Court File No: 33959

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

B E T W E E N:

WAYNE PENNER

Appellant

- and -

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

Respondents

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INDEX

I.	**-**	**Overview**	**1**
II.	**-**	**Statement Of Position On Question In Issue**	**2**
III.	**-**	**Statement of Argument**	**2**
IV.	**-**	**Costs**	**10**
V.	**-**	**Request For Permission To Present Oral Argument**	**10**
VI.	**-**	**Table of Authorities**	**11**
VII.	**-**	**Statutes, Regulations And Ordinances**	**13**

I. OVERVIEW

1. In this case, the Court must decide whether the doctrine of issue estoppel should be applied so that the outcome of an internal police disciplinary proceeding precludes a civilian complainant from seeking redress in a civil court. Therefore, the outcome of this appeal will have a significant effect on the extent to which citizens can seek meaningful redress for police wrongdoing.

2. The appellant alleges that the respondent police officers unlawfully deprived him of his liberty, assaulted him and arbitrarily arrested and strip searched him without reasonable grounds. If any or all of this is true, the respondents violated his rights under sections 7, 8 and 9 of the *Charter* and the common law in the most profound manner. The necessity of a claimant's ability to seek meaningful redress in these circumstances is self-evident. As the Chief Justice observed in *Hill v. Hamilton-Wentworth Regional Police Services Board*, denying a remedy in tort to the victims of police wrongdoing "is quite literally, to deny justice".[1]

3. The CCLA submits that the application of issue estoppel should never prevent serious allegations of police misconduct from being considered by an independent and neutral adjudicator. In the case at bar, this is precisely what happened, as the appellant's troubling allegations of police misconduct were finally determined through a process controlled almost entirely by the police service which is named as a defendant in the civil action that it has now successfully arrested. In addition to depriving the appellant of any opportunity to seek redress, the extension of issue estoppel to police disciplinary hearings also threatens to undermine public confidence in the police complaint and discipline process itself.

4. The CCLA has two submissions on the issues raised in this appeal:

   (a) a disciplinary proceeding between a chief of police and a police officer under the *Police Services Act* cannot give rise to an issue estoppel in a civil claim by a member of the public against the police service, because the disciplinary proceeding is not "judicial" for the purposes of the law of issue estoppel; and

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[1] *Hill* v. *Hamilton-Wentworth Regional Police Services Board*, 2007 SCC 41, [2007] 3 S.C.R. 129 at ¶ 35

(b) in the alternative, as a matter of discretion, courts should not give effect to issue estoppel arising from disciplinary proceedings. Doing so would work against the orderly administration of justice and undermine the purposes of the *Police Services Act* and public confidence in the judicial and disciplinary processes.

II. STATEMENT OF POSITION ON QUESTION IN ISSUE

5. The CCLA does not take a position on the facts of this case. Its position with respect to the appellant's question in Part II of his factum is that issue estoppel should not be applied to bar the appellant's civil claims.

III. STATEMENT OF ARGUMENT

Issue Estoppel Does Not Apply Because the Previous Proceeding was not Judicial

6. There are three pre-conditions to the operation of issue estoppel, namely, that:

a) the same question has been decided;

b) the judicial decision which is said to create the estoppel was final; and

c) the parties to the judicial decision are the same in both proceedings.[2]

7. Even where the criteria for the application of issue estoppel are met, the Court has discretion to refuse to give effect to it.[3] The exercise of this discretion is guided by numerous considerations. The list of factors is open. The ultimate 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 a particular case.[4]

8. One of the preconditions to applying issue estoppel is the "fundamental" requirement that the decision in the prior proceeding be "judicial".[5] Discipline proceedings under the *Police Services Act* fail to meet this basic requirement because they are not "judicial" as that concept is understood in Canadian law. The application of issue estoppel in this case barred a civil claim

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[2] *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44, [2001] 2 S.C.R. 460 at ¶ 25; *British Columbia (Workers' Compensation Board) v. Figliola*, 2011 SCC 52 at ¶ 27

[3] *Schweneke v. Ontario* (2000), 47 O.R. (3d) 97, cited in *Danyluk, ibid.* at ¶ 63

[4] *Danyluk, ibid.* at ¶ 67

[5] *Ibid.* at ¶ 35

against the very party who had acted as the decision maker in the previous discipline proceeding. This in turn introduced an institutional bias to that process which undermines both the system of police oversight and accountability in Ontario, and the rights of citizens to seek redress for civil wrongs and *Charter* breaches.

The decision of the hearing officer was not judicial

9. A party may only invoke the doctrine of issue estoppel if he or she can demonstrate that the prior decision was rendered in a judicial proceeding.[6] In order to be considered 'judicial' for these purposes, the earlier proceeding must meet minimum standards of fairness:

> The decision of an administrative tribunal may be a judicial decision for the purpose of issue estoppel though the tribunal's procedures do not conform to the procedures in a civil trial. Provided the tribunal's procedures meet fairness requirements and provided the tribunal is carrying out a judicial function, its decision will be a judicial decision.[7]

10. The essence of judicial fairness is independence, neutrality and the absence of bias. "Impartiality is the fundamental qualification of a judge and the core attribute of the judiciary".[8]

11. In *Danyluk v. Ainsworth Technologies Inc.*, this Court held that a decision could be judicial without being correct or without being rendered in accordance with the principles of natural justice.[9] In determining if a proceeding is 'judicial', the focus is on the nature of the proceeding, rather than whether or not the decision maker erred in carrying out his or her function in the particular case in question.[10]

12. Hearings under Part V of the *Police Services Act* have many of the attributes of quasi-judicial proceedings: Evidence is adduced through an adversarial process, there is a record and the hearing is conducted in accordance with the *Statutory Powers Procedures Act*. There is, however, a significant exception, which is fatal to any attempt to characterize the proceeding as judicial for the purposes of issue estoppel: The decision maker, i.e. the commanding officer of the police officer who stands accused of misconduct, is not independent. To the contrary, the statute is designed to promote the chief's interest in maintaining order and discipline. That

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[6] *Danyluk, supra* note 2 at ¶ 35
[7] *Minott v. O'Shanter Development Company Ltd.* (1999), 42 O.R. (3d) 321, 1999 CanLII 3686 (ON CA) at ¶ 35
[8] *Wewaykum Indian Band v. Canada*, 2003 SCC 45, [2003] 2 S.C.R. 259 at ¶ 59
[9] *Danyluk, supra* note 2 at ¶ 47
[10] *Ibid.* at ¶ 47

legitimate interest is undermined if the proceeding presents an opportunity, or temptation, for the chief to exonerate his or her subordinate's conduct, with a view to shielding the police service from civil liability.

