SCC File No: 33959

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

BETWEEN:

WAYNE PENNER

APPELLANT
(Appellant/Plaintiff)

AND:

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

RESPONDENTS
(Respondents/Defendants)

# FACTUM

# OF THE BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION


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## INDEX

## Part I – Overview of arguments and statement of facts

1. This appeal is about access to justice. Should an individual be denied his "day in court" over civil claims against the police because proceedings before a police disciplinary tribunal got decided before the court had a chance to decide his case on its merits? The question is a sensitive one. It touches on the public's reasonable ambivalence between confidence in and wariness of the police. The lower courts erroneously held the plaintiff had his "one bite of the cherry" when the police discipline tribunal decided the discipline case in favour of the officers and held the plaintiff was precluded from proceeding with his civil claims in court. The BCCLA urges recognition of (a) rights of individuals to be free from unreasonable interference by government agents, (b) rights of individuals to access to justice by having civil and constitutional rights' claims adjudicated in court, (c) the public interest in holding government, including the police, accountable in civil courts, and (d) the public interest in ensuring that the judiciary remains an independent, impartial bulwark against violations by other branches of government of individuals' rights. The issue estoppel rule should respect a party's right to his "day in court" in a trial on the merits of the civil claims he frames, notwithstanding prior tribunal decisions. While prior *court* decisions adverse to a party on an issue may be entitled to great deference, that is not so with regard to prior *tribunal* decisions.[1] Contrary to the lower courts in this case, it should "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."[2]

## Part II – Concise statement of positions regarding the questions in issue

2. The main parties to this appeal differ on what standards should govern issue estoppel. The BCCLA agrees generally with the Appellant on the issues framed on this appeal, including whether issue estoppel was properly applied and the points of error:

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[1] *Danyluk v Ainsworth Technologies,* [2001] 2 SCR 460 (Appellant's Authorities, Tab 9) para. 62, per Binnie, J.:" discretion is necessarily broader in relation to the prior decisions of administrative tribunals because of the enormous range and diversity of the structures, mandates and procedures of administrative decision makers." Compare *Beals v. Saldanha*, 2003 SCC 72, [2003] 3 SCR 416 paras. 171-2 per LeBel, J., dissenting.

[2] *Grennan v Reddoch and Whitehorse General Hospital,* 2002 YKCA 17 at paras. 34-35. Accord, see *Burchill v. Yukon,* 2002 YKCA 4 at paras. 26-28.

a. Issue 1, the discipline tribunal lacked the "hallmarks of an ordinary civil trial" because of (i) lack of independence of the adjudicator, and (ii) limited participation by the plaintiff, and (iii) "clear and convincing" evidence being required for a finding of culpability,

b. Issue 2, Issue estoppel undermines the purposes of the police complaints process,

c. Issue 3, The public's lack of confidence in the independence of the police complaints system,

d. Issue 4, The statutory scheme is incompatible with issue estoppel, and

e. Issue 5, Applying issue estoppel undermined the unique role of the judiciary to decide disputes, maintain the division of powers, keep executive action within legal bounds, and to uphold the Charter).

3. The BCCLA disagrees with the Respondent that the three preconditions of issue estoppel (e.g., recognizing a prior final judicial decision involving the same parties or their privies and on the same issues as now presented) have been met. The Respondent argues the Appellant conceded those, but that is not clear: e.g., the Appellant attacks whether recognition should be given the tribunal's decision. If the Respondent is correct, we are left with the oddity of checking off "final judicial decision" as met, yet then disputing whether "discretion" concerning the "interests of justice" bars estoppel because the tribunal, its decision and process do not sufficiently match the court's. If the "discretion" leads one to decide against recognition, what was the purpose of the "precondition" recognizing a "prior final judicial decision"? Similar points can be made about the other "preconditions". Defining them as minimal hurdles creates a hair-trigger effect, forestalled only by the "discretion". Yet whether treated as aspects of the "preconditions" or as matters for "discretion", these points still have to be considered.

4. The Appellant and other interveners address this case's specific Ontario legislation and policing context and the need for independent, impartial tribunals to avoid conflict of interest, broadly defined, of police investigating and deciding issues relating to police conduct. The BCCLA's position on those is generally in line with that of the Appellant, the Criminal Lawyers Association and the Canadian Civil Liberties Association.

