigation of Patrick Street’s claim for entitlement to the \$4 million mortgage — first occurred in 2019, when Patrick Street advanced the argument before the application judge. It is telling that 11368 took no issue with counsel’s conduct in the courts below. For these reasons, I cannot accept that a personal costs order is appropriate in this case.

[141] I would thus dismiss the appeal, with costs payable by Patrick Street to 11368 on a party-and-party basis.

The reasons of Karakatsanis and Martin JJ. were delivered by

MARTIN J. —

I. Introduction

[142] I write separately to address the issue of public importance put forward in the leave application to this Court: whether a party can raise *res judicata* for the first time on appeal.

[143] Chief Justice Wagner does not expressly address this issue because he is satisfied that 11368 NL Inc. argued *res judicata* at first instance. That said, his

conclusion that a litigant is required to advance all arguments at the first proceeding suggests that a party may not be able to raise it for the first time before an appellate court (see paras. 5, 39 and 45-53). Justice Côté, by contrast, concludes that *res judicata* was not argued before the application judge and, as a matter of law, it cannot be raised for the first time on appeal (see paras. 197-214).

[144] In my view, 11368 did not argue or raise *res judicata* before the application judge, but it may do so on appeal. The question of whether a party may raise *res judicata* for the first time on appeal is a novel legal issue that has not yet been decided by this Court. Nevertheless, there is no reason for the Court to establish a special or specific bright-line rule barring a party from raising *res judicata* for the first time on appeal.

[145] This Court has established a general standard to determine when a party can raise a new legal argument, which can — and should — be adopted in the present context. That standard allows a court of appeal “to consider a new issue of law on the appeal where it is able to do so without procedural prejudice to the opposing party and where the refusal to do so would risk an injustice” (*Performance Industries Ltd. v. Sylvan Lake Golf & Tennis Club Ltd.*, 2002 SCC 19, [2002] 1 S.C.R. 678, at para. 33; see also *Guindon v. Canada*, 2015 SCC 41, [2015] 3 S.C.R. 3, at para. 22). Allowing parties to raise *res judicata* for the first time on appeal conforms with the modern approach to civil procedure, promotes the rationales underpinning the doctrine, and provides sufficient flexibility to do justice in individual cases.

[146] Applying the *Sylvan Lake/Guindon* test, I would permit 11368 to raise *res judicata* for the first time on appeal. Patrick Street Holdings Limited would not face any prejudice by allowing 11368 to argue *res judicata* before this Court, and failing to permit this argument on appeal would risk an injustice.

[147] Considering the substance of the *res judicata* issue, I would allow the appeal. I take no position on whether the requirements of the estoppel doctrines were made out in this case. Even if the tests for *res judicata* were satisfied, I would exercise my discretion to allow Patrick Street's claim to proceed on its merits and remit the matter back to the Supreme Court of Newfoundland and Labrador.

II. Res Judicata Was Not Raised by 11368 at First Instance

[148] This case centers around a complex mortgage dispute involving a number of securities; multiple interested parties; various transactions; a series of different legal proceedings, with separate pleadings, transcripts, decisions; and the distribution of the proceeds of sale of a property. It is in this context that we must determine what was argued in the courts below.

[149] I agree with the Chief Justice that there is a difference between pleading the material facts underlying an issue and arguing or raising that issue (paras. 35 and 49). I also agree that there were sufficient facts before the application judge to deal with the issue of *res judicata*. I am not satisfied, however, that the doctrine of *res judicata* was argued or raised sufficiently before the application judge.

[150] Neither 11368 nor the application judge in the hearing of the 2019 application or the reasons for judgment, respectively, made any reference to *res judicata*; asserted that Patrick Street should be estopped from proceeding with the claim on its merits; raised any caselaw related to *res judicata*; implicitly or explicitly drew attention to any of elements of the tests for *res judicata*; or mentioned whether 11368 was relying on cause of action estoppel, issue estoppel, or abuse of process by relitigation.

[151] The silence of the application judge's reasons on these legal issues is important. A judge's decision, absent a claim of insufficiency of reasons, is usually a prime indicator of what was raised and argued in any particular case. One of the rationales for a judge's duty to give reasons is to ensure that the judge consciously engages with what was argued and applies the appropriate legal standard.

[152] The fact that 11368 and the application judge may have thought the issue was decided in the first proceedings cannot alone ground support for a finding of *res judicata*. This doctrine does more than ask whether an issue was previously decided. Indeed, "estoppel is a doctrine of public policy that is designed to advance the interests of justice" (*Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44, [2001] 2 S.C.R. 460, at para. 19; *British Columbia (Workers' Compensation Board) v. Figliola*, 2011 SCC 52, [2011] 3 S.C.R. 422, at para. 27). Without considering the established elements of the tests for *res judicata* or deciding whether to use the court's discretion

to estop the proceedings, a judge cannot properly consider whether the application of the doctrine would further the interests of justice.

[153] On my reading, the application judge’s reasons for his decision on the 2019 application suggest that he was directly addressing Patrick Street’s alleged entitlement to the \$4 million and using his decision on the 2016 applications as *prima facie* evidence to decide that question (see, by analogy, *Dhillon v. Dhillon*, 2006 BCCA 524, 232 B.C.A.C. 249, at para. 22, citing D. J. Lange, *The Doctrine of Res Judicata in Canada* (2nd ed. 2004), at p. 11). Nothing in the application judge’s decision on the 2019 application indicates that he was estopping or precluding Patrick Street from raising the question. This is clear from his comment at para. 23 of his decision on the 2019 application where, after explaining the basis for his decision on the 2016 applications, he states: “I have been shown nothing to cause me to change my mind on this issue . . .” (2020 NLSC 99). The application judge was not saying that Patrick Street was estopped from raising the issue; he was simply saying that there was no new evidence to decide it differently.

[154] Even if 11368’s argument is accepted, there would be no way to determine whether the application judge’s analysis is rooted in issue estoppel, cause of action estoppel, or abuse of process by relitigation. Such a result would preclude any meaningful appellate review and provide limited clarity on the basis for the decision.

III. 11368 May Raise *Res Judicata* for the First Time on Appeal

A. *The Jurisprudence Does Not Provide an Answer to This Question*

[155] This Court has never held that *res judicata* can be raised only at first instance. My colleagues cite two decisions of this Court to suggest otherwise (*Davies v. McMillan* (1892), Cameron 306; *Cooper v. The Molsons Bank* (1896), 26 S.C.R. 611). In *Davies*, Gwynne J., for the majority, stated at p. 317 that “it would be necessary that the plea [of estoppel] should contain suitable averments of what was the precise matter in contestation in such interpleader issue and of what is the precise matter in contestation in the present action”. And in *Cooper*, at p. 620, Strong C.J. explained that “[u]nder the system of pleading introduced by the Judicature Act, it has been decided that *res judicata* as a defence, or as a reply to a counter claim, must be specially pleaded.” These statements speak to how *res judicata* should be pleaded but say nothing about whether it can be raised for the first time on appeal.

[156] This Court should be wary when relying on 19th century jurisprudence on civil procedure. As aptly pointed out by the Chief Justice, the rules of civil procedure have changed completely since the late 1800s (see para 46). In *Cooper*, the Court was interpreting Ontario’s *Judicature Act*, which is no longer in force and has been overtaken by the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, and the *Courts of Justice Act*, R.S.O. 1990, c. C.43. The *Rules of Civil Procedure*, like other provincial rules of civil procedure, have established a complete code governing pleadings which replaced the older common law requirements applying to specific types of claims.

[157] The appellate jurisprudence is also unclear on this point. Some provincial appellate courts have held that a party cannot raise *res judicata* on appeal if they did not raise it at first instance (*Dhillon*, at para. 21; *Merck & Co., Inc. v. Apotex Inc.*, 2006 FCA 323, [2007] 3 F.C.R. 588, at paras. 87-90; *Quadrangle Holdings Ltd. v. Coady*, 2015 NSCA 13, 355 N.S.R. (2d) 324, at paras. 41-44). However, in *Davis v. Her Majesty the Queen in Right of the Province of Manitoba*, 2019 MBCA 78, [2019] 8 W.W.R. 567, the Manitoba Court of Appeal rejected an absolute rule barring parties from raising *res judicata* for the first time on appeal and instead relied on the test from *Sylvan Lake* and *Guindon* to decide the issue (paras. 16 and 22).

[158] Whether *res judicata* can be raised for the first time on appeal is therefore a novel issue before this Court that must be determined according to first principles.

B. *The Appropriate Test to Determine if a Party May Raise Res Judicata for the First Time on Appeal*

[159] To raise *res judicata* for the first time on appeal, a party must meet the test that applies whenever someone seeks to raise any new legal issue on appeal. Under that test, a court of appeal may “consider a new issue of law on the appeal where it is able to do so without procedural prejudice to the opposing party and where the refusal to do so would risk an injustice” (*Sylvan Lake*, at para. 33; *Guindon*, at para. 22).

[160] There are a number of reasons to afford appellate courts the discretion to allow parties to raise *res judicata* for the first time on appeal.