13. Under the *Police Services Act*, all public complaints about the conduct of police officers are filed with the Office of the Independent Police Review Director. The OIPRD may retain the matter and conduct its own investigation, refer the complaint to the chief of the implicated police service or refer the matter to the chief of another police service. The chief to whom the complaint is referred is required to order an investigation; however, the report from that investigation is considered by the chief of the police service whose officer is the subject of the complaint. If the chief believes on reasonable grounds that the police officer is guilty of misconduct or unsatisfactory work performance, he or she must order a hearing. If the OIPRD has retained and investigated a complaint, and concludes on reasonable grounds that the police officer is guilty of misconduct or unsatisfactory work performance, the chief is required to conduct a hearing.[11] That is, (apart from complaints which the OIPRD keeps for itself), the impugned officer's employer decides if there will be a hearing about his or her alleged misconduct.[12]

14. The chief of the impugned officer (and police service) conducts the hearing. He or she will hold the hearing when he or she (or the OIPRD) has formed the belief "on reasonable grounds that the conduct of the police officer who is the subject of the complaint constitutes misconduct ... or unsatisfactory work performance". The chief of police may "delegate" the duty and power to hold the hearing to *inter alia* a police officer or former police officer of the rank of inspector or higher.[13]

15. This "delegation" should not be confused with referring the matter to a neutral arbitrator. The *Act* explicitly provides that the chief's "delegate" acts as such,[14] with the result that the employer conducts the hearing about the employee's misconduct:

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[11] *Police Services Act*, R.S.O. 1990, c. P. 15, ss. 58 (1), 59, 61 (5), 66 (3), 67, 68 (3)
[12] The statute was amended after the events in issue in the case at bar. The amendments are not material to the CCLA's submissions.
[13] *Police Services Act*, *supra* note 11, ss. 66 (3), 91 (1)1
[14] *Ibid.* s. 94

> Delegation, as the word is generally used, does not imply a parting with powers by the person who grants the delegation, but points rather to a conferring of an authority to do things which otherwise the person would have to do himself. ... it is never used by legal writers, so far as I am aware, as implying that the delegating person parts with his power in such a manner as to denude himself of his rights. ... [The] word 'delegate' means little more than an agent.[15]

16. As noted, the hearing has many of the attributes of a judicial proceeding. The chief appoints a prosecutor, who is a party to the hearing together with the subject officer and (if applicable) the member of the public who filed the complaint. If the chief or the chief's delegate finds that there has been misconduct or unsatisfactory work performance "on clear and convincing evidence", he or she shall impose discipline, ranging from dismissal to loss of pay.[16] The chief has no other remedial power.

17. This procedure in which the chief rules on misconduct may be appropriate for maintaining order and discipline in a paramilitary organization (this issue is not before the Court), but it cannot be fairly characterized as judicial insofar as it has any effect on a subsequent action for damages in which both the employer and the employee are named as defendants. In this case, the chief of police, who was named as a defendant in a civil action, selected his own delegate to determine the issue of his employee's liability, and by extension, his own. There is no question that the chief of police thereby acquired a direct pecuniary interest in the outcome of the proceeding under the *Police Services Act* which he both initiated and determined. A direct pecuniary interest, no matter how trivial, will constitute bias,[17] and in any event gives rise to a reasonable apprehension of bias.

18. The hearing is not rendered judicial by virtue of a right of appeal to the Ontario Civilian Commission on Police Services, or a further appeal to the Divisional Court. As demonstrated in the case at bar, these appellate reviews are bound by the factual findings of the first hearing, which is neither independent nor neutral. Indeed, the Divisional Court was highly critical of

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[15] *Huth v. Clarke* (1890), 25 Q.B.D. 391 at 395, cited with approval in *Attorney General of Nova Scotia v. Attorney General of Canada*, [1951] S.C.R. 31at 46

[16] *Police Services Act, supra* note 11, ss. 82, 83, 84 (1), 85

[17] *Energy Probe v. Canada (Atomic Energy Control Board)* (1984), 15 D.L.R. (4th) 48 (F.C.A.) at 12-13; see also *Ladies of the Sacred Heart of Jesus (Convent of the Sacred Heart) v. Armstrong's Point Association and Bulgin* (1961), 29 D.L.R. (2d) 373, M.J. No. 50 (C.A.) at ¶ 29

OCCOPS for failing to defer to the findings that the chief's delegate had made about the chief's employee.[18]

19. In the result, the case at bar presents a different issue than that in *Danyluk,* in which the structure of the original proceeding was sound, but the adjudicator's decision was flawed because of a denial of natural justice. Although the claimant in *Danyluk* chose not to appeal, the nature of the proceeding was nevertheless 'judicial', and the final result thus *prima facie* gave rise to an issue estoppel. The court was nevertheless left with "the stubborn fact" that an important claim "has simply never been properly considered and adjudicated", and the claimant was permitted to re-litigate as a matter of discretion because the Court was empowered to prevent injustice.[19]