5. The Ontario Attorney General's "middle ground"[3] that prior judicial determinations may be received and weighed with other evidence by the trial court is a possible

[3] Referring to obiter of Binnie, J., in *B.C. (AG) v Malik*, 2011 SCC 18 at paras. 46-48.

improvement. It would at least provide claimants with their "day in court." But it has problems. What weight ought a trial judge give a prior administrative decision unless all the evidence from the former is put before the court? Isn't the prior decision merely an opinion on the issues before the court, objectionable hearsay coming from any other source? With credibility assessments, should the court prefer its own view or defer to the prior administrative tribunal? Finally, if this approach merely postpones when a court abdicates its duty to decide on the merits and delegates that to what a tribunal earlier decided, nothing much would have been accomplished.

6. The BCCLA advocates for a rule that would put the burden on the party asserting issue estoppel to establish not just the three basic preconditions for its application, but also that the interests of justice required that the claimant be denied his day in court and an adjudication of his claims before an independent, impartial superior court judge by demonstrating that there would be substantial prejudice to the applicant to let the case proceed and that prejudice outweighs any to the claimant.

**Part III – Statement of Argument**

**Context and Purpose Affect Perspective and Findings**

7. Clear differences in context exist between what the tribunal and the court do. The tribunal's jurisdiction is limited. It focused on whether there was clear and convincing evidence of professional misconduct. The court's jurisdiction is general, is based on the civil standard of proof and engages common law and Charter tort jurisprudence. The tribunal's process, from a complainant's perspective, is summary in nature and does not afford discovery and other procedures that a trial process affords. The adjudicator in the complaint tribunal here was a retired police superintendent.[4] In court, the adjudicator will possess the qualifications, impartiality and independence of a superior court judge. The plaintiff is an ancillary party before the tribunal; in court the plaintiff is dominus litus. The complaint tribunal's remedial jurisdiction was limited to discipline; the court's jurisdiction is general and allows the plaintiff compensation. Those differences affect

[4] Binnie, J., in *Dunsmuir v New Brunswick* at para. 151 noted the comment by Rand, J., in *Roncarelli v. Duplessis* that every statute has its own perspective. Each tribunal thus doing its job has its own perspective. Their limited view may well be appropriate for their functioning within their own jurisdiction, but is likely not in the context of claims presented to the courts under the common law.

how things are perceived and adjudicated. This court has acknowledged that in the course of framing the "reasonableness" test in judicial review cases. Similarly, context has also been held to affect legal determinations, including what is meant by "the interests of justice."[5]

**Avoiding Technical Justice and Facilitating Access to Justice**

8. "Technical justice is to be avoided where possible."[6] Applying issue estoppel against the plaintiff drove him from the judgment seat without a hearing in court.[7] The issue estoppel rule is anomalous given that rules of civil process channel parties to a trial. Some may argue issue estoppel is not civil procedure. Yet that begs the question, presuming that a party's rights merged into a prior decision. Issue estoppel requires that the plaintiff persuade the court that the "interests of justice" require that a trial be held. That reverses the usual presumption and burden.[8] Rules about striking pleadings, misjoinder, non-joinder, misnomers, irregularities, defects in form, want of prosecution or summary judgment are framed so that cases proceed to trial unless serious prejudice would occur.[9] Those rules presume that finding the truth, achieving justice, ensuring fairness and preserving public confidence are best done at a trial by the court on the merits and that cutting a case off without a trial is exceptional and quite extraordinary.[10]

9. *Nelles v. Ontario*[11] is an example of this court refusing to let a common law rule providing for prosecutorial immunity extend too far. Lamer, C.J., said that:

> ... using his office to maliciously prosecute an accused, the prosecutor would be depriving an individual of the right to liberty and security of the person in a manner that does not accord with the principles of fundamental justice. ... When a person can demonstrate that one of his *Charter* rights has been infringed, access to a court of competent jurisdiction to seek a remedy is essential .... Whether or not a common law or statutory rule can constitutionally have the effect of excluding the

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[5] *R. v. Thomas,* [1998] 3 SCR 535, at paras. 37-38, 42.

[6] *Christie v. Edwards,* [1940] S.C.R. 410 at p. 417

[7] *Hunt v. Carey Canada,* [1990] 2 S.C.R. 959 at paras. 19-21.

[8] *Danyluk, supra,* at para. 33.

[9] *Tundra Helicopters Ltd. v. Allison Gas Turbine,* 2002 BCCA 145 per Esson, J.A at paras. 35-37; *Armstrong v. McCall,* [2006] 213 O.A.C. 229, per Borins, J.A., at paras. 11, 12 and 36.

