Court File Number: 33959

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

BETWEEN:

WAYNE PENNER

Appellant

and

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

Respondents

FACTUM OF THE RESPONDENTS

(Regional Municipality of Niagara Regional Police Services Board, Gary E. Nicholls, Nathan Parker, Paul Koscinski and Roy Federkow)
(Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada*)

BLANEY McMURTRY LLP
Barristers & Solicitors
2 Queen Street East, Suite 1500
Toronto, Ontario
M5C 3G5

Tel: (416) 593-1221
Fax: (416) 593-5437

Eugene G. Mazzuca
Kerry Nash
Rafal Szymanski

Counsel for the Respondents

McMILLAN LLP
Barristers & Solicitors
50 O'Connor Street, Suite 300
Ottawa, Ontario
K1P 6L2

Tel: (613) 232-7171
Fax: (613) 231-3191

Eugene Meehan, Q.C.
Jeffrey Beedell

Ottawa Agent for the Respondents

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Ottawa, Ontario
K1P 6L2

Tel: (613) 232-7171
Fax: (613) 231-3191

Eugene Meehan, Q.C.
Jeffrey Beedell

Ottawa Agent for the Respondents

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

Tel: (416) 964-3408
Fax: (416) 929-8173

Julian N. Falconer
Julian K. Roy
Sunil S. Mathai

Counsel for the Appellant

GOWLING LAFLEUR HENDERSON LLP
Barristers & Solicitors
160 Elgin Street, Suite 2600
P.O. Box 466, Station D
Ottawa, Ontario
K1P 1C3

Tel: (613) 233-1781
Fax: (613) 563-9869

Brian A. Crane, Q.C.

Ottawa Agent for the Appellant

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OVERVIEW

1. In this appeal, the Appellant challenges the Court of Appeal for Ontario's discretionary ruling that the application of issue estoppel would not work an injustice in this particular case. The Appellant *does not* appeal the findings below that the three preconditions for issue estoppel have been met.

2. The discretionary exercise of whether to apply issue estoppel depends on the unique factual circumstances of each case. Here, the Appellant overlooks the facts underlying this appeal in favour of abstract notions of injustice that are not present in this case. The Respondents submit that the Court of Appeal for Ontario correctly applied the list of factors germane to a determination of whether the application of issue estoppel would work an injustice in the Appellant's case.

3. In *Danyluk v. Ainsworth Technologies Inc.*, this Court devised a test of general application for issue estoppel.[1] By design, the *Danyluk* test is malleable to the facts of each case. It remains the same regardless of which two venues are considered for the application of issue estoppel. The Appellant would now have this Court carve out one exception - police discipline proceedings under Part V of the Ontario *Police Services Act* (the "***PSA***")[2] - to which he argues the application of issue estoppel ought not apply.

4. If this appeal succeeds, the door will be opened for two inconsistent judicial findings on the same issue. This runs contrary to the numerous policy reasons underpinning the doctrine of issue estoppel, including finality, the right of an individual to be protected from multiplication of suits and prosecutions, and the avoidance of collateral attacks and abuse of process.

5. The facts of this particular case support the discretionary finding by the Court of Appeal for Ontario that the application of issue estoppel would not work an injustice. Accordingly, the Respondents respectfully submit that this discretionary decision should not be disturbed.

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[1] [2001] 2 S.C.R. 460 ["*Danyluk*"], Respondents' Book of Authorities, Tab 7.

[2] R.S.O. 1990, c. P.15, as amended [the "*PSA*"] (historical version for period January 1, 2003 to March 8, 2005), Appellant's Book of Authorities, Tab 53.

PART 1 - STATEMENT OF FACTS

6. The Respondents generally do not take issue with the Statement of Facts as set out in the Appellant's factum, with the following exceptions:

(i) The last three sentences of paragraph 8 are presented as facts but are more properly described as allegations in the Statement of Claim. Moreover, the Statement of Claim alleges that the Appellant was arrested solely by Constables Parker and Koscinski; not the court officer, Constable Federkow, as stated in the Appellant's factum.

(ii) At paragraph 19 of the Appellant's factum, the Appellant states that the Respondents' Rule 21 motion sought to bar the allegations of "unlawful arrest, assault and/or malicious prosecution" on the basis of *stare decisis*, *res judicata*, issue estoppel, and abuse of process. In addition to those three allegations, the Respondents also sought to bar the Appellant's claim for "unlawful detention" on the motion.[3] The Appellant's claims for unlawful strip search and use of defective equipment (*i.e.* handcuffs) were not issue estopped on the Respondents' motion below and the Appellant may proceed with these claims.