20. In the case at bar, the defect is not in the manner in which the chief's delegate conducted the discipline hearing. Rather, the process itself cannot be said to be judicial for the purposes of applying issue estoppel, as the respondent chief of police and his force faced potential civil liability in the subsequent proceeding. The chief of police becomes judge in his own cause if his conclusions (or those of his delegate) in the disciplinary proceeding are carried forward and bind the parties (including the chief) for all purposes in the subsequent civil suit:

> The maxim *nemo judex in causa sua debet esse* underlies the doctrine of "reasonable apprehension of bias". It translates into the principle that no one ought to be a judge in his own cause... . As a general principle, this is not permitted in law because the taint of bias would destroy the integrity of proceedings conducted in such a manner.[20]

21. If this Court determines that a decision in a disciplinary proceeding under the *Police Services Act* gives rise to an issue estoppel in a civil claim, chiefs who conduct hearings (or their delegates) will be placed in a position of irreconcilable conflict of interest. A chief of police presumably wants to maintain order and discipline in the police service and wants to promote a process which identifies and responds to misconduct. The chief's ability to accomplish these objectives is undermined, however, if his or her duty under the *Act* to address misconduct is pitted against the power to make findings which will reduce or eliminate his or her exposure to a civil claim.

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[18] *Parker v. Niagara (Regional Municipality) Police Service*, [2008] O.J. No. 1066 (Div. Ct.) at ¶ 29
[19] *Danyluk, supra* note 2 at ¶ 80
[20] *Brosseau v. Alberta Securities Commission,* [1989] 1 S.C.R. 301 at 309

The Court's Discretion

22. Even if the disciplinary proceeding had been judicial, such that it could give rise to an issue estoppel, the court should exercise its discretion to avoid injustice. As this Court held in *Danyluk,* the objective of issue estoppel is to promote the orderly administration of justice, "but not at the cost of real injustice in [any] particular case".[21] Thus, even where the requirements of issue estoppel are fully made out, courts can exercise their discretion to permit subsequent litigation. This discretion is broader with respect to prior decisions emanating from administrative tribunals, due to their varied mandates and procedures.[22]

23. The list of factors to be considered for and against the exercise the court's discretion is open[23] and includes the words, purpose and scheme of the legislation governing the prior proceeding, and, most importantly, the potential for injustice.

24. In the Court below, two factors were identified in favour of the exercise of discretion not to apply issue estoppel: (1) The two proceedings have different purposes, and (2) Mr. Penner had no financial stake in the disciplinary proceeding.[24] The CCLA submits that the reasonable apprehension of bias in police disciplinary proceedings creates the potential for injustice, and apparent injustice, which overwhelms the other factors considered by the Court of Appeal. The CCLA will restrict its submissions to this factor and to the statutory context.

(a) Reasonable Apprehension of Bias and Potential Injustice

25. As discussed above, the disciplinary proceeding is infused with a conflict of interest if it is will be determinative of subsequent civil proceedings against the decision-maker and his or her police service or employer.

26. Concerns about reasonable apprehension bias and partiality are heightened when dealing with police oversight, as the maintenance of public confidence in the oversight of police is a societal objective of fundamental importance.

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[21] *Danyluk, supra* note 2 at ¶ 67
[22] *Ibid.* at ¶ 62
[23] *Ibid.* at ¶ 67
[24] *Penner v. Niagara (Regional Municipality) Police Services Board* (2010), 102 O.R. (3d) 688, 2010 ONCA 616 (CanLII) at ¶ 41

27. In Ontario, the oversight of policing has been a longstanding public policy concern. The 1989 *Report of the Race Relations and Policing Task Force* recognized that police forces are "unlike any other institution in our society", and that their "paramilitary framework, the camaraderie which binds their membership and the secrecy with which much of their work is cloaked have all combined, over time, to make [them] uniquely insular institutions".[25]

28. The report referred to the "understandable" public perception that investigations of police officers by other police officers lack the impartiality that is required to maintain public confidence.[26] The Task Force observed that such procedures "are clearly no longer acceptable" and expressed the view "that police internal investigations no longer satisfy public demand for impartiality".[27] As Abella J.A. (as she was) observed in *Ontario v. Browne*, the public "may well" perceive that the police are "protective" when dealing with public complaints.[28]

29. Internal discipline proceedings do not satisfy the need for impartiality any more than internal investigations. As noted, discipline proceedings have a specific purpose: The chief may be an appropriate judge of how best to maintain order and discipline in the ranks which he (in this case) commands. His interest in adjudicating a civilian's claim for damages against a member of his ranks, the organization he commands and himself, cannot appear to be either objective or appropriate.

30. The CCLA submits that police disciplinary proceedings are characterized by a reasonable apprehension of bias which militates against the application of issue estoppel to a civil claim against police officers.

(b) Statutory Context

31. In *Danyluk*, the first and second of the various criteria which the Court considered in the exercise of its discretion not to apply issue estoppel were (i) the language and (ii) the purpose of the statute governing the proceeding in which the initial determination was made. The CCLA

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[25] 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 38
[26] *Ibid.* at 146-147 [Emphasis added]
[27] *Ibid.*
[28] *Ontario (Civilian Commission on Police Services) v. Browne* (2001), 56 O.R. (3d) 673, 2001 CanLII 3051 (ON CA) at ¶ 69

submits that in keeping with this reasoning, a court should never exercise its discretion in a manner that is inconsistent with the legislative purpose of the relevant statute, or which undermines it.

32. The purpose of Part V of the *Police Services Act* is "demonstrably to increase public confidence in the provision of police services, including the processing of public complaints".[29] If the findings from a disciplinary prosecution under the *Act* give rise to an estoppel in later civil proceedings, the legislative purpose is immediately compromised for the reasons detailed above: The introduction of a pecuniary interest on the part of the decision-maker destroys the objectivity that is essential to maintaining public confidence in the process.