[10] *Hunt v Carey Canada*, supra: it must be "plain and obvious" that a claim is "bound to fail" before it may be struck out; *Odhavji Estate v Woodhouse,* 2003 SCC 69 at para. 15: "...only if the statement of claim is certain to fail because it contains a "radical defect"" should the plaintiff not get a trial; *Manuge v Canada,* 2010 SCC 67 at paras. 14, 17-24; *R. v. Imperial Tobacco,* 2011 SCC 42 at para. 17.

[11] [1989] 2 SCR 170 at p. 196, Lamer, J.

> courts from granting the just and appropriate remedy, their most meaningful function under the *Charter*, does not have to be decided in this appeal. It is, in any case, clear that such a result is undesirable and provides a compelling underlying reason for finding that the common law itself does not mandate absolute immunity.

10. The right to make a claim in the civil courts would be nullified if a tribunal were permitted to supersede it.[12] Dickson, C.J.C., wrote that: "Of what value are the rights and freedoms guaranteed by the Charter if a person is denied or delayed access to a court of competent jurisdiction in order to vindicate them? How can the courts independently maintain the rule of law and effectively discharge the duties imposed by the Charter if court access is hindered, impeded or denied? The Charter protections would become merely illusory, the entire Charter undermined... There cannot be a rule of law without access, otherwise the rule of law is replaced by a rule of men and women who decide who shall and who shall not have access to justice."[13]

11. Some may argue this appeal is a contest between fairness and efficiency. But it is really a struggle to ensure that fundamental rights, including the right to access justice through the courts, and that the ability of individuals who claim mistreatment by government agents to have their "day in court" are protected.

**Clarification and Reform of the Issue Estoppel Rule**

12. *Danyluk* should be re-formulated so as to correspond with the presumption that cases ought to be tried unless it can be clearly and convincingly shown that it is against the interests of justice to do so. By treating all prior decisions as being presumptively applicable unless a "discretion" component is applied as an exemption, the rule creates uncertainty and fails to pay proper heed to the court's jurisdiction, the right of parties to access justice, and differences in the nature and context in which decisions are made. This case shows how elusive the concept of a "full and fair opportunity" to present or defend a case in prior administrative proceedings is.[14]

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[12] See Appellant's Appeal Record, p. 54, para. 50, pleading violations of the *Charter of Rights and Freedoms* in addition to civil claims of false arrest and imprisonment, excessive use of force, malicious prosecution, assault, unlawful strip search and negligent use of handcuffs (see also AF, paras. 10, 82-86).

[13] *B.C.G.E.U. v. British Columbia (Attorney General)*, [1988] 2 S.C.R. 214 at paras. 24-25.

[14] Finch, J.A., as he then was, in *British Columbia (Minister of Forests) v. Bugbusters Pest Management Inc.* (1998), 50 BCLR (3d) 1 (C.A.) at para. 29 held procedural differences meant no "full and fair opportunity" existed; Abella, J.A., as she then was, in *Rasanen v. Rosemount Instruments Ltd.* (1994), 17 O.R. (3d) 267 (C.A.) at paras. 32-35 posited that compliance with basic natural justice allowed for issue

13. In efforts to transport tribunal decisions to preclude court proceedings, a presumption *against* applicability would be preferable. That would require spelling out when and why administrative law processes were to be accorded judicial recognition as being determinative of judicial proceedings, rather than treating them as if they all are unless a discretion to exempt is applied.[15]

14. Traditional justifications for res judicata and issue estoppel require re-examination. Prof. Yuval Sinai provides a helpful start for that.[16] Serious questions exist over how the rule values process over truth.[17] Questions exist over whether forcing parties to put all issues forward at once and fight their first battle as if it is total war really serves the interests of justice.[18] Such an approach stimulates over-litigation, drives up costs and hinders access to justice.[19] It limits or deprives parties the freedom to frame their case as they see fit, one of the hallmarks of the adversary system and individual liberty.[20] It is not clearly the most efficient way of proceeding – it distorts parties' rational economic decisions.[21] Further, arguments about economy of judicial resources are not clear-cut – if parties frame a few issues initially and only return to court on other issues if

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estoppel to be applied; *Danyluk* overturned issue estoppel where natural justice was followed by a tribunal, but its focus and the plaintiff's expectations of it were limited. In *N.S.Public Service LTD Plan Trust Fund v Wright*, 2006 NSCA 101, Cromwell, J.A., as he then was, held the preconditions for issue estoppel were present but that it would be unfair to apply it given the tribunal's limited purview, the lack of notice to the claimant that proceeding before the tribunal might preclude going to court, and the lack of a clear answer to a specific question in issue. *Bank of Nova Scotia v Yoshikuni Lumber* (1992), 74 B.C.L.R. (2d) 19 (C.A.) at para. 22 held that "Discretionary powers must be exercised judicially. If there are errors of law, or in respect of critical facts, made during the course of exercising the discretionary powers, or if "no weight, or no sufficient weight, has been given to relevant considerations...then the reversal of the order on appeal may be justified.""

