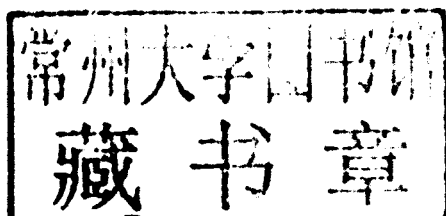




# **The Doctrine of Res Judicata in Canada**

**Third Edition**



**Donald J. Lange, B.A., LL.B., Ph.D. (Cantab.)**

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## **The Doctrine of Res Judicata in Canada, Third Edition**

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**The Doctrine of  
Res Judicata in Canada**

**Third Edition**

**To**  
**Marion Stirrett**

## ABOUT THE AUTHOR

Donald J. Lange, B.A., LL.B., Ph.D. (Cantab.), of the Ontario Bar, is a lawyer and a scholar. He is well qualified to write this definitive Canadian treatise on *res judicata* and related doctrines. He has practised exclusively in the area of civil litigation for nearly 30 years, appearing as counsel in many reported decisions. He is also a Deputy Judge of the Small Claims Court and, in that capacity, has rendered many reported judgments. Dr. Lange's articles have also been published in leading periodicals such as the *Canadian Bar Review* and the *Osgoode Hall Law Journal*.

# PREFACE TO THE THIRD EDITION

There have been over 2,000 Canadian decisions on *res judicata* and related doctrines since the second edition of this book was published in 2004. I have examined these decisions to determine their importance to the jurisprudence and added over 400 to the third edition.

The section on issue estoppel in criminal law is completely revised following the leading decision of the Supreme Court of Canada in *R. v. Mahalingan*.<sup>1</sup> The estoppel effect of a consent order is reconsidered based on Supreme Court of Canada *obiter dicta* in *Rick v. Brandsema*.<sup>2</sup> New sections have been added to some chapters, including an extensive review of the law under vexatious proceedings legislation and sections on security for costs and lawyer negligence. Many other sections have been expanded or rewritten to accommodate the growing case law. Two new key principles sections have been developed to assist advocates and judges. “The Key Principles of Discretion” identifies when a court may apply judicial discretion to the estoppel doctrines. “The Six Essential Doctrines” sets out the most concise definitions of the main doctrines in the book.

The developing law has prompted a reorganization of the chapters. Chapter 5 is now entitled “Discretion and Special Circumstances,” with new lead sections discussing the exercise of judicial discretion when considering whether or not issue estoppel or cause of action estoppel should apply to a second proceeding. The chapter on the doctrine of abuse of process by relitigation has been revised and moved from Chapter 7 to Chapter 4, to immediately follow the chapters on issue estoppel and cause of action estoppel because of the doctrine’s higher profile in the jurisprudence following *Toronto (City) v. Canadian Union of Public Employees, Local 79*.<sup>3</sup>

Since the first edition was published in 2000, the Canadian judiciary has quoted or referred to this book in numerous decisions at the trial and appellate levels, including on five occasions by the Supreme Court of Canada. Indeed, I am pleased to report that the book has been described as a “highly influential work ... which is widely cited and generally relied upon as being authoritative in Canadian courts.”<sup>4</sup>

I express my appreciation to LexisNexis Canada for providing product development and editorial assistance for the third edition, and to my spouse, Marion Stirrett, for her loving interest in the mysteries of *res judicata*.

This is the law of Canada between October 19, 1820 and January 1, 2010.

Donald J. Lange  
Toronto, Canada  
July 1, 2010

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<sup>1</sup> *R. v. Mahalingan*, [2008] S.C.J. No. 64.

<sup>2</sup> *Rick v. Brandsema*, [2009] S.C.J. No. 10.

<sup>3</sup> *Toronto (City) v. Canadian Union of Public Employees, Local 79*, [2003] S.C.J. No. 64.

<sup>4</sup> L.S. Abrams and K.P. McGuinness, *Canadian Civil Procedure Law*, 2nd ed. (Markham, Ont.: LexisNexis, 2010) at 232.

# PREFACE TO THE SECOND EDITION

Since the first edition of this book in 2000, there have been three new leading decisions from the Supreme Court of Canada regarding the doctrine of *res judicata* and related doctrines. This is significant for a jurisprudence which previously looked for authority to the leading decisions of *Angle v. Minister of National Revenue*<sup>1</sup> and *Grandview (Town) v. Doering*,<sup>2</sup> now 30 years old. In *Danyluk v. Ainsworth Technologies Inc.*,<sup>3</sup> the court introduced and mandated a consideration of the exercise of discretion in the application of issue estoppel. In *Toronto (City) v. Canadian Union of Public Employees, Local 79*,<sup>4</sup> the court provided a definitive analysis of the doctrine of abuse of process by relitigation, refusing to adopt the non-mutuality approach to issue estoppel as applied in the United States. In *Beals v. Saldhana*,<sup>5</sup> the court established the scope of fraud as an exception of special circumstances in estopping a foreign judgment in domestic proceedings.

