

CANADA / JUDGMENT

James v. British Columbia

2007 BCCA 547

COURT

British Columbia Court of Appeal

DECIDED

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2007 BCCA 547 James v. British Columbia

Court of Appeal for British Columbia

Citation:

James v. British Columbia,

2007 BCCA 547

Date: 20071113

Docket: CA034211

Between:

Kenneth David James

Appellant

(Plaintiff)

And:

Her Majesty The Queen in Right

of the Province of British Columbia

Respondent

(Defendant)

Before:

The Honourable Madam Justice Huddart

The Honourable Madam Justice Saunders

The Honourable Madam Justice Levine

J.J. Arvay, Q.C.

Counsel for the Appellant

J.E. Gouge, Q.C. and K. Horsman

Counsel for the Respondent

Place and Date of Hearing:

Victoria, British Columbia

17 April 2007

Place and Date of Judgment:

Vancouver, British Columbia

13 November 2007

Written Reasons by:

The Honourable Madam Justice Huddart

Concurring Reasons in part by:

The Honourable Madam Justice Saunders (p. 29, para. 61)

Concurred in by:

The Honourable Madam Justice Levine

Reasons for Judgment of the Honourable Madam Justice Huddart:

- [1] This appeal is from an order dismissing the appellant's claim in negligence against the provincial Crown on the basis that the claim was barred by *res judicata*. On a trial of the issue he directed, the case management judge, R.D. Wilson J., held that the claim was barred by a consent dismissal order in an earlier representative action brought under r. 5(11) of the British Columbia Supreme Court Rules. The claim underlying both actions arose from a sawmill closure in January 2001.

Background Facts

- [2] For two years prior to January 2001, the appellant, Kenneth David James, was a member of the Industrial, Wood and Allied Workers of Canada, CLC, Local Union 1-80 (the "Union") employed by TFL Forest Ltd. ("TFL") at its sawmill in Youbou, British Columbia. Much of the timber processed at the mill was harvested under Tree Farm Licence No. 46 (the "Licence"). In 1991, the Licence contained the following clause:

The licensee will not cause its timber processing facility at Youbou to reduce production or to close for a sustained period of time, unless, and to the extent that the Minister or his designate, exempts the licensee from the requirement of this paragraph.

- [3] In 1997, the Licence was replaced with a new licence that did not contain the above or any comparable clause. After giving notice to the Minister of Forests on 10 April 2000, TFL terminated its operations at the mill on 26 January 2001. As a result, Mr. James and 195 other members of the bargaining unit lost their jobs and ceased to qualify as members of the Union. Non-union employees also lost their jobs.
- [4] Believing the Crown's failure to include protection for the Youbou Mill in the renewal licence constituted bad faith or negligence, on 4 March 2001, the Union and William O. Routley sued the Crown for damages. The Union claimed for lost union dues. On behalf of the unionized employees, Mr. Routley claimed damages for the loss of their jobs. Some (like Mr. James) were employed at the mill when it closed and the alleged cause of action arose. Others (like Mr. Routley) had been employed at the mill and remained eligible to work there (by virtue of remaining on the Union seniority list), but were not employed at the mill when it closed. Mr. Routley was working as the Union's president.
- [5] In the Routley action, the Crown's statement of defence included this pleading:
3. With reference to paragraph 3 the Defendants state that the Plaintiff Routley is not entitled to maintain the representative action on behalf of the employees by reason of the fact that the subject employees do not have the same interest in the proceeding.
- [6] However, the Crown did not follow up on this pleading with an application to challenge the continuance of the action as a representative proceeding. Mr. James supported the commencement of the Routley action, and at no time did Mr. James advise Crown counsel of any concern he might have had about the procedure the Union and Mr. Routley had undertaken. At some point, TFL was added as a third party. Neither Mr. James nor any of the persons Mr. Routley claimed to represent sought an order to be substituted for him as representative plaintiff or added as a defendant; both routes were open to them under the British Columbia Supreme Court Rules. It appears that no one invited the court to take an active role in the management of the Routley action as envisaged by McLachlin C.J.C. in her reasons for the court in *Western Canadian Shopping Centres Inc. v. Dutton*, [2001] 2 S.C.R. 534, 2001 SCC 46 [Western Canadian].
- [7] After the Crown advised counsel who acted for both the Union and Mr. Routley of its intention to apply for an order dismissing their action as disclosing no reasonable cause of action, plaintiff's counsel sought and obtained documents under the Freedom of Information and Protection of Privacy Act, R.S.B.C. 1996, c. 165. By letter dated 25 April 2003, plaintiff's counsel advised the Union and Mr. Routley that "this action cannot succeed" and should be discontinued. On 10 May 1993, at a meeting of members in good standing of the Union, a motion to abandon the action was passed. The consent dismissal order followed in due course and was entered on 29 May 2003.

