S.C.C. No.: 33266

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA)

BETWEEN:

HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF BRITISH COLUMBIA AS REPRESENTED BY THE ATTORNEY GENERAL OF BRITISH COLUMBIA

APPELLANT (RESPONDENT)

AND:

RIPUDAMAN SINGH MALIK, RAMINDER MALIK and JASPREET SINGH MALIK

RESPONDENTS (APPELLANTS)

FACTUM OF THE APPELLANT (HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF BRITISH COLUMBIA AS REPRESENTED BY THE ATTORNEY GENERAL OF BRITISH COLUMBIA)

(Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada*)

Jonathan Eades
Counsel for the Appellant

Ministry of the Attorney General
Legal Services Branch
3rd Floor, 1001 Douglas Street
Victoria, B.C. V8W 9J7
Tel. : (250) 387-2789
Fax : (250) 356-8653
Email : jonathan.eades@gov.bc.ca

Pierre Landry
Ottawa Agent for Counsel for the Appellant

Noël & Associés, s.e.n.c.r.l.
111, rue Champlain
Gatineau, Québec J8X 3R1
Tel. : (819) 771-7393
Fax : (819) 771-5397
Email : p.landry@noelassocies.com

THÉMIS MULTIFACTUM INC.
4, rue Notre-Dame Est, bur. 100, Montréal (Québec) H2Y 1B7
Téléphone : 514 866-3565 Télécopieur : 514 866-4861
info@multifactum.com www.multifactum.com

Bruce E. McLeod
Counsel for the Respondent
Ripudaman Singh Malik

Bruce E. McLeod
1120 – 1040 West Georgia Street
Vancouver, B.C. V6E 4H1
Tel. : (604) 682-3133
Fax : (604) 682-3161
Email : bmcleod1@telus.net

Marie-France Major
Ottawa Agent for Counsel for the Respondent

Lang Michener LLP
300-50 O'Connor Street
Ottawa, Ontario K1P 6L2
Tel. : (613) 232-7171
Fax : (613) 231-3191
Email : mmajor@langmichener.ca

Thomas Manson
Counsel for the Respondent
Raminder Malik

Forstrom Jackson
1200 – 625 Howe Street
Vancouver, B.C. V6C 2T6
Tel. : (604) 685-8757
Fax : (604) 661-0759
Email : trm@fjlaw.ca

Marie-France Major
Ottawa Agent for Counsel for the Respondent

Lang Michener LLP
300-50 O'Connor Street
Ottawa, Ontario K1P 6L2
Tel. : (613) 232-7171
Fax : (613) 231-3191
Email : mmajor@langmichener.ca

Self-Represented Respondent

Jaspreet S. Malik
200 – 6330 Fraser Street
Vancouver, B.C. V5W 3A4
Tel. : (604) 321-3232
Fax : (604) 325-0093
Email : jsmalik@southfraserlaw.com

Marie-France Major
Ottawa Agent for Jaspreet S. Malik

Lang Michener LLP
300-50 O'Connor Street
Ottawa, Ontario K1P 6L2
Tel. : (613) 232-7171
Fax : (613) 231-3191
Email : mmajor@langmichener.ca

THÉMIS MULTIFACTUM INC.
4, rue Notre-Dame Est, bur. 100, Montréal (Québec) H2Y 1B7
Téléphone : 514 866-3565 Télécopieur : 514 866-4861
info@multifactum.com www.multifactum.com

FACTUM OF THE APPELLANT

Authorities

S.C.C. No.: 33266

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA)

BETWEEN:

HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF BRITISH COLUMBIA AS REPRESENTED BY THE ATTORNEY GENERAL OF BRITISH COLUMBIA

APPELLANT (RESPONDENT)

AND:

RIPUDAMAN SINGH MALIK, RAMINDER MALIK and JASPREET SINGH MALIK

RESPONDENTS (APPELLANTS)

FACTUM OF THE APPELLANT
(HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF BRITISH COLUMBIA AS REPRESENTED BY THE ATTORNEY GENERAL OF BRITISH COLUMBIA)
(Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada*)

PART I: OVERVIEW AND STATEMENT OF FACTS

A. Overview

1. This appeal raises the question of whether a superior court judge on an interlocutory application may consider the uncontested factual findings of a prior judicial decision as *prima facie* evidence for any purpose.

2. The British Columbia Court of Appeal (the "Court of Appeal") ruled in this case that such prior judicial findings are inadmissible for any purpose on an interlocutory Anton Piller application unless issue estoppel or abuse of process has been established in respect of each of the findings.

3. Her Majesty the Queen in right of the Province of British Columbia (the "Province") submits that the Court of Appeal erred in so ruling for two principal reasons.

4. First, the Court of Appeal erred by applying an unjustifiably exclusionary approach to the admissibility of prior judicial findings on interlocutory applications. The Province submits that the better approach is to recognize that such findings are admissible as *prima facie*, rebuttable evidence on the application.

5. Second, the effect of the Court of Appeal's decision was to interfere with the inherent jurisdiction of the judge to control the superior court's process. Specifically, by requiring the judge to make a final determination on the legal questions of issue estoppel and abuse of process at an interlocutory stage, the Court of Appeal interfered with the inherent jurisdiction of a judge in chambers to defer to trial the final determination of such legal questions. Further, the Court of Appeal unjustifiably bound the eventual trial judge to certain factual findings that it

considered were issue estopped, again amounting to an interference with the inherent jurisdiction of the superior court.

B. Background Facts

6. On June 23, 1985, a bomb exploded on Air India flight 182 over the Atlantic Ocean resulting in the deaths of 329 passengers and crew. On the same day, a second bomb exploded at Tokyo's Narita airport, killing two baggage handlers and injuring a number of other people. The Respondent, Ripudaman Singh Malik ("R.S. Malik"), was one of the persons accused of perpetrating these acts; he was charged on October 27, 2000. The criminal trial (the "Air India trial") commenced on April 28, 2003, and ended on March 16, 2005, with R.S. Malik being acquitted.

Reasons for Judgment of the Chambers Judge, Appellant's Record ("A.R."), Volume I, page 33, para. 1

7. On November 20, 2001, R.S. Malik sought funding from the Province for his defence costs in the Air India trial on the basis that his assets could not be readily liquidated. Although the Province says there was some doubt concerning R.S. Malik's actual financial situation, on or about March 21, 2002, it entered into interim funding arrangements, which included an acknowledgement on the part of R.S. Malik that he was not entitled to such funding unless he had committed all of his resources to his defence, and gave a covenant not to encumber, or to allow the encumbrance of his assets.

Reasons for Judgment of the Chambers Judge, A.R., Volume I, page 33, para. 2

8. On or about August 6, 2002, R.S. Malik and the Province reached a further agreement (the "Defence Counsel Agreement"). The Defence Counsel Agreement

contained similar provisions to the interim funding agreements, and also provided that R.S. Malik would cooperate in the transfer of all of his assets to the Province and would assist in the identification of those assets.

Reasons for Judgment of the Chambers Judge, A.R., Volume I, page 33, para. 3

9. R.S. Malik did not transfer his assets to the Province as promised and in January 2003, the Province gave R.S. Malik notice that it would terminate the Defence Counsel Agreement if he did not execute an indemnity. R.S. Malik refused to do so.

Reasons for Judgment of the Chambers Judge, A.R., Volume I, page 43, para. 11

10. On May 14-15, 2003, the Province brought an application before Tysoe J. with respect to the disclosure of financial information from R.S. Malik and a request for security by the Province for further funding of R.S. Malik's defence. Justice Tysoe adjourned the Province's application for security, made orders regarding the disclosure of financial information by R.S. Malik, and restrained R.S. Malik from "altering, disposing of, or encumbering in any way, any interest he has in any real or personal property wheresoever situated."

Reasons for Judgment of the Chambers Judge, A.R., Volume I, page 43, para. 11
Affidavit No. 1 of Gordon Houston sworn October 19, 2007 (the "Houston Affidavit"), A.R., Volume III, page 2, para. 6 and Exhibit "A", page 18, paras. 4 and 5

11. In August 2003, R.S. Malik applied to the British Columbia Supreme Court for relief from the obligation to contribute to the funding of his defence costs on the basis of indigency ("Rowbotham Application").