33. The scheme of the Act is similarly unsuited to the application of issue estoppel to a civil claim, as the proceeding is focused in its entirety on discipline. The procedure appropriately safeguards the subject police officer's rights, but treats the complainant as an (admittedly interested) bystander with no stake in the outcome. A "prosecutor" has carriage of the matter, and must make out the case "on clear and convincing evidence". The subject officer cannot be compelled to testify, the complainant has no discovery rights, there are no remedies available to the complainant and he or she cannot be compensated for costs.

34. In exercising its discretion, the court will be guided by the statutory context:

> The focus of an earlier administrative proceeding might be entirely different from that of the subsequent litigation, even though one or more of the same issues might be implicated. In *Bugbusters*, *supra*, a forestry company was compulsorily recruited to help fight a forest fire in British Columbia. It subsequently sought reimbursement for its expenses under the B.C. *Forest Act*. The expense claim was allowed *despite* an allegation that the fire had been started by a Bugbusters employee who carelessly discarded his cigarette. (This, if proved, would have disentitled Bugbusters to reimbursement.) The Crown later started a $5 million negligence claim against Bugbusters, for losses occasioned by the forest fire. Bugbusters invoked issue estoppel. The court, in the exercise of its discretion, denied relief. One reason, *per* Finch J.A., at para. 30, was that
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> > a final decision on the Crown's right to recover its losses was not within the reasonable expectation of either party at the time of those [reimbursement] proceedings [under the *Forest Act*].[30]

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[29] *Ibid,* at ¶ 67

[30] *Danyluk, supra* note 2 at ¶ 71

35. The inconsistent purposes of the discipline proceedings and a civil claim for damages make the application of issue estoppel inapt. The former does not contemplate the latter, and would be overwhelmed by its procedural requirements. As this Court held in *Danyluk*:

> Putting excessive weight on the ESA decision in terms of issue estoppel would likely compel the parties in such cases to mount a full-scale trial-type offence and defence, thus tending to defeat the expeditious operation of the ESA scheme as a whole. This would undermine fulfilment of the purpose of the legislation.[31]

36. In most civil claims against police forces, the *Charter* rights of a civilian are engaged. The CCLA submits that the importance of these constitutional rights is such that they cannot be properly determined, and disposed of, in disciplinary proceedings under the *Police Services Act*. In *Vancouver (City) v. Ward*, this Court held that the objects of compensation, vindication and deterrence were served by the award of damages under s. 24(1) of the *Charter*.[32] Tort remedies are similarly essential for justice to be done.[33] There is a public interest in the vindication of *Charter* rights, and in deterring state actors from breaching the *Charter*. Because of the reasonable apprehension of bias described above, public confidence in the findings of the chief or his delegate that negate or deny *Charter* breaches by his or her police force will necessarily be lacking.

IV. COSTS

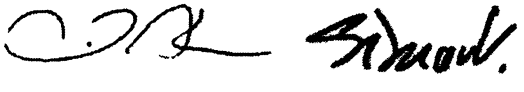
37. The CCLA does not seek costs and asks that none be awarded against it.

V. REQUEST FOR PERMISSION TO PRESENT ORAL ARGUMENT

38. The CCLA respectfully requests permission to present oral argument at the hearing of this appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

November 30, 2010



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[31] *Ibid.* at ¶ 73
[32] *Vancouver (City) v. Ward*, 2010 SCC 27, [2010] 2 S.C.R. 28 at ¶ 31
[33] *Hill, supra* note 1 at ¶ 35

VI. TABLE OF AUTHORTIES

CASELAW	PARAGRAPH
Attorney General of Nova Scotia v. Attorney General of Canada, [1951] S.C.R. 31	15
British Columbia (Workers' Compensation Board) v. Figliola, 2011 SCC 52	6
Brosseau v. Alberta Securities Commission, [1989] 1 S.C.R. 301	20
Danyluk v. Ainsworth Technologies Inc., 2001 SCC 44, [2001] 2 S.C.R. 460	6, 7, 8, 9, 11, 19, 22, 23, 34
Energy Probe v. Canada (Atomic Energy Control Board)(F.C.A.) (1984), 15 D.L.R. (4th) 48 (F.C.A.)	17
Hill v. Hamilton-Wentworth Regional Police Services Board, 2007 SCC 41, [2007] 3 S.C.R.	2, 36
Ladies of the Sacred Heart of Jesus (Convent of the Sacred Heart) v. Armstrong's Point Association and Bulgin (1961), 29 D.L.R. (2d) 373, M.J. No. 50 (C.A.)	17
Minott v. O'Shanter Development Company Ltd. (1999), 42 OR (3d) 321, 1999 CanLII 3686 (ON CA)	9
Ontario (Civilian Commission on Police Services) v. Browne (2001), 56 O.R. (3d) 673, 2001 CanLII 3051 (ON CA)	28, 32
Vancouver (City) v. Ward, 2010 SCC 27, [2010] 2 S.C.R. 28	36
Wewaykum Indian Band v. Canada, 2003 SCC 45, [2003] 2 S.C.R. 259	10
LEGISLATION	
Police Services Act, R.S.O. 1990, c. P. 15, s. 94	13, 14, 15, 16

SECONDARY AUTHORITIES

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 38. 27, 28

VII. STATUTES, REGULATIONS AND ORDINANCES

***Police Services Act*, R.S.O. 1990, c. P. 15, s. 94**

PART V
COMPLAINTS AND DISCIPLINARY PROCEEDINGS

Prosecutor at hearing

82. (1) The chief of police shall designate to be the prosecutor at a hearing held under subsection 66 (3), 68 (5) or 76 (9),

(a) a police officer from any police force of a rank equal to or higher than that of the police officer who is the subject of the hearing; or

(b) a person authorized under the *Law Society Act* to be a prosecutor at the hearing. 2007, c. 5, ss. 10, 13 (4).

Same

(2) A police officer from another police force may be the prosecutor at the hearing only with the approval of his or her chief of police. 2007, c. 5, s. 10.

