File Number: 22959

IN THE SUPREME COURT OF CANADA
(On Appeal From the Court of Appeal for Ontario)

BETWEEN:

WAYNE PENNER

Appellant
(Plaintiff)

and

REGIONAL MUNICIPALITY OF NIAGARA REGIONAL POLICE SERVICES BOARD, GARY E. NICHOLLS, NATHAN PARKER, PAUL KOSCINSKI and ROY FEDERKOW

Respondents
(Defendants)

FACTUM OF THE APPELLANT

OVERVIEW

1. This case raises the following question: should the doctrine of issue estoppel be extended so as to supplant the judiciary's traditional role as the ultimate arbiter of disputes between citizens and the state over the use or misuse of police powers?

2. To answer the above question in the affirmative will effectively put the police complaints system out of reach and ultimately "out of business", as competent legal advice would rarely include recommending an election in favour of a police adjudicator (with statutorily circumscribed powers) chosen by and acting under the authority of a Chief of Police[1] over an independent member of the judiciary (with broad remedial powers) with no connection to the police.

[1] Indeed, chiefs of police can personally adjudicate their own hearings if they so choose (see section 64(7) and 76(1) of the *Police Services Act*, R.S.O. 1990, c. P.15, Appellant's Book of Authorities Tab 53).

3. In this case, the Ontario Court of Appeal applied the doctrine of issue estoppel to legal and factual findings made by a retired police superintendent (the "Hearing Officer") in the course of a police disciplinary hearing. In so doing, the Court barred Mr. Penner from seeking police accountability through an independent adjudicator before the courts.

4. Mr. Penner's statement of claim alleges that he was arrested without reasonable and probable grounds and was the subject of an excessive use of force. Mr. Penner's claim further alleges he was strip searched by the Respondent Officers without any justifiable reason. Indeed, the legality of the strip search was not addressed by the Hearing Officer or the subsequent appeals. These types of allegations cry out for independent adjudication.

5. With respect, the Ontario Court of Appeal's decision failed to address two significant aspects of the police disciplinary proceedings. First, the Court of Appeal's finding that the police adjudicative hearings have all the "hallmarks of an ordinary civil trial"[2] was made without conducting any analysis of the contrast in independence enjoyed by Superior Court Judges versus the lack of independence of a police adjudicator. Second, the Court of Appeal, in its one paragraph treatment of the purposes of the *Police Services Act* (the *"Act"*)[3] , failed to determine whether certain statutory provisions oust the application of issue estoppel to the findings of a discipline hearing. Full analysis of these two issues demonstrates that the *Act* recognizes, as was intended by the Legislature, that a police disciplinary hearing was not meant to prevent a public complainant from pursing civil remedies for police misconduct.

[2] Decision of the Court of Appeal for Ontario dated September 27, 2010 at ¶ 48, Appellant's Record, Tab 3.
[3] *Police Services Act*, R.S.O. 1990, c. P.15, Appellant's Book of Authorities, Tab 53.

6. Put simply, discipline hearings run by police officer adjudicators (appointed by Police Chiefs) and prosecuted by police officers (appointed by and often acting under the instruction of Chiefs of Police during the hearings) cannot replace accountability obtained by civil actions in our Honourable Courts.

PART I - FACTS

7. This appeal arises out of the Court of Appeal's dismissal of the Appellant's claims against the Respondents on the basis of issue estoppel. The Court applied issue estoppel in respect of findings made at a police disciplinary hearing that the Respondents did not unlawfully arrest the Appellant or use unnecessary force in his arrest. The Appellant's civil proceeding was commenced prior to the release of the Hearing Officer's ruling. The civil proceeding was based in large part on allegations that were the subject matter of the discipline hearing.

(a) The events giving rise to the action

8. On January 28, 2003, the Appellant was arrested by Constables Federkow (the Court Officer), Parker and Koscinski for allegedly causing a disturbance while attending his wife's *Provincial Offences Act* trial. The arrest was effected in the courtroom, and in the absence of any instruction or request by the presiding Justice of the Peace or the Court Officer. In the course of the arrest, the Appellant suffered multiple injuries including an injury to his right wrist, bruising to his right temple and a black eye.[4] While at the police station, the Respondents, Parker and Koscinski, again assaulted the Appellant punching him twice in the head. The Respondents then submitted the Appellant to an unlawful strip search.

[4] Statement of Claim at ¶ 35, Appellant's Record, Tab 8.

9. The Respondent officers charged the Appellant with causing a disturbance, assault resisting arrest, and breach of probation contrary to the *Criminal Code of Canada*. The charges were withdrawn at the request of the Crown on June 23, 2003.[5]

10. On July 22, 2003, the Appellant commenced a civil proceeding related to this incident. The statement of claim sought damages for *inter alia* malicious prosecution, excessive use of force, assault, false arrest, false imprisonment, and for an allegedly unlawful strip search.[6] The below chart details the claims made against each of the Respondent officers, the Chief, and the Regional Municipality of Niagara Regional Police Services Board:

Respondent	**Claim (paragraph of Statement of Claim)**
Constable Parker	False Arrest (para. 36 and 37)
	Excessive Use of Force (para. 36 and 37)
	False Imprisonment (para. 36 and 37)
	Malicious Prosecution (para. 36 and 37)
	Assault (para. 39)
	Unlawful strip search (para. 49(d))
Constable Koscinski	False Arrest (para. 36 and 37)
	Excessive Use of Force (para. 36 and 37)
	False Imprisonment (para. 36 and 37)
	Malicious Prosecution (para. 36 and 37)
	Assault (para. 39)
	Unlawful strip search (para. 49(d))

[5] Decision of the Court of Appeal for Ontario dated September 27, 2010 at ¶ 8-9, Appellant's Record, Tab 3.
[6] Statement of Claim at ¶ 35, Appellant's Record, Tab 8.

Constable Federkow	False Arrest (para. 40) False Imprisonment (para. 40) Malicious Prosecution (para. 38)
Chief Gary E. Nicholls	Vicarious liability for unknown officers who aided in false arrest, false imprisonment, and malicious prosecution (para. 41) Negligent Supervision (para. 44)
Regional Municipality of Niagara Regional Police Services Board	Negligent use of defective handcuffs causing permanent damage to the Appellant's right wrist (para. 32) Vicarious liability for unknown officers who aided in false arrest, false imprisonment, and malicious prosecution (para. 41) Negligent supervision (para. 44)

(b) The police discipline hearing

11. Following his arrest, the Appellant also filed a complaint under the *Act* alleging misconduct by Constables Koscinski and Parker. He claimed that the arrest was unlawful and that unnecessary force was used during and subsequent to the arrest. The Appellant further alleged that he was assaulted by Constables Parker and Koscinski while detained at the police station.[7]

12. The Niagara Regional Police Services Board referred the matter for a Disciplinary Hearing in respect of Constables Koscinski and Parker. The matter was prosecuted on behalf of the Niagara Regional Police Service by an Ontario Provincial Police Inspector. Both officers

[7] Decision of the Court of Appeal for Ontario dated September 27, 2010 at ¶ 2, Appellant's Record, Tab 3.

were charged with unnecessary or unlawful exercise of authority contrary to section 2(1)(g)(i) and (ii) of the *Code of Conduct*.[8]

13. As a public complainant, the Appellant enjoyed standing at the hearing as provided by the *Act*. He was entitled to, and in fact did, cross-examine witnesses and make legal submissions at the hearing. The Appellant was self-represented throughout.

14. Evidence was heard over several days in March and April 2004 before a retired police superintendent who acted as the Hearing Officer. The Hearing Officer's decision, rendered on June 28, 2004, found both officers not guilty of the disciplinary charges on the basis that Parker and Koscinski had reasonable and probable grounds to arrest the Appellant and had the lawful authority to do so.[9] The Hearing Officer's decision does not address the lawfulness of the strip search.

(c) The appeal to the Ontario Civilian Commission on Police Services

15. The Appellant appealed, pursuant to section 70(1) of the *Act* from the decision of the Hearing Officer to the Ontario Civilian Commission on Police Services (the "OCCPS"), as it was then called.

16. The OCCPS held that the Hearing Officer erred by failing to determine whether a police officer's powers to arrest were fettered by a Justice of the Peace's power to control order in his

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[8] O. Reg. 123/98, at the time s. 2(1)(g)(i) and (ii) read as follows:

2(1) Any chief of police or other police officer commits misconduct if he or she engages in,

…

(g) Unlawful or Unnecessary Exercise of Authority, in that he or she,

(i) without good and sufficient cause makes an unlawful or unnecessary arrest, or

(ii) uses any unnecessary force against a prisoner or other person contacted in the execution of duty.