[15] *Johnson v Gore Wood & Co.,* [2002] 2 AC 1 per Lord Bingham (p. 20 Lexis), "...a broad, merits based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case, focusing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court..."

[16] Y. Sinai, *The Downside of Preclusion: Some Behavioural and Economic Effects of Cause of Action Estoppel in Civil Actions,* (2011) 56 McGill L.J. 3; Y.Sinai, *Reconsidering Res Judicata: a Comparative Perspective,* (2011) 21 Duke Jo. Comp. & Int'l Law 353.

[17] Y. Sinai, *Reconsidering Res Judicata*, supra, pp. 363-366.

[18] *Burchill v. Yukon,* 2002 YKCA 4 at para. 28; *Grennan v Reddoch and Whitehorse General Hospital,* 2002 YKCA 17 at paras. 34; Y. Sinai, *Reconsidering Res Judicata*, supra, p. 376.

[19] Y. Sinai, *The Downside of Preclusion*, supra, pp. 683-693.

[20] *Aldi Stores Ltd v WSP Group plc,* [2007] EWCA Civ 1260; 115 ConLR 49 at para. 18 (page 14) and para. 25 (page 15) per Thomas, L.J.; also, Y. Sinai, *Reconsidering Res Judicata*, supra., pp. 369-372; Y. Sinai, *The Downside of Preclusion*, supra, pp. 715-716.

[21] Y. Sinai, *The Downside of Preclusion*, supra, pp. 693-700, 707-8.

necessary, their cost may be less and less judicial time taken up.[22] The modern rise of broad application of issue estoppel and res judicata has coincided with longer trials and greater concerns over access to justice.

15. Context matters to how issue estoppel rules are formulated and applied: *R. v. Mahalingan*[23] shows that for criminal law. Three judges wanted to eliminate it entirely, saying context required that. A narrow majority allowed it a role, albeit limited and redefined. It did not do so by tweaking the "discretion" aspect of *Danyluk.* It put in place *per se* rules and exceptions. *Contextual* sensitivity drove that. Decisions are often driven by context – both because of who the decision makers are and the focus of their attention. Such differences allowed for asymmetrical application of issue estoppel (e.g., applying it against the Crown, but not against accused persons). A similar approach could reasonably obtain here, with discipline findings adverse to the police being usable in civil court, but not findings in favour of the police.

16. Similarly, with the "collateral attack" doctrine, the court has been wary of denying litigants their "day in court." *Canada (Attorney General) v. TeleZone Inc.* upheld the right of a party to proceed in court concerning claims for damages arising from an adverse decision of a federal minister on a telecommunications licence application. No judicial review proceedings had been taken before the Federal Court to quash the federal minister's decision. Collateral attack was argued, but rejected.[24]

17. A finding on the merits by the court in the Appellant's case that was at odds with what a discipline tribunal found would not undermine confidence in the administration of justice. It would merely demonstrate that the police community's view of what was appropriate for discipline purposes, based as it is upon a legislative standard for culpability and the employment context, differs from the protection of private rights and the compensation remedy available in the civil courts.[25]

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[22] Y. Sinai, *Reconsidering Res Judicata*, supra. Pp. 368-9, 376-378; and in any event, from *Aldi Stores*, supra, at para. 24 (page 15), "... it is the duty of the state to provide the necessary resources; the litigant cannot be denied the right to bring a claim ... on the basis that he could have acted differently and so made more efficient use of the court's resources."

[23] 2008 SCC 63 paras. 1-2, 21-34, 56-57 and 74-76 per McLachlin, C.J.C. and Charron, J., paras. 83-84.

[24] 2010 SCC 62 at paras. 60-78.

[25] *Dunsmuir v New Brunswick*, 2008 SCC 9, per Binnie, J., at paras. 123-125 and 127.