7. The Respondents wish to add the following facts to provide a broader landscape to those asserted by the Appellant.

Events Giving Rise to the Action

8. On January 29, 2003, the Appellant attended the provincial offences trial of his wife. The Respondent, Constable Nathan Parker (**"Cst. Parker"**) served as a witness. Throughout these proceedings, the Appellant sat as a spectator near the back of the courtroom wearing sunglasses

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[3] Notice of Rule 21 Motion, Appellant's Record, Tab 10.

and chewing gum. The Respondent, Constable Paul Koscinski (**"Cst. Koscinski"**), sat behind the Appellant in the last row of the courtroom awaiting an unrelated matter.[4]

9. During Cst. Parker's testimony, the Appellant was heard by various members of the public sitting in the body of the court making comments, including a statement to the effect of "That's your f***ing opinion." The prosecutor described that the Appellant was "chirping … making comments, sort of to the side and under his breath, muttering … almost doing a running commentary on the … proceedings as they unfolded." At one point during the officer's testimony, the court officer, Constable Roy Federkow (**"Cst. Federkow"**) is noted on the transcript to state "You want to make a comment you can leave the Courtroom right now sir. I'm talking to you. … You want to make a comment you can leave."[5]

10. Following Cst. Parker's testimony, he sat next to Cst. Koscinski in the back row and advised the Appellant that he would be arrested if he did not stop his behaviour. When the Appellant's wife took the stand, the following exchange was recorded on the transcript of proceeding:

> THE COURT: Do you want to take your, okay do you want to take the stand please?
>
> THE CLERK OF THE COURT: Do you wish to swear on the bible?
>
> MAN FROM THE BODY OF THE COURT: Keep shaking your head.
>
> THE CLERK OF THE COURT: Please take the bible in your hand.
>
> MR. BROWN [PROSECUTOR]: Your Worship the proceedings have been disrupted two or three times now and I'd ask that you consider removing the gentleman chewing gum with the sunglasses from the Courtroom. I'd like to speak to proceed with the trial uninterrupted [*sic*].
>
> THE COURT: Make sure that there is no interruption whatsoever, okay?
>
> MAN FROM THE BODY OF THE COURT: Your Honour, I haven't said a word.
>
> THE COURT: Okay.

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[4] Decision of the Hearing Officer at p. i, iii, and vi, Appellant's Record, Tab 12A; Commission Decision at p. 2, Appellant's Record, Tab 12B.

[5] Decision of the Hearing Officer at p. iv, v and vii, Appellant's Record, Tab 12A; Commission Decision at p. 2, Appellant's Record, Tab 12B.

> MAN FROM THE BODY OF THE COURT: Until this officer approached me and threatened me with arresting me.[6]

11. The Appellant pulled away from Cst. Parker's hand and the officer decided to arrest him for causing a disturbance. Cst. Koscinski assisted with the arrest while the Appellant actively resisted. The courtroom "dissolved into pandemonium" as the officers took the Appellant into the hallway and ultimately completed the arrest. The Justice of the Peace "fled" the courtroom and the court clerk followed, locking the door behind him and calling 911.[7]

12. The Appellant was taken to the police station where he was booked, searched and lodged in a holding cell. He was ultimately released on a promise to appear.[8] While at the police station, he alleges he was assaulted and submitted to an unlawful strip search.[9]

Proceedings Under the *Police Services Act*

13. Following these events, the Appellant filed a complaint against Cst. Parker and Cst. Koscinski under Part V of the *PSA*. He then commenced the within civil proceeding on July 22, 2003, alleging, *inter alia*, malicious prosecution, false arrest, assault and excessive force against the Respondents. The Appellant had standing at the police disciplinary hearing and had the option of retaining counsel but chose not to do so, although he was represented by legal counsel James A. Scarfone of the law firm Scarfone Hawkins LLP in his civil proceedings.[10]

14. The complaints proceeded to a police discipline hearing before Superintendent (retired) Robert J. Fitches (the **"Hearing Officer"**) that was heard over the course of several days in March and April 2004. There were a total of 13 witnesses, including the prosecutor from the provincial offences trial, the court reporter, the court officer, two members of the public in the

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[6] Commission Decision at p. 2 and 3, Appellant's Record, Tab 12B.

[7] *Ibid.*

[8] *Ibid.*

[9] Statement of Claim at para. 35, Appellant's Record, Tab 11A.

[10] *Ibid.*

courtroom awaiting their trials on that day, the Appellant, his wife, Cst. Parker, Cst. Koscinski, and the officer in charge of the cells when the Appellant arrived at the police station.[11]

15. There were 32 exhibits filed in the discipline proceeding. In particular, an audiotape of court proceedings taken in the courtroom at the time of the arrest was entered into evidence, as was the police station's videotape of the Appellant at the police station during the time he alleges to have been assaulted.[12] There were also 13 photographs of the Appellant following his arrest entered into evidence.