Reasons for Judgment of the Chambers Judge, A.R., Volume I, page 43, para. 12

12. Commencing August 5, 2003, Justice Stromberg-Stein heard some 10 days of evidence at the Rowbotham Application. The Respondents – R.S. Malik, Raminder Kaur Malik ("R.K. Malik"), the wife of R.S. Malik, and their son, Jaspreet Singh Malik ("J.S. Malik"), a lawyer - and certain other adult Malik children swore affidavits and testified in support of R.S. Malik's application for government funding.

Reasons for Judgment of the Chambers Judge, A.R., Volume I, page 43, para. 13
Houston Affidavit, A.R., Volume III, page 3, paras.9 and 10

13. On September 19, 2003, Justice Stromberg-Stein dismissed the Rowbotham Application. Justice Stromberg-Stein provided written reasons for judgment (the "Rowbotham Reasons"), which included the following findings of fact (the "Rowbotham Findings"):

- At his bail hearing in December, 2000, a Personal Net Worth Statement was filed on behalf of R.S. Malik and R.K. Malik indicating a net worth of $11,648,439.85;
- In November, 2001, R.S. Malik approached the Attorney General ("AG") to fund his defence and asserted that he had assets but those assets were not in cash form and liquidating them would require time;
- In February, 2002, negotiations between R.S. Malik's counsel and the AG led to an interim funding agreement;
- The funding agreement was entered into so funding could commence immediately and the AG advanced funds in good faith based on R.S. Malik's representations;
- Subsequently, R.S. Malik claimed he was insolvent because his assets were insufficient to discharge his liabilities, including debt owed to unsecured creditors, all of whom were family members;

- The evidence establishes a collective effort by R.S. Malik and the Malik family members to diminish the value of his estate;

- The assets of R.S. Malik and his family are so interconnected as to be fused. The Malik family has conducted its affairs such that all assets were jointly held for the benefit of all. Assets and income are pooled for one common enterprise;

- Title to the Marguerite Street home is in R.K. Malik's name alone. The land was purchased and the home constructed from joint funds. The Maliks shared all expenses;

- Regarding property in India, the Maliks provided numerous contradictory explanations concerning both the value and the ownership of this property;

- Regarding the allegation that Gurdip Malik loaned R.S. Malik $330,000 US, the evidence shows these funds were received from Gurdip Malik's company, Papillon Eastern Imports Ltd. in Los Angeles, and used to pay business and personal expenses, and to reduce the line of credit;

- J.S. Malik was instrumental in obtaining and arranging the registration of a security agreement against R.S. Malik's shares in the hotel;

- There is evidence of collusion to secure Gurdip Malik's loan before this hearing and to reduce R.S. Malik's equity in the hotel;

- There is no record of outstanding wages now claimed, dating as far back as 1994 and up to 1997. No formal records were kept regarding the hours worked by the children;

- Although confusing, the evidence establishes the Maliks never intended to pay their children and the children never contemplated they would be paid;

- Following R.S. Malik's arrest his family continued to transfer, give away and buy luxury vehicles. A 1999 $108,000 Mercedes, purchased by R.S. Malik with joint funds, was transferred to R.K. Malik while he was incarcerated. R.K. Malik elected to repay the car loan before it was due;

- R.K. Malik gave away her 1998 Land Rover of unknown value;

- Evidence about the purchase of the Lexus is inconsistent and confusing. In March 2001 the Maliks' son Hardeep purchased a $35,000 Lexus with joint funds. He then borrowed that amount and lent it to Khalsa Developments Ltd. The loan was paid off by Khalsa Developments Ltd.;

- The Maliks' son Darshan purchased a $22,000 Chevy Blazer with joint funds in 2003;

- The Maliks reported charitable donations for the years 1994 to 2000 of $564,729.97. Of that amount, $512,612.97 was donated to either Satnam Education Society or Satnam Trust, which were headed by R.S. Malik;

- In violation of a court order not to dispose of any assets, $72,000 from R.S. Malik's income tax refund was placed in a joint account and used to pay business debt. This money was repaid to the Province during this application;

- R.S. Malik's agreement to contribute to the cost of his defence, as outlined in the Defence Counsel Agreement, is a compelling consideration. R.S. Malik failed to liquidate his assets;

- R.S. Malik and R.K. Malik have manipulated facts to suit their particular needs as evidenced by the representations at the bail hearing about the value of the Maliks' assets;

- The evidence shows that R.S. Malik and his family have tried to arrange his financial and business affairs to minimize the value of his estate, to render him insolvent, and to therefore limit the amount of his contribution, or to eliminate that obligation entirely; and

- Any perceived cash shortage is artificial and contrived.

Reasons for Judgment of the Chambers Judge, A.R., Volume I, page 43, para. 13; pages 56-58, para. 43

14. On October 17, 2003, notwithstanding the dismissal of the Rowbotham Application, the Province negotiated a further agreement (the "Payment Agreement") with R.S. Malik and his solicitors. Under the Payment Agreement, R.S. Malik acknowledged that he was indebted to the Province for all sums advanced under the Defence Counsel Agreement. He further agreed to transfer all of his assets to the Province. The Payment Agreement set out terms by which future fees would be paid until the end of the trial.

Reasons for Judgment of the Chambers Judge, A.R., Volume I, page 44, para. 15

Houston Affidavit, A.R., Volume III, Exhibit "E", page 97, section C

15. On December 13, 2005, the Province demanded repayment of $5,200,131.51 paid under the Defence Counsel Agreement and $1,681,526.33 paid under the Payment Agreement. This sum was adjusted downward in R.S. Malik's favour by $72,498.81 for monies paid into court. R.S. Malik has paid the Province the amount due under the Payment Agreement, but has not transferred his assets to the Province.

Reasons for Judgment of the Chambers Judge, A.R., Volume I, page 49, paras. 24-25

16. On October 23, 2007, the Province brought an action against R.S. Malik in debt for $5,200,131.31 plus prejudgment interest, for advances made to fund R.S. Malik's defence costs in the Air India trial.

Statement of Claim filed October 23, 2007, A.R., Volume II, pages 1-26

17. In addition to the claim in debt, the Province alleges that R.S. Malik and his wife, R.K. Malik, and three of his sons, along with named corporate entities controlled by the Malik family, conspired to, and defrauded the Province in wrongfully assisting R.S. Malik to avoid his obligations under the funding agreements entered into with the Province. The Province alleges that the Rowbotham Application was one of the material elements in a scheme of the Respondents to defraud the Province.

Statement of Claim filed October 23, 2007, A.R., Volume II, pages 13-14, paras. 27-28; pages 16-21, paras. 37-43

18. The same day the Statement of Claim was filed, the Province appeared *ex parte* in chambers before Justice McEwan (the "Chambers Judge") and obtained an Anton Piller Order (the "AP Order"), and a Mareva Injunction (the "Mareva Injunction") against R.S. Malik, R.K. Malik, and their son, J.S. Malik. The AP Order was

immediately executed, and all materials obtained pursuant to it have remained in the custody of the supervising solicitors.

Oral Reasons for Judgment of the Chambers Judge, A.R., Volume I, pages 3-6

19. In support of its *ex parte* application, the Province filed evidence, including an affidavit of senior counsel for the Ministry of Attorney General, Gordon Houston, which attached the Rowbotham Reasons as an exhibit.

Houston Affidavit, A.R., Volume III, Exhibit "D", pages 57-94

20. In addition to the Rowbotham Reasons, the Province placed additional evidence before the Chambers Judge, including a series of transactions and family dealings with respect to property owned by R.S. Malik, both before and after the Rowbotham Application. Such properties included R.S. Malik's residence (the "Marguerite Street Property") and a downtown Vancouver property (the "Hamilton Street Property"). In the submission of the Province, such transactions demonstrated that the financial disclosure of R.S. Malik was neither complete nor accurate and also revealed a significant risk that evidence relevant to the Province's claims in its action may disappear if an AP Order is not obtained.

Reasons for Judgment of the Chambers Judge, A.R., Volume I, pages 44-45, paras. 16-17; page 49, para. 27
Houston Affidavit, A.R., Volume III, page 4, para. 14; pages 8-10, paras. 30-31

21. These transactions were effected by members of the South Fraser Law Group and its predecessor, Unterman and Associates, a law firm with which R.S. and R.K. Maliks' son, the defendant J.S. ("Jaspreet") Malik, is associated.