[161] First, recognizing a party's ability to raise *res judicata* for the first time on appeal would harmonize the law of *res judicata* with the broader jurisprudence on civil procedure. In general, we should strive to ensure consistency in our caselaw, such that each element fits together in a coherent whole. Under Canadian civil procedure, when the requisite standards are met, parties may raise new issues on appeal. There is no reason to apply a special and specific standard to *res judicata*. The *Sylvan Lake/Guindon* test is of general application and was designed to set out the standard for when new legal arguments can be made on appeal. Its internal criteria, being the absence of prejudice to the opposing party and the absence of any risk of injustice, further the same type of fairness and flexibility that *res judicata* seeks to promote.

[162] Second, the policy rationales underpinning *res judicata* can also be achieved on appeal. My colleague Côté J. suggests that these rationales weigh in favour of preventing parties from raising *res judicata* on appeal if it was not argued at first instance. That may sometimes be the case, but both rationales may also cut in the other direction. Permitting a party to raise *res judicata* for the first time on appeal can promote finality because the court can put an immediate end to duplicative proceedings, prevent inconsistent results from taking effect, and halt any further use of resources (see *Danyluk*, at para. 18). And, applying *res judicata* on appeal can promote fairness by vindicating one's right to not be vexed twice, particularly where the second proceeding below should never have occurred (*Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63, [2003] 3 S.C.R. 77, at para. 38; *Angle v. M.N.R.*, [1975] 2 S.C.R. 248, at p. 267; *Danyluk*, at para. 18). The fact that the policy rationales underpinning *res*

judicata can be either hindered or furthered when the doctrine is raised on appeal indicates that appellate courts should retain a discretion to permit parties to do so when necessary.

[163] Third, and relatedly, the discretion to hear an issue for the first time on appeal and the residual discretion to apply or not apply *res judicata* provide appellate courts with sufficient flexibility to ensure that the interests of justice are advanced. A court will, at both stages, consider the litigant's interest in fairness and society's interest in the finality of disputes. A flexible approach to determining whether to consider a question for the first time on appeal — like the one set out in *Sylvan Lake* and *Guindon* — allows an appellate court to account for any unfairness at both the lower court and appellate levels.

C. *11368 May Raise Res Judicata for the First Time on Appeal*

[164] Applying the test from *Sylvan Lake* and *Guindon*, I would allow 11368 to raise *res judicata* for the first time on appeal in this case. This conclusion brings little risk of procedural prejudice to Patrick Street. Both parties made submissions on *res judicata* in the Court of Appeal and Patrick Street did not object to that court considering the doctrine.

[165] Additionally, refusing to consider *res judicata* would risk an injustice and could undercut the policy reasons for the doctrine. If we assume that 11368's arguments have merit, then failing to consider *res judicata* would permit Patrick Street to

potentially undermine a final decision of a court. Moreover, it risks undermining 11368's right not to be repeatedly vexed by the same legal arguments. This is particularly true in this case, where 11368 was the applicant, and did not know how Patrick Street would defend against the application.

[166] The fact that refusing to consider *res judicata* could produce these unjust results obliges the Court to consider the claim of *res judicata* on appeal and on its merits.

IV. The Court Should Exercise its Discretion to Let the Claim Proceed on its Merits

[167] I agree with my colleague Côté J. that, even if the estoppel doctrines applied, this Court should allow the claim to proceed on its merits.

[168] *Res judicata* is a doctrine rooted in fairness, justice, and finality (*Danyluk*, at paras. 19 and 33; *Penner v. Niagara (Regional Police Services Board)*, 2013 SCC 19, [2013] 2 S.C.R. 125, at para 69). In order to have finality in the administration of justice, judges must be confident that they are, on a balance of probabilities, promoting fairness when they estop proceedings.

[169] I am not confident that I can reach a fair and just conclusion on what was decided with respect to the 2019 application. Getting to that conclusion would require relying on counsel's dissection of the pleadings, parsing of the record, or invocation of various snippets of the judgments. The lack of clarity in that reasoning process calls

into question the fairness of applying *res judicata* to end Patrick Street's ability to claim and prove any entitlement to funds that it may be owed.

[170] Using a broader lens to look at these proceedings brings to light the potential injustice in applying *res judicata* in this case. The 2016 applications represented a priority dispute between J-3 Consulting and Excavating Ltd. and John Cook, on the one hand, and Patrick Street on the other. 11368 brought no claim in those proceedings that it was entitled to the remaining funds. In turn, Patrick Street had no reason to foresee that the applications would be completely dispositive of its claim for entitlement to its \$4 million mortgage. This is all the more true given that Patrick Street or a person affiliated with Patrick Street claimed more than 12 different encumbrances, totalling over \$13 million, over Kenmount Terrace. The encumbrances held by other individuals, by contrast, amounted to just over \$1 million. That means that, even if these other individuals were entirely successful in the priority dispute, Patrick Street (or someone affiliated with Patrick Street) could have expected to receive the entire remaining balance. And, as a result, there would have been more than enough to cover the \$4 million mortgage. Granted, Patrick Street likely had incentive to maximize its profits and seek payment for each of their encumbrances. But it had little reason to think that the result of the 2016 applications would permanently disqualify its claim for entitlement to all of the remaining funds, and that those funds would instead be directed to 11368.

[171] I am therefore concerned that relying on *res judicata* here would be the sort of “mechanical” application that Binnie J. warned against in *Danyluk* (see paras. 1 and 33). I would exercise this Court’s residual discretion to not apply *res judicata*.

V. Disposition

[172] For the above reasons, I would allow the appeal. I would permit Patrick Street’s claim to proceed on the merits and remit the matter back to the Supreme Court of Newfoundland and Labrador.

The following are the reasons delivered by

CÔTÉ J. —

I. Overview

[173] This appeal concerns cause of action estoppel, issue estoppel, and abuse of process by relitigation. It engages not only how these doctrines apply to a series of applications, but also when cause of action estoppel and issue estoppel must be raised in a proceeding and whether cause of action estoppel is subject to judicial discretion.

[174] Cause of action estoppel and issue estoppel are two species of *res judicata*, a common law rule developed to protect the administration of justice by safeguarding the finality of decisions and promoting fairness between the parties. Cause of action

estoppel and issue estoppel do so by ensuring that, once causes of action or issues are finally adjudicated by a court of competent jurisdiction, they are not relitigated. These doctrines are essential, but their application is not without risk. Courts have long expressed the need for caution when applying these doctrines to summary proceedings, like applications. Courts have rightly recognized the injustice that may arise when a summary proceeding — that was meant to address a narrow issue — is later used to bar redress in a subsequent proceeding for matters that the parties, and perhaps the court, did not contemplate as being decided in the first proceeding.

[175] This appeal provides our Court with the opportunity to affirm this prudential stance. In 2016, Patrick Street Holdings Limited exercised its rights as a mortgagee to force the sale of a property in St. John’s, Newfoundland and Labrador, owned by 11368 NL Inc. called Kenmount Terrace. Pursuant to its statutory obligations, Patrick Street provided an accounting of how it proposed to distribute the proceeds from the sale to all encumbrancers registered on Kenmount. That accounting initially indicated that there were insufficient funds to pay four charges on the property: a mechanics’ lien held by J-3 Consulting and Excavating Ltd.; two collateral mortgages held by John Cook; and a collateral mortgage held by Patrick Street worth up to \$4 million (“Collateral Mortgage”).

[176] In response, J-3 and Mr. Cook each brought respective applications requesting a better accounting and the payment of their charges in priority to Patrick Street’s Collateral Mortgage (“2016 applications”). The application judge

determined that J-3's and Mr. Cook's charges ranked in priority to the Collateral Mortgage and ordered them to be paid. In the process, he found that several charges in the accounting were invalid and excluded them. He also made "no allowance for" the Collateral Mortgage in the accounting because Patrick Street "failed to complete any analysis of the actual amount, if any, owing under the mortgage" (2017 NLTD(G) 167, 79 C.L.R. (4th) 127, at paras. 61-62). He found that, after making no allowance for Patrick Street's mortgage and paying Mr. Cook and J-3, there remained a \$4.2 million surplus from the power of sale. He made no order with respect to the distribution of this surplus.

[177] In 2019, 11368 brought an interlocutory application against Patrick Street, requesting that it be paid the \$4.2 million surplus from the power of sale ("2019 application"). Patrick Street argued that no such payout was warranted because, while it was determined that Patrick Street's encumbrance did not have priority in the 2016 applications, \$4 million of the surplus was nonetheless owed to it under its Collateral Mortgage. The application judge ruled that the whole of the surplus was to be paid to 11368 once another encumbrancer, Deanna Cheeke, was paid out (2020 NLSC 99).

[178] Patrick Street appealed this decision. In the Court of Appeal and before our Court, 11368 has argued that the 2016 applications bar Patrick Street from claiming that it is entitled to payment under the Collateral Mortgage. In particular, Patrick Street's claim for entitlement is said to be barred by cause of action estoppel, issue estoppel, and abuse of process by relitigation. Patrick Street disagrees. It argues

that 11368 cannot raise *res judicata* for the first time on appeal and before our Court because it failed to do so at first instance. It also disputes that the doctrines raised by 11368 apply to its claim for entitlement.

[179] I agree with Patrick Street. As the Chief Justice rightly affirms, a party seeking to raise *res judicata* must do so in its pleadings or, if that is not possible, it must do so at the earliest opportunity. Because *res judicata* must be raised at the earliest opportunity, I find that it cannot be raised for the first time on appeal. Failure to raise *res judicata* as required may result in it being waived. In the present case, I find that *res judicata* was not raised in due time. Therefore, it was an error of law for the Court of Appeal to address *res judicata*, and 11368 is barred from raising it on appeal.