16. The prosecutor at the police discipline hearing put forward legal argument and expert opinion in support of the Appellant's position that a police officer does not have the lawful right to arrest someone in a courtroom while a Justice of the Peace is presiding.[13] The Appellant provided his own written submissions on this issue of law, which is also raised in the Statement of Claim.[14]

17. The Hearing Officer's ruling was released on June 28, 2004. The Hearing Officer made the following findings of fact:

- After reviewing the video tape evidence of what transpired at the police station, the Hearing Officer "was unable to see any evidence whatsoever of any excessive or unnecessary force used on [the Appellant] by Constable Parker or anyone else... There is *no* evidence of excessive force used at the police station." [Emphasis in original]

- "...there is no clear, convincing or cogent evidence whatsoever to indicate [the Appellant] was the victim of the unnecessary or unlawful application of force while in custody at the police station".

- "The evidence indicates that the force that was applied during the arrest was in keeping with the Use of Force Continuum or Wheel".

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[11] Commission Decision at p. 4, Appellant's Record, Tab 12B.

[12] Decision of the Hearing Officer at p. vi, ix, and xiv, Appellant's Record, Tab 12A.

[13] Decision of Hearing Officer at p. viii, Appellant's Record, Tab 12A.

[14] Statement of Claim at para. 37(f), Appellant's Record, Tab 11A.

- The Hearing Officer was "convinced that [the Appellant] was exhibiting behaviour that would be consistent with escalating hostility. Based on the evidence I have examined during the hearing and during my deliberations, the force that was used during [the Appellant's] arrest was totally justified".[15]

18. The Appellant provided testimony, actively participated by cross-examining the witnesses, and provided written submissions on points of law. He was also a named party on the subsequent appeal to the Ontario Civilian Commission on Police Services (the **"Commission"**) and a named respondent on further judicial review to the Superior Court of Justice - Divisional Court. The Appellant did not appeal from the decision of the Divisional Court.

19. The Commission, a civilian body providing oversight to decisions made by a hearing officer, found that the Hearing Officer made a manifest error by failing to address whether the officers had lawful authority to arrest the Appellant in a courtroom presided over by a Justice of a Peace, without direction to do so. The Commission held the officers did not have legal authority in the circumstances and found the arrest to be unlawful. Accordingly, *any* force used in effecting the arrest was unjustified.[16] However, the Commission entirely agreed with the finding that there was no evidence to support the claim of unnecessary use of force at the police station:

> We wish it clearly understood that any finding of unnecessary force does not include the alleged blow to Mr. Penner's eye while he was being booked at 11 Division. This particular allegation is clearly not supported by the evidence and the Hearing Officer's decision in this regard is both correct and proper in law.[17]

20. On judicial review of the Commission's ruling, a panel of three Justices sitting in the Superior Court of Justice - Divisional Court unanimously found the decision of the Commission to be an error in law and therefore unreasonable. The Hearing Officer was correct in law that it was unnecessary to decide whether the powers of Justice of Peace or the police officer were paramount. The powers co-existed. Only if their actions conflicted would there be a need to

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[15] Decision of Hearing Officer at p. xiv, xvi, and xvii, Appellant's Record, Tab 12A.

[16] Commission Decision at p. 10, 13, and 15, Appellant's Record, Tab 12B.

[17] *Ibid.* at p. 15, Appellant's Record, Tab 12B.

determine which power was paramount. In this case, the actions of Cst. Parker and Cst. Koscinski were not in conflict with the actions of the Justice of the Peace and, therefore, no such determination was necessary.[18] With regards to the Hearing Officer's findings of fact, the Divisional Court found as follows:

> [28] These were findings the Hearing Officer was entitled to make on the evidence. We find no manifest error, no ignoring of conclusive or relative evidence, nor any indication he misunderstood the evidence or drew erroneous conclusions from it. There was ample evidentiary foundation for his findings of fact.
>
> [29] We conclude, therefore, that any of the Commission's findings of fact, which tend to limit or cast doubt upon the Hearing Officer's findings, are unreasonable and cannot stand.[19]

The Rule 21 Motion

21. In his ruling of October 27, 2009, Justice Fedak struck the Appellant's claims for unlawful arrest, unnecessary use of force (during and subsequent to his arrest), false imprisonment, and malicious prosecution on the basis of issue estoppel. Justice Fedak held that "the three requirements of issue estoppel are met. The allegations of use of unnecessary force following the plaintiff's arrest are *res judicata* as against Parker and Koscinski."[20]

22. The Appellant's claims for unreasonable strip search and use of defective equipment (handcuffs) were not impacted by Justice Fedak's decision. These claims survived the Respondents' Rule 21 motion. To the extent the Appellant alleges on this appeal that these claims have been estopped, the Respondents disagree.

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[18] Divisional Court Endorsement at paras. 28 and 29, Appellant's Record, Tab 12C.

[19] *Ibid.* at para. 28, Appellant's Record, Tab 12C.

[20] Ruling on Rule 21 Motion at para. 39, Appellant's Record, Tab 5.