Reasons for Judgment of the Chambers Judge, A.R., Volume I, pages 44-45, para. 16

22. With respect to such transactions, Gordon Houston testified as follows:

> "As a result of the Reasons for Judgment of the Honourable Madam Justice Stromberg-Stein, I verily believe that Jaspreet Malik took steps to assist Mr. Malik in arranging his financial and business affairs to minimize the value of his estate, to render him insolvent, and to therefore limit the amount of his contribution to the sums advanced by the Province, or to eliminate that obligation entirely."

Houston Affidavit, A.R., Volume III, page 12, para. 39

C. Findings of the Chambers Judge

23. On January 21-25 and 31, 2008, a hearing ("Review Hearing") was held, again before the Chambers Judge, to review the execution of the AP Order and to hear applications brought by the Respondents to set aside the AP Order and the Mareva Injunction. R.S. Malik and R.K. Malik filed affidavit evidence for the Review Hearing. J.S. Malik did not.

Reasons for Judgment of the Chambers Judge, A.R., Volume I, page 32
R.S. Malik Affidavit, A.R., Volume II, pages 77-80
R.K. Malik Affidavit, A.R., Volume II, pages 106-110

24. The Respondents' sworn evidence at the Review Hearing did not deny or rebut the Province's allegations or take issue with the Rowbotham Findings.

25. In reasons dated July 31, 2008, the Chambers Judge dismissed the Respondents' applications.

Reasons for Judgment of the Chambers Judge, A.R., Volume I, pages 31-101

26. The Chambers Judge found that the Province had made out a strong *prima facie* case of fraud and conspiracy, based on the Rowbotham Findings and on the other evidence filed before him.

Reasons for Judgment of the Chambers Judge, A.R., Volume I, page 50, para. 30; page 69, para. 61

27. In respect of arguments raised as to *res judicata*, the Chambers Judge expressly left it open for the Respondents to take issue with the Rowbotham Findings and the other evidence filed by the Province at trial. The Chambers Judge stated:

> From the perspective of a court assessing evidence with a view to ensuring that the positions of the parties are protected ***until the facts can be determined at trial***, arguments about the legal limits of *res judicata* and witness immunity will not defeat a strong fact based *prima facie* case that the defendants have acted in ways that are inconsistent with their contractual and other legal obligations. The allegation that aspects of the defendants' dealings or behaviour have been the subject of a series of adverse rulings in another proceeding, will not, ***in the absence of material facts demonstrating that the rulings were effectively unfounded or irrelevant***, be negated by abstract arguments unattached to actual findings of fact. The legal arguments that the defendants submit the Province should have made on their behalf do not (now that they have been made by the defendants' representatives), suffice to overcome the *prima facie* case that has been put on largely uncontroverted allegations of fact. [emphasis added]

Reasons for Judgment of the Chambers Judge, A.R., Volume I, page 69, para. 61

D. Findings of the Court of Appeal

28. On May 7, 2009, the Court of Appeal set aside the AP Order against all of the Respondents, and set aside the Mareva Injunction against all of the Respondents except R.S. Malik.

Reasons for Judgment of the Court of Appeal, A.R., Volume I, pages 105-138

29. The Court of Appeal acknowledged that the Chambers Judge had the inherent jurisdiction to grant the AP Order and the Mareva Injunction, but found that he had

erred in determining that a *prima facie case* had been established. In particular, the Court of Appeal found that the Chambers Judge erred in admitting as evidence any of the Rowbotham Findings that did not meet the tests for issue estoppel or abuse of process.

Reasons for Judgment of the Court of Appeal, A.R., Volume I, page 120, para. 26; page 126, para. 38; page 136, para. 62

30. The Court of Appeal found that the majority of the Rowbotham Findings were inadmissible because the doctrines of issue estoppel and abuse of process do not prevent the defendants from relitigating those facts. The Court held as follows:

> [26] ... Unless the *Rowbotham* findings were admissible on the basis that the defendants were bound by them and could not challenge them, it was not sufficient for the Crown to rely on the *Rowbotham* findings as establishing a strong *prima facie* case and say that it would prove its case at trial by introducing other evidence.
>
> ...
>
> [38] It follows, in my view, that the only *Rowbotham* findings admissible on the application for the *Mareva* injunction were the findings that Mr. Malik could look to his own assets to raise funds, that Mr. Malik could look to the income and assets of his family to fund his defence costs because their assets were fused and that, as a result, Mr. Malik had the means to pay for, or make a contribution towards, his defence costs. The remaining Rowbotham findings were not admissible because the doctrines of issue estoppel and abuse of process do not prevent the defendants from relitigating those facts. In my opinion, the admissible *Rowbotham* findings, together with the supplemental facts contained in the affidavits filed by the Crown, do not establish a strong *prima facie* case of fraud or a real risk of dissipation of assets by the defendants. Accordingly, it is my view that the injunction should be set aside, at least as against the defendants other than Mr. Malik.
>
> ...
>
> [64] ... In my opinion the admissible evidence did not establish a strong *prima facie* case of fraud or show a real possibility the defendants will destroy any incriminating documents that may be in their possession.
>
> [65] Therefore it is my view that the *Anton Piller* order should not have been granted on the basis of the admissible evidence before the Court.

PART II: STATEMENT OF THE QUESTIONS IN ISSUE

31. This appeal raises two main issues:

    1. In the context of an interlocutory *ex parte* application, was the Court of Appeal correct in law in disallowing the evidentiary use of a prior judicial determination, and more particularly, in holding that the Rowbotham Findings - except to the extent that they were binding and met the tests for issue estoppel or abuse of process - were wholly inadmissible for any purpose?

    2. Was the Court of Appeal correct in interfering with the inherent jurisdiction of a superior court judge to defer until trial the decision as to the final evidentiary use of the uncontested findings of a prior judicial decision of a fellow superior court judge?

32. The Province maintains that both issues should be answered in the negative.

33. In respect of these two issues, the Province has identified five principal errors that it submits were committed by the Court of Appeal. The Province's argument is structured in reference to these five errors, set out below in the Introduction section to Part III of this factum.

PART III: STATEMENT OF ARGUMENT

Introduction

34. The Court of Appeal set aside the AP Order on the basis that, in its view, most of the Rowbotham Findings were inadmissible in determining whether a strong *prima facie* case had been established.

35. In so deciding, the Court of Appeal ruled that uncontested factual findings in a prior judicial decision were inadmissible for any purpose on an interlocutory application unless the tests for issue estoppel or abuse of process were fully met in respect of such findings. In two passages which contain the core of its analysis, the Court of Appeal reasoned as follows:

> [26] ... Unless the *Rowbotham* findings were admissible on the basis that the defendants were bound by them and could not challenge them, it was not sufficient for the Crown to rely on the *Rowbotham* findings as establishing a strong *prima facie* case and say that it would prove its case at trial by introducing other evidence.
> ...
> [38] ...The remaining Rowbotham findings were not admissible because the doctrines of issue estoppel and abuse of process do not prevent the defendants from relitigating those facts....

36. The Court of Appeal cited no legal authority in support of its broad exclusionary ruling on the admissibility of prior judicial findings. For the reasons that follow, the Province respectfully submits that the Court of Appeal's ruling was erroneous for at least five reasons:

A. Issue estoppel and abuse of process are not rules of evidentiary admissibility;

B. The Court of Appeal's ruling was inconsistent with the duty of full and frank disclosure on Anton Piller applications;

C. The Court of Appeal unjustifiably interfered with the superior court's inherent jurisdiction to control its process;

D. The Court of Appeal erred in applying a strict exclusionary rule to the admissibility of prior judicial rulings on interlocutory applications; and

E. The Court of Appeal applied the test for issue estoppel too restrictively

A. Issue estoppel and abuse of process are not rules of evidentiary admissibility

37. As noted above, the Court of Appeal found that uncontested findings in a prior judicial decision were inadmissible for any purpose on an interlocutory application unless the tests for issue estoppel and abuse of process were fully met in respect of such findings.

38. In so ruling, it appears that the Court of Appeal confused doctrines relating to control of the superior court's process (i.e. issue estoppel and abuse of process) with a rule of evidentiary admissibility.

39. In particular, the Court of Appeal appears to have collapsed three separate questions into one, namely:

1. are prior judicial findings admissible evidence on an interlocutory application?;
2. if prior judicial findings are admissible evidence, are the Respondents entitled to adduce evidence to rebut the prior judicial findings?; and

3. should a final decision concerning the conclusive effect of evidence, if any, including determinations on issue estoppel and abuse of process, be made at the interlocutory stage or deferred to trial?