[180] I also agree with Patrick Street that *res judicata* and abuse of process by relitigation have no application to its alleged entitlement under the Collateral Mortgage. Cause of action estoppel prevents the relitigation of claims that have already been decided. It does not apply here because Patrick Street's claim under its Collateral Mortgage is separate and distinct from what was claimed by J-3 and Mr. Cook in the 2016 applications. Issue estoppel bars reconsideration of an issue, fact or question that was necessary to adjudicate an earlier proceeding. It does not apply because it was not necessary for the application judge to determine whether the Collateral Mortgage was payable in order to adjudicate the claimed priority and right to payment of J-3 and Mr. Cook based on their encumbrances. Finally, because there has been no relitigation

of its claim for entitlement, Patrick Street's actions do not amount to abuse of process by relitigation. Patrick Street is therefore not barred from raising its claim.

[181] In dealing with these issues, our Court must also address whether a judge has the discretion to not apply cause of action estoppel once its elements have been made out. Like the Chief Justice and Martin J., I would find that such a discretion exists. The policy rationale for cause of action estoppel and issue estoppel, the existence of discretion in closely related doctrines, and the weight of the case law all favour such a discretion. Though I find that Patrick Street is not estopped from bringing its claim, if it had been, I would have found that applying cause of action estoppel, issue estoppel, or abuse of process by relitigation would lead to injustice. Therefore, like my colleague Martin J., I would not have applied them in the circumstances.

[182] In light of the foregoing, I would allow the appeal and remit the matter of Patrick Street's claim for entitlement under its Collateral Mortgage for decision.

II. Issues

[183] The primary issue before our Court is whether Patrick Street is barred from litigating its claim for entitlement to payment of its Collateral Mortgage from Kenmount's sale proceeds because of the 2016 applications. I address this question by assessing the following:

1. Did 11368 properly raise *res judicata* in the 2019 application?

2. Does cause of action estoppel bar Patrick Street from arguing its claim for entitlement to payment under its Collateral Mortgage?
3. Does issue estoppel bar Patrick Street from arguing its claim for entitlement to payment under its Collateral Mortgage?
4. Does abuse of process by relitigation bar Patrick Street from arguing its claim for entitlement to payment under its Collateral Mortgage?
5. If Patrick Street's claim is barred by cause of action estoppel, issue estoppel, or abuse of process by relitigation, should the Court exercise its discretion to not apply these doctrines?

III. Analysis

[184] If found to apply, *res judicata* and abuse of process by relitigation allow a court to dispose of a case or issue without assessing its merits. When the matter disposed of was indeed previously within the contemplation of the parties as being before the court for decision, the application of these doctrines supports the administration of justice. If, however, the matter was not so decided or the parties were unclear about what was to be decided, a finding of *res judicata* or abuse of process can result in a grievous injustice. This potential for injustice is heightened in the context of summary proceedings, which are meant to address discrete legal issues with efficiency and speed, rather than resolve a broader dispute in its entirety.

[185] Cause of action estoppel, issue estoppel, and abuse of process by relitigation emerge from two primary concerns: finality and fairness (*British Columbia (Workers' Compensation Board) v. Figliola*, 2011 SCC 52, [2011] 3 S.C.R. 422, at para. 34). The finality of decisions is essential. Relitigating issues outside of the formal appeal process opens up the possibility of inconsistent findings of fact and the inconsistent application of the law to these facts (*Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44, [2001] 2 S.C.R. 460, at para. 18). It undermines the authority of decisions which, once rendered and not appealed, are to be fully binding on the parties (*Figliola*, at para. 34). Unwarranted relitigation diminishes the credibility and authority of judgments — their moral force — while also wasting scarce judicial resources through the duplication of court efforts (*Hoque v. Montreal Trust Co.*, 1997 NSCA 153, 162 N.S.R. (2d) 321, at paras. 67 and 77; *Petrelli v. Lindell Beach Holiday Resort Ltd.*, 2011 BCCA 367, 340 D.L.R. (4th) 733, at para. 71).

[186] Fairness is no less important. No one should be “twice vexed” by the same cause or issue (*Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63, [2003] 3 S.C.R. 77, at para. 50; *Peter Ballantyne Cree Nation v. Saskatchewan*, 2025 SKCA 45, at para. 16). Successful parties should be able to continue with their lives, secure in the knowledge that the litigation is over. Unsuccessful parties should be able to move on from the litigation without the temptation to, as is often said, have another “kick at the can”. Parties should not have to expend time, energy, and money to rehash completed litigation.

[187] However, in safeguarding the interests of both society and litigants in the finality of judicial decisions, courts must neither lose sight of the importance of ensuring justice in each case nor forget that, in certain circumstances, relitigation may benefit the administration of justice (*Toronto (City)*, at para. 52; see also paras. 53-55). This is reflected in our Court’s assertion in *Danyluk* that the purpose of issue estoppel — closely related to cause of action estoppel — 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” (para. 33). I take Cromwell J.A. (as he then was) to have made this same point in an often-cited *res judicata* appeal:

This appeal involves the interplay between two fundamental legal principles: first, that the courts should be reluctant to deprive a litigant of the opportunity to have his or her case adjudicated on the merits; and, second, that a party should not, to use the language of some of the older authorities, be twice vexed for the same cause. Distilled to its simplest form, the issue in this appeal is how these two important principles should be applied to the particular facts of this case.

(*Hoque*, at para. 19)

These dynamics are always engaged when a court considers *res judicata*. The present appeal is no different.

[188] In the context of the matter before our Court, fairness to the parties and the need to scrutinize finality are of particular importance. Much of the jurisprudence on *res judicata* concerns successive actions relating to the same causes of action or issues. Actions are comprehensive proceedings that address in depth the causes of action or issues in dispute. They involve formal pleadings, robust rules of discovery, and the

procedural clarification of controversies over time. By contrast, applications are comparatively summary proceedings. They are often conducted quickly, with minimal formal pleadings, without discovery obligations, and on a primarily paper record. They often deal only with discrete elements of a larger dispute. Accordingly, there is a greater potential that an earlier application may be used to improperly bar later redress for matters that the parties or the court did not contemplate as being finally decided.

[189] Responding to these distinctions, courts “have always exercised a degree of caution when applying the doctrine of *res judicata* to decisions reached in applications” (*Fitterer Estate v. Fitterer*, 2006 BCSC 795, 27 E.T.R. (3d) 82, at para. 66; *A.I. Enterprises Ltd. v. Schelew*, 2008 NBQB 190, 332 N.B.R. (2d) 234, at para. 31; see also D. Lange, *The Doctrine of Res Judicata in Canada* (5th ed. 2021), at pp. 365-67). This need for attentiveness to the narrow context of applications has been recognized for over a century.

[190] In *Cameron v. Hull* (1913), 9 D.L.R. 843, the High Court of Ontario addressed whether a claim for the specific performance of a purchase and sale had been “definitely and finally settled by the dismissal” of a prior application (p. 844). The High Court found that *res judicata* did not apply, in part because the prior application was a statutory summary proceeding that afforded “a convenient and inexpensive way of getting the opinion of the Court on isolated points arising out of or connected with the contract” in question (p. 845). The prior application did not address the whole matter,

but rather left the broader dispute as “a matter for decision in an action for specific performance” (p. 845 (emphasis added)).

[191] In *Re Knowles*, [1938] 3 D.L.R. 178, the Court of Appeal for Ontario addressed whether an initial application made to determine certain rights associated with the administration of a will barred a later challenge to the lawfulness of a testamentary transfer based on that same will. *Res judicata* was found by the application judge to apply, and this finding was affirmed by the Court of Appeal because the issue in question was “so distinctly raised” and “so distinctly dealt with” in the prior application that it had to be barred (p. 184). While the estoppel was clear in the particular circumstances, the Court of Appeal affirmed:

But in the case of vague applications instituted by way of originating notice, this doctrine of estoppel ought to be applied with extreme caution, particularly where the application is brought by executors and trustees for advice, so that questions which were not specifically in issue and are not definitely raised and were not really in the contemplation of the parties, may not be held thereafter to be concluded. [Emphasis added; pp. 184-85.]

(See also *Hammill Estate v. McDonell* (1994), 3 E.T.R. (2d) 300 (Ont. Ct. J. (Gen. Div.)), at para. 35.)

[192] More recently, in *Buschau v. Rogers Communications Inc.*, 2003 BCSC 1718, 38 C.C.P.B. 16, rev'd on other grounds 2004 BCCA 142, 237 D.L.R. (4th) 260, the defendants applied to reopen an order to correct an alleged miscalculation. The plaintiffs contended that the application to reopen was barred by *res judicata* because the defendants had unsuccessfully sought to fix the issue earlier under the slip rule. While the court's comments address *res judicata* in the context of interlocutory

applications, they have value for all applications. The court noted the following, at para. 36:

The court has some discretion, however, with respect to the application of the doctrine [of *res judicata*], and will generally apply it less stringently to interlocutory orders than to final orders. In particular, the rule in *Henderson v. Henderson* (1843), 3 Hare 100, 67 E.R. 313 (Eng. V.-C.) that a party must bring forward “its full case” at one time is of limited application to interlocutory applications. Judicial efficiency, one of the foundations of the doctrine of *res judicata*, will often be well served by allowing interlocutory applications to deal with only small parts of a larger picture.