The Court of Appeal for Ontario Decision

23. The Court of Appeal affirmed the motion judge's finding that the three preconditions for issue estoppel were met in this case. This decision is not challenged on this appeal. However, the Court of Appeal held that the motion judge erred by failing to provide any analysis in support of his discretionary decision to give effect to issue estoppel. As a result, the Court of Appeal considered afresh whether to exercise its own discretion not to apply issue estoppel in the circumstances.[21]

24. In determining whether to exercise discretion to refuse to give effect to issue estoppel, the Court of Appeal applied the relevant discretionary factors. In particular, the Court of Appeal made the following findings:

- Different Purposes: The Court of Appeal agreed with the Appellant that the legislature did not intend to foreclose his civil action because he filed a complaint under the *PSA*. (para. 42)

- No Financial Stake: This factor favoured the Appellant because he did not derive any financial benefit from the disciplinary proceedings. However, the strength of this consideration against applying issue estoppel was diminished by the indirect potential benefit the Appellant may have received if the discipline proceedings had been decided in his favour. Under those circumstances, issue estoppel would have worked to *his* benefit in the subsequent civil proceedings. (para. 43)

- Expertise of the Decision Maker: This factor favoured the Respondents because the Hearing Officer, a retired police superintendent, had as much expertise as the Court would have when analyzing the issue of reasonable and probable grounds for arrest and use of excessive/unnecessary force. (para. 45)

- Procedures in the Disciplinary Proceedings: This factor favoured the Respondents. The Court of Appeal determined that the police disciplinary hearing had all the hallmarks of a civil trial. The higher standard of proof applicable to police discipline hearings was immaterial in these particular circumstances in light of the factual findings made by the Hearing Officer. (paras. 46 - 51)

- The Appellant's Active Participation: This factor favoured the Respondents. The Appellant actively participated throughout the disciplinary proceedings by giving

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[21] Court of Appeal Decision at para. 39, Appellant's Record, Tab 3.

evidence, cross-examining other witnesses, and making oral submissions to support his complaint. (para. 52)

- Right of Appeal: This factor favoured the Respondents. The Appellant's claims were fully assessed at the hearing, on appeal to the Commission and at the Divisional Court in accordance with the *PSA*. (para. 53).

25. On considering each of these factors, the Court of Appeal determined that the "cumulative strength of the considerations in favour of applying issue estoppel outweigh the strength of those against applying it."[22] Ultimately, the Court of Appeal found that the application of issue estoppel would not be unjust in this case.

26. It is from this discretionary ruling that the Appellant now appeals.

PART II - QUESTION IN ISSUE

27. The Appellant phrases the question in issue broadly, asking whether the Court of Appeal for Ontario erred in law by applying issue estoppel in this case. The Appellant does not challenge the finding that the three preconditions of issue estoppel were met in this case. Accordingly, the Respondents respectfully submit that the question in issue is more succinctly stated as follows: **Whether the Court of Appeal for Ontario erred and was clearly wrong in its discretionary ruling that the application of issue estoppel would not work an injustice in the particular circumstances of this case?**

PART III - STATEMENT OF ARGUMENT

28. The Respondents submit that the Court of Appeal's discretionary decision to apply issue estoppel should be affirmed for three reasons.

29. First, the Appellant seeks to review a discretionary ruling that deserves deference from a reviewing court, including the Supreme Court of Canada. Rightly, the burden for overturning such a decision is onerous; mere disagreement with the result is not enough. On the facts of this

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[22] *Ibid.* at para. 55, Appellant's Record, Tab 3.

case, the Appellant has failed to show a reversible error that the decision below was clearly wrong or exercised on a wrong principle of law.

30. Second, the Appellant seeks to fundamentally alter settled law in Canada. This Court's decision in *Danyluk* outlines a test of general application that is malleable to the unique circumstances of each case. This test was correctly applied by the Court of Appeal below. The Appellant now proposes to refocus the discretionary analysis away from the particular facts of each case towards an inquiry into the characteristics of the subject administrative tribunal. In advancing this argument, the Appellant appeals to broad notions of *potential* for injustice to unnamed future complainants in the abstract, largely ignoring the facts unique to his particular case. In so doing, the Appellant's analysis ultimately fails to address the key question on this appeal: Would the application of issue estoppel *given the particular facts of the Appellant's case* be unfair and unjust? The Respondents submit that both the motion judge and Court of Appeal below correctly answered this question: 'No'.

31. Third, the application of issue estoppel in this case accords with the policy reasons underpinning both motions to strike and the doctrine of *res judicata*. This litigation amounts to a collateral attack on a final judicial decision. Challenging unequivocal findings of fact in subsequent litigation is also an abuse of process.