40. It is in respect of the second and third questions, and not the first, that the doctrines of abuse of process and issue estoppel become relevant. In other words, these doctrines are traditionally asserted defensively as an estoppel or "shield" against vexatious relitigation of issues and not, as the Court of Appeal appeared to assume, as a "sword" to establish admissibility of evidence.

41. As will be argued more fully below, it is commonly more appropriate for the conclusive effect of evidence to be addressed by the trial judge in light of all the evidence and not by a chambers judge on an interlocutory application, who will in many cases not have access to all the necessary facts or full legal argument from all parties.

42. Furthermore, contrary to the Court of Appeal's conclusion in this case, the fact that prior judicial findings could in law be relitigated at trial because they do not meet the strict test for issue estoppel or amount to an abuse of process does not *ipso facto* make these findings inadmissible for any purpose on an interlocutory application. In the Province's submission, the admissibility of such findings is conceptually distinct from the applicability of the doctrines of issue estoppel and abuse of process.

43. Indeed, on an interlocutory application it is permissible and frequently necessary to rely on hearsay evidence that may be inadmissible at trial. As with other forms of hearsay evidence on a preliminary application, the evidentiary value of prior judicial findings should generally be addressed as a matter relating to weight and not admissibility.

44. In this case, the Province submits that the Rowbotham Findings were admissible evidence on an interlocutory application for at least three reasons.

45. First, the evidence of the Rowbotham Findings was hearsay, but the evidence was properly entered by an affidavit on an interlocutory application. The British Columbia *Rules of Court* permit evidence to be sworn on information and belief on an interlocutory application where the source of the information is given. In this instance, the Houston Affidavit provided the source of information and belief.

British Columbia Rules of Court, Rule 51(10)
Houston Affidavit, A.R., Volume III, pages 1-16

46. Second, even if the evidence had not been properly sworn on information and belief, it is submitted that the evidence met the two criteria for admissible hearsay set out in *R. v. Khan*, [1990] 2 S.C.R. 531, namely, necessity and reliability.

47. With respect to necessity, the Province submits that at the time of the *ex parte* application, no other admissible evidence was available to the Province apart from the Rowbotham Findings and the other evidence filed with the Chambers Judge. As is common when allegations of fraud are made, the Anton Piller application was brought at the outset of litigation, meaning that no pre-trial discovery of evidence had taken place.

48. With respect to reliability, it is submitted that there are few hearsay sources with better *prima facie* guarantees of reliability than a previous judicial decision. Moreover, the Province emphasizes that the Rowbotham Findings were never appealed nor contested by the Respondents in their applications to set aside the AP Order and the Mareva Injunction.

49. Third, the Rowbotham Application and the Rowbotham Reasons were pleaded by the Province as material facts in respect of the alleged fraud and conspiracy. As such, the Province was required to place these material facts before the Chambers Judge, as discussed in the next section of the argument.

Statement of Claim filed October 23, 2007, A.R., Volume II, pages 13-14, paras. 27-30; pages 16-21, paras. 37-43

B. The Court of Appeal's ruling was inconsistent with the duty of full and frank disclosure on Anton Piller applications

50. The Province submits that the Court of Appeal's rigid exclusionary approach to the admissibility of prior judicial decisions in this case is inconsistent with the well-known duty on *ex parte* applicants to make full and frank disclosure of all materials facts to the court.

51. Recent cases have found that positions taken by the parties before other courts in related litigation ought to be disclosed as material facts on an Anton Piller application.

52. In *Netbored Inc. v. Avery Holdings Inc.*, [2005] F.C.J. No. 1723 (T.D.), a judge on an Anton Piller review motion considered that the duty of full and frank disclosure required counsel on an *ex parte* Anton Piller application to inform the court of ongoing discussions between counsel with respect to parallel litigation in another court.

53. In *Top Star Distribution Group Inc. v. Sigma*, [2000] F.C.J. No. 41 (T.D.), a judge set aside an Anton Piller order for material non-disclosure, including non-

disclosure of a lawsuit in the United States involving companies related to the plaintiff with respect to ownership of the trade-marks in issue.

54. Failure to disclose a prior judicial decision was considered a breach of the duty of full and frank disclosure in *Havana House Cigar & Tobacco Merchants Ltd v. Jane Doe*, [1999] F.C.J. No 1225 (T.D.). In that case, Reed J. reviewed Anton Piller executions in a trade mark dispute. Plaintiff's counsel advised the court that "review of the five [Anton Piller] executions should be expected to take about 5-10 minutes in total." No one appeared on behalf of the Defendant. Justice Reed noted that he had previously rejected an interlocutory injunction in a similar action brought by the plaintiff and on his own initiative he considered other court files brought by the same plaintiff against different defendants, all seeking to assert trade-mark rights with respect to cigars.

55. As a result of such inquiry, Reed J. learned that plaintiff's counsel had failed to advise the court that in one of the plaintiff's similar actions, Rothstein J. (as he then was), had previously criticized the plaintiff for proceeding by way of an interlocutory injunction on a second occasion instead of proceeding to have its rights adjudicated at trial. Justice Reed concluded that the prior judicial decision of Justice Rothstein was relevant to his Anton Piller review hearing for the following reasons:

> [t]he fact that evidence, essentially the same as that filed in support of an Anton Piller order, when tested in a contested action was found insufficient to support an interlocutory injunction, is very relevant to the renewal or continued operation of an Anton Piller order. The motion for issuance of an Anton Piller is ex parte and often heard in camera. *As such, there is a heavy duty on the requesting party to disclose all relevant factors. Mr. Justice Rothstein's decision was a relevant factor.* [emphasis added]

Havana House Cigar & Tobacco Merchants Ltd v. Jane Doe, at para. 25

56. Justice Reed carried out no analysis of the application of the doctrines of issue estoppel or abuse of process to determine whether the prior judicial decision of Rothstein J. was admissible. The Province submits that this makes sense given that Anton Piller orders are interim, not final.

57. The Province submits that it would make little sense for Anton Piller applicants to be required to make full and frank disclosure of prior judicial decisions if, due to the rigid exclusionary rule of evidence adopted by the Court of Appeal in this case, courts in most applications would be precluded from considering such prior decisions for any purpose at all.

58. Further, a requirement that prior judicial findings be conclusive evidence as a precondition for admissibility suggests a more onerous requirement for applicants seeking Anton Piller orders than previously accepted. In *Celanese Canada Inc. v. Murray Development Corp.*, [2006] 2 S.C.R. 189, this Court confirmed that an application for an Anton Piller order needed to establish a strong *prima facie* case, not a conclusive case.

59. In sum, the Chambers Judge, like Justice Reed in *Havana House Cigar*, properly considered the Rowbotham Reasons as a material fact that needed to be disclosed in the Anton Piller Application, and properly decided that the Rowbotham Findings were admissible for consideration as *prima facie* evidence on the application.

C. The Court of Appeal unjustifiably interfered with the superior court's inherent jurisdiction to control its process

60. The principal justification given by the Court of Appeal for its decision to interfere with the Chambers Judge's decision was its view that the Chambers Judge had erred by considering inadmissible evidence.

61. However, the Province submits that this was a mischaracterization of the Chambers Judge's decision. Contrary to the Court of Appeal's view, the ruling of the Chambers Judge was not in fact a final ruling on evidentiary admissibility of the Rowbotham Findings but, more fundamentally, a deferral to trial of a final ruling on legal questions such as issue estoppel and abuse of process. In this respect, it is more accurate to state that the Chambers Judge made a ruling on control of the court's process within the superior court's inherent jurisdiction, which is subject to a high level of appellate deference, rather than a final evidentiary ruling, which is subject to a lesser level of deference.

62. The Province maintains that the control of process decision made by the Chambers Judge was consistent with the caution that this Court provided in *Danyluk v. Ainsworth Technologies Inc.,* [2001] 2 S.C.R. 460 at para. 33 that "the rules governing issue estoppel should not be mechanically applied".

63. By contrast, with respect, it appears that the Court of Appeal was mechanical in its application of the doctrine of issue estoppel: first, in finding that this doctrine needed to be applied at an interlocutory stage; and second, in apparently merging issue estoppel and abuse of process into a single test, thereby disregarding the directives of this Court that these tests are distinct and the issue estoppel test is more flexible: *Toronto (City) v. Canadian Union of Public Employees (C.U.P.E.)*, Local 79, [2003] 3 S.C.R. 77.

a. Inherent jurisdiction includes control of process

64. The inherent jurisdiction of the superior court to control its own process has long been recognized as a cornerstone of the rule of law in Canada.