[193] Finally, in *A.I. Enterprises*, the court found that a prior application under the *Business Corporations Act*, S.N.B. 1981, c. B-9.1, did not bar a later action despite both having involved the alleged wrongful termination of the same property manager. Both the application and the action alleged a breach of “good faith”, but the specific duty under the *Business Corporations Act* in the application was different from the relevant duties under the management contract in the action. Finding this difference sufficient to overcome *res judicata*, the court warned that an “over simplification of the ‘essence’ of both proceedings creates the real risk of missing important distinctions between the two” (para. 5 (emphasis added)). It stated further that applications “should be encouraged and ordinarily be capable of being pursued without fear that such may result in all claims related to the subject being barred on the basis of *res judicata*” (para. 30). The court noted the following:

The ill sought to be avoided by the principle of *res judicata* must be weighed against the advantage or desirability of a party first pursuing any summary proceedings available It could not have been intended that

a party, by choosing to proceed by way of a statutory summary proceeding in respect of some of his rights, thereby has to abandon all other rights. The ability to claim in respect of the broader rights and duties should not be lost in this manner. [para. 35]

[194] The policy reasons underpinning these expressions of caution are clear. Finding that *res judicata* applies where the matter said to be estopped was not in the contemplation of all of the parties in the prior summary proceeding could discourage the use of efficient, narrow legal mechanisms meant to target specific issues. At the same time, not finding that *res judicata* applies where the matter said to be estopped was fully contemplated and decided upon could encourage the use of unnecessary and cumbersome actions in the hope of ensuring finality. To strike the right balance, courts must be cautious, closely scrutinizing the causes of action or issues raised and argued in the first proceeding and in the proceeding that is said to be barred by estoppel. Courts must avoid oversimplifying *the “essence” of the proceedings* and must instead be attentive to their distinctions.

A. *Res Judicata Was Not Adequately Raised in the 2019 Application, and 11368 Is Now Estopped From Raising It*

[195] The majority of the Court of Appeal found that the issue of *res judicata* was properly before them and decided the appeal on that basis, without addressing the merits of Patrick Street’s claim. Patrick Street argues that this was in error. It argues that *res judicata* must be raised at the first opportunity and that delay gives rise to a cross-estoppel. It asserts that 11368 did not plead or otherwise raise *res judicata* at first instance. Consequently, 11368 was barred from raising *res judicata* before the Court

of Appeal and is similarly barred from raising this issue before our Court. 11368 contends that failure to plead *res judicata* at the first opportunity does not preclude estoppel arguments on appeal and that, even if such a rule existed, it raised *res judicata* appropriately and *res judicata* was the basis of the decision in the 2019 application.

[196] I fully agree with the Chief Justice that a party seeking to raise *res judicata* must do so at the earliest opportunity. If *res judicata* is not raised as soon as possible — ideally in the party’s pleadings — the party is barred from raising it later on. Because *res judicata* must be raised at the earliest opportunity, I find that it cannot be raised for the first time on appeal. Finding otherwise would run counter to clear appellate jurisprudence and undermine the policy benefits that the doctrine of *res judicata* seeks to achieve. Though I agree with the Chief Justice on the law, I agree with Patrick Street and my colleague Martin J. that the issue of *res judicata* was not pleaded, raised, or decided in the 2019 application. As a result, 11368 was estopped from arguing cause of action estoppel or issue estoppel on appeal and is estopped from doing so before our Court.

(1) *Res Judicata* Must Be Raised as Soon as Possible and Cannot Be Raised for the First Time on Appeal

[197] The rule that *res judicata* must be pleaded is long-standing. In *Davies v. McMillan* (1892), Cameron 306, our Court stated that estoppel must be pleaded and that pleas of estoppel should contain descriptions of both the precise matter contested in the prior decision and the precise matter contested in the legal proceeding where

estoppel is claimed (pp. 316-17). In *Cooper v. The Molsons Bank* (1896), 26 S.C.R. 611, at p. 620, our Court again recognized that *res judicata* must be pleaded in actions:

Under the system of pleading introduced by the Judicature Act, it has been decided that *res judicata* as a defence, or as a reply to a counter claim, must be specifically pleaded.

[198] While these and other cases focus on the need for *res judicata* to be pleaded, courts have a similarly long history of being sensitive to whether there was a sufficient opportunity to plead *res judicata* in practice. In *Miller v. Weldon* (1870), 13 N.B.R. 188, at p. 193, the New Brunswick Supreme Court dismissed a claim for estoppel, stating the following: “Estoppel by record and by deed must, in order to make them binding, be pleaded if there be an opportunity; otherwise the party omitting to plead waives the estoppel” (emphasis added). In *Brown v. Yates* (1877), 1 O.A.R. 367, at p. 374, the Court of Appeal for Ontario found that “the rule is now too well established to be disturbed” that “where the party claiming [an estoppel’s] benefit has not chosen to plead it, although there was an opportunity, he is deemed to have waived the absolute estoppel . . ., and to leave the judgment as evidence only for the jury” (emphasis added). *Brown* cited *Feversham v. Emerson* (1855), 11 Ex. 385, 156 E.R. 881, which stated that the “rule is established by a series of cases, that, if a party means to insist on an estoppel, he must plead it” and that it is “perfectly well-settled law, — and does not now admit of the least question . . . — that if a party does not take the first opportunity which the pleadings afford him of relying on an estoppel, he leaves the matter at large” (p. 884 (emphasis added)).

[199] While this rule is old, with respect, I cannot agree with my colleague Martin J. that it is anachronistic. Instead, it has repeatedly been applied by appellate courts within the modern context of civil procedure (*Merck & Co., Inc. v. Apotex Inc.*, 2006 FCA 323, [2007] 3 F.C.R. 588, at paras. 87-90; *Boyd v. Cook*, 2016 BCCA 424, 62 B.L.R. (5th) 196, at para. 33; *Bailey v. Guaranty Trust Co. of Canada*, 1987 ABCA 95, 39 D.L.R. (4th) 111, at para. 32; *Dhillon v. Dhillon*, 2006 BCCA 524, 232 B.C.A.C. 249, at para. 21; *Canada v. MacDonald*, 2021 FCA 6, 456 D.L.R. (4th) 536, at para. 30; *Mann v. Mann* (1974), 1 O.R. (2d) 416). The same understanding is widely found in scholarly writings on *res judicata*, which hold that *res judicata* must be pleaded or raised at the earliest opportunity (Lange, at pp. 13-17; K. R. Handley, *Spencer Bower and Handley: Res Judicata*, at pp. 263 and 276; S. N. Lederman, M. K. Fuerst, and H. C. Stewart, *Sopinka, Lederman & Bryant: The Law of Evidence in Canada* (6th ed. 2022), at ¶19.150).

[200] With such case law in mind, I agree with the Chief Justice that *res judicata* must be pleaded if possible. I also agree that if it is not possible to plead it, *res judicata* must be raised at the earliest opportunity, even if the only opportunity is at the hearing (para. 52). In the absence of a sufficient pleading or raising of *res judicata*, it is deemed to be waived.

[201] I also find, contrary to my colleague Martin J., that there is a related obligation to raise *res judicata* at first instance rather than for the first time on appeal. This rule necessarily emerges from the requirement that *res judicata* must be pleaded

or raised as soon as possible — if *res judicata* must be pleaded or otherwise raised as soon as possible, it follows that it must be raised at first instance. It is also affirmed by appellate jurisprudence and reinforced by the policy reasons underlying the doctrine itself.

[202] Appellate case law across the country is clear on the need to raise *res judicata* at first instance and on the effect of failing to do so. In *Dhillon*, the British Columbia Court of Appeal held that “[t]he appellants cannot now raise *res judicata* in this appeal, having not pleaded it or formally applied to raise it at trial” (para. 21). Citing *Dhillon*, the Nova Scotia Court of Appeal affirmed in *Quadrangle Holdings Ltd. v. Coady*, 2015 NSCA 13, 355 N.S.R. (2d) 324, that “if *res judicata* is not pleaded it should not be raised as a ground on appeal” (para. 42). Similarly, in *Davis v. Her Majesty the Queen in Right of the Province of Manitoba*, 2019 MBCA 78, [2019] 8 W.W.R. 567, the Manitoba Court of Appeal dismissed an appeal on the ground of *res judicata* in part because “it was raised for the first time on appeal” and because the *res judicata* test raised factual issues that were not determined at first instance by the applicable tribunal (para. 22; see also para. 21). While the court in *Davis* engaged with the general test for raising a new issue on appeal, it neither commented on nor rejected the rule that *res judicata* must be raised at first instance. Moreover, this rule has also been affirmed in secondary sources. Once more, Lange’s *The Doctrine of Res Judicata in Canada* and Handley’s *Res Judicata* both agree that *res judicata* must be pleaded or raised at first instance (Lange, at pp. 13-17; Handley, at p. 263).

[203] The policy reasons for this requirement are compelling. First, raising *res judicata* only on appeal leaves the appellate court to decide the factually anchored requirements of *res judicata* without the benefit of lower court findings. Second, if *res judicata* is not raised at first instance, the parties in the lower court once more present their case in full and a judge once more decides the case on its merits — a party who was vexed once is vexed again. Third, if *res judicata* is raised for the first time on appeal and found to apply, then the judicial resources expended in deciding the merits at first instance are wholly wasted. Fourth, not raising *res judicata* at first instance ignores the binding decision of a court of competent jurisdiction — flouting the administration of justice and opening up the possibility of inconsistent findings of fact and law.