- [8] The record is unclear how much, if anything, Mr. James had heard about the proposed settlement of the Routley action before the meeting. While four members of the Youbou Timberless Society, all retired members of the Union, heard informally of the meeting and attended as guests, the evidence before the trial judge does not support his finding that Mr. James was at the meeting. Mr. James testified he did not attend, and there was no evidence to the contrary. It seems Mr. Routley did not seek the agreement of those he represented nor did he give them an opportunity to express their views or seek to continue the representative action before he consented to the settlement on their behalf. Mr. James learned of the consent dismissal order on 17 June 2003 when Mr. Routley gave him a copy of counsel's opinion. On 16 July 2003, Mr. James commenced the action that is the subject of this appeal. R.D. Wilson J. certified the James action under the Class Proceedings Act, R.S.B.C. 1996, c. 50 on 5 May 2004: *James v. British Columbia*, 2004 BCSC 608. His order was entered on 5 July 2004. The Crown's appeal from that order was dismissed on 15 March 2005: *James v. British Columbia*, 2005 BCCA 136, 38 B.C.L.R. (4th) 263.
- [9] Mr. James represents three classes of former TFL employees, two "union classes" and the "non-union class". The essence of the claim on behalf of all three classes, like that of the Union and Mr. Routley in their action, is that Crown employees inadvertently removed the language of the clause protecting the Youbou Mill from closure in breach of their private law duty of care. For that breach of duty, Mr. James claims damages for all who were employed by TFL at the Youbou Mill during the period from 10 April 2000 to 26 January 2001.
- [10] Although plaintiff's counsel in the Routley action believed that this claim had no chance of success because it would require a challenge to the Minister of Forests in the exercise of his discretion, plaintiff's counsel in the James action has a different opinion because of the Crown's concession that the omission of the protective clause was inadvertent.

The Judgment Under Appeal

- [11] On 26 August 2005, the case management judge severed the defences of res judicata, abuse of process and estoppel and ordered that they be tried before any other issue pursuant to r. 39 (29) of the British Columbia Supreme Court Rules. After a summary trial of those issues in March 2006, R.D. Wilson J. concluded that the defence of res judicata should be applied and dismissed the action: *James v. British Columbia*, 2006 BCSC 873.
- [12] Applying the analysis developed in *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44, [2001] 2 S.C.R. 460 [Danyluk], for issue estoppel, R.D. Wilson J. set out in para. 46 the three conditions necessary to invoke estoppel (whether cause of action estoppel, as the respondent maintained, or issue estoppel as the appellant submitted); they are:
- i) the cause of action in both proceedings must be identical;
 - ii) the judgment which is said to create the estoppel must be final; and

iii) the parties to that judgment or their privies are the same persons as the parties to the proceedings in which the estoppel is raised or their privies.

After finding that these conditions were satisfied, R.D. Wilson J. then went on to consider whether "as a matter of discretion, the doctrine ought to be applied". Taking guidance from *G.M. (Canada) v. Naken*, [1983] 1 S.C.R. 72 [Naken] and *Toronto (City) v. CUPE, Local 79* (2001), 55 O.R. (3d) 541 (C.A.), aff'd [2003] 3 S.C.R. 77, 2003 SCC 63 [Toronto (City)], R.D. Wilson J. concluded that Mr. James' action was not one in which the court should exercise its discretion to permit relitigation. Understanding that the determination as to whether to permit relitigation was fact-specific, R.D. Wilson J. decided not to do so because the Routley action was not public litigation; Mr. James had not taken the opportunity to "opt out" of an action in which he had meaningful participation; Mr. James' rights and privileges under the British Columbia Supreme Court Rules remained open to him; and Mr. James had known of the plea of *res judicata* since delivery of the statement of defence.

The Positions of the Parties

- [13] The appellant concedes for the purposes of this appeal that the Crown has established the first two conditions for the application of the doctrine of *res judicata* founded on cause of action estoppel. First, the causes of action in the Routley action and the James action are identical, and, second, the consent dismissal order finally disposed of the Routley action. The focus of his appeal is on the third condition and the residual discretion not to apply the doctrine.
- [14] With respect to the third condition, the appellant says neither he, nor any person he represents, was a party or a privy to the Routley action and that, therefore, cause of action estoppel does not apply to him or those he represents. He alleges the trial judge erred in concluding (at para. 49) that, "[a]lthough the parties are not the same, their privies are the same," and thus bound by the consent dismissal order.
- [15] However, the Crown submits that r. 5(13)(a) renders unnecessary any consideration of privity vis-à-vis those "represented as parties" in the Routley action, i.e. Mr. James and all those who were members of the Union when their cause of action arose. Thus, the Crown asserts, the *res judicata* defence need be analyzed only in respect of the non-union class, and in its view, this Court should find the trial judge properly found the members of the non-union class to be privies of Mr. Routley.
- [16] The appellant disagrees and submits the policy underlying the provisions of the Class Proceedings Act should inform this Court's interpretation and application of r. 5(13)(a). The appellant argues that the main clause in r. 5(13)(a) applies only to the parties of record, in this case, Mr. Routley, the Union and the Crown. Or, if the main clause in r. 5(13)(a) is found to apply to persons represented as parties, then, the appellant submits that those represented as parties and their privies are entitled, under the coordinate clause of r. 5(13)(a), to seek an exemption from the enforcement of the consent dismissal order by estoppel.