[9] Decision of Superintendent Fitches dated June 28, 2004, Appellant's Record, Tab 12A.

or her courtroom. In answering this question, the OCCPS held that, absent a direction from the Justice of the Peace or a clear and imminent threat, the officers did not have the lawful authority to arrest the Appellant in the courtroom. As a result, the OCCPS found the arrest to be unlawful and revoked the finding of the Hearing Officer. Since the Appellant's arrest was found to be unlawful, the OCCPS also found that any force in effecting the arrest was not justified.[10]

(d) Statutory Appeal - Divisional Court's decision

17. Constables Parker and Koscinski commenced an application for judicial review of the OCCPS's decision to the Superior Court of Justice – Divisional Court.[11]

18. Relying on the deference afforded to the Hearing Officer on judicial review, the Divisional Court found that there was "no manifest error, no ignoring of conclusive or relative evidence, nor any indication [the Hearing Officer] misunderstood the evidence or drew erroneous conclusions from it."[12] The Divisional Court held that the arrest of the Appellant was lawful, and set aside the decision of the OCCPS and restored that of the Hearing Officer.[13]

(e) Rule 21 Motion brought by the Respondents

19. On October 21, 2009, the Respondents brought a motion pursuant to Rule 21 of the Ontario *Rules of Civil Procedure* seeking a determination of a question of law before trial. The Respondents argued that the Appellant's allegations in the statement of claim of unlawful arrest, assault and/or malicious prosecution were barred on the basis of *stare decisis, res judicata,* issue estoppel and/or abuse of process.

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[10] Decision of Commission dated April 22, 2005, Appellant's Record, Tab 12B.
[11] Endorsement of Divisional Court dated January 16, 2008, Appellant's Record, Tab 12C.
[12] *Ibid.* at ¶ 28.
[13] *Ibid.*

20. In Reasons for Decision dated October 27, 2009, the learned Motions Judge held that the requirements of issue estoppel had been met with respect to the claims brought by the Appellant for unlawful arrest, the use of unnecessary force during and subsequent to his arrest, and malicious prosecution. The Motions Judge went on to hold, without explanation, that this was not an appropriate case to exercise his decision not to apply issue estoppel.[14]

(f) Court of Appeal's decision

21. The Appellant appealed the Motions Judge's decision to the Court of Appeal.[15]

22. The Court of Appeal dismissed the appeal. The Court found that the three requirements for issue estoppel established by this Honourable Court in *Danyluk v. Ainsworth Technologies Inc.*[16] had been satisfied by the police discipline hearing. The Court of Appeal correctly identified the three part test as follows:

> The respondents seek to estop Mr. Penner from litigating in his civil action issues decided in the disciplinary hearing under the Police Service Act. To do so, they must show three things:
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> (i) The same question was decided in the disciplinary proceedings;
> (ii) The judicial decision said to create the estoppel is final; and
> (iii) The parties, or their privies, to the judicial decision are the same persons as the parties, or their privies, to the proceedings in which the estoppel is raised.
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> Even if these three requirements of issue estoppel have been met, the court retains the discretion to refuse to apply it if doing so would be unfair or work an injustice.[17]

23. With respect to the first branch of the test, the Court of Appeal held that the Hearing Officer's decision had found that the Appellant's arrest was lawful; that there were reasonable

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[14] Reasons for Decision of Justice Fedak dated October 27, 2009, Appellant's Record, Tab 4.
[15] Endorsement of Divisional Court dated January 16, 2008, Appellant's Record, Tab 12C.
[16] *Danyluk v. Ainsworth Technologies Inc.*, [2001] 2 S.C.R. 460 ["*Danyluk*"], Appellant's Book of Authorities, Tab 9.
[17] Decision of the Court of Appeal for Ontario dated September 27, 2010 at ¶ 23-24, Appellant's Record, Tab 3.

grounds to make the arrest; that the officers had not engaged in an excessive use of force; and that the officers had not assaulted the Appellant at the police station. As a result, the Court held that the Hearing Officer's decision, coupled with the Divisional Court's decision, had addressed the issues raised in the claim, namely, the claims for false arrest, false imprisonment, malicious prosecution, assault and excessive use of force.[18]

24. With respect to the second branch of the test, the Court of Appeal held that the Motions Judge was correct in finding that the parties on the discipline hearing were the same parties involved in the civil proceeding. The Court went on to examine the extent of the Appellant's participation, as an unrepresented litigant, in the discipline hearing and related appeals. The Court held that the Appellant's degree of participation was significant because he testified, cross-examined witnesses, made submissions on the legal issues, commenced an appeal to the OCCPS and appeared before the Divisional Court on application for judicial review.[19] The Court held that this degree of participation was sufficient to establish the second branch of the test.

25. With respect to the third branch of the test, the Court of Appeal held that the Hearing Officer's decision was final as it had been affirmed on judicial review by the Divisional Court and the Appellant had not sought to appeal the Divisional Court's decision.[20]

26. The Court of Appeal observed that the Motions Judge failed to provide any analysis for his decision not to exercise the discretion in favour of allowing the claim to proceed. The Court of Appeal held that the decision was not entitled to any deference.[21]

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[18] Decision of the Ontario Court of Appeal dated September 27, 2010 at ¶ 27-28 and 34-37, Appellant's Record, Tab 3.
[19] *Ibid.* at ¶ 29-33.
[20] *Ibid.* at ¶ 25.
[21] *Ibid.* at ¶ 39.

27. The Court noted that two factors supported the Appellant's position that issue estoppel should not apply: (1) that the Legislature did not intend to foreclose the Appellant's civil action simply because a person filed a complaint under the *Act*; and (2) that the Appellant had no financial stake in the discipline hearing.[22]

28. The Court went on to hold that three factors favoured the application of issue estoppel (1) the expertise of the Hearing Officer; (2) the disciplinary proceeding against the two officers had all the hallmarks of an ordinary civil trial; and (3) the Appellant's active participation in the discipline hearing and subsequent appeals.[23] With respect to the expertise of the Hearing Officer, the Court of Appeal held that "a senior and experienced police officer has as much expertise as a court would have."[24]

29. After weighing the various factors, the Court of Appeal held that the application of issue estoppel, in the circumstance of this case, would not cause an injustice.[25]

PART II - QUESTION IN ISSUE

30. The issue to be determined in the herein appeal is whether the Court of Appeal for Ontario erred in law in applying issue estoppel so as to bar the Appellant's civil claims.

PART III - STATEMENT OF ARGUMENT

31. The Appellant respectfully submits that the Court of Appeal made five errors in applying issue estoppel.

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[22] Decision of the Ontario Court of Appeal dated September 27, 2010, at ¶ 42-43, Appellant's Record, Tab 3.
[23] *Ibid.* at ¶ 45-54.
[24] *Ibid.* at ¶ 45.
[25] *Ibid.* at ¶ 55.

32. First, the Court of Appeal erred in holding that a police discipline hearing has "all the hallmarks of an ordinary civil trial". The Appellant respectfully submits that the police discipline hearing intentionally lacks several of the "hallmarks" of a civil justice system.

33. Second, the Appellant submits that the Court of Appeal gave insufficient weight to the purpose of the police complaints provisions of the *Act.* A full review of the purposes of the complaint system demonstrates that the application of issue estoppel would frustrate the purpose of the *Act.*

34. Third, the Court of Appeal failed to consider the effect that the application of issue estoppel would have on the public's legitimate concerns regarding the lack of independence in the police complaints system. If the Court of Appeal's judgment is affirmed, the public will be left with the reasonable apprehension that an arguably biased police complaint system will oust public accountability provided in the civil process.

35. Fourth, the Court of Appeal erred in failing to avert itself to the civil inadmissibility provisions of the *Act*. Respectfully, the Court of Appeal should not have applied issue estoppel in the face of incompatible statutory provisions that ousted the common law doctrine of issue estoppel.

36. Finally, the Court of Appeal's analysis failed to appreciate the unique role of judges as "guardian(s) of the Constitution"[26] and "the foremost defenders of individual freedoms and human rights."[27]

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[26] *Ell v. Alberta*, [2003] 1 S.C.R. 857 at ¶ 23 ["*Ell*"], Appellant's Book of Authorities, Tab 10.
[27] *Therrien (Re)*, [2001] 2 S.C.R. 3 at ¶108 ["*Therrien (Re)*"], Appellant's Book of Authorities, Tab 33.

Issue 1: The Court of Appeal erred in determining that a police discipline hearing has the "hallmarks of an ordinary civil trial"

(i) The Hearing Officer's lack of true independence is not a hallmark of an ordinary civil trial

37. At paragraph 48 of its decision, the Court of Appeal held that the police discipline proceedings had "all the hallmarks of an ordinary civil trial." With respect, the Appellant submit sthat a closer examination of the discipline proceeding reveals that a discipline proceeding does not, in fact, have "all the hallmarks of an ordinary civil trial." As this Honourable Court found in *Odhavji Estate v. Woodhouse*, the "public complaints process is no alternative to liability in negligence."[28]

38. The first significant difference between a police discipline hearing and a civil trial is the independence of the adjudicators. As further described below, the police complaint system requires complaints be investigated by a Chief of Police with the Chief determining whether a hearing is required. The Chief of Police appoints a prosecutor (a police officer) and the hearing officer (a superintendant or retired superintendent). The police discipline proceeding provides so much power to the Chief of Police that the Court of Appeal of Ontario has ruled that the Chief of Police is not entitled to appeal a decision of a hearing officer:

> If, in the absence of an explicit appeal right, the Chief were granted standing to review his decision or, as in this case, the decision of a police officer he has delegated to hold the hearing on his behalf, it could erode confidence - on the part of police generally, those subject to discipline proceedings, and the public at large - in the independence and fairness of the discipline process. The PSA reflects principles of fairness and natural justice in that it does not allow the Chief, who has control of virtually all aspects of the discipline process, to seek to overturn a decision he does not like by a hearing officer he appointed. The Chief concedes that he cannot do this by way of appeal; in my view, a proper

[28] *Odhavji Estate v. Woodhouse*, [2003] 3 S.C.R. 263 at ¶ 60 Appellant's Book of Authorities, Tab 23.