MacMillan Bloedel Ltd. v. Simpson, [1995] 4 S.C.R. 725 at paras. 29-30

65. In his seminal article on the topic, I.H. Jacob identified the following attributes of inherent jurisdiction:

> 1. [It] is exercisable as part of the process of the administration of justice. It is part of procedural law ... and not of substantive law; it is invoked in relation to the process of litigation.
>
> 2. ...[I]t is exercisable by summary process ... generally without waiting for the trial or for the outcome of any pending or other proceeding ....
>
> 3. ...[It] may be invoked not only in relation to the litigant parties in pending proceedings, but in relation also to anyone, whether a party or not, and in respect of matters which are not raised as issues in the litigation between the parties ....

I.H. Jacob, (1970), 23 *Current Legal Problems* 23, pages 24-25

66. The inherent jurisdiction of the superior court should not be confused with discretion. Jacob makes the following comment at page 25:

> The inherent jurisdiction of the court is a concept which must be distinguished from the exercise of judicial discretion. These two concepts resemble each other, particularly in their operation, and they often appear to overlap, and are therefore sometimes confused the one with the other. There is nevertheless a vital juridical distinction between jurisdiction and discretion, which must always be observed.

67. Recent appellate court authorities have similarly confirmed the importance of distinguishing between jurisdiction and discretion, a distinction that the Province submits was not made clear by the Court of Appeal in this case.

Clear Creek Contracting Ltd. v. Skeena Cellulose Inc., [2003] B.C.J. No. 1335 (C.A.) at para. 46
Stelco Inc. (Re), [2005] O.J. No. 1171 (C.A.) at paras. 36-38
Reasons for Judgment of the Court of Appeal, A.R., Volume I, page 116, para.19

68. It is well established that there is a substantial onus on a party seeking to appeal the exercise of a superior court's inherent jurisdiction to control its own process, and that an appellate court should not interfere with such an exercise of jurisdiction unless the superior court has made "some clear error in legal principle, a palpable and overriding error of fact, or if the decision would result in a patent injustice".

Central Halifax Community Assn. v. Halifax (Regional Municipality), [2007] N.S.J. No. 135 (C.A.)

b. Inherent jurisdiction includes deferral of a final ruling on conclusive effect of evidence to trial

69. The superior court's inherent jurisdiction to control its own process includes, in the submission of the Province, the jurisdiction on an interlocutory application to defer until trial final ruling on legal issues such as issue estoppel, abuse of process and the conclusive effect of evidence.

70. The jurisdiction to defer to trial such final rulings exists for at least two reasons. First, chambers judges on interlocutory applications generally do not have the benefit of all the evidence and full legal argument that would be available to the trial judge.

71. Second, where a chambers judge makes a binding ruling on legal questions such as issue estoppel and abuse of process at an interlocutory stage, such ruling has the effect of pre-emptively binding the trial judge. Given the incomplete information often available to a chambers judge at an early stage in the process, there is a serious risk in many cases that such a pre-emptive ruling could jeopardize the fairness of the trial process.

72. Some of the foregoing concerns were addressed and explained by Arbour J. (as she then was) in *Risi Stone Ltd. v. Omni Stone Corp.*, [1989] O.J. No. 103 (H.C.J.), a case which considered the admissibility of an affidavit making use of portions of the Canadian Industrial Design file history on a motion for an interlocutory injunction. On the grounds that the application was interlocutory in nature and that legal issues relating to admissibility could be resolved later at trial, Justice Arbour decided to admit the evidence and consider the objections as going to the weight of the evidence, but to defer to trial a final legal ruling on admissibility.

73. *Consumers Automart Ltd. v. Hyundai Auto Canada,* [1991] B.C.J. No. 2574 (S.C.) also involved an application for an injunction. Newbury J. (as she then was) deferred to trial the legal question whether the parol evidence rule applied to the plaintiff's evidence of an alleged oral contract.

74. More generally, in *Manitoba (Attorney General) v. Metropolitan Stores Ltd.,* [1987] 1 S.C.R. 110, this Court considered the difficulty or impossibility to decide the merits at an interlocutory stage, in that instance in a constitutional case. Justice Beetz stated as follows for the Court:

> even in cases where the plaintiff had a serious question to be tried or even a prima facie case, the court is generally much too uncertain as to the facts and the law to be in a position to decide the merits.

Manitoba (Attorney General) v. Metropolitan Stores Ltd., at para. 50

75. The Chambers Judge followed an approach consistent with these authorities. However, the Court of Appeal overrode the Chambers Judge on a control of process decision, effectively deciding that the Chambers Judge did not have the jurisdiction to put over to trial the final determination on the legal questions of issue estoppel and abuse of process, or the conclusive effect of the Rowbotham Findings.

76. In so doing, it is submitted that the Court of Appeal unjustifiably interfered with the power of a superior court to control its process. Whereas *Simpson*, *supra*, considered, in the Province's submission, an inadvertent "horizontal erosion" of the superior court's powers by Parliament, the present case concerns "vertical erosion" of the superior court's inherent jurisdiction through the Court of Appeal substituting its opinion on process over that of a superior court judge and by misconstruing as discretionary what was in fact jurisdictional.

D. The Court of Appeal erred in applying a strict exclusionary rule to the admissibility of prior judicial rulings on interlocutory applications

a. The "long shadow" of *Hollington v. Hewthorn*

77. The Court of Appeal cited no legal authority in support of its conclusion that an exclusionary principle of law applies to prevent admission into evidence of a prior civil decision, or the factual findings therein, on an interlocutory application for any purpose absent a finding of issue estoppel or abuse of process.

78. However, in applying a strict exclusionary rule, it appears the Court of Appeal relied at least impliedly on a line of cases dating back to a decision of the English Court of Appeal in *Hollington v. Hewthorn & Company Limited*, [1943] K.B. 587, in

which the Court of Appeal adopted a strict exclusionary rule in respect of the use of prior criminal convictions as evidence in subsequent civil cases.

79. *Hollington* concerned the evidentiary use of a criminal conviction for careless driving in a civil action. The plaintiff died before the civil action was commenced and the administrator of the estate sued and tendered the careless driving conviction as *prima facie* evidence of the defendant's negligence. The Court of Appeal rejected the use of the conviction even as *prima facie* evidence.

80. Leading scholars and several appellate courts have criticized *Hollington*. Sopinka, for instance, has referred to the "injustice of the rule" to the extent that it allows a convicted criminal to avoid the implications of his or her wrongdoing in a subsequent civil proceeding.

> Sopinka, Lederman & Bryant, *The Law of Evidence in Canada*, 3rd Edition, Butterworths, 2009, pages 1340-1341

81. Lord Denning commented on *Hollington* as follows:

> ...there is a strange rule of law which says that a conviction is no evidence of guilt, not even prima facie evidence. That was decided in *Hollington v. Hewthorn & Co., Ltd.* I argued that case myself and did my best to persuade the court that a conviction was evidence of guilt. But they would not have it. I thought that the decision was wrong at the time. I still think it is wrong.

> *Goody v. Odhams Press, Ltd.*, [1966] 3 All E.R. 369 (C.A.), at pages 371-372

82. Shortly after the *Odhams Press* decision, the English Parliament enacted s. 11 of the *Civil Evidence Act* 1968 (c. 64) and overrode *Hollington*. Other jurisdictions, including British Columbia, Ontario and Alberta, have also enacted legislation to counteract the effect of *Hollington*, insofar as the use of criminal convictions in subsequent proceedings is concerned.

Evidence Act, R.S.B.C. 1996 c. 124. s. 71
Evidence Act, R.S.O. 1990 c. E.22, s. 22.1, as amended by S.O. 1995, c. 6, s. 6
Alberta Evidence Act, R.S.A. 1980, c. A-21, s. 26

83. The New Zealand Court of Appeal ruled in *Jorgensen v. News Media (Auckland) Ltd.,* [1969] N.Z.L.R. 961 (C.A.), that *Hollington* was wrongly decided and was not part of the law in that country. The Court of Appeal conducted an extensive review of English authorities prior to and following *Hollington* and questioned not only on whether that case was correctly decided but also whether the English Court of Appeal was entitled to decide *Hollington* as it did given prior, contrary authorities of the Privy Council in *Harvey v. The King*, [1901] A.C. 601 and the English Court of Appeal in *Harvey, Hill v. Clifford*, [1907] 1 Ch. 420.