- [17] Alternatively, the appellant submits, the trial judge erred in refusing to exercise his residual discretion not to give effect to the plea of *res judicata* when (at para. 59) he failed to read *Naken* with the caution prescribed in para. 46 of *Western Canadian*. In the appellant's view, the court's residual discretion to refuse to apply *res judicata* on the basis of issue estoppel is or should be available on the basis of cause of action estoppel as well. The injustice alleged to justify the exercise of that discretion is the inability of those who disagreed with Mr. Routley's settlement of his action (the Youbou Timberless Society) to continue to prosecute a claim they believed to be well founded when they had no notice of its abandonment, and in which, consequently, neither they nor the court had a voice. The appellant attributes this injustice to a flawed process under the Supreme Court Rule governing representative actions, not to any conduct of the province.
- [18] The Crown responds that it settled the Routley action in good faith, understanding that Mr. Routley represented those for whom he sued (196 IWA bargaining unit members, including the appellant, Mr. James), and that it cannot be required to face the same claim again because the appellant and others like him were not consulted about, and did not approve of, the settlement and have since obtained an order certifying the James action under the Class Proceedings Act. In the Crown's view, the court's limited jurisdiction to employ its discretion to refuse to enforce a settlement agreement does not survive the entry of a consent order giving effect to the settlement and does not affect the validity or enforceability of the settlement agreement: *Katen v. Katen*, 2005 BCSC 495; *Shepherd v. Robinson*, [1919] 1 K.B. 474 (C.A.) at 477; *Arnold v. National Westminster Bank Plc.*, [1991] 2 A.C. 93 (H.L.) [*Arnold*]. Therefore, according to the Crown, the trial judge properly found neither the members of the union classes nor the management employees came within the narrow exception to cause of action estoppel, as explained in *Arnold*.

Discussion

- [19] As I noted earlier, the appellant does not dispute the validity of either the settlement or the consent order in the Routley action, nor does he dispute the enforceability of the order by and against the parties of record. He acknowledges they are estopped from relitigating the cause of action. His challenge is to its enforceability against persons Mr. Routley appointed himself to represent, either under r. 5(13) or by application of the doctrine of the cause of action species of estoppel *per rem judicatam*.
- [20] The trial judge did not distinguish between cause of action estoppel and issue estoppel for the purposes of his consideration or application of the defence of *res judicata*. For his purposes, it was not necessary. It will be helpful, however, to consider the defence founded on cause of action estoppel and the position of the claimants in the James action at common law before turning to a consideration of the effect of r. 5(13) on their claims.
- [21] The English House of Lords distinguished cause of action estoppel from issue estoppel at 104-5 in *Arnold*. About cause of action estoppel Lord Keith of Kinkel wrote (at 104):

Cause of action estoppel arises where the cause of action in the later proceedings is identical to that in the earlier proceedings, the latter having been between the same parties or their privies and having involved the same subject matter. In such a case the bar is absolute in relation to all points decided unless fraud or collusion is alleged, such as to justify setting aside the earlier judgment

- [22] Subsequently, Lord Keith discussed the "special circumstances" that might take a case out of issue estoppel or the extended form of cause of action estoppel at issue in *Henderson v. Henderson* (1843), 3 Hare 100 at 114-15 (Ch.). In that discussion, at 108, Lord Keith reiterated that the rule of cause of action estoppel is absolute, "the subject-matter of the two proceedings being identical".
- [23] It is necessarily implicit in the reasoning of Estey J. in *Naken* that those represented by the plaintiff in a representative proceeding are subject to that rule of law. Thus, at common law, the claims of the members of the union classes are barred so long as the earlier order is not set aside. The position of the non-union class members depends on whether they are privies of Mr. Routley, as the trial judge found. If they are privies, cause of action estoppel would apply to bar their claims too.
- [24] The next question is whether and how r. 5(13)(a) affects the claims of the union class members. Rule 5(13) provides:

Enforcement of order made in representative proceeding

- (13) (a) An order made in a proceeding under subrule (11) is binding on all the persons represented in the proceeding as parties, but shall not be enforced against a person not a party to the proceeding except with leave of the court.
- (b) An application for leave shall be served on the person against whom the applicant seeks to enforce the order, and that person may dispute liability to have the order enforced against him or her.
- (c) On the application, the court may order that the question whether the order is enforceable against that person be determined in such manner as it thinks just.

While the parties agree the main clause of r. 5(13)(a) does not apply to privies not represented as parties, the effect the coordinate clause may have on their claims is not so clear. The difficulty of interpretation and application derives from the use of the words "persons represented as parties" in the main clause of para. (a) and the words "person not a party to the proceeding" in the coordinate clause.

- [25] The trial judge's only comment on r. 5(13) is this found under the heading "Material Facts" at para. 36 of his reasons for judgment:

Counsel then proceeded to finalize the matter. Counsel for the union and Mr. Routley prepared, and circulated, a consent dismissal order. The order was entered 29 May 2003. By that order, the proceedings were dismissed without costs to any party. Rule 5(13)(a) makes that order binding on Mr. James and the 196 bargaining unit members.

- [26] After completing his statement of material facts, the trial judge moved directly to a discussion of the *res judicata* defence. He did not consider the interplay between r. 5(13) and that defence following his finding that Mr. James and the others "represented as parties" in the Routley action were bound by the consent dismissal order. It seems likely submissions at the summary trial, like his reasons, had focused on the issue he had directed be tried, the defence of *res judicata*, without discussion of the effect of the coordinate clause in r. 5(13) (a).
- [27] At the second step of his analysis of that defence, the trial judge found support in the reasons of Estey J. in *Naken* at 101 for the proposition that an order resolving a representative proceeding gives rise to the application of the defence of *res judicata* (founded on cause of action estoppel) as does any other order: the discretion is not "necessarily broader" as the appellant was arguing. Despite the caution in *Naken* at 101 that a "specific provision by statute regulation or otherwise" could affect the application of the defence of *res judicata*, the trial judge nevertheless applied the doctrine of *res judicata* without any consideration of the effect of the 1977 change to the British Columbia Supreme Court Rules, discussed below, which introduced r. 5(13) for representative proceedings.
- [28] Canadian authorities provide only general assistance to an understanding of r. 5(13). In those to which we were referred, the only specific reference to the effect of an order in a representative proceeding since the addition of r. 5(13) is in *Oregon Jack Creek Indian Band v. Canadian National Railway Co.* (1989), 56 D.L.R. (4th) 404 (B.C.C.A.), *aff'd* [1989] 2 S.C.R. 1069, a case where this Court considered whether a claim to determine and enforce aboriginal rights was properly brought as a representative action. At 414, Macfarlane J.A. wrote for the court:

Thus, it appears that a representative action has been endorsed as the correct form in which to bring a claim involving aboriginal rights. The important thing is that all interests be represented at trial and that all persons who may have such a claim are bound by the result. It is only after evidence has been heard that all of the members of the class can be properly identified.