(i) The standard of appellate review of a discretionary ruling is high

32. The Appellant appeals from a discretionary ruling unique to this particular case.

33. The standard of appellate review of a discretionary decision is onerous. Discretionary orders may only be overturned where the discretion was exercised on a wrong principle of law or where a clear error has been made.[23]

34. Where, as on this appeal, overturning the discretionary decision below has the potential to fundamentally redraw well-established boundaries of judicial discretion, considerable caution is warranted. Recently, Justice Fish offered the following guidance on such matters:

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[23] *Watt v. Beallor Bealler Burns Inc.*, [2004] O.J. No. 2347 at paras. 6 and 7 (C.A.), Respondents' Book of Authorities, Tab 34. See also: *Hudon v. Colliers Macaulay Nicolls Inc.*, [2001] O.J. No. 1588 at para. 18 (S.C.J. - Div. Ct.), Respondents' Book of Authorities, Tab 10.

> [58] An appellate court that would have exercised original discretion as the trial judge did will rarely be tempted to tamper with the law as it stands. The temptation, I fear, is far greater, where the appellate court might have been inclined to exercise its discretion differently. Disagreement, particularly strong disagreement, invites caution: A reviewing court must not, on account of its disagreement alone, place trial judges offside by redrawing the established boundaries of their discretion.
>
> [59] I think it better by far for an appellate court to affirm a discretionary decision with which it disagrees than to reverse it impermissibly by adopting, *ex post facto*, a more regimented framework that might have resulted in what it regards as a preferable result at trial. In the context that concerns us here, the law as it stands does not authorize us to intervene in the impugned decision of the trial judge. And the proposed change in the law, while it would prevent trial judges in future cases from exercising their discretion as the trial judge did here, would at the same time hypothecate their constitutional duty, under s. 24(1) of the *Charter*, to fashion appropriate and just remedies in circumstances we cannot anticipate.[24]

35. If this Honourable Court accepts the Appellant's proposal of how the discretion *should* have been exercised in this case, then by implication overturning the discretionary ruling below would redraw the discretionary analysis set out in cases such as *Minott*[25], *Schweneke*[26], and accepted by this Court in *Danyluk*[27]. These cases espouse the guiding principles of discretionary analysis and have been uniformly applied throughout the country for both administrative tribunals and court proceedings alike.

36. As noted by Justices Doherty and Feldman for the Court in *Schweneke,* abstract concerns arise in virtually every case where the finding relied on to support the doctrine of issue estoppel was made by a tribunal and not a court.[28] If this Court were to shift the discretionary analysis away from the factual circumstances specific to each case in favour of much broader considerations of abstract potential injustice as the Appellant proposes, this will, as Justice Fish

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[24] *R. v. Bjelland*, [2009] 2 S.C.R. 651 at paras. 58 and 59, Respondents' Book of Authorities, Tab 21.

[25] *Minott v. O'Shanter Development Co.*, [1999] O.J. No. 5 ["*Minott*"], Respondents' Book of Authorities, Tab 15; *Danyluk, supra* note 1 at para. 67, Respondents' Book of Authorities, Tab 7.

[26] *Schweneke v. Ontario*, [2000] O.J. No. 298 (C.A.) ["*Schweneke*"], Respondents' Book of Authorities, Tab 31.

[27] *Supra* note 1, Respondents' Book of Authorities, Tab 7.

[28] *Supra* note 26 at para 44, Respondents' Book of Authorities, Tab 31.

has warned, impair the ability of trial judges to fashion appropriate and just remedies in circumstances that cannot be anticipated.

(ii) The Court of Appeal for Ontario correctly exercised its discretion

37. Where the three prerequisites for issue estoppel are met, as they were in this case, a court may exercise its discretion to refuse to give effect to issue estoppel if doing so would work an injustice. This discretion is case specific and the party seeking to invoke the discretion has the burden of demonstrating the alleged injustice.[29]

38. It is an error in principle for a court not to address the factors for and against the exercise of discretion when considering whether to apply issue estoppel in any context.[30] Although the motion judge expressly chose not to exercise his discretion to deny the application of issue estoppel, it was the motion judge's failure to expressly address the above factors in his written reasons that prompted the Court of Appeal to consider afresh whether to exercise its own discretion not to apply issue estoppel in the Appellant's case.

39. The list of factors a court must consider in exercising its discretion of whether to apply issue estoppel is open. No one factor is determinative of the analysis, but their cumulative weight should determine whether to apply issue estoppel with the primary factor being the potential injustice of its application. The Respondents respectfully submit that the Court of Appeal below correctly considered all relevant factors and appropriately weighed each factor in exercising its discretion to apply issue estoppel.[31]

(a) The overall potential injustice

40. Citing *Schweneke*[32] as authority the Court of Appeal below framed the scope of its discretionary analysis in this way: "is there something in the circumstances of this case such that

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[29] *Ibid.* at para. 39, Respondents' Book of Authorities, Tab 31.

[30] *Danyluk, supra* note 1 at para. 66, Respondents' Book of Authorities, Tab 7.

[31] Court of Appeal Decision at paras. 39 - 55, Appellant's Record, Tab 3.