Same

(3) The board or Commission shall designate to be the prosecutor at a hearing held under subsection 69 (8) or 77 (7), as the case may be, a person authorized under the *Law Society Act* to be a prosecutor at the hearing, and the board shall pay the prosecutor's remuneration regardless of whether the prosecutor is designated by the board or by the Commission. 2007, c. 5, s. 13 (5).

Hearings, procedure

83. (1) A hearing held under subsection 66 (3), 68 (5), 69 (8), 76 (9) or 77 (7) shall be conducted in accordance with the *Statutory Powers Procedure Act*. 2007, c. 5, s. 10.

Application of this section

(2) Subsections (3), (4), (5), (6), (11), (12), (13), (14), (15) and (16) apply to any hearing held under this Part. 2007, c. 5, s. 10.

Parties

(3) The parties to the hearing are the prosecutor, the police officer who is the subject of the hearing and, if the complaint was made by a member of the public, the complainant. 2007, c. 5, s. 10.

Notice and right to representation

(4) The parties to the hearing shall be given reasonable notice of the hearing, and each party may be represented by a person authorized under the *Law Society Act* to represent the party. 2007, c. 5, s. 13 (6).

Examination of evidence

(5) Before the hearing, the police officer and the complainant, if any, shall each be given an opportunity to examine any physical or documentary evidence that will be produced or

any report whose contents will be given in evidence. 2007, c. 5, s. 10.

Police officer not required to give evidence

(6) The police officer who is the subject of the hearing shall not be required to give evidence at the hearing. 2007, c. 5, s. 10.

Non-compellability

(7) No person shall be required to testify in a civil proceeding with regard to information obtained in the course of his or her duties under this Part, except at a hearing held under this Part. 2007, c. 5, s. 10.

Inadmissibility of documents

(8) No document prepared as the result of a complaint made under this Part is admissible in a civil proceeding, except at a hearing held under this Part. 2007, c. 5, s. 10.

Inadmissibility of statements

(9) No statement made during an attempt at informal resolution of a complaint under this Part is admissible in a civil proceeding, including a proceeding under subsection 66 (10), 69 (12), 76 (12) or 77 (9), or a hearing under this Part, except with the consent of the person who made the statement. 2007, c. 5, s. 10.

Recording of evidence

(10) The oral evidence given at the hearing shall be recorded and copies of transcripts shall be provided on the same terms as in the Superior Court of Justice. 2007, c. 5, s. 10.

Release of exhibits

(11) Within a reasonable time after the matter has been finally determined, documents and things put in evidence at the hearing shall, on request, be released to the person who produced them. 2007, c. 5, s. 10.

No communication without notice

(12) Subject to subsection (13), the person conducting the hearing shall not communicate directly or indirectly in relation to the subject matter of the hearing with any person, unless the parties receive notice and have an opportunity to participate. 2007, c. 5, ss. 10, 13 (7).

Exception

(13) The person conducting the hearing may seek legal advice from an advisor independent of the parties, and in that case the nature of the advice shall be communicated to them so that they may make submissions as to the law. 2007, c. 5, s. 10.

If Crown Attorney consulted

(14) If a Crown Attorney has been consulted, the person conducting the hearing may proceed to deal with the part of the complaint that, in his or her opinion, constitutes misconduct as defined in section 80 or unsatisfactory work performance, unless the Crown Attorney directs otherwise. 2007, c. 5, s. 10.

Hearing to continue

(15) If the police officer who is the subject of the hearing is charged with an offence under a law of Canada or of a province or territory in connection with the conduct that was the subject of the complaint, the hearing shall continue unless the Crown Attorney advises the chief

of police or board, as the case may be, that it should be stayed until the conclusion of the proceedings dealing with the offence. 2007, c. 5, s. 10.

Photography at hearing

(16) Subsections 136 (1), (2) and (3) of the *Courts of Justice Act* (photography at court hearing) apply with necessary modifications to the hearing and a person who contravenes subsection 136 (1), (2) or (3) of the *Courts of Justice Act*, as it is made to apply by this subsection, is guilty of an offence and on conviction is liable to a fine of not more than $2,000. 2007, c. 5, s. 10.

Six-month limitation period, exception

(17) If six months have elapsed since the day described in subsection (18), no notice of hearing shall be served unless the board, in the case of a municipal police officer, or the Commissioner, in the case of a member of the Ontario Provincial Police, is of the opinion that it was reasonable, under the circumstances, to delay serving the notice of hearing. 2007, c. 5, s. 10.

Same

(18) The day referred to in subsection (17) is,

(a) in the case of a hearing in respect of a complaint made under this Part by a member of the public about the conduct of a police officer other than a chief of police or deputy chief of police,

(i) the day on which the chief of police received the complaint referred to him or her by the Independent Police Review Director under clause 61 (5) (a) or (b), or

(ii) the day on which the complaint was retained by the Independent Police Review Director under clause 61 (5) (c);

(b) in the case of a hearing in respect of a complaint made under this Part by a member of the public about the conduct of a chief of police or deputy chief of police, the day on which the board received the complaint referred to it by the Independent Police Review Director under subsection 61 (8); or

(c) in the case of a hearing in respect of a complaint made under this Part by a chief of police or board, the day on which the facts on which the complaint is based first came to the attention of the chief of police or board, as the case may be. 2007, c. 5, s. 10.

Findings and disposition

84. (1) If at the conclusion of a hearing under subsection 66 (3), 68 (5) or 76 (9) held by the chief of police, misconduct as defined in section 80 or unsatisfactory work performance is proved on clear and convincing evidence, the chief of police shall take any action described in section 85. 2007, c. 5, s. 10.

Same

(2) If at the conclusion of a hearing under subsection 69 (8) or 77 (7) held by the board, misconduct as defined in section 80 or unsatisfactory work performance is proved on clear and

convincing evidence, the board shall take any action described in section 85. 2007, c. 5, s. 10.