84. North P. found in *Jorgensen* as follows:

> In my opinion then the question submitted to this Court should be answered thus: in the present case proof of the conviction of the plaintiff Jorgensen of the murder of Speight, while not conclusive of his guilt, is evidence admissible in proof of the fact of guilt. Whether such evidence discharges the evidentiary burden of proof at any stage of the trial will be for the Court to decide on the evidence tendered.

Jorgensen v. News Media (Auckland) Ltd., page 980, lines 37-43.

85. It is uncertain whether, and to what extent, *Hollington* currently forms part of the common law of Canada. In *Foncière Cie d'Assurance de France v. Perras*, [1943] S.C.R. 165, Justice Davis of this Court, sitting on a five-member panel, cited *Hollington* without analysis and in *obiter dicta*. No other decision of this Court has referred to *Hollington* since.

86. In Ontario, the courts have clearly rejected *Hollington* as part of the common law. In *Demeter v. British Pacific Life Insurance Co.*, [1984] 48 O.R.(2d) 266 (C.A.), the Court of Appeal stated with respect to *Hollington* that "the fact that the defendant

driver in that case had been convicted of careless driving at the time and the place of the accident did not amount to even prima facie evidence of his negligent driving at that time and place, is not the law of Ontario."

87. One year after *Demeter*, a separate panel of the Ontario Court of Appeal confirmed its rejection of *Hollington*. In *Re Del Core,* [1985] O.J. No. 2548 (C.A.), the Ontario College of Pharmacists admitted in evidence a criminal conviction concerning acts of fraud by a pharmacist. The College made a finding of professional misconduct. On appeal, the Divisional Court set aside this finding on the basis of a statutory provision which stated "nothing is admissible in evidence before a discipline committee that would be inadmissible in a court in a civil case...." A majority of the Ontario Court of Appeal then reversed the Divisional Court decision and restored the College's finding of professional misconduct.

Re Del Core, at para. 61

88. Each member of the panel in *Re Del Core* wrote reasons and all agreed that *Hollington* was not good law in Ontario. Justice Blair reasoned as follows:

> Since evidence of prior convictions only affords prima facie proof of guilt it follows that its effect may be countered in a variety of ways. For example, the conviction may be challenged or its effect mitigated by explanation of the circumstances surrounding the conviction. It is both unnecessary and imprudent to attempt any exhaustive enumeration. The law in Ontario is only now emerging from the long shadow cast over it by the decision in *Hollington v. Hewthorn*, supra. It would be highly undesirable to replace this arbitrary rule by prescribing equally rigid rules to replace it. The law should remain flexible to permit its application to the varying circumstances of particular cases.

Re Del Core, at para. 61

89. In the context of admissibility of prior civil judgments, legislatures in Canada have adopted a tailored approach, excluding admissibility in some circumstances where policy considerations dictate. For example, in Ontario, legislative provisions have been enacted preventing the admission in civil proceedings of a wide class of documents generated from professional disciplinary proceedings, including decisions made in such proceedings. In *M.F. v. Sutherland*, [2000] O.J. No. 2522 (C.A), Justice Laskin explained the policy rationale for this admissibility prohibition for documents arising from a proceeding under a health profession act:

> to encourage the reporting of complaints of professional misconduct against members of a health profession, and to ensure that those complaints are fully investigated and fairly decided without any participant in the proceedings - a health professional, a patient, a complainant, a witness or a College employee - fearing that a document prepared for College proceedings can be used in a civil action.

M.F. v. Sutherland, at paras. 29-31
Section 36(3) of the *Regulated Health Professions Act* ,S.O. 1991, c. 18

90. A separate panel of the Court of Appeal confirmed this policy rationale in *Task Specific Rehabilitation Inc. (c.o.b. TSR Clinics) v. Steinecke,* [2004] O.J. No. 3159 (C.A.).

91. In the present appeal, there is no legislative provision preventing admission of documents from another proceeding such as was at issue in *Sutherland*, *supra*, nor do the policy considerations discussed in *Sutherland* apply in this case. Accordingly, absent acceptance of a *Hollington*-type common law principle of inadmissibility, a prior judicial decision ought to be *prima facie* admissible evidence.

92. In British Columbia, the law in relation to the admissibility of prior judgments has developed differently than in Ontario and *Hollington* has continued to affect decisions on the admissibility of prior judicial decisions, though often implicitly. For

instance, the British Columbia Court of Appeal in *Dhillon v. Dhillon*, [2006] B.C.J. No. 3008 (C.A.) accepted *Meshwa* v. *Meshwa* (1970), 75 W.W.R. 459 (B.C.S.C.) as authority for the proposition that civil judgments are inadmissible in a subsequent civil proceeding. The court in *Meshwa* noted that *Hollington* had been strongly criticized, yet viewed that it was bound to follow an earlier decision, *Lingor* v. *Lingor*, [1955] B.C.J. No. 120 (S.C.), which, in turn, had relied upon *Hollington* as good law.

Dhillon v. *Dhillon,* at paras. 57-61
Meshwa v. *Meshwa,* at para. 6
Lingor v. Lingor, at para. 4

b. Hollington should not form part of Canadian Law

93. Justice Blair observed in *Re Del Core* that *Hollington* has "cast a long shadow" in Canadian law. This appeal provides this Court with an opportunity to remove the shadow by clarifying the extent, if any, to which the strict exclusionary rule established in *Hollington* forms part of the law of Canada, at least in respect to the admissibility of prior civil judgments on interlocutory applications.

94. The approach that the Province proposes as an alternative to *Hollington* finds support in *Harvey*, *supra.* In *Harvey*, the Privy Council set aside a default judgment against a party, relying on the factual findings in a court order from a prior civil proceeding. In the prior proceeding, a Master found as follows: "Harvey is of unsound mind and is incapable of managing his affairs" (page 605). In a subsequent civil proceeding, default judgment was taken against Harvey.

95. A petition was brought to set aside the default judgment, supported by an attorney's affidavit, attaching the Master's order as an exhibit. The judge of first instance relied on the findings of fact in the prior judicial decision and set aside the

default judgment. The Supreme Court of Ceylon reversed, but the Privy Council restored the decision of first instance, finding as follows:

> [Counsel] was bold enough to contend that the orders in Lunacy were not admissible in evidence in these proceedings at all, and that the Courts in Ceylon were justified in paying no attention to them. Their Lordships are not prepared to accede to this contention. The orders are not conclusive evidence of anything except their own existence; but, being made by a competent tribunal in a matter within its jurisdiction, they cannot be rejected as inadmissible, or as no evidence of the truth of the facts recited in them which are essential to their validity. They are admissible as prima facie evidence and if uncontradicted they ought to be regarded as sufficient evidence of those facts, not only in this country, but in all His Majesty's dominions.

Harvey v. The King, at page 611

96. As mentioned, the approach in *Harvey* was accepted by the English Court of Appeal in *Hill v. Clifford*, by the New Zealand Court of Appeal decades later in *Jorgensen*, and subsequently by the Ontario Court of Appeal in *Re Del Core*. It is submitted that this approach, whereby prior judicial decisions are admissible as *prima facie*, rebuttable evidence, ought to be confirmed by this Court, certainly insofar as interlocutory applications are concerned.

c. *Hollington* is inapplicable on the facts of this case

97. In the alternative, the Province submits that even if *Hollington* is found by this Court to represent the law of Canada, it addresses a different circumstance than found in the present appeal in several respects and is therefore distinguishable.

98. First, *Hollington* concerned the use of a prior conviction for the purposes of making a final ruling on the merits in a subsequent civil trial. At issue in this appeal is the use of a prior judicial decision for the purposes of making an interlocutory ruling to

preserve evidence pending a final determination at trial. Unlike *Hollington*, the Chambers Judge did not purport to rely upon the Rowbotham Findings to make any final ruling on the merits in this case.

99. Second, in *Hollington* and similar cases, the alleged wrong gave rise to two separate and distinct *after the fact* proceedings: in the example of *Hollington*, a car accident, followed by criminal and civil actions. By contrast, in this case the alleged wrong of fraud and conspiracy gave rise to only one proceeding, namely the case at bar. Rather than seeking to introduce a prior judicial finding or ruling from an *after the fact* consideration of the same facts by another tribunal, here the Rowbotham Application has itself been pleaded as a material fact and a step in the alleged fraud and conspiracy. The Rowbotham Application is not after the fact, as it is directly implicated in the material facts of this case. For instance, the terms of the Payment Agreement itself include references to the Rowbotham Reasons.