[Emphasis added.]

- [29] A foreshadowing of the difficulty of interpretation that brings the parties to this Court can be found in Justice Estey's discussion in *Naken* (at 99 to 100) regarding the shortcomings of r. 75 of the Rules of Practice of the Supreme Court of Ontario which he called a "simple" rule "entirely inadequate to the task". There, Justice Estey seems to distinguish between parties (to whom the procedures for discovery and provisions for costs apply) and non-parties neither entitled to use nor subject to those procedures and provisions. Then, with regard to the costs aspect, he continued (at 100):

The difficulty with a class action in this regard is that until a member of the group is awarded the status of a party by being a representative or being amongst the represented, such person does not come within the purview of the court's authority with respect to costs, that is either to pay or receive costs. Consequently, where the appellant or a litigant in like position is put to the active defence of several thousand claimants for membership in the class, there would appear to be no authority in the court to award costs against the unsuccessful claimants. Neither party was able to indicate any provision in the Rules appropriate to this aspect of the proceeding.

[Emphasis added.]

[30] This passage suggests a non-party is a person not yet "awarded the status of a party by being amongst the represented". It is not clear how that status could be "awarded" under the rule he was discussing. Nor is it obvious how that status could be established under r. 5(11).

[31] Chief Justice McLachlin provided an answer in *Western Canadian*. In her reasons for the Supreme Court, (without reference to changes to the English Rule in 1962 or the B.C. rules in 1977, discussed below), the Chief Justice discussed the history of the representative action and the development of the modern class action. Then she turned to the task of interpreting r. 42 of the Alberta Rules of Court, acknowledging at para. 31 that "[a]bsent comprehensive codes of class action procedure, provincial rules based on Rule 10, Schedule, of the English Supreme Court of Judicature Act, 1873, govern". At para. 31, she concluded that the intention of the Alberta legislature was clear from the existence of r. 42 and the absence of a comprehensive code of class action procedure: "Class actions may be brought. Details of class action practice, however, are largely left to the courts". At para. 34, the Chief Justice wrote that the task of the courts was to:

fill the void under their inherent power to settle the rules of practice and procedure as to disputes brought before them. However desirable comprehensive legislation on class action practice may be, if such legislation has not been enacted, the courts must determine the availability of the class action and the mechanics of class action practice.

[32] The Chief Justice then went on to establish the conditions necessary to a representative action, taking guidance from the comprehensive class action legislation in Quebec, Ontario and British Columbia. Regarding the fundamental importance of the first condition, that the class be capable of clear definition, the Chief Justice made this comment at para.38:

Class definition is critical because it identifies the individuals entitled to notice, entitled to relief (if relief is awarded), and bound by the judgment. It is essential, therefore, that the class be defined clearly at the outset of the litigation. The definition should state objective criteria by which members of the class can be identified. While the criteria should bear a rational relationship to the common issues asserted by all class members, the criteria should not depend on the outcome of the litigation. It is not necessary that every class member be named or known. It is necessary, however, that any particular person's claim to membership in the class be determinable by stated, objective criteria: [authorities omitted.]

[Emphasis added.]

[33] To the extent this approach suggests that the representative action is a dying breed, to be replaced by a new form of class action upon the enactment of a comprehensive class proceeding code, it cannot apply in British Columbia. First, it does not consider that British Columbia, in 1977, added r. 5(12) and r. 5(13) to the rule permitting representative proceedings, both of which provide some procedural rules for their conduct and enforcement. Second, it does not recognize that British Columbia permits both class proceedings under the Class Proceedings Act and representative actions under the Supreme Court Rules. The evident intention of the Legislature in British Columbia is to retain the old form of class action, while permitting the new form. A court's obligation is to make both work, so that litigants can select the procedure that works best for their purposes.

[34] Nevertheless, the approach in *Western Canadian* is helpful where it does apply. From *Western Canadian* at paras. 24, 44, 46 to 48, I take the advice to apply the English Court of Appeal decision in *Markt & Co. Limited v. Knight Steamship Company Limited*, [1910] 2 K.B. 1021 (C.A.) [*Markt*] and the Supreme Court's own decision in *Naken* with caution. Importantly, for our purposes, courts are also to recognize as fundamental the importance of striking a balance between efficiency and fairness, as the Chief Justice wrote:

49 Other procedural issues may arise. One is notice. A judgment is binding on a class member only if the class member is notified of the suit and is given an opportunity to exclude himself or herself from the proceeding. This case does not raise the issue of what constitutes sufficient notice. However, prudence suggests that all potential class members be informed of the existence of the suit, of the common issues that the suit seeks to resolve, and of the right of each class member to opt out, and that this be done before any decision is made that purports to prejudice or otherwise affect the interests of the class members.

51 The diversity of class actions makes it difficult to anticipate all of the procedural complexities that may arise. In the absence of comprehensive class-action legislation, courts must address procedural complexities on a case-by-case basis. Courts should approach these issues as they do the question of whether a class action should be allowed: in a flexible and liberal manner, seeking a balance between efficiency and fairness.