Same

(3) If at the conclusion of a hearing under subsection 69 (8) or 77 (7) held by the Commission, misconduct as defined in section 80 or unsatisfactory work performance is proved on clear and convincing evidence, the Commission shall, subject to subsection (4), direct the board in writing to take such action described in section 85 as the Commission specifies. 2007, c. 5, s. 10.

Notice needed

(4) The Commission shall not direct the board to impose the penalties of dismissal or demotion unless the notice of hearing or a subsequent notice served on the chief of police or deputy chief of police indicated that they might be imposed if the complaint were proved on clear and convincing evidence. 2007, c. 5, s. 10.

Delegation of chief's powers and duties

94. (1) A chief of police may delegate the following powers and duties to a police officer or a former police officer of the rank of inspector or higher, a judge or retired judge, or such other person as may be prescribed:

1. Conducting a hearing under subsection 66 (3), 68 (5) or 76 (9) and taking an action under subsection 84 (1), if that subsection applies.

2. Acting under subsections 66 (4) and (10), subsection 68 (6) or subsections 76 (10) and (12). 2007, c. 5, s. 10.

Same

(2) A person to whom the chief of police may delegate under subsection (1) may only act as a delegate if he or she meets the prescribed qualifications, conditions or requirements, if any. 2007, c. 5, s. 10.

Same

(3) If a chief of police delegates the powers and duties described in paragraph 1 of subsection (1) to a police officer from another police force of the rank of inspector or higher, that police officer may only act as a delegate with the approval of his or her chief of police. 2007, c. 5, s. 10.

Same

(4) A chief of police may delegate his or her powers and duties under this Part, other than the powers and duties described in subsection (1), to any member of any police force. 2007, c. 5, s. 10.

PART VII SPECIAL INVESTIGATIONS

Special investigations unit

113. (1) There shall be a special investigations unit of the Ministry of the Solicitor General. R.S.O. 1990, c. P.15, s. 113 (1).

Composition

(2) The unit shall consist of a director appointed by the Lieutenant Governor in Council on the recommendation of the Solicitor General and investigators appointed under Part III of the *Public Service of Ontario Act, 2006*. R.S.O. 1990, c. P.15, s. 113 (2); 2006, c. 35, Sched. C, s. 111 (4).

Idem

(3) A person who is a police officer or former police officer shall not be appointed as director, and persons who are police officers shall not be appointed as investigators. R.S.O. 1990, c. P.15, s. 113 (3).

Acting director

(3.1) The director may designate a person, other than a police officer or former police officer, as acting director to exercise the powers and perform the duties of the director if the director is absent or unable to act. 2009, c. 33, Sched. 2, s. 60 (3).

Peace officers

(4) The director, acting director and investigators are peace officers. R.S.O. 1990, c. P.15, s. 113 (4); 2009, c. 33, Sched. 2, s. 60 (4).

Investigations

(5) The director may, on his or her own initiative, and shall, at the request of the Solicitor General or Attorney General, cause investigations to be conducted into the circumstances of serious injuries and deaths that may have resulted from criminal offences committed by police officers. R.S.O. 1990, c. P.15, s. 113 (5).

Restriction

(6) An investigator shall not participate in an investigation that relates to members of a police force of which he or she was a member. R.S.O. 1990, c. P.15, s. 113 (6).

Charges

(7) If there are reasonable grounds to do so in his or her opinion, the director shall cause informations to be laid against police officers in connection with the matters investigated and shall refer them to the Crown Attorney for prosecution. R.S.O. 1990, c. P.15, s. 113 (7).

Report

(8) The director shall report the results of investigations to the Attorney General. R.S.O. 1990, c. P.15, s. 113 (8).

Co-operation of police forces

(9) Members of police forces shall co-operate fully with the members of the unit in the conduct of investigations. R.S.O. 1990, c. P.15, s. 113 (9).

Co-operation of appointing officials

(10) Appointing officials shall co-operate fully with the members of the unit in the conduct of investigations. 2009, c. 30, s. 60.

PARTIE V
PLAINTES ET PROCÉDURES DISCIPLINAIRES

Poursuivant à l'audience

82. (1) Le chef de police désigne comme poursuivant à une audience tenue en application du paragraphe 66 (3), 68 (5) ou 76 (9) :

a) soit un agent de police qui appartient à n'importe quel corps de police et qui a un grade égal ou supérieur à celui de l'agent de police faisant l'objet de l'audience;

b) soit une personne autorisée en vertu de la *Loi sur le Barreau* à être un poursuivant à l'audience. 2007, chap. 5, art. 10 et par. 13 (4).

Idem

(2) Un agent de police qui appartient à un autre corps de police ne peut être le poursuivant lors d'une audience qu'avec l'approbation de son chef de police. 2007, chap. 5, art. 10.

Idem

(3) La commission de police ou la Commission désigne comme poursuivant à une audience tenue en application du paragraphe 69 (8) ou 77 (7), selon le cas, une personne autorisée à être un poursuivant à l'audience en vertu de la *Loi sur le Barreau*, et la commission de police verse la rémunération du poursuivant, que celui-ci soit désigné par elle ou par la Commission. 2007, chap. 5, par. 13 (5).

Audiences et procédure

83. (1) Une audience tenue en application du paragraphe 66 (3), 68 (5), 69 (8), 76 (9) ou 77 (7) se déroule conformément à la *Loi sur l'exercice des compétences légales*. 2007, chap. 5, art. 10.

Application du présent article

(2) Les paragraphes (3), (4), (5), (6), (11), (12), (13), (14), (15) et (16) s'appliquent à toute audience tenue en application de la présente partie. 2007, chap. 5, art. 10.

Parties

(3) Sont parties à l'audience le poursuivant, l'agent de police qui fait l'objet de l'audience et, si la plainte a été déposée par un membre du public, le plaignant. 2007, chap. 5, art. 10.