Houston Affidavit, A.R., Volume III, Exhibit "E", page 97, para. D

E. The Court of Appeal applied the test for issue estoppel too restrictively

100. In the further alternative, if this Court affirms the evidentiary approach applied by the Court of Appeal to prior judicial decisions at an interlocutory stage, the Province submits that the Court of Appeal nonetheless erred by applying the test for issue estoppel too restrictively in this case for three reasons:

a. The Court of Appeal erred in determining that the majority of the Rowbotham Findings were "collateral findings";

b. The Court of Appeal failed to sufficiently consider other evidence before the Chambers Judge that supported the AP Order; and

c. The Court of Appeal erred in not considering the Malik family members as "privies" of R.S. Malik.

a. The Court of Appeal erred in determining that the majority of the Rowbotham Findings were "collateral findings"

101. The Province submits that the Court of Appeal erred in ruling that the Chambers Judge relied upon collateral findings that were not essential to the decision of Justice Stromberg-Stein in the Rowbotham Reasons.

102. In *Danyluk*, this Court confirmed that, under the doctrine of issue estoppel, the estoppel extends to "the material facts and the conclusions of law or of mixed fact and law" that were "necessarily (even if not explicitly) determined in other proceedings."

103. In the case at bar, the Court of Appeal ruled that the doctrine of issue estoppel did not apply to the majority of the Rowbotham Findings because most of the Rowbotham Findings were, in its view, "collateral findings". Specifically, the Court of Appeal ruled that the doctrine of issue estoppel applied only to the following factual findings:

> ...Mr. Malik could look to his own assets to raise funds, that Mr. Malik could look to the income and assets of his family to fund his defence costs because their assets were fused and that, as a result, Mr. Malik had the means to pay for, or make a contribution towards, his defence costs.

Reasons for Judgment of the Court of Appeal, A.R., Volume I, pages 136-137, para. 63

104. The Province submits that the Court of Appeal's ruling was an unjustifiably narrow reading of the material facts that were "necessarily (even if not explicitly)

determined" in the Rowbotham Reasons. Specifically, the Court of Appeal failed to take into account all the material findings by Justice Stromberg-Stein relating to the collective efforts by R.S. Malik and the Malik family members to diminish the value of his estate.

105. On a plain reading of the Rowbotham Reasons, the Province submits that it is apparent that the Rowbotham Findings were in fact necessary to Justice Stromberg-Stein's determination of the central question in the Rowbotham Application. Justice Stromberg-Stein stated the central question to be answered, in two parts, as follows:

> Has Mr. Malik fulfilled the factual and evidentiary onus to establish indigency as defined in the Rowbotham jurisprudence; or has he disentitled himself by his actions? [emphasis added]

Houston Affidavit, A.R., Volume III, Exhibit "D", page 64, para. 16

106. In respect of this central question, Justice Stromberg-Stein stated her conclusion as follows:

> I agree with the Attorney General that Mr. Malik's application should be dismissed. As the discussion will show, Mr. Malik has failed to meet the factual and evidentiary onus to establish indigency as defined in the *Rowbotham* jurisprudence. Even if his financial circumstances could be classified as difficult, they are not extraordinary. Furthermore, he has not been prudent, has failed to prioritize legal fees, and has submitted erroneous, contradictory and unreliable evidence. The evidence establishes a collective effort by Mr. Malik and the Malik family members to diminish the value of his estate. If Mr. Malik is indeed indigent, it is because he has made himself so and he is not able to succeed on this application. [emphasis added]

Houston Affidavit, A.R., Volume III, Exhibit "D", pages 65-66, para. 21

107. It is clear from the above passage that Justice Stromberg-Stein's findings concerning the "collective effort by Mr. Malik and the Malik family members to diminish the value of his estate" were explicitly necessary to her determination on the second part of the central question that she posed, namely, whether Mr. Malik had "disentitled himself by his actions". It is also clear that all of the Rowbotham Findings were material facts, and not "collateral" as found by the Court of Appeal, in respect of this central question.

108. Although the Court of Appeal referenced both the above passages from the Rowbotham Reasons, it failed to discuss or address the significance of the second part of the central question posed by Justice Stromberg-Stein. Given the centrality of this question to the analysis in the Rowbotham Reasons, it is submitted that the Court of Appeal erred in so doing.

109. More generally, it is submitted that, in ruling that the majority of the Rowbotham Findings were "collateral", the Court of Appeal failed to take into the wide-ranging factual nature of a Rowbotham application, and the substantial discretion accorded to a judge in deciding such an application. The wide range of factual criteria and considerations to be considered were reviewed and summarized in the Rowbotham Reasons.

Houston Affidavit, A.R., Volume III, Exhibit "D", pages 66-71, para. 23

110. A judge on a Rowbotham Application is required to exercise judicial discretion, taking into account all relevant factors disclosed by the evidence. The process of assessing, weighing and pronouncing upon that evidence was the central judicial function which Justice Stromberg-Stein had to perform on the Rowbotham Application. It is submitted that such assessment, weighing and pronouncement cannot be described as "collateral". Indeed, if Justice Stromberg-Stein had omitted to assess, weigh and take into account the Rowbotham Findings, she

would have failed to exercise her discretion judicially and her decision would have been vulnerable on appeal: *R. v. Beauchamps*, [2002] 2. S.C.R. 767.

b. The Court of Appeal failed to sufficiently consider other evidence before the Chambers Judge that justified the AP Order

111. The Court of Appeal overturned the Chambers Judge's ruling, and substituted its own view on the facts, on the principal basis that in its opinion the Rowbotham Findings did not in themselves support a strong *prima facie* case for the AP Order. However, in so ruling the Court of Appeal discounted the fact that the Chambers Judge had taken into account a range of facts independent of the Rowbotham Findings in reaching his conclusion. The Province submits that the Court of Appeal erred in failing to take into account the significance of those independent facts.

112. In addition to the Rowbotham Findings, there was evidence before the Chambers Judge that R.S. Malik, R.K. Malik, and J.S. Malik conducted themselves in ways that gave rise to concerns that they would dissipate assets or arrange for the destruction of documents if the Mareva Injunction and AP Order were not obtained. On October 17, 2003, a few weeks after the Rowbotham Hearing, R.S. Malik entered into the Payment Agreement. In addition to confirming his agreement to transfer all of his assets to the Province, R.S. Malik covenanted as follows in the Payment Agreement:

> Malik will not to [sic] execute any documents, resolutions or agreements of any kind which could have an adverse effect on the ability of the Attorney General to recover payment of the Reimbursement Amount or on the Security Documents to be provided by Malik under paragraph 5.1(d) hereof.

Houston Affidavit, A.R., Volume III, Exhibit "E", page 97, recital "C"; page 106, section 5.5

113. As such, steps taken to reduce R.S. Malik's interest in assets by way of granting mortgages on his properties would violate such covenants. The Province put evidence before the Chambers Judge that included a number of transactions entered into by R.S. Malik, including the Marguerite Street Property and the Hamilton Street Property, *following* the Payment Agreement and in contravention of the covenants therein. The Province also directed the Chambers Judge to a Court Order in place prior to the Rowbotham Application that prohibited, *inter alia*, encumbrance of real property owned by R.S. Malik.

Reasons for Judgment of the Chambers Judge, A.R., Volume I, pages 44-45, paras. 11, 16-17
Houston Affidavit, A.R., Volume III, Exhibit "A", pages 17-23

114. The Chambers Judge referred to these transactions and then stated as follows: "On the basis of the material submitted and the representations made by counsel I was satisfied that a good arguable case of fraud of sufficient seriousness had been established such that an order ought to be made without notice…".

Reasons for Judgment of the Chambers Judge, A.R., Volume I, pages 49-50, paras. 27, 30

115. However, the Court of Appeal found that the "supplemental facts contained in affidavits filed by the Crown, do not establish a strong prima facie case of fraud or a real risk of dissipation of assets by the defendants." The Court made this finding without analysis and it is submitted should not have discounted evidence independent of the Rowbotham Findings that R.S. Malik acted in ways with respect to the Marguerite Street Property and the Hamilton Street Property that breached covenants in the Payment Agreement. The Province submits that this evidence itself would have been sufficient for the Chambers Judge to grant the AP Order.