[Emphasis added.]

[35] However, because r. 5(13) pre-existed and survived the enactment of the Class Proceedings Act without amendment, I am not attracted by the appellant's invitation to follow the path taken in *Western Canadian* and look primarily to that Act for guidelines. In my view, the better approach is to look to the history of r. 5(13), its purpose as explained in the authorities, and most importantly, to the ordinary meaning of its language in the context of the British Columbia Supreme Court Rules as a whole, bearing in mind the need to make the representative action and the class proceeding work as complementary vehicles for the efficient and fair prosecution and defence of causes of action with common issues.

- [36] Representative proceedings were permitted under the 1873 English Rule 16/9 discussed in *Markt*. Equivalent provisions were discussed in *Naken* as Ontario's r. 75, and in *Western Canadian* as Alberta's r. 42. Rule 5(11) is the B.C. equivalent; it provides:

Representative proceeding

- (11) Where numerous persons have the same interest in a proceeding, other than a proceeding referred to in subrule (17), the proceeding may be commenced and, unless the court otherwise orders, continued by or against one or more of them as representing all or as representing one or more of them.

For the most part, English courts treated their 1873 representative proceeding rule as a flexible tool of convenience to be applied according to its wide and permissive scope, an approach to its interpretation and application supported by *Western Canadian*. Nevertheless, by 1910, the courts had moved to the more restrictive approach exemplified in the Court of Appeal's decision in *Markt*, where Fletcher Moulton L.J. explained (at 1039) that under the rules,

The plaintiff is the self-elected representative of the others. He has not to obtain their consent. It is true that consequently they are not liable for costs, but they will be bound by the estoppel created by the decision. The differences from the point of view of the defendant are equally striking. Those in whose behalf the action (so far as it is a representative action) is brought are not responsible for the costs, and are not subject to the ordinary liabilities of litigants in respect of discovery, &c. The language of the rule appears to me to present no difficulties of construction and to make clear the limitations of its scope. They answer in all respects to what one would expect from the considerations to which I have referred. The essential condition of a representative action is that the persons who are to be represented have the same interests as the plaintiff in one and the same cause or matter.

- [37] A brief summary of the law and practice taken from *The Supreme Court Practice*, vol.1 (London: Sweet & Maxwell, 1973) and the authorities cited in that text is helpful in understanding the English rules and good evidence there is little new in the difficulties the parties to this appeal face.
- [38] While neither leave nor a representation order was necessary under r. 16/9 to commence an action, as practice developed in England, a plaintiff could seek such an order, among other matters defining the class to be represented. Any member of that class could apply to be excepted from it and named a party in their personal capacity or as representing others with a common interest. A representative plaintiff, as *dominus litis* until judgment, could discontinue, compromise, submit to dismissal, as he pleased. He had no such power after judgment because the represented persons could not bring a further action. If the action was properly constituted, any person represented in, but not a party to it, was bound by any judgment given in the action, because he was present by representation. Each person represented could take the benefit of a judgment in their favour and seek to enforce it. (See *Handford v. Storie* (1825), 2 Sim. & St. 196, 57 E.R. 320 (Ch.); *Fraser v. Cooper* (1882), 21 Ch.

D. 718; *Re Calgary & Medicine Hat Land Co. Ltd.*, [1908] 2 Ch. 652 at p. 659 (C.A.); *Barker v. Allanson*, [1937] 1 K.B. 463 at 475 (C.A.)).

- [39] While leave was not required to enforce the judgment in representative proceedings as against the parties actually before the court, as against a person represented in but not a party to the proceedings, the judgment could be enforced only with the court's leave. On such an application, the validity or the binding character of the judgment could not be challenged by the person against whom it was sought to be enforced, for he was bound by the estoppel created by the judgment; but he could escape having such a judgment enforced against him if it was fraudulently obtained or otherwise by reason of facts and matters particular to his case, most commonly, that he was not a member of the class represented in the action at the time when the cause of action arose: *Commissioner of Sewers v. Gellatly* (1876), 3 Ch. D. 610 at 615 and 617.
- [40] In dictum at page 22 in *Watson v. Cave* (No. 1) (1881), 17 Ch.D. 19 (C.A.), where the court refused a dissentient bondholder's application for leave to appeal an order appointing receivers, Cotton L.J. advised the proper course of action for a person who thinks himself aggrieved by a representative plaintiff:

It is a suit called a representative suit, and the Plaintiff sues on behalf of himself and all others who have the same interest as himself, that is, not all those who take the same view of what is for their benefit, but all those who, being interested jointly with him in some property, have not taken any steps to assert their rights adversely to those which the Plaintiff chooses to assert. That is a suit rather difficult of management, but it must be dealt with as if all those persons were named Plaintiffs on the record. Here the Plaintiff, who has the actual management of the suit, has applied for and obtained an order which does not bind any property, or any interest in property, of an absent party, but produces an effect which one of the persons who are Plaintiffs by representation thinks is not for his benefit, although the actual Plaintiff on the record thinks it is. Where there is an order obtained by A.B. and C.D. as plaintiffs, and A.B. thinks it beneficial and C.D. disagrees, the proper course is not to appeal, because it is an order obtained by C.D. as much as by A.B., but to take steps either to prevent A.B. any longer having the conduct of the cause, or to get C.D. struck out from being a plaintiff and made a defendant, when he may resist anything which A.B. seeks to do, and which he thinks is not advisable to have done.