Préavis et droit à un représentant

(4) Il est donné aux parties à l'audience un préavis raisonnable de l'audience, et chaque partie peut se faire représenter par une personne autorisée à la représenter en vertu de la *Loi sur le Barreau*. 2007, chap. 5, par. 13 (6).

Examen de la preuve

(5) Avant l'audience, l'agent de police et le plaignant, s'il y en a un, ont chacun la possibilité d'examiner toute preuve matérielle ou documentaire qui sera produite ou tout rapport dont le contenu sera présenté en preuve. 2007, chap. 5, art. 10.

Témoignage non obligatoire de l'agent de police

(6) L'agent de police qui fait l'objet de l'audience n'est pas tenu de témoigner à l'audience. 2007, chap. 5, art. 10.

Non-contraignabilité

(7) Nul n'est tenu de témoigner dans une instance civile relativement à des

renseignements qu'il a obtenus dans l'exercice des fonctions que lui attribue la présente partie, sauf dans le cadre d'une audience tenue en application de la présente partie. 2007, chap. 5, art. 10.

Inadmissibilité des documents

(8) Aucun document préparé par suite du dépôt d'une plainte déposée en vertu de la présente partie n'est admissible dans une instance civile, sauf dans le cadre d'une audience tenue en application de la présente partie. 2007, chap. 5, art. 10.

Inadmissibilité des déclarations

(9) Aucune déclaration faite au cours d'une tentative de règlement à l'amiable d'une plainte entreprise en vertu de la présente partie n'est admissible dans une instance civile, y compris une instance tenue aux termes du paragraphe 66 (10), 69 (12), 76 (12) ou 77 (9), ou une audience prévue à la présente partie, sans le consentement de son auteur. 2007, chap. 5, art. 10.

Enregistrement des témoignages

(10) Les témoignages oraux recueillis à l'audience sont enregistrés et des copies de la transcription sont fournies suivant les mêmes conditions qu'à la Cour supérieure de justice. 2007, chap. 5, art. 10.

Remise de pièces

(11) Dans un délai raisonnable après le règlement définitif de l'affaire, les documents et objets présentés en preuve à l'audience sont rendus sur demande à la personne qui les a produits. 2007, chap. 5, art. 10.

Interdiction de communiquer sans préavis

(12) Sous réserve du paragraphe (13), la personne qui dirige l'audience ne communique ni directement ni indirectement avec aucune personne à propos de l'objet de l'audience, sauf si les parties sont préalablement avisées et ont la possibilité de participer. 2007, chap. 5, art. 10 et par. 13 (7).

Exception

(13) La personne qui dirige l'audience peut demander des conseils juridiques à un conseiller indépendant des parties, auquel cas la teneur des conseils leur est communiquée pour leur permettre de présenter des observations relatives au droit applicable. 2007, chap. 5, art. 10.

Cas où un procureur de la Couronne a été consulté

(14) Si un procureur de la Couronne a été consulté, la personne qui dirige l'audience peut traiter la partie de la plainte qui, à son avis, constitue un cas d'inconduite, au sens de l'article 80, ou d'exécution insatisfaisante du travail, sauf directive contraire du procureur de la Couronne. 2007, chap. 5, art. 10.

Poursuite de l'audience

(15) Si l'agent de police qui fait l'objet de l'audience est inculpé d'une infraction à une loi du Canada, d'une province ou d'un territoire relativement à la conduite qui faisait l'objet de la plainte, l'audience se poursuit à moins que le procureur de la Couronne n'indique au chef de police ou à la commission de police, selon le cas, qu'il y aurait lieu de la suspendre jusqu'à l'issue de l'instance portant sur l'infraction. 2007, chap. 5, art. 10.

Photographies à l'audience

(16) Les paragraphes 136 (1), (2) et (3) de la *Loi sur les tribunaux judiciaires* (photographies à l'audience) s'appliquent, avec les adaptations nécessaires, à l'audience et quiconque contrevient au paragraphe 136 (1), (2) ou (3) de cette loi, tel qu'il est rendu applicable par l'effet du présent paragraphe, est coupable d'une infraction et passible, sur déclaration de culpabilité, d'une amende d'au plus 2 000 $. 2007, chap. 5, art. 10.

Délai de prescription de six mois, exception

(17) S'il s'est écoulé six mois depuis le jour décrit au paragraphe (18), aucun avis d'audience n'est signifié à moins que la commission de police, dans le cas d'un agent de police municipal, ou le commissaire, dans le cas d'un membre de la Police provinciale de l'Ontario, n'estime qu'il était raisonnable, dans les circonstances, de retarder la signification de l'avis d'audience. 2007, chap. 5, art. 10.

Idem

(18) Le jour visé au paragraphe (17) correspond :

a) dans le cas d'une audience sur une plainte déposée par un membre du public en vertu de la présente partie au sujet de la conduite d'un agent de police autre qu'un chef de police ou un chef de police adjoint :

(i) soit au jour où le chef de police a reçu la plainte que lui a renvoyée le directeur indépendant d'examen de la police en application de l'alinéa 61 (5) a) ou b),

(ii) soit au jour où la plainte a été retenue par le directeur indépendant d'examen de la police en application de l'alinéa 61 (5) c);

b) dans le cas d'une audience sur une plainte déposée par un membre du public en vertu de la présente partie au sujet de la conduite d'un chef de police ou d'un chef de police adjoint, au jour où la commission de police a reçu la plainte que lui a renvoyée le directeur indépendant d'examen de la police en application du paragraphe 61 (8);

c) dans le cas d'une audience sur une plainte déposée par un chef de police ou une commission de police en vertu de la présente partie, en le jour où le chef de police ou la commission de police, selon le cas, a pris connaissance des faits sur lesquels se fonde la plainte. 2007, chap. 5, art. 10.