[204] In short, fairness and finality are both undermined when *res judicata* is raised for the first time on appeal. My colleague Martin J. argues that this may only “sometimes be the case” and that “both rationales may also cut in the other direction” (para. 162). With respect, in light of the policy arguments noted above, I must disagree. Allowing *res judicata* to be raised for the first time on appeal always means that a party has been twice vexed, judicial resources have been wasted, inconsistent findings have become possible, and the interests of justice have been frustrated. While it could be argued that considering *res judicata* on appeal may promote finality and fairness going forward in certain cases, that consideration would likely occur only after the bulk of judicial resources have already been wasted and the parties have gone through the more expensive and time-consuming part of the relitigation. Moreover, such consideration

on appeal will still leave an appellate court to engage with factual and legal issues in the absence of findings below. These negative consequences are best avoided by adhering to the rules of *res judicata* that have been in place for over a century, rather than allowing parties to raise an issue late that could and should have been raised at first instance and as soon as possible. These impacts are especially unacceptable because there is rarely any reason to justify not raising this doctrine at first instance, particularly when counsel is involved.

[205] In light of the logical inconsistency between requiring *res judicata* to be pleaded or raised at the earliest opportunity and allowing it to be raised on appeal, the clarity of the case law and secondary sources, and the policy reasons supporting *res judicata* being raised at first instance, I find that it cannot be raised on appeal.

(2) *Res Judicata* Was Not Raised at First Instance and Cannot Be Argued on Appeal

[206] On the basis of these rules, Patrick Street argues that 11368 did not plead or properly raise *res judicata* in the 2019 application and therefore is estopped from raising it on appeal. 11368 argues that *res judicata* was sufficiently raised at first instance and therefore has not been waived. I agree with Patrick Street. Like my colleague Martin J., I find that neither the application, nor the hearing transcript, nor the application judge's reasons suggest that the issue of *res judicata* was raised and decided in the 2019 application. While these sources contain a discussion of the prior decision, they do not raise *res judicata*. However, I must part ways with Martin J. on

the implications of *res judicata* not having been properly raised. I find that, having not been raised or decided at first instance, the issue of *res judicata* cannot be raised on appeal. Therefore, Patrick Street’s claim must be allowed to proceed.

[207] In support of its argument that *res judicata* was sufficiently raised, 11368 notes the following statements made by its counsel at the hearing of the 2019 application:

As you noted Justice, this is an application by 11368 . . . for confirmation of monies owed to the . . . mortgagor from the power of sale proceeds and, Justice, you heard this matter previously so I’m not going to belabour the facts. You’ve heard them all; you’ve decided on them. . . .

. . .

. . . Our position with respect to that is that you considered these arguments at trial already, the Court of Appeal has also heard these arguments and agreed with you that [the Collateral Mortgage] . . . should not be considered in account whatsoever. . . . Again, those arguments were made at both levels of court and did not hold any water

. . . You have already ruled on this matter before, and the Court of Appeal ruled on it as well. These arguments were made in front of the Court of Appeal. . . . [W]hat [Patrick Street is] essentially asking you to do is now reverse your position on that [Collateral Mortgage] to say, yes, there was sufficient evidence to determine what was owing under the mortgage. . . . There has been no new evidence to establish what’s owing under that mortgage

(A.R., vol. II, at pp. 518, 523 and 534)

[208] 11368 also points to several passages in the reasons for decision on the 2019 application. It emphasizes the following statement by the application judge, referencing his reasons for decision on the 2016 applications: “I deducted the

\$4,000,000 that Patrick Street Holdings claimed . . . because Patrick Street Holdings provided no analysis of what amount, if any, may have been owing to it under the collateral mortgage” (para. 24). 11368 also raises this statement from the application judge’s reasons for decision on the 2019 application: “I have been shown nothing to cause me to change my mind on this issue; and I accept White J.A.’s affirmation of the conclusion I stated on the \$4,000,000 mortgage amount in the reasons I filed on the Originating Application” (para. 25).

[209] With respect, none of the above speaks to *res judicata*. The application documents and hearing transcript note the prior decision, but neither contains any reference to issue estoppel or cause of action estoppel, *res judicata* more broadly, or the relevant tests or case law. Neither includes any analysis of the similarities or differences between the 2016 and 2019 applications. Neither suggests that the merits of Patrick Street’s claim should not be addressed because it is barred by estoppel. Rather, the 2019 application documents and hearing transcript indicate that Patrick Street’s claim for entitlement was being argued on its merits and that it was being decided on substantially the same basis as in the 2016 applications.

[210] While I agree with the Chief Justice that the questions of how an application is *decided* and whether a matter is *raised* are distinct (para. 62), this does not mean that the reasons for decision lack utility. Rather, the reasons for decision provide useful indications of what was before the court. The reasons for decision in the

2019 application strongly suggest that the application judge did not decide the matter based on *res judicata* and that *res judicata* had not been raised.

[211] Like the application documents and hearing transcript, the application judge’s reasons give no indication that *res judicata* was before him. Instead, the excerpts indicate that the issue of Patrick Street’s claim for entitlement was argued and decided on the same evidence as in the 2016 applications. The reasons suggest that the application judge was addressing Patrick Street’s alleged entitlement on its merits and using the rationale he provided in the 2016 applications as the basis for his decision. As characterized by Hoegg J.A. in dissent, the application judge made a “simple transfer of his reasons for decision [on the 2016 applications] to his decision [on the 2019 application]” (2024 NLCA 11, at para. 647).

[212] Indeed, the alternative would cast the integrity of the application judge’s reasons into doubt. Without considering the tests for *res judicata*, a judge cannot properly consider whether applying it would further the interests of justice. Even if I accepted that *res judicata* was raised in the decision, there would be no way to determine whether the application judge’s analysis was based on issue estoppel, cause of action estoppel, or abuse of process by relitigation. He provided no analysis of any of the doctrines nor any of the factual and legal determinations necessary to apply them. Such a result would preclude meaningful appellate review and is itself unacceptable (*R. v. Sheppard*, 2002 SCC 26, [2002] 1 S.C.R. 869, at para. 28).

[213] In the absence of any tangible suggestion that the issue of *res judicata* was raised or decided, and keeping in mind the caution needed when dealing with this doctrine in the context of applications, I am of the view that the 2019 application is best understood as concerning whether the application judge should rely on his prior analysis. This explains the lack of any discussion relating to *res judicata* and makes sense of the application judge's statement that, in the 2019 application, he had been shown nothing to change his mind.

[214] Nothing in the 2019 application, hearing transcript, or decision is sufficient to show that *res judicata* was raised and adjudicated. Having not raised *res judicata* at first instance, 11368 cannot argue it on appeal. Patrick Street's claim for entitlement under its Collateral Mortgage should have been addressed on its merits by the Court of Appeal. However, for the sake of completeness, I address 11368's arguments on cause of action estoppel, issue estoppel, and abuse of process by relitigation below.

B. *Cause of Action Estoppel Does Not Bar Patrick Street's Claim*

[215] Despite the foregoing, the majority of the Court of Appeal found that cause of action estoppel applied to prevent Patrick Street from claiming payment of its Collateral Mortgage from the proceeds of the power of sale. Justice Hoegg, dissenting, did not address cause of action estoppel. Against the majority's view, Patrick Street argues that cause of action estoppel has no application, in part because the causes of action in 2016 were separate and distinct from the claim it seeks to bring. 11368, by contrast, urges our Court to find that the causes of action in 2016 encompassed, and

therefore bar, Patrick Street’s claim. For the reasons below, I agree with Patrick Street. Cause of action estoppel does not apply — the cause of action underlying Patrick Street’s claim is separate and distinct from the causes of action brought by J-3 and Mr. Cook in 2016.

(1) The Test for Cause of Action Estoppel

[216] Cause of action estoppel works to prevent the relitigation of claims that have been previously decided (*Catalyst Capital Group Inc. v. VimpelCom Ltd.*, 2019 ONCA 354, 145 O.R. (3d) 759, at para. 49; *Glenko Enterprises Ltd. v. Keller*, 2008 MBCA 24, 290 D.L.R. (4th) 712, at para. 37). It bars both the relitigation of the same cause of action and the raising of any point in subsequent proceedings that “could and should have been decided” in the prior proceeding (*Pennyfeather v. Timminco Ltd.*, 2017 ONCA 369, at para. 128; see also *Catalyst Capital*, at para. 50, citing *Hoque*, at para. 37; *Henderson v. Henderson* (1843), 3 Hare 100, 67 E.R. 313, at p. 319).

[217] I agree with the Chief Justice’s description of the test for cause of action estoppel (para. 70). That test reflects our Court’s decision in *Grandview v. Doering*, [1976] 2 S.C.R. 621, and various summaries provided in the jurisprudence (*Glenko*, at para. 38; *Cliffs Over Maple Bay Investments Ltd., Re*, 2011 BCCA 180, 17 B.C.L.R. (5th) 60, at para. 28; *Catalyst Capital*, at para. 25; *Furlong v. Avalon Bookkeeping Services Ltd.*, 2004 NLCA 46, 243 D.L.R. (4th) 153; *Sherwood Steel Ltd. v. Odyssey Construction Inc.*, 2014 ABCA 320, 5 Alta. L.R. (6th) 268; *Dosen v. Meloche Monnex*

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D.L.R. (4th) 530). I repeat it here for convenience:

- (1) There is a final decision of a court of competent jurisdiction in a prior action;
- (2) The parties to the subsequent litigation were parties to, or in privity with parties to the prior action;
- (3) The cause of action in the prior action is not separate and distinct; and
- (4) The basis of the cause of action and the subsequent action were argued or could have been argued in the prior action, if the parties had exercised reasonable diligence.