The second edition examines these three Supreme Court decisions as well as over 500 decisions from trial and appellate courts across Canada rendered since 2000. For example, the reader will find that the exercise of discretion in the application of cause of action estoppel has been considered. The archaic doctrine of merger of a cause of action has been given new life. What constitutes a judicial decision has been redefined. The issue of the relitigation of a conviction in a civil proceeding has been thoroughly analyzed.

I am pleased to report that the first edition was well received by the Canadian judiciary. The book was cited by the Supreme Court of Canada on three occasions, and on many occasions by the Courts of Appeal of Alberta, New Brunswick, Nova Scotia, Ontario, and the Federal Court of Canada, as well as by numerous provincial superior courts and tribunals.

I wish to thank LexisNexis Canada for providing product development and editorial assistance for the second edition. I especially thank my spouse, Marion Stirrett, for her unfailing interest and support of this book.

This is the law of Canada between October 19, 1820 and June 1, 2004.

Donald J. Lange  
Toronto, Canada  
December 1, 2004

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<sup>1</sup> *Angle v. Minister of National Revenue* (1974), 47 D.L.R. (3d) 544 (S.C.C.).

<sup>2</sup> *Grandview (Town) v. Doering*, [1976] 2 S.C.R. 621.

<sup>3</sup> *Danyluk v. Ainsworth Technologies Inc.*, [2001] S.C.J. No. 46.

<sup>4</sup> *Toronto (City) v. Canadian Union of Public Employees, Local 79*, [2003] S.C.J. No. 64.

<sup>5</sup> *Beals v. Saldanha*, [2003] S.C.J. No. 77.



# PREFACE TO THE FIRST EDITION

This book is about the law of Canada. It consolidates over 2,000 Canadian and pre-Confederation cases on issue estoppel, cause of action estoppel, and related doctrines. It establishes the current state of the law in Canada and provides leading statements on the principles of law as articulated by Canadian judges since Confederation.

The book is intended to be a comprehensive reference source for litigators, judges, and scholars. The “Key Principles” in the book distillate the law of Canada in regard to the doctrines of issue estoppel, cause of action estoppel, and abuse of process by relitigation. The analysis in the book dissects the minutiae of these complex doctrines. There are many related doctrines which are explored and many problem areas which are analyzed. The reader will find in the book a body of jurisprudence distinctively Canadian.

I wish to thank the librarians and staff of the Great Library of the Law Society of Upper Canada, where I conducted my research over a period of years, my publisher for editorial support and the inevitable extensions of time, and my colleague, Roy Wise, for his interest and support. To Marion Stirrett, this book is dearly dedicated. Without Marion, this consolidation of the law of Canada would not have been possible.

I researched, I read, I wrote. This is the law of Canada between October 19, 1820 and January 1, 2000.

Donald J. Lange  
Toronto, Canada  
August 1, 2000

# ON READING THE FOOTNOTES

The footnotes are organized in the order of levels of court and chronology. When more than one case is cited in a footnote, the appellate court is cited first, in chronological order citing the most recent case first, followed by lower court cases in the same chronological order. In footnote references to appellate cases, concurrence or dissension among the panel is noted where applicable. The reader will, on occasion, find an appellate case, reversing or affirming a lower court decision, cited following the lower court case because it is reversed or affirmed “on another ground” or “on other grounds” without affecting the precedent value of the lower court decision as cited. Case quotations in the text and footnotes identify the name of the judge. The quotations retain the formatting from their original paper or electronic source. References to “See also” in the footnotes identify additional cases related to the matter discussed. Some case commentary appears in the footnotes often beginning with the introductory word “In.”

Cases with electronic citations, for example, “[2001] S.C.J. No. 46,” are citations from LexisNexis Quicklaw. Cases with citations of “A.C.W.S.” or “W.C.B.” are references to unreported decisions in Canadian digests of cases, namely, the All Canada Weekly Summaries and the Weekly Criminal Bulletin, respectively. These footnotes cite the page number where the case is summarized in the digest followed by a reference to the actual page or pages of the unreported reasons for judgment under discussion. Cases from these digests may be ordered from the publisher of the digests.

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