> interpretation of the PSA, and considerations of principle and policy, preclude an identical attack grounded in judicial review. [29]

39. The Divisional Court has recognized the lack of independent adjudication over police complaints in Ontario. In *Sharma v. Waterloo Regional Police Service*, the Divisional Court recognized that selecting a retired superintendant to adjudicate over a police disciplinary hearing created an institutional bias, but found that the *Act* created and permitted this institutional bias. [30]

40. A juxtaposition of the requirements of the independence of the judiciary and the *Act's* statutorily permitted institutional bias demonstrates the necessity of allowing a complainant to seek civil remedies. In *R. v. Valente* this Honourable Court identified three essential conditions of judicial independence: (1) security of tenure; (2) financial security; and (3) institutional independence.[31] As this Honourable Court decided in *Reference re Independence and Impartiality of Judges of the Provincial Court of Prince Edward Island*, the independence of the judiciary is necessary to ensure that adjudicators are insulated from the parties to a litigation:

> … I do not wish to overlook the fact that judicial independence also operates to insulate the courts from interference by parties to litigation and the public generally: Lippé, supra, at pp. 152 et seq., per Gonthier J. As Professor Shetreet has written (in "Judicial Independence: New Conceptual Dimensions and Contemporary Challenges", in S. Shetreet and J. Deschênes, eds., Judicial Independence: The Contemporary Debate (1985), 590, at p. 599):
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> > Independence of the judiciary implies not only that a judge should be free from executive or legislative encroachment and from political pressures and entanglements but also that he should be removed from financial or business entanglement likely to affect or rather to seem to affect him in the exercise of his judicial functions.[32]

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[29] *Watson v. Catney*, [2007] O.J. No. 231 (C.A.).
[30] *Sharma v. Waterloo Regional Police Service*, [2006] O.J. No. 2948 at para. 27 (Div. Ct.) (QL); see also *McCormack v. Toronto Police Service*, [2005] O.J. No. 5149 (Div. Ct.) (QL).
[31] *R. v. Valente* (1985), 23 C.C.C. (3d) 193 (S.C.C.).
[32] *Reference re Independence and Impartiality of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3 at ¶ 130.

41. A hearing officer, usually a retired police superintendant, who performs *per diem* adjudications for a police service and who is selected by a Chief of Police is not truly independent from the parties to the police disciplinary hearing. The lack of institutional independence is permissible for the limited purpose of a discipline hearing, however, it surely is not a "hallmark" of a civil trial.

42. The Appellant respectfully submits that issue estoppel should not apply where the discipline hearing does not provide for truly independent adjudication.

(ii) Limited participation by a public complainant is not a hallmark of an ordinary civil trial

43. The entitlement of members of the public to initiate a complaint and participate in a hearing does not change the essential character of a police discipline hearing as a dispute between an employer and employee. Once the public complainant has initiated a complaint, she assumes a passive role until the hearing. Prior to the hearing, a public complainant has no control over the investigation. The public complainant has no ability to demand production of documents or any form of early discovery. The public complainant is entitled to disclosure of the results of the investigation but cannot lead or direct it. The public complainant is at the mercy of the police force investigating its own police officer. The Newfoundland Court of Appeal described the role of a public complainant in the Newfoundland police complaints process as follows:

> Part III takes its cue from its title, i.e., PUBLIC COMPLAINTS. It creates the office of Public Complaints Commissioner and provides the procedure by which citizens can express dissatisfaction with a particular police action. Once a complaint is made, a citizen ... is in the hands of others. She or he has no control over those whose duty it is to perform the procedures which Part III and the Complaints Regulations require.... It makes no logical sense to frustrate a scheme

> put in place by the legislature to allow a citizen a user-friendly police complaint procedure by holding that every step along the way is mandatory.[33]

44. The Legislature's intention, in allowing a public complainant to participate in a police discipline hearing, was to increase transparency and public confidence in police oversight.[34] It was not, however, meant to address the civil rights of a public complainant. Unlike a civil proceeding where the plaintiff can direct the investigation and prosecution of a claim through discoveries, the public complainant is left as a passive participant in the system who is only permitted to challenge a police officer's account at the discipline hearing itself.

45. Subsequent to *Danyluk*, the Yukon Court of Appeal in *Grennan Estate* v. *Reddock*, held that only in exceptional circumstances should issue estoppel be applied in a tribunal-to-court context. The case involved an issue of medical malpractice. Prior to the court proceeding, there was a disciplinary proceeding before the Yukon Medical Council in which adverse findings were made against the physician and he was found guilty of professional misconduct. The decision of the trial judge in the court proceeding was based, in part, on applying issues estoppel in a tribunal-to-court context. In reversing the lower court, the Court of Appeal held that a tribunal decision should rarely be considered dispositive of a civil case:

> In a recent case from the *Yukon Territory Court of Appeal, Burchill v. Commissioner of the Yukon Territory*, [2002] Y.J. No. 19, one of the issues was whether a previous decision of an employment tribunal ought to be found to be dispositive in subsequent litigation between the parties. This was an employment law case. The court concluded that issue estoppel ought not to be applied. Saunders J.A. noted that to uncritically accept issue estoppel as being applicable had the potential to turn administrative proceedings into full blown hearings on allegations of cause contrary to sensible public policy. She referred to the

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[33] *Newfoundland and Labrador (Royal Newfoundland Constabulary Public Complaints Commissioner) v. Oates* [2003] N.J. No. 190 at ¶ 17 (C.A.) (QL) Appellant's Book of Authorities, Tab 22.

[34] *Browne v. Ontario (Civilian Commission on Police Services)*, (2001), 56 O.R. (3d) 673 at ¶ 60, Appellant's Book of Authorities, Tab 5.

judgment of the Supreme Court in the *Danyluk* case. In this case, I would sound the same cautionary note. It seems to me fundamentally undesirable in the majority of cases to import findings made in an administrative proceeding, where differing considerations and purposes are relevant, into a related civil proceeding before a court concerning damages for alleged negligence or breach of duty. The scope of the proceedings and the resources employed may be significantly different.

.... In my view however, there are other more substantial considerations that militate against the application of the principles of issue estoppel or res judicata in circumstances like the present. To allow as governing the earlier findings of an administrative tribunal in proceedings involving possibly differing standards and levels of participation by the parties or their privies could have the capacity to work an injustice. Also, as was pointed out in *Burchill*, supra, to allow such a principle to be invoked could result in an enormous expansion of the scope and cost of administrative proceedings. That would not be a useful development. Binnie J. in *Danyluk*, supra, made reference to the following excerpt from the American Restatement of the Law, as being worthy of note. In *Danyluk*, this is cited as: American Restatement of the Law, Second: Judgments 2d (1982), vol. 2 s. 83(2)(c):

> procedural elements as may be necessary to constitute the proceeding a sufficient means of conclusively determining the matter in question, having regard for the magnitude and complexity of the matter in question, the urgency with which the matter must be resolved, and the opportunity of the parties to obtain evidence and formulate legal contentions.

That excerpt highlights what I conceive to be a very salient consideration in these cases, namely, would it be appropriate to apply earlier conclusions having regard to the scope of the administrative proceedings, the resources, (legal or investigative), available and the salient issues being contested in such proceedings? While issue estoppel has a useful role to play in encouraging finality of proceedings and the achievement of economical justice, I should think it would be the exceptional case where it would be thought appropriate to adopt the previous conclusions of an administrative tribunal as being dispositive in a subsequent civil case. That exceptional case might occur where issues such as abuse of process arise for consideration. I consider that it was not appropriate for the trial judge in this case to rely on issue estoppel as a basis for an adverse finding against the appellant Reddoch [sp]. In my view, it was error to adopt such an approach.[35]

[35] *Grennan Estate v. Reddock*, [2002] Y.J. No. 119 (C.A.), leave to appeal to the Supreme Court of Canada refused, [2003] S.C.C.A. No. 61 Appellant's Book of Authorities, Tab 13.

46. Procedural fairness in the context of a discipline hearing is meant to protect the officer who could be the subject of serious punishment including loss of employment. For example, section 69(5)[36] of the *Act*, as it then was, required that police officers be given an opportunity to examine any physical or documentary evidence that would be relied upon at the hearing. This statutory protection is not afforded to the public complainant. Unlike a civil proceeding, an officer charged with misconduct does not have an obligation to disclose their case to a public complainant and may decide not to testify at the discipline hearing. While a public complainant is considered a "party" under the *Act*, the procedural fairness owed to an officer will often trump the "rights" of the public complainant.