Reasons for Judgment of the Court of Appeal, A.R., Volume I, page 120, para. 38

c. The Court of Appeal erred in not considering the Malik family members as "privies" of R.S. Malik

116. In applying the test for issue estoppel, the Court of Appeal appears to have considered that the Malik family member were not "privies" of R.S. Malik. The Province submits that the Court of Appeal erred in so ruling.

117. It is well established that a prior judicial decision gives rise to issue estoppel against the parties to the prior proceeding, and also against their "privies". Thus, if the Malik family members were "privies" of R.S. Malik, the Rowbotham Findings would bind them in the same way, and to the same extent, that they bind R.S. Malik.

118. Lord Reid stated in *Carl Zeiss Stiftung v. Rayner & Keeler Ltd (No. 2)*, [1967] 1 A.C. 853 at page 910 that a privy could be "... of either blood, title or interest...".

119. In *Danyluk, supra*, at para. 60, this Court confirmed that privity was somewhat elastic and determinations needed to be made on a case-by-case basis.

120. The courts have adopted a flexible approach to the definition of "privy" and have recognized "privies" in a wide array of factual circumstances.

D.J. Lange, *The Doctrine of Res Judicata in Canada*, Markham, Ont.: Butterworths, 2000, pages 71-76

121. In this case, it is submitted that, even taking into account only the limited facts which the Court of Appeal accepted met the test for issue estoppel, R.K. Malik and J.S. Malik were clearly privies of R.S. Malik for at least two reasons.

122. First, both R. K. Malik and J.S. Malik are immediate relations of R.S. Malik and thus were "blood" privies. Second, the Court of Appeal affirmed the factual finding of Stromberg-Stein J. that "the assets of Mr. Malik and the family were fused" and therefore these immediate family members should be considered privies by "interest".

Reasons for Judgment of the Court of Appeal, A.R., Volume I, page 126, para. 37

123. As such, the Appellant maintains that this Court would be entitled to find that the Respondents are privies and that they are bound by the Rowbotham Findings on the basis of issue estoppel or, in the alternative, pursuant to the discretion the Court retains to prevent further litigation by way of the doctrine of abuse of process as set out in *Toronto v. C.U.P.E., supra.*

PART IV: COSTS

124. The Province submits that costs in this appeal should follow the event.

PART V: NATURE OF ORDER SOUGHT

125. The Province requests an Order that this Appeal be allowed and the AP Order be restored.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Dated at Victoria, British Columbia, this 6th day of April, 2010

(S) Jonathan Eades & Matthew Taylor

Jonathan Eades & Matthew Taylor
Counsel for the Appellant,
Her Majesty the Queen in right
of the Province of British Columbia

PART VI: AUTHORITIES

Rule 51 — Affidavits

[en. B.C. Reg. 55/93, s. 19.]

Contents of affidavit

(10) An affidavit may state only what a deponent would be permitted to state in evidence at a trial, except that, if the source of the information is given, an affidavit may contain statements as to the deponent's information and belief, if it is made

(a) in respect of an application for an interlocutory order, or

(b) by leave of the court under Rule 40 (52) (a) or 52 (8) (e).

EVIDENCE ACT

[RSBC 1996] CHAPTER 124

Evidence of previous conviction admissible in subsequent proceeding

71 (1) In this section:

"conviction" means a conviction

(a) that is not subject to appeal or further appeal, or

(b) for which no appeal is taken;

"finding of guilt" means the plea of guilty made before a court by a defendant to an offence or, as the case may be, the finding by a court that a defendant is guilty of an offence, and the court makes an order directing that the defendant be discharged for the offence either absolutely or on the conditions specified in a probation order, and

(a) the order directing the discharge is not subject to further appeal, or

(b) no appeal is taken in respect of the order directing the discharge,

and **'found guilty'** has a corresponding meaning.

(2) Subject to subsection (3), if

(a) a person has been convicted of or is found guilty of an offence anywhere in Canada, and

(b) the commission of that offence is relevant to any issue in an action,

proof of the conviction or the finding of guilt, as the case may be, is admissible in evidence to prove that the person committed the offence, whether or not that person is a party to the action.

(3) If the action in subsection (2) is conducted before a jury, a party has the right to argue at trial, in the jury's absence, that introduction

of the evidence referred to in subsection (2) would, in relation to its probative value, unduly influence the jury.

(4) Subsection (3) does not apply to actions for defamation.

(5) A certificate containing the substance and effect of the charge and of the conviction or finding of guilt, as the case may be, purporting to be signed by

(a) the officer having custody of the records of the court in which the offender was convicted or found guilty, or

(b) a person authorized to act for the officer,

is, on proof of the identity of a person named in the certificate as the offender, sufficient evidence of the conviction of that person or the finding of guilt against that person, without proof of the signature or of the official position of the person purporting to have signed the certificate.

(6) If proof of the conviction or finding of guilt of a person is tendered in evidence under subsection (2) in an action for defamation, the conviction or finding of guilt of that person is conclusive proof that that person committed the offence.

(7) If proof of a conviction or a finding of guilt is admitted in evidence under this section, the contents of the information, complaint or indictment relating to the offence for which the person was convicted or found guilty is admissible in evidence.

(8) Subject to subsection (6), the weight to be given to the conviction or finding of guilt must be determined by the judge or jury, as the case may be.

Evidence Act

R.S.O. 1990, CHAPTER E.23

Proof of conviction or discharge

22.1 (1) Proof that a person has been convicted or discharged anywhere in Canada of a crime is proof, in the absence of evidence to the contrary, that the crime was committed by the person, if,

(a) no appeal of the conviction or discharge was taken and the time for an appeal has expired; or

(b) an appeal of the conviction or discharge was taken but was dismissed or abandoned and no further appeal is available. 1995, c. 6, s. 6 (3).

Same

(2) Subsection (1) applies whether or not the convicted or discharged person is a party to the proceeding. 1995, c. 6, s. 6 (3).

Same

(3) For the purposes of subsection (1), a certificate containing the substance and effect only, omitting the formal part, of the charge and of the conviction or discharge, purporting to be signed by the officer having the custody of the records of the court at which the offender was convicted or discharged, or by the deputy of the officer, is, on proof of the identity of the person named as convicted or discharged person in the certificate, sufficient evidence of the conviction or discharge of that person, without proof of the signature or of the official character of the person appearing to have signed the certificate. 1995, c. 6, s. 6 (3).

ALBERTA EVIDENCE ACT

Chapter A-18

Admissibility of Previous Court Proceedings

Admissibility of previous court proceedings

26(1) In this section,

(a) "conviction" means a conviction

(i) that is not subject to appeal or further appeal, or

(ii) in respect of which no appeal is taken;

(b) "finding of guilt" means the plea of guilty by an accused to an offence or the finding that an accused is guilty of an offence made before or by a court that makes an order directing that the accused be discharged for the offence either absolutely or on the conditions prescribed in a probation order, when

(i) the order directing the discharge is not subject to further appeal, or

(ii) no appeal is taken in respect of the order directing the discharge,

and "found guilty" has a corresponding meaning.

(2) When

(a) a person has been convicted of or is found guilty of an offence anywhere in Canada, and

(b) the commission of that offence is relevant to an issue in an action,

then, whether or not that person is a party to the action, proof of the conviction or the finding of guilt, as the case may be, is admissible in evidence for the purpose of proving that the person committed the offence.

(3) A certificate containing the substance and effect only, omitting the formal part, of the charge and of the conviction or finding of guilt, as the case may be, purporting to be signed by

(a) the officer having the custody of the records of the court in which the offender was convicted or found guilty, or

(b) the deputy of the officer,

is, on proof of the identity of a person as the offender, sufficient evidence of the conviction of that person or the finding of guilt against that person, without proof of the signature or official character of the person appearing to have signed the certificate.

(4) When proof of the conviction or finding of guilt of a person is tendered in evidence pursuant to subsection (2) in an action for defamation, the conviction of that person or the finding of guilt against that person is conclusive proof that the person committed the offence.

(5) When proof of a conviction or a finding of guilt is admitted in evidence under this section, the contents of the information, complaint or indictment relating to the offence of which the person was convicted or found guilty is admissible in evidence.

(6) Subject to subsection (4), the weight to be given the conviction or finding of guilt shall be determined by the judge or jury, as the case may be.

RSA 1980 cA-21 s27