18. *Garland v Consumers Gas* rejected the argument that a class action to recover damages for overcharges of gas utility costs was precluded by the Ontario Energy Board's jurisdiction or orders. The Board's orders concerned Consumers Gas, not the class plaintiffs; that parallels the police board's decision concerning the police officers here. The court ruled there was no "collateral attack" bar on bringing the class action.[26]

***Wrongful Interference with Civil or Constitutional Rights***

19. The Appellant at paras. 37-42 and 67-75 AF notes lack of independence of the tribunal and erosion of confidence in legal process where the tribunal in question lacks, either as a matter of substance, practice or perception, the independence and impartiality that is an integral feature of the courts. The Respondent at paras. 64-69 RF misses the point by erroneously pivoting to whether bias in the administrative law sense has been shown. We are not talking about attacking the tribunal decision in its context here, but rather whether it should rule over the courts.

20. Depriving a litigant of their "day in court" for alleged violations of their civil and constitutional rights because they have had a "day in complaints tribunal" is unsatisfactory. The tribunal process could not and did not involve determining the complainant's civil claims. It is hardly strange that the complainant did not invest significant resources in it (e.g., by having a lawyer involved and treating the process as one that would decide his rights as to claims pleaded in the civil case to exceed $1,000,000 in damages).[27]

21. Different prisms and filters necessarily affect not just the perspective of the decision-maker, but also the perspective of the parties involved in the process and the public about what was addressed by the tribunal and how far and wide the effects of its decision should be. Society has become more sensitive to this both in terms of diversity of appointments of decision makers and also in terms of creating special tribunals to deal with specific contexts.

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[26] 2004 SCC 25 at paras. 70-73.

[27] See Finch, J.A., in *British Columbia (Minister of Forests) v. Bugbusters Pest Management Inc.* , supra, at para. 29: "The resources which one might devote to resisting a claim of $100,000 are in no way commensurate with what might reasonably be devoted to recovery of $5 million."

22. Courts have frequently passed by assertions that the determination was one that properly was the province of the administrative officer and could not be revisited in court. *Ashby v White* and *Roncarelli v Duplessis* are instructive on this point. In both instances, government agents asserted their jurisdiction allowed for the decision but the courts looked through that and assessed whether the rights involved had been violated. Indeed, other legislation establishes the court's general jurisdiction over civil disputes, including those against the Crown and police.[28]

***The Public Interest in Holding Police Accountable in Court***

23. Claims of violations of private actors at the hands of government actors provide the greatest test for any legal system. Of necessity, such claims are adjudicated by government itself. The Canadian legal tradition separates governmental powers into the executive, legislative and judicial, and has constitutional guarantees of the jurisdiction of each.[29] With the judiciary, guarantees of independence and impartiality serve to ensure public confidence. It is a fundamental principlel of the rule of law is that "the relationship between the state and the individual ... be regulated by law."[30] Police complaint tribunals are not part of the judicial branch of government. They are part of the executive. They have "expertise" in relation to police discipline. That expertise, however worthwhile it may be in its context, is nonetheless inappropriate if applied as an answer to civil claims involving violations of individual rights.

24. The BCCLA participated in the Wood, Braidwood and Davies Commissions of Inquiry[31] and has pursued other efforts to raise awareness of the problems inherent in having the police investigate themselves. Accountability, a key element of maintaining public confidence, requires that the reasonable perception of a conflict of interest by having members of the police community purport to make final pronouncements about

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[28] *Courts of Justice Act*, RSO 1990, cC.43, ss. 11(2) and 96; *Proceedings Against the Crown Act*, RSO 1990, c P.27, ss. 3, 4, 5(1); *Police Services Act*, RSO 1990, c P.15, ss. 27, 30-31.

[29] *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, 2003 SCC 62, [2003] 3 SCR 3 at para. 32-36.

[30] *Christie v Attorney General of British Columbia*, [2007] 1 S.C.R. 873, 2007 SCC 21 at para. 20

[31] The *Wood Commission Report* (2007) is a precursor to the other two reports noted. It is found at: http://www.pssg.gov.bc.ca/police_services/publications/complaint_process/Report_PoliceComplaintProcess.pdf. Paras. 22-27 reference the perspective that exists among members of the police community.

their conduct and liability, be avoided by having true independence and impartiality both in investigations and adjudication.[32]

25. By putting in place police complaints tribunals, the legislature has not tried, and could not legitimately purport, to remove the court's jurisdiction to adjudicate tort claims such as the one presented here, particularly insofar as claims of violations of constitutional rights are concerned.[33] Since there is no legislative effort to remove from the civil court system the right of affected individuals to litigate claims of violations of their rights at the hands of the police, it would be inappropriate for judge-made rules to have that effect.