[32] *Schweneke, supra* note 26, Respondents' Book of Authorities, Tab 31.

the usual operation of the doctrine of issue estoppel would work an injustice?"[33] This approach accords with Justice Binnie's guiding dicta in *Danyluk*: "as a final *and most important factor*, the Court should stand back and, taking into account the entirety of the circumstances, consider whether application of issue estoppel *in the particular case* would work an injustice" between the parties.[34] [Emphasis added] Here, the Court of Appeal took a step back, weighed the cumulative effect of the relevant discretionary factors and correctly held that the application of issue estoppel would not work an injustice in the Appellant's case.[35]

41. The Respondents submit that, provided nothing in the specific circumstances of the case would result in an injustice to the parties, issue estoppel applies as equally to an officer who has been convicted in a police disciplinary hearing as to a complainant who has advanced groundless allegations in such proceeding. This is consistent with the object of the *PSA*, being to increase confidence in the provision of police services, including the processing of complaints.[36]

42. It is first and foremost the Respondents' position on this appeal that the arguments raised by the Appellant seeking to overturn the Court of Appeal's discretionary ruling fail to demonstrate in any way how the application of issue estoppel would work an injustice *in the Appellant's case*. Instead, the Appellant asks this Court to look far beyond the facts of his case in search of injustice or the potential for injustice in the abstract. This, however, is not enough and, in fact, an improper exercise of a court's discretion. The Appellant must show how the application of issue estoppel would work an injustice in his particular case. As the Court of Appeal for Ontario in *Schweneke* correctly noted:

> In our view, a party seeking to invoke the discretion cannot simply rely on the potential for the kind of injustice described in the above quoted passage from *Minott* but must demonstrate that the situation described in

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[33] Court of Appeal Decision at para. 38, Appellant's Record, Tab 3.

[34] *Danyluk, supra* note 1 at para. 80, Respondents' Book of Authorities, Tab 7.

[35] Court of Appeal Decision at paras. 54-55, Appellant's Record, Tab 3.

[36] *Browne v. Ontario (Civilian Commission on Police Services)*, [2001] O.J. No. 4573 at paras. 66-67 (C.A.), Respondents' Book of Authorities, Tab 2; *Corp. of the Canadian Civil Liberties Assn. v. Ontario (Civilian Commission on Police Services)*, [2002] O.J. No. 3737 at para. 35 (C.A.) ["*CCLA*"], Respondents' Book of Authorities, Tab 6.

> that passage actually arose in the particular case. The discretion must respond to the realities of each case and not to abstract concerns that arise in virtually every case where the finding relied on to support the doctrine was made by a tribunal and not a court.[37]

43. The Respondents respectfully submit that the Court of Appeal correctly exercised its discretion below and that the Appellant did not discharge his burden.

(b) Different purposes between the disciplinary proceedings and the civil claim

44. The Appellant argues that the purpose of police discipline hearings are by nature disciplinary while the purpose of civil actions is compensatory. The Court of Appeal below agreed. The Appellant now claims that the consideration of this factor should have been *the* central focus of its analysis and afforded *more* weight contrary to this Court's decision in *Danyluk*. The Appellant provides no case law in support of this position.

45. In the context of issue estoppel, the purpose of two proceedings should not be given overwhelming weight. The focus of issue estoppel, after all, is whether the *issues* in the two proceedings are the same. In this case, they were. As was reasoned by the Court of Appeal for Ontario in *McIntosh v. Parent*:

> [13] Two totally distinct ideas are often confounded in speaking of res judicata. When a question is litigated, the judgment of the Court is a final determination as between the parties and their privies. Any right, question, or fact distinctly put in issue and directly determined by a court of competent jurisdiction as a ground of recovery, or as an answer to a claim set up, cannot be re-tried in a subsequent suit between the same parties or their privies, *though for a different cause of action*. The right, question, or fact, once determined, must, as between them, be taken to be conclusively established so long as the judgment remains.[38] [Emphasis added]

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[37] *Schweneke, supra* note 26 at para. 44, Respondents' Book of Authorities, Tab 31.

[38] *McIntosh v. Parent*, [1924] O.J. No. 59 at para. 13 (C.A.), Respondents' Book of Authorities, Tab 12. See also: *Angle v. Canada (Minister of National Revenue)*, [1975] 2 S.C.R. 248 (QL) (per Laskin J. in dissent) ["*Angle*"], Respondents' Book of Authorities, Tab 1; *Danyluk, supra* note 1 at para. 24, Respondents' Book of Authorities, Tab 7; Donald J. Lange, *The Doctrine of Res Judicata in Canada*, 3rd ed. (Markham, ON: LexisNexis Canada Inc., 2010) at p. 28-30, Respondents' Book of Authorities, Tab 47.

Accordingly, as long as the three preconditions for issue estoppel are met the nature and purpose of the venues in which the issue is considered should not be determinative.