47. The difference between the procedural requirements of a civil case and that of an administrative discipline hearing were identified by the Federal Court of Appeal in *Ager v. R.* (a decision that predates this Honourable Court's decision in *Danyluk*), as a reason not to apply issue estoppel. In *Ager*, two air traffic controllers were transferred under protest from operation to instructional duties. They filed grievances and extensive public hearings were held involving many witnesses and numerous documents. The controllers had brought court actions for a declaration that they were entitled to special benefit duties and they also claimed damages flowing from the denial of those benefits. The Federal Court of Appeal decided not to apply issue estoppel holding as follows:

> There are many fundamental distinctions to be drawn between a hearing or adjudication before an administrative board or tribunal or quasi-judicial tribunal and a trial in a court of law. As these have a direct bearing on the subject, it would be useful to enumerate and comment on some of them.
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> 1. Generally speaking, in proceedings before administrative tribunals, there is no requirement or provision for the exchange of formal pleadings wherein the essential or basic facts which the parties intend to establish or deny in support of

[36] Now section 83(5) of the *Act*, Appellant's Book of Authorities, Tab 54.

> their case must be clearly stated beforehand. There is thus no requirement on the parties to clearly define all of the fundamental issues of fact and of mixed law and fact before the hearing takes place.
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> 2. There is, generally speaking, no right to pretrial oral discovery or discovery of documents nor are there procedural provisions for pretrial motions to order discovery.
>
> 3. Most boards are authorized to accept, and do in fact regularly accept and act upon, unsworn testimony.
>
> 4. Before many such boards and tribunals there is no absolute right for a person whose interest might be directly affected by the decision to actually be present during the proceedings, providing that person has been made fully aware of the nature and extent of the evidence adduced and has been afforded a reasonable opportunity of replying, of presenting evidence and otherwise meeting the case presented.
>
> 5. During the course of the hearing, hearsay evidence, including hearsay at times several steps removed from the original source of information, is allowed before many of these tribunals and similarly informal and unverified proof is accepted regarding the admission of exhibits and other documentary evidence. As a result a finding can at times be reached by an administrative tribunal which could never be made by a court of law where strict evidentiary rules must be applied. It would not only be unjust and illogical but it would constitute a travesty of justice to oblige a court of law to be bound by an issue of fact which, if tried before it, could not be established.[37]

(iii) "Clear and convincing" is not a hallmark of an ordinary civil trial

48. The standard of proof applicable to police disciplinary hearings also suggests that the purpose of the hearing is regulatory. Pursuant to section 63(10) of the *Act* an adjudicator must find that misconduct is proven on "clear and convincing evidence" before a police officer can be disciplined.[38] The "clear and convincing" standard has been accepted as the relevant standard in the misconduct hearings of many professional bodies and is a higher burden of proof than the

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[37] *Ager v. R*, [1983] F.C.J. No. 94 rev'd on other grounds (1984), 8 Admin L.R. 133 (Fed. C.A.) ["*Ager*"] Appellant's Book of Authorities, Tab 2.

[38] See also *Canadian Civil Liberties Association v. Ontario (Civilian Commission on Police Services)* (2002), 61 O.R. (3d) 649 at ¶ 50, Appellant's Book of Authorities, Tab 6; *Porter v. York (Regional Municipality) Police*, [2001] O.J. No. 5970 at ¶ 11 (S.C.) (QL), Appellant's Book of Authorities, Tab 26.

balance of probabilities.[39] The higher burden of proof favours police officers and is commensurate with the potential jeopardy for serious professional sanctions:

> The standard of proof used at a hearing was also discussed at length. I heard various arguments that the standard of proof should be changed and arguments that it remain the same. There is no doubt that the standard of proof is of some benefit to police officers. Police officers, by the very nature of their employment, often find themselves in positions of conflict. As a result, complaints are not infrequently filed against them. A finding of misconduct or unsatisfactory work performance based on a "clear and convincing evidence" standard ensures that discipline is not administered without significant proof. On the other hand, it is troubling to many groups with whom I met that a police officer could be found in a civil proceeding to have engaged in misconduct (and a police service ordered to pay significant damages) while the complaint against the officer has been found to be unsubstantiated in a PSA hearing in relation to the same incident.[40]

49. The Appellant respectfully submits the different standard of proof required in police discipline hearings is another factor that militates against the application of issue estoppel. The fact that the Appellant had to "prove" the Defendants' conduct based on "clear and convincing", a higher standard than a "balance of probabilities" indicates that the Appellant was not afforded the "hallmarks of an ordinary civil trial".

50. In the only other case in Canada to address the application of issue estoppel to police discipline hearings, the Ontario Superior Court of Justice found that issue estoppel should not apply because of the higher standard of proof in police disciplinary hearings.[41]

51. The Court of Appeal dismissed this argument on the basis that the Hearing Officer "would have made the same findings of fact even if the standard of proof had been on a balance

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[39] R. Steinecke, A Complete Guide to the Regulated Health Professions Act, looseleaf (Aurora, ON: Canada Law Book Inc., 2003) at ¶ 6-66 to 6-677, Appellant's Book of Authorities, Tab 40; see also *Canadian Civil Liberties Association v. Ontario (Civilian Commission on Police Services)* (2002), 61 O.R. (3d) 649, Appellant's Book of Authorities, Tab 6.

[40] The Honourable Patrick J. Lesage, Report on the Police Complaints System in Ontario, April 22, 2005 at pgs. 39-40, Appellant's Book of Authorities, Tab 43.

[41] *Porter v. York (Regional Municipality) Police*, [2001] O.J. No. 5970 at ¶ 9-12 (Sup. Ct.) (QL) Appellant's Book of Authorities, Tab 26.

of probabilities."[42] This analysis fails to reflect the fact that a hearing officer is **not** entitled to find misconduct pursuant to a lower standard of proof.

52. If the Court of Appeal's analysis on the differing standard of proof is affirmed, then parties to a discipline hearing and subsequent civil proceedings will be required to engage in a speculative exercise of determining what a hearing officer would have decided if permitted to make a finding of misconduct on a "balance of probabilities". This exercise will become the single most important factor in determining whether issue estoppel applies because this is the only factor identified by the Court of Appeal that differs from case to case. The other factors identified by the Court of Appeal in favour of the application of issue estoppel would apply to all cases where the public complainant actively participates in the discipline hearing.

53. The Court of Appeal's approach, in attempting to ascertain whether a lower standard of proof would have netted the same result, does not promote certainty and finality in the judicial process – the entire purpose of issue estoppel. The common law doctrine of issue estoppel should evolve in a matter that encourages certainty and finality. Where certainty and finality are simply incompatible with a legislative scheme, then issue estoppel should not apply:

> The court in *Danyluk* provides a list of seven factors relevant to the exercise of the court's discretion, but also states that these are not exhaustive. The list of factors is open.
>
> The factors listed are: the wording of the statute from which the power to issue the administrative order derives; the purpose of the legislation; the availability of an appeal; the safeguards available to the parties in the administrative procedure; the expertise of the administrative decision-maker; the circumstances giving rise to the prior administrative proceedings; and finally, the potential injustice of applying the doctrine of issue estoppel.

[42] Decision of the Ontario Court of Appeal dated September 27, 2010 at ¶ 51, Appellant's Record, Tab 3.

> The first five of these factors I would describe as structural in nature, dependent primarily on the nature of the legislation and the tribunal. The last two factors are more case-specific.
>
> The sort of open-ended discretion approved by the Supreme Court of Canada in *Danyluk* carries with it substantial risk of inconsistent application, of Chancellor's foot justice. This risk is particularly troublesome, given that the entire purpose of the doctrine of issue estoppel is to promote certainty and finality in the judicial process. For this reason, close attention must be paid to the manner in which this court has exercised discretion in previous cases.[43]

54. In light of the above, the Appellant respectfully submits that the Court of Appeal erred in holding that the procedures in the discipline hearing had the "hallmarks" of a civil trial. The public complainant in a police discipline hearing is a passive actor who has no right to shape the investigation or the manner in which the prosecution's case is lead. The public complainant is not provided with any advance form of discovery to know the officer's case and is left in the dark until the start of the hearing. These procedures are adequate for the protection of a person whose employment is in jeopardy. They are not, however, intended to be an alternative to civil procedures that treat a defendant and plaintiff on equal footing.

Issue 2: Issue estoppel undermines the purposes of the Police Complaints Provisions of the *Police Services Act*

55. In determining whether to exercise its discretion to not apply issue estoppel, the Court of Appeal was required by *Danyluk* to consider the purpose of the public complaints process as against the Appellant's civil proceedings. The Appellant submits that this aspect of the analysis should have been central to the question of whether the application of issue estoppel would work

[43] *Goodkey v. Dynamic Concrete Pumping Inc.*, [2003] B.C.J. 1026 at ¶ 27 (S.C.) (QL), Appellant's Book of Authorities, Tab 12; see also *Furlong v. Avalon Bookkeeping Services Ltd.*, [2004] N.J. No. 276 at ¶ 41(C.A.) (QL) Appellant's Book of Authorities, Tab 11.

an injustice. The Court of Appeal's one paragraph treatment demonstrates that this factor was given insufficient weight.[44]

56. A review of the statutory provisions of the *Act* and the purposes of police discipline hearings demonstrates that the application of issue estoppel to police discipline hearings would frustrate the purposes of the *Act* and causes an "injustice".