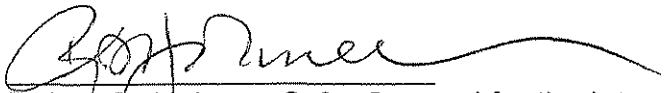
***Conclusion***

26. Rules of procedure are servants, not masters of justice.[34] Where found wanting, as here, they should be changed. A *per se* rule could be adopted, whether as a legal rule or a principle guiding discretion, that tribunal decisions are simply not a proper basis for issue estoppel in court cases.[35] Alternatively, the rule could be reformed so the party arguing for issue estoppel must demonstrate the current preconditions and also that the interests of justice require that no trial take place because, for example, there would be substantial prejudice to the applicant if the case goes ahead and that prejudice is not outweighed by the prejudice the claimant would suffer from not getting his "day in court."

**Parts IV and V—Costs and Permission to present oral argument**

27. The BCCLA does not seek costs and asks that no costs be awarded against it. The BCCLA respectfully requests leave to present oral argument not exceeding ten minutes.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 29th day of November, 2011.



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[32] Without conceding that if a civilian adjudicator had decided the discipline complaint here that ought to bar a civil claim. The context of the tribunal proceeding would still have significant differences from court.

[33] *Vancouver v. Ward,* 2010 SCC 27 at paras. 1-5. See also Lamer, C.J.C., in *Reference re Remuneration of Judges of the Provincial Court (P.E.I.)*, (*supra*), at paras. 88, 99, 103 and 105.

[34] *Reekie v. Messervey (Motion)*, [1990] 1 S.C.R. 219; *.R. v. G. (S.G.)*, [1997] 2 S.C.R. 716 at para. 100.

[35] Cf. *Grennan* and *Burchill* holding administrative decisions should rarely lead to issue estoppel.

TABLE OF AUTHORITIES

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| *15.* | *Garland v. Consumers' Gas Co,* 2004 SCC 25 at paras. 70-73 | 18 |
| *16.* | *Grennan v Reddoch and Whitehorse General Hospital,* 2002 YKCA 17 at paras. 34-35 | 1, 14 & 26 |
| *17.* | *Hunt v. Carey Canada,* [1990] 2 S.C.R. 959 at paras. 19-21 | 8 |
| *18.* | *Johnson v Gore Wood & Co.,* [2002] 2 AC 1 per Lord Bingham (p. 20 Lexis) | 13 |
| *19.* | *Manuge v Canada,* 2010 SCC 67 at paras. 14, 17-24;. | 8 |
| *20.* | *N.S.Public Service LTD Plan Trust Fund v Wright*, 2006 NSCA 101, Cromwell, J.A | 12 |
| *21.* | *Nelles v. Ontario*, [1989] 2 SCR 170 at p. 196, Lamer, J. | 9 |
| *22.* | *Odhavji Estate v Woodhouse,* 2003 SCC 69 at para. 15 | 8 |
| *23.* | *R. v. G. (S.G.), [1997] 2 S.C.R. 716 at para. 100* | 26 |
| *24.* | *R. v. Imperial Tobacco,* 2011 SCC 42 at para. 17 | 8 |
| *25.* | *R. v. Mahalingan*, 2008 SCC 63 paras. 1-2, 21-34, 56-57 and 74-76 per McLachlin, C.J.C. and Charron, J., paras. 83-84. | 15 |
| *26.* | *R. v. Thomas, [1998] 3 SCR 535, at paras. 37-38, 42.* | 7 |
| *27.* | *Rasanen v. Rosemount Instruments Ltd.* (1994), 17 O.R. (3d) 267 (C.A.) at paras. 32-35 | 12 |
| *28.* | *Reekie v. Messervey (Motion)*, [1990] 1 S.C.R. 219 | 26 |
| *29.* | *Reference re Remuneration of Judges of the Provincial Court (P.E.I.)*, (*supra*), at paras. 88, 99, 103 and 105 | 25 |
| *30.* | *Tundra Helicopters Ltd. v. Allison Gas Turbine,* 2002 BCCA 145 per Esson, J.A at paras. 35-37; | 8 |
| *31.* | *Vancouver v. Ward,* 2010 SCC 27 at paras. 1-5 | 25 |
| **SECONDARY AUTHORITIES** | | |