46. The Supreme Court of Canada has also affirmed the principle that issue estoppel applies in cases where two proceedings are separate and distinct. In *R. v. Grdic*, Justice Wilson, for the minority, stated as follows:

> An estoppel, however, can apply also to a single issue which may arise between two parties who, although litigating for the second time regarding issues related factually to their first case, face each other in an altogether new cause of action: see *Hoystead v. Commissioner of Taxation*, [1926] S.C. 155 (P.C.).[39]

47. According to Donald J. Lange, when underlying evidentiary findings of an issue have been decided in a previous proceeding, they, too, "may not be relitigated in a separate and distinct cause of action."[40]

48. The Appellant relies extensively on the public complaints regime in Newfoundland to suggest that similar proceedings in Ontario are not intended to address the civil rights of a public complainant. However, section 58(1) of the *Royal Newfoundland Constabulary Act, 1992* goes one step further then the *PSA* in stating that "Nothing in this Act shall preclude ... the commencement of a civil action arising out of a complaint."[41] There is no equivalent provision in the *PSA* and therefore the two regimes are not directly comparable.

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[39] *R. v. Grdic*, [1985] 1 S.C.R. 810 at para. 8, Respondents' Book of Authorities, Tab 25. See also: *R. v. Duhamel*, [1981] A.J. No. 651 at para. 16 (C.A.), aff'd [1984] 2 S.C.R. 555, Respondents' Book of Authorities, Tabs 23 and 24, respectively; *Erdos v. Canada (Minister of Citizenship and Immigration)*, [2005] F.C.J. No. 2062 at para. 16 (C.A.) ["*Erdos*"], Respondents' Book of Authorities, Tab 9; *Minott, supra* note 25 at para. 16, Respondents' Book of Authorities, Tab 15; *City of Moncton v. Aprile Contracting Ltd.*, [1980] N.B.J. No. 87 at 692 (C.A.), Respondents' Book of Authorities, Tab 5; *Merck Frosst Canada Inc. v. Canada (Minister of National Health and Welfare)*, [1997] F.C.J. No. 344 at para. 18 (T.D.) ["*Merck Frosst*"], Respondents' Book of Authorities, Tab 14; *Price v. Shediac (Town)*, [1992] N.B.J. No. 108 (Q.B.) (QL) ["*Price*"], Respondents' Book of Authorities, Tab 19.

[40] Lange, *Doctrine of Res Judicata, supra* note 38 at p. 33-34, Respondents' Book of Authorities, Tab 47. See also: *Minott, supra* note 25 at para. 24, Respondents' Book of Authorities, Tab 15; *Moody v. Ashton*, [2004] S.J. No. 758 at para. 166 (Q.B.), Respondents' Book of Authorities, Tab 16; *LeBlanc v. Parry*, [1998] O.J. No. 1242 at para. 8 (Gen. Div.), Respondents' Book of Authorities, Tab 11; *Merck Frosst, supra* note 39 at paras. 20-21, Respondents' Book of Authorities, Tab 14; *Price, supra* note 39, Respondents' Book of Authorities, Tab 19.

[41] S.N.L. 1992, c. R-17, s. 58(1), Respondents' Book of Authorities, Tab 38.

49. However, even if the *PSA* included a provision similar to s.58(1) of the Newfoundland statute, the existence of such a provision would not, in and of itself, bar the application of issue estoppel in this case. In *Wong v. Shell Canada*, the Alberta Court of Appeal applied issue estoppel notwithstanding a provision similar to s. 58(1) of the *Royal Newfoundland Constabulary Act, 1992*.[42] In considering this specific provision, the Court reasoned that:

> While s. 9(1)(a) does not purport to remove any common law rights, and, in fact, seeks to preserve them, the wording does not preclude the application by the courts of issue estoppel. The legislature has provided the employee with a choice of forum. The employee may commence an action or may pursue remedies under the Code. The legislation does not provide that both remedies may be pursued by the employee in respect of the same complaint. In *Rasanen v. Rosemount Instruments Ltd.* (1994), 68 O.A.C. 284 (C.A.), the Ontario Court of Appeal reached this conclusion regarding the effect of similar legislative provisions and we agree with the reasoning in that decision. See also: *Fayant v. Campbell's Maple Village Ltd.* (1993), 14 Alta. L.R. (3d) 382 (Q.B.), *Brown v. CKWX Ltd.* (1985), 7 C.C.E.L. 191 (B.C.Co.Ct.), *Sherwood v. Burston* (1994), 127 Sask. R. 71 (Q.B.).[43]

50. According to Donald J. Lange, a statutory provision must be clear on its face if the legislation intends to bar the application of issue estoppel in future litigation, giving the following example of a statutory provision that would bar the application of issue estoppel: "nothing in this Act affects the rights or benefits of an employee under any law, custom, contract or arrangement that are more favourable to him than his rights or benefits under this Act."[44] Even in *Danyluk*, this Honourable Court reasoned that relitigation of the same issue could be an abuse notwithstanding a provision that expressly stated that "No civil remedy of an employee against his or her employer is suspended or affected by this Act."[45]

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[42] [1995] A.J. No. 979 (C.A.); leave to appeal refused [1995] S.C.C.A. No. 551, Respondents' Book of Authorities, Tab 35. In that case, s. 9(1) of the *Employment Standards Code*, S.A. 1988, c. E-10.2 read "Nothing in this Act effects any civil remedy that an employee has against his employer or that an employer has against his employee.