(i) The Police Discipline Process in 2004

57. At the time of the police discipline hearing at issue in the proposed appeal, Part V of the *Act* provided the following statutory mechanism for the resolution of public complaints:

(a) Section 57 permitted a member of the public to commence a complaint with respect to the conduct of an officer;

(b) Section 64(1) required a Chief of Police or his delegate to investigate a public complaint and prepare a written report on the results of the investigation;

(c) Section 64(7) required a Chief of Police to hold a police discipline hearing where the complaint investigation concluded that "a police officer's conduct may constitute misconduct";

(d) Pursuant to section 64(8), the Chief of Police could designate a prosecutor for the hearing that was either a police officer or counsel;

(e) Pursuant to section 76(1), the Chief of Police could designate a former police officer, a current officer, judge or retired judge to adjudicate the discipline hearing;

(f) Pursuant to section 69(3), the public complainant was a party to the police discipline hearing and could retain counsel or an agent to represent them at the hearing (section 69(4));

(g) A public complainant or the subject officer had the right to appeal the findings of an adjudicator to the OCCPS (section 70(1)); and

(h) Pursuant to section 71, a party to an OCCPS appeal could appeal the OCCPS's decision to the Divisional Court.[45]

[44] Decision of the Ontario Court of Appeal dated September 27, 2010 at ¶ 42, Appellant's Record, Tab 3.
[45] *Police Services Act*, R.S.O. 1990, c. P.15, Appellant's Book of Authorities, Tab 53.

(ii) Purpose of Police Discipline Process

58. A review of Canadian case law on police discipline suggests that the police discipline process should serve four distinct purposes:[46]

(a) The discipline process should protect the employer's interest in maintaining integrity and discipline on the police workplace;[47]

(b) The discipline process should protect the rights of the police officers suspected of misconduct; [48]

(c) The discipline process should ensure a high standard of conduct of the police and public confidence in the police;[49] and

(d) The discipline process should ensure that the interests of a public complainant are protected.[50]

59. The Ontario Court of Appeal has long recognized that the primary purpose of the complaints system in Ontario is the discipline of police officers:

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[46] See Paul Ceyssen, *Legal Aspects of Policing*, looseleaf (Toronto, Earlscourt Legal Press., Update 23, 2007) (volume 1), at 5-44, Appellant's Book of Authorities, Tab 38.

[47] *R. v. Wigglesworth*, [1987] 2 S.C.R. 541, Appellant's Book of Authorities, Tab 30.

[48] See *Turbucz and Wallaceburg Police* (1976), 1 O.P.R. 283 at 287 (O.P.C) (the disciplinary framework is protective rather than punitive, since a police officer could otherwise be dismissed at pleasure) Appellant's Book of Authorities, Tab 34. See also, *White v. Dartmouth (City)* (1991), 106 N.S.R. (2d) 45 at 51, 2 Admin. L.R. (2d) 283 at 292 (T.D.) in which the court referred to "protection of police officers from unwarranted disciplinary action" as one of the purposes of the Nova Scotia process, Appellant's Book of Authorities, Tab 36. See also *Halifax Regional Police Service v. Wilms* (1999), 177 N.S.R. (2d) 320, 16 Admin. L.R. (3d) 304 (S.C.) Appellant's Book of Authorities, Tab 14, and *Symington v. Nova Scotia Police Review Board* (2002), 202 N.S.R. (2d) 296 at 301-302, 632 A.P.R. 296 at 301-302 (S.C.) Appellant's Book of Authorities, Tab 32, in this regard.

[49] See, for example, *Coady v. Ryan* (1992), 103 Nfld. & P.E.I.R. 155 at 160, 326 A.P.R. 155 at 160 (Nfld. T.D.) (in which the court referred to the "broad public purposes" served by the police discipline process: "to ensure high standards of conduct within the Royal Newfoundland Constabulary") Appellant's Book of Authorities, Tab 7; *White v. Dartmouth (City)*, 106 N.S.R. (2d) 45 at 51, 2 Admin. L.R. (2d) 283 at 292 (the purposes of the Police Act include "public protection from abuse of police power") Appellant's Book of Authorities, Tab 36, and *Symington v. Nova Scotia Police Review Board* (2002), 202 N.S.R. (2d) 296 at 301-302, 632 A.P.R. 296 at 301-302 (S.C.) Appellant's Book of Authorities, Tab 32. See also *Police Services Board v. Morris* (1985), 156 C.L.R. 397 at 411-12 Appellant's Book of Authorities, Tab 25; *Re Bowen*, [1996] 2 Qd. R. 8 at 9-10 (S.C.) Appellant's Book of Authorities, Tab 31.

[50] See *Halifax Regional Police Service v. Wilms* (1999), 177 N.S.R. (2d) 320 at 320, 16 Admin. L.R. (3d) 304 at 312 (S.C.) Appellant's Book of Authorities, Tab 14, in which the court included the following as one of the purposes of the *Nova Scotia Police Act*: "To maintain public confidence in the police force and its reputation through a disciplinary process that imposes sanctions against those members of the police force who engage in discreditable conduct." See also *Symington v. Nova Scotia Police Review Board* (2002), 202 N.S.R. (2d) 296 at 301-302, 632 A.P.R. 296 at 301-302 (S.C.) Appellant's Book of Authorities, Tab 32. *Police Services Board v. Morris* (1985), 156 C.L.R. 397 at 411-12 and *Re Bowen*, [1996] 2 Qd. R. 8 at 9-10 (S.C.) Appellant's Book of Authorities, Tab 25.

> With that exception, the legislative scheme in Ontario, like the one in Saskatchewan, **is intended to create a complete substantive and procedural code for discipline of police officers within the provisions of the Police Services Act and its regulations**. As stated by the Supreme Court, this scheme accords with a well-founded public policy which gives police boards the "exclusive responsibility for maintaining an efficient police force in the community. The ability to discipline members of the force is integral to that role" (para. 31). I see no basis on which to distinguish the analysis and conclusion reached by the Supreme Court in the Saskatchewan case from this case and the Ontario scheme for police discipline.[51]

60. The lack of independent adjudication of complaints reflects the fact that that the primary purpose of Part V of the *Act* is the discipline of employees. As such, upon a finding of misconduct, an adjudicator may only impose management-style discipline to a subject officer:

> **Findings and disposition after hearing**
>
> 64(10) At the conclusion of the hearing, if misconduct or unsatisfactory work performance is proved on clear and convincing evidence, the chief of police shall take any action described in section 68.
>
> **Powers of chief and board**
>
> 68(1) The chief of police may, under subsection 64(10),
>
> (a) dismiss the police officer from the police force;
>
> (b) direct that the police officer be dismissed in seven days unless he or she resigns before that time;
>
> (c) demote the police officer, specifying the manner and period of the demotion;
>
> (d) suspend the police officer without pay for a period not exceeding 30 days or 240 hours, as the case may be;
>
> (e) direct that the police officer forfeit not more than three days or 24 hours pay, as the case may be; or

[51] *Abbott et al. v. Collins et al.* (2003), 64 O.R. (3d) 789 at ¶ 27 [emphasis added] Appellant's Book of Authorities, Tab 1.

> (f) direct that the police officer forfeit not more than 20 days or 160 hours off, as the case may be.[52]

61. An adjudicator does not have the statutory power to provide any form of monetary redress to a public complainant.[53]

62. Professor Philip Stenning, in a 1997 report prepared for the British Columbia Police Complaints Commissioner, detailed 13 objectives of a police discipline proceeding. Relevant for this appeal are the following objectives:

> **1. Accessibility**
>
> The process should be reasonably straightforward, and accessible and understandable to potential complainants, as well as to police officers to whom it applies.
>
> **2. Fairness and respect for rights**
>
> The process should be fair to both complainants and police officers who are the subject of complaints ("respondents"), as well as to others who may, voluntarily or involuntarily, become involved in the process (as witnesses etc.), and should at all times respect the dignity and legal and constitutional rights of all such persons.
>
> **3. Openness and accountability**
>
> The process should be open and accountable to complaints, respondents, police services to which it applies and their police boards, and to the public more generally, while protecting legitimate privacy interest of those who become involved in it and the integrity of police operations. Such accountability should also apply to the Police complaint Commissioner.
>
> **4. Timeliness**
>
> The process should provide for the timely handling and disposition of complaints while allowing sufficient time for adequate and effective investigation and resolution of them.