- [41] To similar effect is the decision of the English Court of Appeal in *Moon v. Atherton*, [1972] 2 Q.B. 435 (C.A.), where a representative plaintiff wished to discontinue the proceeding she had begun on behalf of all the tenants of a block of flats because of her potential liability for costs if she lost. One tenant (who was entitled to legal aid), wanted to continue the action. The court granted the objecting tenant leave to amend the proceeding by substituting herself as the named plaintiff in place of the representative plaintiff and deleting all reference to the others. A new action by her would have been statute-barred.

[42] The rule governing representative proceedings was revised in 1962 by the English Rule 15/12 which codified the law and practice under the former rule: see *The Supreme Court Practice*, supra, at 197-98 (England has since introduced detailed provisions governing Group Litigation in its Civil Procedure Rules, 1998, S.I. 1998/3132, rr. 19.10-19.15: *Western Canadian* at para. 30. They are not relevant to this appeal). Rule 15/12 provided:

Representative proceedings (O. 15, r. 12)

12. -

. . .

- (3) A judgment or order given in proceedings under this Rule shall be binding on all the persons as representing whom the plaintiffs sue or, as the case may be, the defendants are sued, but shall not be enforced against any person not a party to the proceedings except with the leave of the court.
- (4) An application for the grant of leave under paragraph (3) must be made by summons which must be served personally on the person against whom it is sought to enforce the judgment or order.
- (5) Notwithstanding that a judgment or order to which any such application relates is binding on the person against whom the application is made, that person may dispute liability to have the judgment or order enforced against him on the ground that by reason of facts and matters particular to his case he is entitled to be exempted from such liability.
- (6) The Court hearing an application for the grant of leave under paragraph (3) may order the question whether the judgment or order is enforceable against the person against whom the application is made to be tried and determined in any manner in which any issue or question in an action may be tried and determined.

[43] In *British Columbia*, r. 5(13) was enacted with effect from 3 January 1977. It was taken from the 1962 English Rule 15/12. For ease of reference I repeat r. 5(13):

Enforcement of order made in representative proceeding

- (13) (a) An order made in a proceeding under subrule (11) is binding on all the persons represented in the proceeding as parties, but shall not be enforced against a person not a party to the proceeding except with leave of the court.
- (b) An application for leave shall be served on the person against whom the applicant seeks to enforce the order, and that person may dispute liability to have the order enforced against him or her.
- (c) On the application, the court may order that the question whether the order is enforceable against that person be determined in such manner as it thinks just.

- [44] I have no doubt that r. 5(13)(a) dictates that an order resolving a representative proceeding is binding on all those persons whom the plaintiff chooses to represent. That is the accepted effect of the equivalent English rule and of orders in representative proceedings made in Canada under the old rule. The difference in wording between r. 5(13)(a) and r. 15/12(3) is not material. I read the variation in wording as an attempt to state more succinctly the intention that lay behind the English Rule 15/12(3), rather than an indication of an intention to change long-standing law and practice.
- [45] This interpretation fulfills the purpose of a representative proceeding and gives all the words a meaning. If the appellant's preferred interpretation were accepted, that an order in a representative action is binding only on the parties of record, the rule maker could have said so plainly, or not at all. Orders made in a proceeding bind the parties: all take the benefit of those made in their favour and suffer the burden of those made against them. All are subject to the rule of cause of action estoppel. The practical effect of the main clause in r. 5(13)(a) is to remove the burden on a defendant of establishing that a person is a privy to a plaintiff.
- [46] Likewise, for the coordinate clause in r. 5(13)(a) to have any function, it must mean that an order binding a person represented as a party, who is not a party of record, cannot be enforced without leave of the court. On my reading, "party" in the coordinate clause does not include those who are "represented as parties" in the main clause. This makes good sense, particularly if the person is represented as an unsuccessful defendant. Such a person might have had no knowledge of the proceeding and may be able to establish reason to be exempted from liability under an order otherwise binding on him. The lack of distinction between a person represented by an unsuccessful defendant and one represented by a settling plaintiff cannot dictate the meaning of a rule applicable to both.
- [47] The requirement to seek leave before enforcing an order provides fairness to a party against whom an order is made, without interfering with the efficiency of what is a simpler procedure for resolving a collective dispute than a class proceeding with its more complex procedural requirements. Rule 5(13)(b) provides for notice and the right to dispute liability, an opportunity not required to be given to a person represented as a party before judgment. Exemption from enforcement of an otherwise binding order was common practice in a representative proceeding in England, made explicit in English Rule 15/12 (5). I am persuaded that is precisely the function of the coordinate clause, supported by the procedural requirements in r. 5(13)(b) and the power granted the court by r. 5(13)(c). It permits a court to exempt a person represented as a party from the effect of an order otherwise binding on him for reasons particular to that person, or if it was fraudulently obtained: see *Commissioner of Sewers v. Gellatly*, supra.

- [48] Thus, r. 5(13) complements the practice that developed under r. 5(11) of permitting persons within the defined class to apply, before judgment, to be made a defendant or substituted as plaintiff. The price to be paid for this added fairness to those represented as parties is to the representative party's ability to control the proceeding.
- [49] Given the effect of the coordinate clause in r. 5(13)(a), the opposing party in a settlement may want to ensure that those represented not only acknowledge the binding effect of the settlement and consequential order but also agree not to seek exemption from liability under it. Before settling, the opposing party may want to be assured that those represented have knowledge of the settlement and do not object to it. As Chief Justice McLachlin contemplated in *Western Canadian*, this interpretation suggests a more active role for the court in a representative proceeding than any party sought in the *Routley* action.
- [50] This interpretation suggests a representative proceeding may be preferred when the class is limited and clearly ascertainable, as in this case and all the authorities provided to us where a representative proceeding was permitted to continue when challenged. The two union classes represented by Mr. Routley were capable of clear definition and so met the condition for a representative proceeding set down in *Western Canadian* at para. 38.