Conclusions et décision

84. (1) Si, à l'issue d'une audience tenue par le chef de police en application du paragraphe 66 (3), 68 (5) ou 76 (9), l'inconduite, au sens de l'article 80, ou l'exécution insatisfaisante du travail est prouvée sur la foi de preuves claires et convaincantes, le chef de police prend l'une ou plusieurs des mesures énoncées à l'article 85. 2007, chap. 5, art. 10.

Idem

(2) Si, à l'issue d'une audience tenue par la commission de police en application du paragraphe 69 (8) ou 77 (7), l'inconduite, au sens de l'article 80, ou l'exécution insatisfaisante du travail est prouvée sur la foi de preuves claires et convaincantes, la commission de police prend l'une ou plusieurs des mesures énoncées à l'article 85. 2007, chap. 5, art. 10.

Idem

(3) Si, à l'issue d'une audience tenue par la Commission en application du paragraphe 69 (8) ou 77 (7), l'inconduite, au sens de l'article 80, ou l'exécution insatisfaisante du travail est prouvée sur la foi de preuves claires et convaincantes, la Commission, sous réserve du paragraphe (4), ordonne par écrit à la commission de police de prendre l'une ou plusieurs des mesures énoncées à l'article 85, selon ce qu'elle précise. 2007, chap. 5, art. 10.

Avis requis

(4) La Commission ne doit pas ordonner à la commission de police d'infliger la peine de renvoi ou de rétrogradation, sauf si l'avis d'audience ou un avis subséquent signifié au chef de police ou au chef de police adjoint indiquait que l'une ou l'autre peine pourrait être infligée si la plainte s'avérait fondée sur la foi de preuves claires et convaincantes. 2007, chap. 5, art. 10.

Délégation des pouvoirs et fonctions d'un chef de police

94. (1) Un chef de police peut déléguer les pouvoirs et fonctions suivants à un agent de police ou ancien agent de police qui a le grade d'inspecteur ou un grade supérieur, à un juge ou à un juge à la retraite, ou à une autre personne prescrite :

1. Mener une audience en application du paragraphe 66 (3), 68 (5) ou 76 (9) et prendre une mesure en application du paragraphe 84 (1), si ce paragraphe s'applique.

2. Agir aux termes des paragraphes 66 (4) et (10), du paragraphe 68 (6) ou des paragraphes 76 (10) et (12). 2007, chap. 5, art. 10.

Idem

(2) La personne à qui le chef de police peut faire la délégation en vertu du paragraphe (1) ne peut agir comme délégué que si elle possède les qualités requises prescrites, s'il y en a, ou satisfait aux conditions ou exigences prescrites, s'il y en a. 2007, chap. 5, art. 10.

Idem

(3) Si un chef de police délègue les pouvoirs et les fonctions visés à la disposition 1 du paragraphe (1) à un agent de police qui appartient à un autre corps de police et qui a le grade d'inspecteur ou un grade supérieur, celui-ci ne peut agir comme délégué qu'avec l'approbation de son chef de police. 2007, chap. 5, art. 10.

Idem

(4) Un chef de police peut déléguer les pouvoirs et les fonctions que lui attribue la présente partie, à l'exclusion de ceux visés au paragraphe (1), à tout membre d'un corps de police quelconque. 2007, chap. 5, art. 10.

PARTIE VII
ENQUÊTES SPÉCIALES

Unité des enquêtes spéciales

113. (1) Est constituée une unité des enquêtes spéciales qui relève du ministère du Solliciteur général. L.R.O. 1990, chap. P.15, par. 113 (1).

Composition

(2) L'unité se compose d'un directeur nommé par le lieutenant-gouverneur en conseil

sur la recommandation du solliciteur général et d'enquêteurs nommés aux termes de la partie III de la *Loi de 2006 sur la fonction publique de l'Ontario*. L.R.O. 1990, chap. P.15, par. 113 (2); 2006, chap. 35, annexe C, par. 111 (4).

Idem

(3) Aucun agent de police ou ancien agent de police ne peut être nommé directeur et aucun agent de police ne peut être nommé enquêteur. L.R.O. 1990, chap. P.15, par. 113 (3).

Directeur intérimaire

(3.1) Le directeur peut désigner une personne, autre qu'un agent de police ou un ancien agent de police, à titre de directeur intérimaire pour exercer ses pouvoirs et ses fonctions s'il s'absente ou a un empêchement. 2009, chap. 33, annexe 2, par. 60 (3).

Agents de la paix

(4) Le directeur, le directeur intérimaire et les enquêteurs sont des agents de la paix. L.R.O. 1990, chap. P.15, par. 113 (4); 2009, chap. 33, annexe 2, par. 60 (4).

Enquêtes

(5) Le directeur peut, de son propre chef, et doit, à la demande du solliciteur général ou du procureur général, faire mener des enquêtes sur les circonstances qui sont à l'origine de blessures graves et de décès pouvant être imputables à des infractions criminelles de la part d'agents de police. L.R.O. 1990, chap. P.15, par. 113 (5).

Restriction

(6) Aucun enquêteur ne peut prendre part à une enquête qui concerne des membres d'un corps de police dont il a été membre. L.R.O. 1990, chap. P.15, par. 113 (6).

Dénonciations

(7) S'il estime qu'il existe des motifs raisonnables de le faire, le directeur fait déposer des dénonciations contre les agents de police au sujet des questions visées par l'enquête et les renvoie au procureur de la Couronne pour qu'il engage une poursuite. L.R.O. 1990, chap. P.15, par. 113 (7).

Rapport

(8) Le directeur fait rapport des résultats des enquêtes au procureur général. L.R.O. 1990, chap. P.15, par. 113 (8).

Collaboration des corps de police

(9) Les membres de corps de police collaborent entièrement avec les membres de l'unité au cours des enquêtes. L.R.O. 1990, chap. P.15, par. 113 (9).

Collaboration des agents de nomination

(10) Les agents de nomination collaborent entièrement avec les membres de l'unité au cours des enquêtes. 2009, chap. 30, art. 60.