In the context of this case, both the third element of the test and the definition of cause of action require more discussion.

[218] For cause of action estoppel to apply, the implicated causes of action must not be “separate and distinct”. Only subsequent proceedings that arise “out of the same relationship, and the same subject matter, as the adjudicated action” are barred (*Lehndorff Management Ltd. v. L.R.S. Development Enterprises Ltd.* (1980), 19 B.C.L.R. 59, at pp. 64-65). It applies even if the relationship between the parties and

the subject matter are the same but the claim is “based upon a different legal conception of the relationship between the parties” (pp. 64-65). Cause of action estoppel is not defeated by manipulating the underlying facts to advance a new legal theory (*Catalyst Capital*, para. 58).

[219] This third element relies on a proper understanding of “cause of action”. This term of art has been defined many times. In *Danyluk*, Binnie J. held that a cause of action comprises “every fact which it would be necessary for the plaintiff to prove, if disputed, in order to support his or her right to the judgment of the court” (para. 54; see also *Canadian Imperial Bank of Commerce v. Green*, 2015 SCC 60, [2015] 3 S.C.R. 801, at paras. 51 and 191; *Markevich v. Canada*, 2003 SCC 9, [2003] 1 S.C.R. 94, at para. 27). To similar effect, in *Air Canada v. McDonnell Douglas Corp.*, [1989] 1 S.C.R. 1554, at p. 1564, our Court found that a cause of action “comprises certain facts which, if proven, establish a plaintiff’s right to the remedy sought from the defendant”.

[220] However, the brevity of these definitions belies the complex nature of causes of action. They are not simply sets of facts, nor are they abstract legal theories. Rather, a cause of action is a set of *material facts* that allow a *particular person* to bring a *claim* for legal redress against *another particular person*. This is why the third element of the test for cause of action estoppel queries both the factual matrix and the relationships that ground a claim that is based on those facts. It also helps to explain the source of the “illusive nature of a separate and distinct cause of action” (Lange, at p. 155).

[221] This composite structure also explains why causes of action may share some material facts while still being separate and distinct. As affirmed by the majority of the Alberta Supreme Court, Appellate Division, in *Hall v. Hall and Hall's Feed & Grain Ltd.* (1958), 15 D.L.R. (2d) 638, at p. 646, “if there are facts which are common to several causes of action, an inquiry into these facts in one cause of action does not prevent an examination of the same facts where another cause of action is set up, provided that this cause of action is separate and distinct” (cited affirmatively in *Sherwood Steel*, at para. 24, and *Smode v. Deveaux* (1996), 216 A.R. 20 (C.A.), at para. 2; see also *Grandview*, at pp. 635-36). Or, as our Court noted in *Danyluk*: “It is apparent that different causes of action may have one or more material facts in common” (para. 54).

(2) Patrick Street's Claim of Entitlement Is Not Barred by Cause of Action Estoppel

[222] 11368 argues that Patrick Street's claim for entitlement under its Collateral Mortgage is barred because the cause of action in the 2016 applications required establishing the value, validity, and priority of the encumbrances on Kenmount, including the Collateral Mortgage. It argues that this cause of action subsumed Patrick Street's claim in the 2019 application. I cannot accede to 11368's argument. The causes of action brought by J-3 and Mr. Cook in 2016 are not the same as either 11368's cause of action in its 2019 application or Patrick Street's claim under its Collateral Mortgage. Therefore, Patrick Street is not estopped from bringing forward its claim for entitlement.

[223] Indeed, focusing on the material facts and the relationships at the core of the proceedings in 2016 and 2019 demonstrates their many distinctions. In the 2016 applications, J-3 and Mr. Cook sought payment of their charges on Kenmount, in priority to Patrick Street's Collateral Mortgage. To establish their right to such payment, J-3 and Mr. Cook had to prove the material facts associated with the validity of their charges on Kenmount and the amounts to which they were entitled under those charges. Those facts emerged from J-3's lien and Mr. Cook's mortgage documents registered on Kenmount. The respective relationships that gave rise to these claims were that of J-3 as lienholder and 11368 as lienee, and Mr. Cook as mortgagee and 11368 as mortgagor. While Patrick Street was a respondent in the 2016 applications, its involvement was based only on its status as the mortgagee who triggered the power of sale. It had no other relationship with J-3's or Mr. Cook's claims for payment. Of course, given the power of sale context, J-3 and Mr. Cook had to address whether their charges were to be paid out in priority to Patrick Street's Collateral Mortgage.

[224] In the 2019 application, 11368 claimed that it was owed the surplus from the power of sale. To prove a right to this remedy, it had to show that all valid charges on Kenmount had been paid out and that it was the person entitled to the mortgaged property under the *Conveyancing Act*, R.S.N.L. 1990, c. C-34. The relationships implicated in this claim were those between 11368 and all of the various encumbrancers on Kenmount. For its part, Patrick Street claimed its own right to payment from the power of sale proceeds based on its Collateral Mortgage. That right derived from the material facts demonstrating the validity of and the amount owing under its Collateral

Mortgage and the relationship between Patrick Street as mortgagee and 11368 as mortgagor.

[225] The above summary indicates that the material facts and the relationships that formed the causes of action in the 2016 and 2019 applications were separate and distinct. In 2016, J-3 and Mr. Cook claimed priority and a right to payment based on their registered encumbrances and their relationships with 11368. In 2019, 11368 claimed the surplus from the power of sale and Patrick Street claimed a right to payment against 11368 based on its Collateral Mortgage. Each claim for a remedy relied on distinct material facts consisting of disparate underlying transactions and registered documents and a different relationship with 11368. These relationships were not merely formal titles; they were the very bases on which each claim rested. Without them, none of the claims or applications could have been brought. Any apparent overlap amongst these causes of action pertains only to the issue of priority that arose in the power of sale context. In short, the claims are separate and distinct, and there is no cause of action estoppel.

[226] In response, 11368 argues that both proceedings are best understood as establishing the value, validity, and priority of the encumbrances on Kenmount. I disagree. This characterization is based on the fact that the 2016 applications emerged from challenges to Patrick Street's accounting of the proceeds of sale. While the accounting was certainly part of the dispute between the parties, this characterization

is too broad and risks conflating the mechanism by which the claims were brought with the essence of the claims, and therefore the causes of action themselves.

[227] Indeed, the application judge saw the task before him as focusing only on the priority and payment of J-3's and Mr. Cook's claims. In his reasons for decision on the 2016 applications, he noted that J-3 and Mr. Cook each claimed that "their charges on the Kenmount Terrace properties rank in priority to some other charges on the property" (para. 3). The issue he saw himself as resolving was how the "J-3 Consulting lien and the John Cook mortgages rank amongst the various charges affecting the Kenmount Terrace properties" (para. 4). In accord with this issue statement, his order addressed only the priority and payment of J-3's and Mr. Cook's claims and the awarding of costs (para. 68). It made no mention of the validity or invalidity of Patrick Street's claim for entitlement under its Collateral Mortgage. While the application judge noted that his task required him to examine the "various charges affecting" Kenmount, that examination was explicitly focused on "the priorities between the various charges", not a full resolution of the value, validity, priority, and payment of each charge (para. 3 (emphasis added)).

[228] The application judge's understanding of the narrow issue before him in the 2016 applications is reflected in the jurisprudence he assessed and applied. He dealt extensively with case law and statutes relating to priorities. He discussed the *Mechanics' Lien Act*, R.S.N.L. 1990, c. M-3 (paras. 5-11), and case law concerning the priority of mechanics' liens relative to mortgages. He addressed jurisprudence on the

validity and priority of collateral mortgages relative to both mechanics' liens and regular mortgages (paras. 32-42). He did not, by contrast, cite anything relating to mortgage law, the law of guarantees, or the interpretation of contracts or mortgages.

[229] Moreover, while he discussed other encumbrances on Kenmount by virtue of their relationship to the priorities of J-3's and Mr. Cook's encumbrances and the broader context of the accounting, the application judge did not exhaustively adjudicate all the encumbrances on Kenmount. He made no order with respect to 11368 and its entitlement to any residue, nor did he otherwise indicate what was to occur with the \$4.2 million left over from the power of sale. For example, the application judge's final table summarizing the charges made no mention of any entitlement to the surplus — further suggesting that he was not seized of what would happen with the proceeds from the power of sale beyond the payments to J-3 and Mr. Cook. This is reinforced by the fact that, though he affirmed them in his reasons, the application judge made no order with respect to: (1) Ms. Cheeke's mortgages; (2) two mechanic's liens held by persons other than J-3; or (3) five mortgages held by Patrick Street or its affiliates. If this was meant to be a comprehensive determination as to the distribution of the proceeds of sale, it fell far short. This further confirms that the accounting was the trigger for J-3's and Mr. Cook's applications in 2016 rather than the cause of action underpinning those applications.