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[52] *Police Services Act*, R.S.O. 1990, c. P.15, s. 64(10) and 68, Appellant's Book of Authorities, Tab 53.
[53] *Ibid.*

> **7. Independence**
>
> Those who investigate, adjudicate or otherwise process complaints must enjoy independence from direction, control or undue influence from police organizations (police services and police unions/associations), police boards and any other person or body who may have some vested or partisan interest in the outcome of the process.
>
> **11. An appropriate balance between internal management and external oversight of the handling of complaints**
>
> Like all other aspects of the effective and efficient operation of a police service, responding appropriately and effectively to public complaints against its members or against the police service as a whole is first and foremost a responsibility of the service's senior management (and ultimately of the chief of police). Ensuring continued public confidence in the police service, however, requires that there also be a degree of independent external oversight and review of (and, in appropriate cases, direct intervention in) this process. The complaint process should provide for an appropriate balance between requiring the management of police services to fulfill their responsibilities for responding to public complaints, and ensuring an appropriate level of independent external oversight, review and direct intervention in the process to maintain public confidence in the police.[54]

63. Accessibility and the quick resolution of police complaints were primary purposes behind the enactment of then Part V of the *Act*. Part V of the *Act*, as it was during the relevant time, came into force and effect in 1998 following the passing of Bill 105.[55] During its second reading before the Legislature, then Solicitor General the Honourable Mr. Runciman, stated that the new complaints system was meant to create a simpler and more accessible system in Ontario. These comments were echoed by then parliamentary secretary to the Solicitor General, Gary Carr:

> [Hon. Mr. Runciman] The third and final area I would like to address is the improved system of police oversight that has been developed as part of Bill 105. It's clear to everyone interested in police oversight that the current system doesn't work. Certainly police and municipal stakeholders told us during our extensive consultations over the last year that the current system is complex, bureaucratic

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[54] P.C. Stenning, *Review of Part 9 (Complaint Procedure) of the British Columbia Police Act, as Amended by section 36 of S.B.C. 1997*, c. 37, Unpublished Report to the British Columbia Police Complaint Commissioner, 11 August 1998, at p. 3-5 as cited in Ceyssen, *supra* note 46 at p. 7-7 to 7-10 Appellant's Book of Authorities, Tab 42.
[55] *An Act to renew the partnership between the Province, Municipalities and the Police and to enhance community safety*, 1st Sess., 36th Leg., Ontario, 1997 (assented to June 26, S.O. 1997, c.8).

> and slow. I know from the inquiries in my office that very few people understand the current system, including members of this assembly.
>
> ***
>
> ... In many ways the new system will be fairer, more credible and more accountable for the police and for the complainant.[56]
>
> ***
>
> [Mr. Carr] The one issue that I think was fairly easy was that of oversight. I know that what we ended up coming up with may have been fairly contentious to a lot of people, but the amendments were probably one of the few things agreed upon by all people at the summit. The amendments will cut the number of discipline/oversight agencies in half. This will allow for a simpler, more accountable new system. Meanwhile, of course the special investigations unit will remain as it is, to ensure the independence and impartial investigation of cases involving serious injury or death.
>
> It wasn't the fault of any government or any political party. What happened was that the oversight had been built up through years of regulations and through a lot of changes, and what we have attempted to do is to help modernize and streamline and simplify an oversight system that is more responsible and accountable to the public. We believe the amendments are a result of many of the reviews and of the hard work that has been done by the policing community, by the public and by municipalities.[57]

64. The courts in Newfoundland have taken the opposite approach to that articulated by the Ontario Court of Appeal. The Newfoundland and Labrador Supreme Court has recognized that the public complaints system "established an alternative to the civil court system, one that will be more timely and presumably less costly for determining issues of police accountability, in order to improve public access and participation in the system."[58] In *Martin v. Royal*, Justice Hall

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[56] Ontario, Legislative Assembly, *Official Report of Debates (Hansard)*, (13 February 1997) at 1520 (Hon. Robert W. Runciman) Appellant's Book of Authorities, Tab 49.
[57] Ontario, Legislative Assembly, *Official Report of Debates (Hansard)*, (19 February 1997) at 1331 (Gary Carr) Appellant's Book of Authorities, Tab 50.
[58] *Martin v. Royal Newfoundland Constabulary Public Complaints Commission*, [2004] N.J. No. 243 at ¶ 39 (S.C.) (QL) Appellant's Book of Authorities, Tab 18; see also *Newfoundland (Royal Newfoundland Constabulary) v. Newfoundland (Royal Newfoundland Constabulary Public Complaints Commissioner)*, [2002] N.J. No. 203 at ¶ 15 (S.C.) (QL) Appellant's Book of Authorities, Tab 21.

held that the public complaints process did not displace the court's independent jurisdiction over issues of police misconduct:

> Nothing in this legislation takes away the rights of citizens to have access to the existing civil court system which maintains its independent jurisdiction over issues of police misconduct through the law of tort and the law of compensatory remedies.[59]

65. The approach of the Court of Appeal will inevitably frustrate the purposes of the public complaints system in Ontario. If issue estoppel is to be applied to findings made at police discipline hearings, putative public complainants will be left with two unpalatable choices. To avoid subjecting her potential civil claim to a binding determination by a retired police officer, a potential claimant may choose to refrain from advancing her complaint, however meritorious. On the other hand, if she chooses to advance her complaint in the discipline proceedings, she will be required to "put her best foot forward" in an effort to convert the police discipline proceeding into an adjudication of her private rights. Under either scenario, the legislative purpose of maintaining an accessible and expeditious complaint system focused on internal discipline is defeated. The public complainant should not be punished by participating in the police discipline hearing.

66. The Court of Appeal erred in according insufficient weight to this factor in determining whether to apply issue estoppel. Justice cannot be served by the application of issue estoppel when to do so would frustrate the purposes of the public complaints process.

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[59] *Martin v. Royal Newfoundland Constabulary Public Complaints Commission*, [2004] N.J. No. 243 at ¶ 39 (S.C.) (QL) Appellant's Book of Authorities, Tab 18.

Issue 3: The public's lack of confidence in the independence of the police complaints system

67. The Court of Appeal correctly recognized that "[t]he catalogue of considerations bearing on the court's discretion is open ended."[60] The list of factors to be considered in determining whether, as a matter of discretion, issue estoppel ought to be applied in a tribunal-to-court context, is open ended because "[t]he objective is to ensure that the operation of issue estoppel promotes the orderly administration of justice but not at the cost of real injustice in the particular case".[61] The underlying purpose of the discretionary factors is to balance the public interest in the finality of litigation with the public interest in ensuring that justice is done.[62]

68. The Appellant respectfully submits that the Court of Appeal ought to have considered the effect the application of issue estoppel would have on the public's perception of justice in determining whether to exercise its discretion.

69. Since the 1970's the public's legitimate concerns with the police complaint process has been catalogued in many reports, inquires and academic literature. By the middle of that decade, the complaints system had come to be seen as closed and secretive, and there were major concerns about the lack of documentation regarding the complaints process:

> While citizen complaints about police have always been a part of the justice system, they began to be seen as a matter of broad community concern in Ontario in the 1970s. Although well-publicized allegations of police misconduct aroused public concern in areas such as St. Catharine's and Tilsonburg, it was predictably within Metropolitan Toronto, an aggregate of several cities with a population of 2.5 million and a police force of 5,000 officers, that public debate was the most frequent and wide-ranging. The critical focus was the perceived nature of the complaint process as a closed, secretive system. Concerns centered on the lack of documentation regarding complaints, and on the lack of information available to the complainant or the public about the investigation and any disciplinary action

[60] Decision of the Ontario Court of Appeal dated September 27, 2010 at ¶ 40, Appellant's Record, Tab 3.
[61] *Danyluk, supra* note 16 at ¶ 67, Appellant's Book of Authorities, Tab 9.
[62] *Ibid*. at ¶ 63.

> taken as a result of the complaint. Increasingly, there was a public belief that the police attitude toward citizen complaints was overprotective.[63]

70. At the relevant time, public complaints about police misconduct in Ontario were investigated, prosecuted and adjudicated by police officers. The hallmarks of independence normally associated with employment discipline tribunals were conspicuously absent in police discipline hearings. This "hallmark" of the police complaints system has been a source of complaint by members of the community for more than a decade. In a article published in 1996, Tammy Landau, expressed the public's concerns over the police investigating their own misconduct:

> Perhaps the most salient feature in the minds of complainants remains the fact that the police investigate the police. While this is itself a great source of concern, complainants are additionally dissatisfied with particular aspects of the investigations which could, at least to some extent, over-ride their lack of confidence in the investigation. Concerns over not listening to their side of the story, narrowly focusing on documentary and physical evidence, giving too much weight to the subject officers' version of events and not enough to that of the complainant or the complainants' witnesses could be more satisfactorily addressed within the current legislative framework.[64]

71. Part V of the *Act*, as it then was, permitted for the investigation, prosecution and adjudication of police complaints by members of the police force at issue in the complaint. This system gave rise to a reasonably held concern that the complaint system lacked independence normally associated with civilian oversight of police. The lack of independence in the police complaints system was noted by several public advocacy groups when Bill 105 was debated at the committee stage. Deputations from the Toronto Board of Management spoke to the failure of

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[63] C.E. Lewis, S.B. Linden and J. Keene, "Public Complaints Against Police in Metropolitan Toronto – The History and Operation of the Office of the Public Complaints Commissioner" (1986-87) 29 Crim. L. Q. 115 at 117, Appellant's Book of Authorities, Tab 37.