Application to this proceeding

- [51] There are two issues this Court need not address on this appeal. The parties agree cause of action estoppel is the foundation for the trial judge's application of the *res judicata* defence. Both treat r. 5(13) as inapplicable to the non-union class who were not represented as parties in the *Routley* action. They part company on whether the doctrine of *res judicata* applies to estop the claims of the non-union class (as the Crown maintains) or to give the Court discretion to permit relitigation by the union classes (as the appellant submits).
- [52] As I noted earlier, the first issue on this appeal is whether Mr. James and those on whose behalf he is bringing the class proceeding, or some of them, were "persons represented in the [*Routley*] proceeding as parties". The evidence establishes that Mr. James and the members of the union classes he represents in his action were members of the Union on the day their cause of action arose. Mr. Routley chose to represent them. They were "represented as parties". Thus, r. 5(13) applies: Mr. James and the members of the two union classes are bound by the consent dismissal order. As well, at common law, cause of action estoppel applies to them as privies and bars their claims because they were present in the action by representation.
- [53] The non-union class members were not represented. So, r. 5(13) does not apply to them and cause of action estoppel bars their claim only if the trial judge correctly found them to be privies of Mr. Routley. The trial judge found the non-union class members to be privies essentially because the causes of action in the two proceedings are identical (para. 53). But the identity of the causes of action in the two proceedings is only the first condition for the application of the doctrine of estoppel. A finding of privity also requires a sufficient degree

of identification between two parties to make it just to hold the judgment should be binding. The essence of privity is that the privy must claim under or through the person with whom he is said to be a privy. Quoting in part from *The Law of Evidence in Canada*, 2d ed. (Toronto: Butterworths, 1999) at 1088, Binnie J. noted in *Danyluk* at para. 60 that "[i]t is impossible to be categorical about the degree of interest which will create privity determinations must be made on a case-by-case basis". The trial judge found in *Black's Law Dictionary*, 8th ed., s.v. "privy" this definition:

The term also appears in the context of litigation. In this sense, it includes someone who controls a lawsuit though not a party to it; someone whose interests are represented by a party to the lawsuit; and a successor in interest to anyone having a derivative claim.

- [54] The only possible justification for finding the non-union class members to be his privy is that Mr. Routley represented their interests. For whatever reason, Mr. Routley did not choose to include them in the Routley action; probably because his concern was to represent the union members in the action primarily controlled by the Union. As the reasons of the trial judge on the certification application (2004 BCSC 608) indicate, the protective clause was included in the tree farm licence in response to the Union's representations. In these circumstances, I cannot say it is just to find the non-union members were privies of Mr. Routley.
- [55] The Crown suggests the result of this finding will be an absurdity that "cannot be allowed to continue". Its submission goes this way. Mr. James has no claim, so he represents a class of which he is not a member. No member of the non-union sub-class he is certified to represent has ever expressed a desire to make a claim. No member of that sub-class has offered to be a representative plaintiff. No member of that sub-class has ever said she suffered a loss by reason of the closure of the Youbou Mill.
- [56] All of that may be true. However, the appropriate forum for the consideration of that submission is an application to the case management judge for termination of the class proceeding or a variation of the certification order, undoubtedly on notice to the members of the class who would be affected by any order. Mr. James has put forward a claim on their behalf that is identical to that made by Mr. Routley on behalf of the other two classes. Their claim is not barred by *res judicata* because they are strangers to the Routley action. Mr. James has been certified as an appropriate person to represent them. That order has not been appealed.
- [57] It follows that I would allow the appeal insofar as the order relates to the sub-class of non-union employees, but I would affirm that cause of action estoppel applies to bar relitigation by the union employees, the consent dismissal order not having been set aside.
- [58] I end by noting that my interpretation of r. 5(13) may leave room for a person bound to an order by that rule, and subject to cause of action estoppel only because represented, to seek exemption from the enforcement by *res judicata* on the ground that the representative plaintiff was purporting to represent a class of which that person was not a member. This

path was not taken, nor suggested as a possibility in either this Court or the trial court. Whether on such an application or in an action to set aside the consent dismissal order as of no effect, the members of the union classes can successfully argue Mr. Routley was purporting to represent a class of which one of more of them was not a member, I leave to the trial court. This is not a matter that can or should be considered by way of an expanded view of the discretion available to the court on cause of action estoppel. To find otherwise, would be to displace the certainty an order resolving a representative proceeding obtains by reason of r. 5(13) and the current understanding of the doctrine of cause of action estoppel

[59] For these reasons, I would allow the appeal and set aside the order as it relates to the non-union class. As it relates to the members of the union classes, I would dismiss the appeal.

[60] Because success is mixed on this appeal, I would make no order as to costs.

"The Honourable Madam Justice Huddart"

Reasons for Judgment of the Honourable Madam Justice Saunders:

[61] I have had the privilege of reading the reasons for judgment of Madam Justice Huddart, with which I am largely in agreement. I agree, in particular, with the disposition of the appeal she proposes as well as her analysis and conclusion on the issue of res judicata, both as it applies to the union members of the proposed class and as it does not apply to the non-union members of the proposed class. However, I take a somewhat different view of the potential application of r. 5(13) of the Rules of Court to a plaintiff to whom the defence of res judicata applies.