[230] 11368 uses the Court of Appeal's reasons with respect to the 2016 applications to support the argument that Patrick Street is to receive nothing for its

Collateral Mortgage. With respect, those reasons have little relevance and offer no clear support for 11368's argument. The question before our Court is what was decided in the 2016 and 2019 applications, not what was stated on appeal. The Court of Appeal merely affirmed the decision of the application judge on the 2016 applications. As discussed above, that decision was narrow and concerned only the determination of priority and payment of J-3's and Mr. Cook's charges. The Court of Appeal's conclusion that it would "uphold the decision of the Applications Judge in finding that there should be no payment under the \$4,000,000 mortgage in priority to the J-3 Consulting lien or the Cook mortgages" supports this (2019 NLCA 69, 94 C.L.R. (4th) 230, at para. 63 (emphasis added)).

[231] In closing, I would add that it is unclear whether cause of action estoppel should apply when the allegedly estopped party never brought forward its claim — i.e., its cause of action — at all. Recall that a cause of action constitutes the material facts and the relationships that ground a "plaintiff's right to the remedy sought from the defendant". A cause of action is a claim brought by a particular plaintiff against a particular defendant. Patrick Street did not bring such a claim. Patrick Street was not a "plaintiff" seeking payment from 11368 as "defendant" in the 2016 applications. Nor is this a case of litigation by installment, where Patrick Street effectively seeks to rechallenge the priority and payment of J-3's and Mr. Cook's encumbrances by raising a new defence or claim that it could have raised previously. Rather, Patrick Street accepts those payments and the ruling on priority and now advances a claim for its own payment for the first time. The application judge's discussion of the Collateral

Mortgage was not a consequence of Patrick Street claiming its entitlement. Instead, it emerged in response to challenges that J-3 and Mr. Cook levied against the priority of the Collateral Mortgage.

[232] In this context, I agree with Patrick Street that the idea that it should be estopped from bringing forward a cause of action when it has never brought that claim forward at all does “not easily fit” into the cause of action estoppel analysis (A.F., at para. 122). Rather, the question of whether Patrick Street’s claim was “necessarily put in issue” by its response to J-3’s and Mr. Cook’s claims and is therefore barred falls to be addressed in issue estoppel — not cause of action estoppel (Wagner C.J.’s reasons, at para. 122).

C. Issue Estoppel Does Not Bar Patrick Street’s Claim

[233] The majority of the Court of Appeal held, with respect to the 2019 application, that Patrick Street’s claim was barred by issue estoppel. Hoegg J.A. dissented, finding that issue estoppel did not apply, that none of its elements were met, and that even if it did apply she would exercise her discretion not to bar Patrick Street’s claim. Before our Court, Patrick Street argues that the majority erred in the application of issue estoppel, and 11368 argues that it applies to bar Patrick Street’s claim. I agree with Patrick Street. Issue estoppel does not apply in the present circumstances. I come to this conclusion because it was not necessary for the application judge to adjudicate the issue of Patrick Street’s claim for entitlement to come to his decision on the 2016 applications.

(1) The Test for Issue Estoppel

[234] Our Court discussed issue estoppel at length in *Danyluk*. Justice Binnie, writing for a unanimous Court, affirmed (at para. 24) the following description of this doctrine provided by Middleton J.A. in *McIntosh v. Parent*, [1924] 4 D.L.R. 420 (Ont. S.C. (App. Div.)), 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.

[235] Of importance for this appeal, issue estoppel does not apply if the allegedly barred question “arose collaterally or incidentally in the earlier proceedings or is one which must be inferred by argument from the judgment” (*Danyluk*, at para. 24, quoting *Angle v. M.N.R.*, [1975] 2 S.C.R. 248, at p. 255). Rather, to be barred by estoppel, the question or issue must have been “fundamental to the decision arrived at” in the earlier proceedings; it must have been “necessarily (even if not explicitly) determined in the earlier proceedings” (para. 24). In other words, issue estoppel “extends to the issues of fact, law, and mixed fact and law that are necessarily bound up with the determination of that ‘issue’ in the prior proceeding” (para. 54).

(2) Patrick Street’s Claim of Entitlement Is Not Barred by Issue Estoppel

[236] 11368 argues that the question of “whether Patrick Street, in distributing the sale proceeds from the sale of Kenmount Terrace, was permitted [to] keep \$4 million itself or whether this had to be provided to other parties” was conclusively determined in the 2016 applications and was therefore barred by estoppel in the 2019 application (R.F., at para. 34). I disagree. This question was not decided in the 2016 applications and, even if it had been, it was not essential or necessary for the court’s adjudication of the applications before it. Therefore, there is no issue estoppel.

[237] First, Patrick Street’s claim for entitlement under its Collateral Mortgage was not adjudicated in the 2016 applications. As noted above, the claim in the 2016 applications concerned the priority and payment of J-3’s and Mr. Cook’s encumbrances. In that context, Patrick Street defended the relative priority of its Collateral Mortgage against J-3’s and Mr. Cook’s arguments that their charges ranked above its encumbrance. Patrick Street was unsuccessful, and the application judge determined that the charges of J-3 and Mr. Cook ranked higher in priority.

[238] Indeed, the application judge did not expressly rule on Patrick Street’s mortgage in his decision on the 2016 applications. He said that he made “no allowance for this mortgage in the accounting” (para. 62). But that statement must be read alongside the purpose of the 2016 applications — to determine priority and payment for J-3 and Mr. Cook. This understanding was confirmed on appeal, where the Court of Appeal agreed, in its decision on the 2016 applications, “that there should be no payment under the \$4,000,000 mortgage in priority to the J-3 Consulting lien or the

Cook mortgages” (para. 63 (emphasis added)). This ruling makes sense given that the application judge’s finding was not based on the invalidity of the mortgage but rather on a lack of analysis as to its precise value. Because the application judge did not address whether Patrick Street was ever entitled to payment under its Collateral Mortgage, this issue is not estopped by the 2016 applications.

[239] Second, even if it is assumed that Patrick Street’s claim for entitlement was conclusively adjudicated, that adjudication would not have been essential or necessary to decide J-3’s and Mr. Cook’s claims, and therefore it is not barred by estoppel. In the 2016 applications, the court had to decide whether J-3’s and Mr. Cook’s charges should be paid from the power of sale in priority to Patrick Street’s claim for entitlement. Adjudicating Patrick Street’s claim was not necessary or fundamental to this determination.

[240] Once certain charges, like the directions to pay, were removed by the application judge, there was enough money from the proceeds of sale to pay for the claims of J-3, Mr. Cook, and Patrick Street. The application judge’s findings on this matter are clear: even after J-3’s and Mr. Cook’s encumbrances were paid out, there remained roughly \$4.2 million in surplus from the proceeds of the power of sale. There were, therefore, sufficient funds from the power of sale to pay Patrick Street, J-3, and Mr. Cook. Once this determination was made, there was no need to determine whether the Collateral Mortgage was to be paid out from the proceeds of sale. There was no conflict between the payments sought by J-3 and Mr. Cook through their 2016

applications and the entitlement of Patrick Street under the Collateral Mortgage that would make a final determination of Patrick Street's payment essential or necessary. Because of this, any decision relating to the Collateral Mortgage was incidental and not binding with respect to Patrick Street's claim.

[241] Even had there been insufficient funds to pay J-3, Mr. Cook, and Patrick Street, Patrick Street's claim for entitlement would still not have been a necessary issue for the application judge. The 2016 applications concerned the priority and payment of J-3's and Mr. Cook's encumbrances. Determining the payment of J-3's and Mr. Cook's encumbrances implicated the relative priority of the Collateral Mortgage, but not its value or payment, once the Collateral Mortgage was found to rank lower than the other charges. Simply put, the question of Patrick Street's entitlement under its Collateral Mortgage — rather than the mere priority of that mortgage — was not essential or necessary to determine the 2016 applications. The issue of Patrick Street's entitlement, therefore, is not barred by estoppel.

D. *Abuse of Process by Relitigation Does Not Bar Patrick Street's Claim*

[242] Unlike *res judicata*, because abuse of process by relitigation concerns the inherent right of courts to protect their processes, there is no requirement that abuse of process by relitigation must have been raised at first instance (*Toronto (City)*, at para. 37; *Gough v. Newfoundland and Labrador*, 2006 NLCA 3, 253 Nfld. & P.E.I.R. 1, at para. 50; *Fieldbloom v. Olympic Sport Togs Ltd.* (1955), 63 Man. R. 47 (C.A.)). It is therefore properly before our Court and was properly before the Court of Appeal. To

that effect, 11368 argues that, even if *res judicata* does not apply, abuse of process by relitigation operates so as to bar Patrick Street’s claim. Again, I cannot accede to this argument. For much of the same reasons discussed above, there has simply been no relitigation.

[243] 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 (*Toronto (City)*, at para. 37, citing *Canam Enterprises Inc. v. Coles* (2000), 51 O.R. (3d) 481 (C.A.), at para. 55, per Goudge J.A., dissenting). It has been applied to “preclude relitigation in circumstances where the strict requirements of issue estoppel . . . 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” (para. 37). While abuse of process does not have the specific requirements of *res judicata*, that does not mean the doctrine should be too readily applied (see paras. 37, 42 and 51). A finding of abuse of process gives rise to extraordinary remedies that should be applied sparingly and only in the clearest cases (*Glenko*, at para. 56; *Lange*, at p. 200).