[64] Landau, Tammy, "When police investigate police: a view from complainants" Canadian Journal of Criminology 38.3 (1996): 291-315 at p. 314, Appellant's Book of Authorities, Tab 39.

Bill 105 to have independent investigations and adjudications, a feature that was present under the former complaint process:

> Bill 105 eliminates an independent tribunal for the hearing of complaints. Under the present system there are boards of inquiry. These can be convened by a chief who reviews a complaint investigation report -- this does not happen very often; perhaps one in a thousand -- or by the police complaints commissioner, or on appeal by a police officer.
>
> Each board of inquiry is at arm's length from the police it is investigating and provides both officers and complainants with an independent tribunal. Under Bill 105, there will be no formal hearings at all except in those cases where the chief of police both (a) determines that a police officer's conduct may constitute misconduct or unsatisfactory work performance, and (b) chooses not to resolve the matter informally without a hearing. When such hearings are held, they are held not by an independent tribunal but by the chief of police.
>
> ***
>
> It is quite clear that under Bill 105 there will be no independent tribunal for hearing the vast majority of complaints against police officers, however serious those complaints may be. This is a significant failing for citizens whose dealings with the police go awry, and also for police officers themselves. [65]

72. In 2002, auditors of the police complaints process in Toronto found that "[t]he lack of an investigative process independent of the police is regarded as a significant impediment in regard to public confidence in the system."[66] More recently, Justice Lesage, in his 2005 report entitled *Report on the Police Complaints System in Ontario*, commented on the widespread public concern caused by police investigating their own misconduct:

> From the submissions received for preparation of the report one of the perspectives that emerges from community groups was that the system is not working to effectively resolve complaints and is, in itself, a cause of mistrust of the police. Many said that this mistrust has led to unwillingness by some

[65] Ontario, Standing Committee on the Administration of Justice, *Official Report of Debates (Hansard)*, (12 May 1997) at 1620 (John Morand) Appellant's Book of Authorities, Tab 51; see also Ontario, Standing Committee on the Administration of Justice, *Official Report of Debates (Hansard)*, (13 May 1997) Appellant's Book of Authorities, Tab 52.

[66] City of Toronto, Audit Services, *Performance Audit: The Public Complaints Process Toronto Police Service*, Jeffrey Griffiths (Toronto: Audit Services, City of Toronto: August 2002) at p. 27, Appellant's Book of Authorities, Tab 41.

> members of the community to contact or cooperate with the police even in situation were serious crimes have been committed. A fair, effective, and transparent complaints system could be a step toward improving confidence and trust in the police. They suggest that this can only come from implementing a fully independent civilian complaints system starting from the reception of complaints to the final adjudication and appeal of disciplinary decisions.
>
> ***
>
> In addition to the barriers to access the system, most community groups said that the investigation of a complaint by the same police service as the subject of the complaint raises significant concerns over the legitimacy and integrity of the investigation. Many felt that investigators within the same police service cannot be objective in the investigation of civilian complaints and that a police culture of protecting fellow officers eliminates any capacity to carry out thorough investigations. Even where the investigations are rigorously conducted and are fair, the perception of taint and unfairness will always exist.[67]

73. The concern regarding "police investigating police" is not unique to Ontario. A number of reports in other provinces have recommended independent police review and adjudication over police complaints. Most recently, under the heading, "Police Investigating Themselves" in the Braidwood Commission on the Death of Robert Dziekanski, Commissioner Braidwood commented on the public's concerns over the lack of independence:

> It was a case of the police investigating themselves, which gives rise to legitimate concerns about conflict of interest. Many members of the public perceive that the investigators may allow loyalty to fellow officers to interfere with the impartial investigative process. This perception, even if not justified in a given case, can lead to public distrust and an undermining of public confidence in the police.[68]

74. In light of his concerns regarding the lack of independence in police investigations, Commissioner Braidwood recommended that British Columbia create an independent

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[67] The Honourable Patrick J. Lesage, *Report on the Police Complaints System in Ontario*, April 22, 2005 at p. 39-40, Appellant's Book of Authorities, Tab 43.

[68] The Honourable Commissioner Thomas Braidwood, *Why? The Robert Dziekanski Tragedy, Braidwood Commission on the Death of Robert Dziekanski,* Phase Two, Part 10 at p. 411, Appellant's Book of Authorities, Tab 44.

investigation office.[69] Similarly, a number of reports have recommended the creation of an independent body to investigate and adjudicate over police complaints or have noted the public's concerns over impartiality.[70]

75. The Appellant respectfully submits that the application of issue estoppel to police complaints will further damage the public's perception of the police complaint process. The public's already minimal confidence in the police complaints system will be substantially eroded if an investigation and adjudication run by the police is relied upon to prohibit recourse to the last vestige of independent police accountability – the Court.

Issue 4: The statutory scheme is incompatible with the application of issue estoppel

76. As the Court of Appeal correctly recognized, the Ontario Legislature never intended the police complaints system to displace a plaintiff's entitlement to have allegations of police misconduct determined by a court. To the contrary, the statutory privilege provisions of the *Act*, by rendering all documents generated in the complaint process inadmissible in civil proceedings, specifically contemplates parallel complaint and civil proceedings in relation to the same subject matter. With respect, the Court of Appeal's failure to even refer to the statutory privilege

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[69] The Honourable Commissioner Thomas Braidwood, *Why? The Robert Dziekanski Tragedy, Braidwood Commission on the Death of Robert Dziekanski,* Phase Two, Part 10 at p. 422, Appellant's Book of Authorities, Tab 44.

[70] See also Ontario, Race Relations and Policing Task Force, *The Report of the Race Relations and Policing Task Force* (Toronto: Race Relations and Policing Task Force, 1989) at p. 146-150 (Chair: Clare Lewis) Stressing the need for independence "from the police in general [and] from the involved police force in particular", the Task Force recommended that "the Solicitor General create an investigative team to investigate police shootings in Ontario. That team should be comprised of homicide investigators chosen from various forces other than the force involved in the shooting, together with at least two civilian members drawn from government investigative agencies independent of the Ministry of the Solicitor General" *Ibid.* at p. 148, 150, Appellant's Book of Authorities, Tab 45. See also Honourable Commissioner Roger Salhany, *Report of the Taman Inquiry into the Investigation and Prosecution of Derek Harvey-Zenk* (September 30, 2008) at p. 82-83, Appellant's Book of Authorities, Tab 46; Commissioner William Davies, *Alone and Cold: The Davies Commission Inquiry into the Death of Frank Paul* Interim Report (February 12, 2009) at Part 7(I)(4)(b) at p. 262, Appellant's Book of Authorities, Tab 47; Commissioner Chair, Paul E. Kennedy, Commission for Public Complaints Against the Police, *Police Investigating Police, A Final Public Report* (August 11, 2009) at p. 91-94, Appellant's Book of Authorities, Tab 48.

provisions of the *Act* reflects the fact that this issue was not considered by the Court in determining whether to exercise its discretion not to apply issue estoppel.

77. The Appellant respectfully submits that the statutory privilege provisions of the *Act*, by necessary implication, preclude the application of issue estoppel. Section 69 of the *Act* prohibits the use of information produced as a result of an investigation or hearing:

> 69(8) No person shall be required to testify in a civil proceeding with regard to information obtained in the course of his or her duties, except at a hearing held under this Part.
>
> 69(9) No document prepared as the result of a complaint is admissible in a civil proceeding, except at a hearing held under this Part.
>
> 69(10) No statement made during an attempt at informal resolution of a com-plaint is admissible in a civil proceeding, including a proceeding under subsection 64(15) or 65(17) or a hearing held under this Part, except with the consent of the person who made the statement.[71]

78. Section 80 of the *Act* mandates confidentiality with respect to all complaints and discipline matters:

> Every person engaged in the administration of this Part shall preserve secrecy with respect to all information obtained in the course of his or her duties under this Part and shall not communicate such information to any other person except,
> (a) as may be required in connection with the administration of this Act and the regulations;
> (b) to his or her counsel;
> (c) as may be required for law enforcement purposes; or
> (d) with the consent of the person, if any, to whom the information relates.[72]

79. In Ontario, sections 69 and 80 of the *Act* have been found to be analogous to section 36(3) of the *Regulated Health Professions Act*[73] that similarly prohibit the admissibility, in civil

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[71] *Police Services Act*, R.S.O. 1990 c. P.15, Appellant's Book of Authorities, Tab 53. Note these provisions are now sections: 83(7)(8) and (9). See also 26.1(10) and (11) Appellant's Book of Authorities, Tab 54.
[72] *Ibid*. at s. 80. Note this provision is now s. 85.
[73] *Regulated Health Professions Act*, S.O. 1991, c. 18 at s. 36(3) :

proceedings, of documents prepared as a result of a complaint against members of the health profession. The Court of Appeal's interpretation of section 36(3) of the *Regulated Health Professions Act* has informed the judicial interpretation of sections 69(9) and 80 of the *Act*:

> Sections 69 and 80 of the Police Services Act are similar to certain provisions of the *Regulated Health Professions Act*, S.O. 1991, c. 18, and should be interpreted and followed as directed by the Court of Appeal in *M.F. v. Sutherland* (2000), 188 D.L.R. (4th) 296, and the Divisional Court in *Middleton v. Sun Media* (2006), 268 D.L.R. (4th) 347 [Middleton].
>
> > In *Forget v. Sutherland* (2000), 134 O.A.C. 117 (C.A.), Laskin J.A., writing for the majority, described the purpose of s. 36(3) at para. 29:
> >
> > I find no relevant indicators of legislative meaning to displace the presumption in favour of the ordinary meaning of s. 36(3). **The purpose of s. 36(3) is 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**. This purpose would be defeated by reading a fraud or bad faith exception into s. 36(3) ... (emphasis added)
> >
> > ***
> >
> > Section 36(3) is one of a number of legislative provisions whose broad objective is to keep College proceedings and civil proceedings separate. Section 36(1) provides for the confidentiality of information that comes to the knowledge of College employees; and s. 36(2) provides that College employees cannot be compelled to testify in civil proceedings about matters that come to their knowledge in the course of their duties. (at para. 31)
> >
> > **In my view, the purpose of s. 36(3) is to prevent not just patients but all participants in College proceedings from using documents**

No record of a proceeding under this Act, a health profession Act or the *Drug and Pharmacies Regulation Act*, no report, document or thing prepared for or statement given at such a proceeding and no order or decision made in such a proceeding is admissible in a civil proceeding other than a proceeding under this Act, a health profession Act or the *Drug and Pharmacies Regulation Act* or a proceeding relating to an order under section 11.1 or 11.2 of the *Ontario Drug Benefit Act*.

> **generated for those proceedings in civil proceedings, in short to keep the two proceedings separate**.[74]

80. Recently, the Divisional Court of Ontario interpreted sections 69(9) and section 80 of the *Act*. The Divisional Court found that the provisions, read together, were intended to keep both information and documentation obtained pursuant to a Part V complaint confidential. The Divisional Court further held that sections 69(9) and 80 "combine to create a statutory privilege for information acquired in the course of duty under Part V."[75] Relying on the Ontario Court of Appeal's judgment in *M. F. v. Sutherland*, the Divisional Court held that the aforementioned provisions were intended to ensure that "documents prepared as a result of a Part V complaint are neither subject to production nor admissible in a civil proceeding."[76] The Divisional Court's decision has the effect of prohibiting a party (plaintiff or defendant) from even pleading information obtained from a Part V complaint. The Divisional Court held that the fact that a complaint was made could not be plead in pleadings.[77] The Appellant submits that if the fact that a complaint was made cannot be plead in a statement of claim or statement of defence, than it stands to reason that a decision of a hearings officer cannot be relied upon to prohibit a claim. With respect, the statutory privilege provisions of the *Act*, as interpreted by Ontario courts, have ousted the application of issue estoppel.

81. Issue estoppel can only be applied to a discipline hearing if the documents prepared for the hearing, including the decision of the hearing officer, could be admissible in a civil proceeding. Sections 69(9) and 80 of the *Act* explicitly prohibits the use of a Hearing Officer's

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[74] *Kernohan v. Ontario*, [2009] O.J. No. 3000 at ¶ 20 and 22 citing *M. F. v. Sutherland* (2000), 188 D.L.R. (4th) 296 (C.A) and *Middleton v. Sun Media* (2006), 268 D.L.R. (4th) 347 (Div. Ct.) [emphasis added] Appellant's Book of Authorities, Tab 16; see also *Andrushko v. Ontario*, [2009] O.J. No. 4086 (QL) rev'd on appeal 2011 ONSC 1107 Appellant's Book of Authorities, Tab 4.
[75] *Andrushko v. Ontario*, 2011 ONSC 1107 at ¶ 24, Appellant's Book of Authorities, Tab 4.
[76] *Ibid.* at ¶ 29.
[77] *Ibid.* at ¶ 30.

decision in a civil proceedings. As such, the Court of Appeal's reliance on the Hearing Officer's decision is inconsistent with the statutory prohibition of section 69(9). The Appellant respectfully submits that the statutory scheme of the *Act* explicitly, or by necessary implication, precludes the application of issue estoppel to a civil action.[78]

Issue 5: The Court of Appeal failed to appreciate the unique role of the judiciary in adjudicating allegations of police misconduct

82. This Honourable Court has consistently recognized the singular role of judges within the Canadian constitutional order. In addition to arbitrating disputes between private parties and preserving the division of federal and provincial constitutional powers, our courts have assumed a preeminent role (especially since the advent of the *Canadian Charter of Rights and Freedoms*) as the protector of individual rights and freedoms from unwarranted state intrusion:

> [Courts act as] protector of the Constitution and the fundamental values embodied in it -- rule of law, fundamental justice, equality, preservation of the democratic process, to name perhaps the most important.[79]

While "the Constitution does not belong to the Courts", our courts remain the "ultimat[e] … guardians of constitutional rules, principles and values when all else fails."[80]

83. The adjudication of allegations of police misconduct across a variety of settings is central to the judiciary's function as "guardian of the Constitution". Be it the assessment of whether evidence should be excluded pursuant to section 24(2) of the *Charter*[81], the imposition of sentence under Part XXIII of the *Criminal Code*[82], or the determination of claims for

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[78] *Collins v. Kenmount Ford Sales Ltd.* [1984] N.S.J. No. 287 (S.C.T.D.) at ¶ 9, Appellant's Book of Authorities, Tab 8; see also *Ostapchuck v. Ostapchuck* (1959), 28 W.W.R. 176 (Sask. Q.B.) at 180, Appellant's Book of Authorities, Tab 24.
[79] *Ell, supra* note 26 at ¶ 22, Appellant's Book of Authorities, Tab 10.
[80] *R. v. Kang-Brown,* [2008] 1 S.C.R. 456, Appellant's Book of Authorities, Tab 27.
[81] *R. v. Grant*, [2009] 2 S.C.R. 353 at ¶ 72-75, Appellant's Book of Authorities, Tab 28.
[82] *R. v. Nasogaluak,* [2010] 1 S.C.R. 206 at ¶ 32: "Courts must guard against the illegitimate use of power by the police against members of our society, given its grave consequences", Appellant's Book of Authorities, Tab 29.

constitutional damages[83], the courts are necessarily the preeminent forum in which allegations of police misconduct are adjudicated.

84. Tort law, including actions in negligence[84] and misfeasance in public office[85], is an essential weapon in the court's arsenal to deter and redress misconduct by police in the exercise of their powers. As stated by this Honourable Court in *Hill, supra*, "To deny a remedy in tort is, quite literally, to deny justice. This supports recognition of the tort of negligent police investigation, in order to complete the arsenal of already existing common law and statutory remedies." When all other common law and statutory mechanisms fail, tort law represents the ultimate means for the individual to invoke the judiciary's protection from police misconduct.

85. The Court of Appeal's application of issue estoppel in this case effectively ceded the judiciary's role and responsibility to definitively adjudicate allegations of police misconduct to a retired police superintendent appointed by a police chief. The Court of Appeal went so far as to equate the expertise of the court and a police officer in the assessing the exercise of police powers. [86]

86. By permitting a retired police superintendant appointed by the police chief of the applicable police service to render what amounts to a final determination as to the propriety of an exercise of police powers, the Court of Appeal effectively turned the constitutional order on its head. Our constitutional order does not empower retired police officials to preempt the judiciary's responsibility to "ensure that the power of the state is exercised in accordance with

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[83] *Vancouver (City) v. Ward*, 2010 SCC 27, Appellant's Book of Authorities, Tab 35.
[84] *Hill v. Hamilton-Wentworth Regional Police Services Board*, 2007 SCC 41, [2007] 3 S.C.R. 129, Appellant's Book of Authorities, Tab 15.
[85] *Odhavji, supra* note 28, Appellant's Book of Authorities, Tab 23.
[86] Decision of the Court of Appeal for Ontario dated September 27, 2010 at ¶ 8-9, Appellant's Record, Tab 3.

the rule of law and the provisions of our Constitution".[87] Public confidence in the administration of justice requires that our judiciary fulfils this role.

PART IV - SUBMISSIONS ON COSTS

87. The Appellant respectfully requests costs throughout.

PART V - ORDER SOUGHT

88. The Appellant respectfully submits that this Honourable Court ought to allow the herein appeal with costs and set aside the Motions Judge's decision.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

DATED at Toronto, this 14th, day of July, 2011.

_____
Julian N. Falconer (L.S.U.C. #29465R)
Julian K. Roy (L.S.U.C. #36894G)
Sunil S. Mathai (L.S.U.C. #49616O)

FALCONER CHARNEY LLP
Barristers-at-Law
8 Prince Arthur Avenue
Toronto, Ontario
M5R 1A9

Telephone: (416) 964-3408
Fax: (416) 929-8179
Lawyers for the Appellant

[87] *Ell, supra* note 26, at ¶ 22, Appellant's Book of Authorities, Tab 10.