[62] As I understand the reasons for judgment of my learned colleague, she would allow for an application by a plaintiff, under what she refers to as the coordinate clause of r. 5(13)(a), for an order that a consent dismissal order of a representative proceeding does not preclude a fresh action. I would not hold that possibility open first because the Rules of Court are mainly procedural and should not, in my view, be interpreted so as to create substantive rights at odds with the application of substantive doctrines, either by way of a claim or by way of a defence, and second because the language of r. 5(13)(a) does not apply to the situation.

[63] The general nature of the Rules of Court is determined by the statutory provision under which they are promulgated, the Court Rules Act, R.S.B.C. 1996, c. 80. That the general nature of the Rules of Court is procedural is evident, in my view, by the language of s. 1(1) which generally provides for rules, and by the examples of matters that may be encompassed in the rules set out in s. 1(2). Section 1 of the Court Rules Act provides:

1 (1) The Lieutenant Governor in Council may, by regulation, make rules that the Lieutenant Governor in Council considers necessary or advisable governing the conduct of proceedings in . . . , the Supreme Court .

(2) Without limiting subsection (1), the rules may govern one or more of the following:

- (a) practice and procedure in each of those courts;
 - (b) the means by which particular facts may be proved and the mode by which evidence may be given;
 - (b.1) appearances and applications by telephone or other means of telecommunication before each of those courts;
 - (b.2) records in each of those courts, including the use of records in electronic or any other format;
 - (c) costs and their review;
 - (d) the establishment and collection of fees for services and duties provided by the government or employees of the government or by other persons;
 - (e) the establishment and payment of fees and allowances payable to witnesses, including witnesses for the Crown, jurors and other persons for services performed or attendances made in any of the courts in British Columbia;
 - (f) all matters arising under the Adult Guardianship Act, the Infants Act, Part 1, the Land Title Inquiry Act, the Patients Property Act and the Wills Variation Act;
 - (g) all matters arising under the Enforcement of Canadian Judgments and Decrees Act, including cancellation of the registration of a judgment;
 - (h) all matters arising under the Civil Forfeiture Act.
- (3) In addition, the rules may make provision for the service of originating process and other documents out of British Columbia.
- [64] The general procedural aspect of the Rules of Court was affirmed in *Penderville Apts. Dev. Partnership v. Cressey Dev. Corp.* (1990), 43 B.C.L.R. (2d) 57, 39 C.P.C. (2d) 18 (C.A.), although where a Rule is specific, it may create substantive rights: see e.g. *Twinriver Timber Ltd. v. International Woodworkers of America, Local No. 1-71* (1970), 14 D.L.R. (3d) 704, [1971] 1 W.W.R. 277 (B.C.C.A.).
- [65] The defence of *res judicata*, in this case by cause of action estoppel, is more than procedure - it is a substantive bar to an action based upon the conclusiveness of earlier proceedings.
- [66] Were r. 5(13) to permit an action to proceed where at common law the defence of *res judicata* is operative, the result would be to permit the Rule to trump the substantive law. There is, as noted in the passage from *G.M. (Canada) v. Naken*, [1983] 1 S.C.R. 72, 144 D.L.R. (3d) 385, a limited discretion as to the application of the defence of *res judicata*. I agree with my learned colleague that the discretion would not apply to the benefit of the plaintiff in this case. On that conclusion, in my view, that is the end of the matter, absent a further order setting aside the order giving rise to the defence of *res judicata*.

[67] This view, I consider, is consistent with the language of r. 5(13), which I do not read as providing a basis for attacking the dismissal order. Rule 5(13)(a) provides:

An order made in a proceeding under subrule (11) is binding on all the persons represented in the proceeding as parties, but shall not be enforced against a person not a party to the proceeding except with leave of the court.

[Emphasis added.]

[68] I agree that the term "person not a party to the proceeding" is broader than the term "person represented in the proceeding as parties" such that, for example, persons represented in the proceeding but who are not parties to the proceeding may be entitled to the benefit of r. 5(13)(a) in respect of an injunction issued against them.

[69] That conclusion, however, does not address the question of whether application of the doctrine of res judicata is "enforcement" of the dismissal order within the meaning of r. 5(13). In my view it is not. While the defendant here seeks to take the benefit of a doctrine of law, it does nothing to take from the plaintiff or to compel action by the plaintiff, as is implicit in the use of that word. Rather, the defendant here seeks only to rely upon an order which is binding upon the plaintiff and which precludes a finding of liability against the defendant in respect to the same cause of action. Further, in the event application of the doctrine of res judicata was "enforcement" of an order, it would be the defendant's responsibility to bring the application because the application must be brought by the person seeking to enforce the order.

[70] As I do not consider that the defendant is seeking to enforce the dismissal order by relying upon res judicata, I do not consider that an application could be brought under r. 5(13). The defendant does not need to bring an application under that rule to gain the benefit of the dismissal order, and the plaintiff is precluded from doing so because he does not seek to enforce an order "against" the defendant.

[71] On this basis I conclude that r. 5(13) does not apply in favour of the plaintiff.

[72] For this reason, the matter being res judicata in respect of the union members of the proposed class, I, too, would dispose of the appeal as proposed by Madam Justice Huddart.

"The Honourable Madam Justice Saunders"

"The Honourable Madam Justice Levine"

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