[244] Abuse of process by relitigation has no application in this case. As I have found above, there has been no relitigation. Without relitigation, there is no basis for concluding that judicial economy, consistency, finality, or the integrity of the administration of justice would be harmed by allowing Patrick Street’s claim to proceed. This doctrine is applied by courts to protect their proceedings from abusive

conduct, not to correct confusion and misunderstanding about what was decided between parties. This is not one of the clearest cases where the doctrine of abuse of process should be applied.

E. *Cause of Action Estoppel, Like Issue Estoppel and Abuse of Process by Relitigation, Is Discretionary, and I Would Not Apply Any of These Doctrines in the Circumstances*

[245] I agree with the Chief Justice and Martin J. that cause of action estoppel is discretionary — even when its test is met, a judge retains the discretion to not bar the matter in question. This provides courts with the flexibility necessary to ensure that justice is done in each case and aligns cause of action estoppel with the discretion provided under the related doctrines of issue estoppel and abuse of process by relitigation. Like my colleague Martin J., I find that in the case at hand, if cause of action estoppel, issue estoppel, or abuse of process by relitigation had applied, I would have exercised my discretion to not apply any of those doctrines. This case has been defined by ambiguity and confusion. On the basis of this confusion, a valid \$4 million mortgage has been rendered worthless to Patrick Street, though 11368 retained both the initial benefit for which it granted the mortgage and now the monies meant to secure that mortgage. This confusion and injustice weigh heavily against barring Patrick Street’s claim.

(1) There Is Discretion to Not Apply Cause of Action Estoppel

[246] Alongside the reasons noted by the Chief Justice and Martin J., I find that both the treatment of discretion under related doctrines and the weight of appellate case law favour the recognition of a discretion to not apply cause of action estoppel. However, that discretion must be understood narrowly and should be used only in rare cases.

[247] While our Court has not expressly confirmed judicial discretion in the context of cause of action estoppel, it has clearly affirmed judicial discretion under the closely related doctrines of issue estoppel and abuse of process by relitigation, both of which are similarly built upon the pillars of finality and fairness (see *Figliola*, at para. 33). In *Danyluk*, our Court affirmed judicial discretion in the context of issue estoppel (see paras. 63-64). It advised courts assessing whether to apply issue estoppel to “stand back and, taking into account the entirety of the circumstances, consider whether application of issue estoppel in the particular case would work an injustice” (para. 80). In *Toronto (City)*, at para. 52, our Court cited *Danyluk*, at para. 80, and found that there is judicial discretion with respect to abuse of process. In so finding, our Court noted that there “may be instances where relitigation will enhance, rather than impeach, the integrity of the judicial system” (para. 52), alluding to “many circumstances in which the bar against relitigation, either through the doctrine of *res judicata* or that of abuse of process, would create unfairness” (para. 53).

[248] While our Court has said little about cause of action estoppel, judicial discretion in this context has been affirmed by appellate courts in Ontario, British

Columbia, Alberta, Manitoba, New Brunswick, and Nova Scotia, often relying on the decisions or rationale in *Danyluk*, *General Motors of Canada Ltd. v. Naken*, [1983] 1 S.C.R. 72, or *Toronto (City) (Toronto (City) v. Canadian Union of Public Employees, Local 79* (2001), 55 O.R. (3d) 541 (C.A.), at para. 95; *Schweneke v. Ontario* (2000), 47 O.R. (3d) 97 (C.A.); *Ontario (Attorney General) v. Bear Island Foundation* (1999), 126 O.A.C. 385, at paras. 31-32; *574095 Alberta Ltd. v. Hamilton Brothers Exploration Co.*, 2003 ABCA 34, 10 Alta. L.R. (4th) 23, at para. 37; *Glenko*, at para. 52; *James v. British Columbia*, 2007 BCCA 547, 288 D.L.R. (4th) 380, at paras. 51, 57 and 66; *Williams v. Kameka*, 2009 NSCA 107, 282 N.S.R. (2d) 376, at paras. 45-47; *Singh v. McHatten*, 2012 BCCA 286, 33 B.C.L.R. (5th) 251, at para. 24, citing *Fournogerakis v. Barlow*, 2008 BCCA 223, 80 B.C.L.R. (4th) 290, at para. 16; *McNichol v. Co-operators General Insurance Company*, 2006 NBCA 54, 298 N.B.R. (2d) 44, at para. 23; *Sackville (Town) v. Canadian Union of Public Employees, Local 1188*, 2007 NBCA 18, 313 N.B.R. (2d) 147, at para. 33).

[249] However, the discretion with respect to cause of action estoppel is not unlimited. Rather, as this Court held in *Naken* and *Danyluk*, it must be constrained. In *Danyluk*, at para. 63, our Court described the basis of this discretion in part by quoting from the Court of Appeal for Ontario’s decision in *Schweneke*, at paras. 38 and 43:

The exercise of the discretion is necessarily case specific and depends on the entirety of the circumstances. In exercising the discretion the court must ask — is there something in the circumstances of this case such that the usual operation of the doctrine of issue estoppel would work an injustice?

...

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

I adopt the same understanding in the context of cause of action estoppel. However, I agree with the Chief Justice that the discretion under cause of action estoppel is somewhat narrower given the breadth of the fourth element of its test, which will likely capture issues that would motivate the use of discretion under issue estoppel (para. 89).

(2) Had I Found That Patrick Street’s Claim Was Barred, I Would Have Exercised My Discretion to Let It Proceed

[250] Like my colleague Martin J., had I found that cause of action estoppel, issue estoppel, or abuse of process by relitigation applied, I would nonetheless have exercised my discretion to not bar Patrick Street’s claim. Keeping in mind the caution that the use of *res judicata* in the context of applications requires, and considering the entirety of the circumstances, I would have found that barring Patrick Street’s claim would work an injustice. I would therefore have refused to apply any form of estoppel.

[251] This case has been rife with uncertainty and ambiguity over what was actually raised and decided in the 2016 and 2019 applications. Each party’s characterizations of what was decided are widely divergent and the record is, at best, unclear. A lack of clarity surrounding what was in the contemplation of the parties as being decided previously increases the potential for injustice and raises questions akin to issues of procedural fairness. Indeed, all of the signs suggest that the final

determination of Patrick Street's claim for entitlement was not in the contemplation of Patrick Street. The 2016 applications sought only the priority and payment of J-3's and Mr. Cook's encumbrances, not a final determination of all issues relating to the accounting. The application judge characterized the issue before him as one of priority and payment, not all encumbrancers were present, and the payment of all encumbrances was not sought. In this setting, it is difficult to see how Patrick Street could have contemplated that the value and validity of all encumbrances on Kenmount, including its own, were going to be conclusively determined.

[252] This confusion supported what appears to be a windfall for 11368. Hoegg J.A.'s dissent in the Court of Appeal's decision on the 2019 application provided an extensive analysis to ground her finding that Patrick Street is entitled to be paid from the proceeds of sale of Kenmount under its Collateral Mortgage. I will not repeat that analysis. However, she noted that 11368 attained considerable benefit from the Collateral Mortgage and if Patrick Street's claim were barred, not only would Patrick Street receive nothing for its mortgage, but also 11368 would gain \$4 million. In the context of the uncertainty noted above, Hoegg J.A.'s reasons raise a significant doubt as to the justice of Patrick Street receiving nothing from its mortgage while 11368 received its initial benefit and the collateral that secured that benefit.

[253] Balancing the public interest in the finality of litigation with the public interest in ensuring that justice is done in each case justifies allowing Patrick Street's claim to proceed on its merits.

IV. Conclusion and Disposition

[254] *Res judicata* and abuse of process by relitigation are essential doctrines for protecting the administration of justice and ensuring fairness for litigants. Yet if applied without due attentiveness, they may rob litigants of their cherished ability to have their cases heard on the merits — upsetting the balance between fairness and finality. In the context of summary proceedings, such as applications, this potential for injustice is significantly amplified. Inattentiveness to this context would discourage litigants from using summary proceedings, which save time, money, and judicial resources. Balance and caution are essential.

[255] The case at bar demonstrates this imperative. Confusion and ambiguity over both what was to be decided in the applications below and what was actually decided by the court has led to claims that an admittedly valid \$4 million mortgage, provided as collateral security between two sophisticated businesses, is all but worthless. This has occurred despite there being little substantive analysis regarding the actual terms of that mortgage. As a result of this confusion and ambiguity, arguments of *res judicata* were addressed on appeal when they were not raised at first instance, and an alleged entitlement that was never properly before a court of competent jurisdiction for determination was deemed to be barred by estoppel. The merits of Patrick Street’s claim should be heard in an application that is actually devoted to hearing them.

[256] However, the record before our Court is insufficient to deal with Patrick Street's claim for entitlement. This question received little comment at first instance and was not addressed by the majority of the Court of Appeal. It was only lightly argued before our Court. As a result, I would allow the appeal and remit the matter back for a hearing of Patrick Street's claim on the merits.

[257] As a final note, I agree with the Chief Justice that this is not the kind of case where an elevated costs award or an award against Patrick Street's solicitors is appropriate. Even had I found that this matter was barred by estoppel and constituted an abuse of process, I would not have made such an order. At best, this dispute can be characterized as being the result of confusion, not bad faith or sharp practice.

Appeal dismissed with costs, KARAKATSANIS, CÔTÉ and MARTIN JJ. dissenting.

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