[43] *Ibid.* at para. 14, Respondents' Book of Authorities, Tab 35.

[44] Lange, *Doctrine of Res Judicata, supra* note 38 at p. 122, Respondents' Book of Authorities, Tab 47. See also: *Deagle v. Shean Co-Operative Ltd.*, [1996] N.S.J. No. 504 at paras. 18-20 (C.A.), Respondents' Book of Authorities, Tab 8; *Collins v. Kenmount Ford Sales Ltd.*, [1984] N.S.J. No. 287 at paras. 8 and 9 (T.D.), Appellant's Book of Authorities, Tab 8.

[45] *Danyluk, supra* note 1 at paras. 68 and 69, Respondents' Book of Authorities, Tab 7.

(c) No financial stake

51. The Court of Appeal below correctly considered the impact of the Appellant's inability to recover financially in the disciplinary proceedings.[46] This was an important consideration weighing *against* the application of issue estoppel but was diminished by the Court's recognition that the Appellant derived an indirect financial benefit if the discipline proceedings were concluded in his favour. In effect, had the officers been found to have wrongfully arrested and/or assaulted the Appellant, there would be no liability issues to be determined in the civil action, leaving damages as the sole remaining issue. In short, on the facts of the Appellant's case, the Court of Appeal correctly held that "*issue estoppel works both ways*."

52. The Respondents submit that the Court of Appeal's finding in this respect is both correct and relevant in the context of the Appellant's case. In exercising its discretion on this basis, the Court of Appeal did not make a reversible error in law or in principle.

(d) Expertise of the decision maker

53. It was relevant for the Court of Appeal to consider the expertise of the Hearing Officer in this case. Given the nature of the Appellant's complaints against Cst. Parker and Cst. Koscinski, to the extent that those complaints necessitated a determination of whether there were reasonable and probable grounds for arrest and the use of excessive or unnecessary force, the Court of Appeal correctly held that "For making these findings, a senior and experienced police officer has as much expertise as a court would have."[47] Moreover, the Court of Appeal limited its consideration of the Hearing Officer's expertise to these issues only. Regarding the legal determination of whether Cst. Parker and Cst. Koscinski had legal authority to arrest the Appellant in a courtroom where a Justice of the Peace was presiding, this matter was ultimately decided by the Divisional Court.

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[46] Court of Appeal Decision at para. 43, Appellant's Record, Tab 3.

[47] Court of Appeal Decision at para. 45, Appellant's Record, Tab 3.

(e) Procedural safeguards in the disciplinary proceedings

54. The Appellant places considerable emphasis on the question of whether the disciplinary proceedings "had all the hallmarks of an ordinary civil trial."[48] The Appellant's factum goes to great lengths to distinguish police disciplinary hearings from ordinary civil proceedings ostensibly to undermine the reliability and/or "judicial" nature of police disciplinary hearings.

55. First, it is significant that the Appellant does *not* appeal from the finding that the Hearing Officer's decision in this case was both judicial and final. In fact, the Appellant conceded this point before the Court of Appeal below.[49] The Appellant should not be entitled to reopen this discussion on appeal by attacking the discretionary ruling of the Court of Appeal. Allowing the Appellant to do so would be wholly inconsistent with his explicit concession.

56. Second, the Appellant's argument necessarily assumes that the Court of Appeal was required to find that the disciplinary proceedings had "all the hallmarks of a civil trial" in order to properly exercise its discretion to apply issue estoppel. However, the appropriate analysis is not whether the administrative proceeding at issue mirrored the processes of a civil trial, but whether on the facts of this case, the Appellant received sufficient procedural protections such that the operation of issue estoppel would not work an injustice.

57. According to *Danyluk,* the absence of procedural protections mitigates in favour of not applying issue estoppel.[50] However, the Court of Appeal below clearly and correctly distinguished the factual circumstances in the Appellant's case from *Danyluk* and held that the Appellant enjoyed sufficient procedural protections which favoured the application of issue estoppel.[51]

58. Third, an argument identical to the Appellant's argument on this appeal - that issue estoppel ought not apply because disciplinary hearings in general do not possess "all the

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[48] *Ibid.* at para. 48, Appellant's Record, Tab 3.

[49] *Ibid.* at para. 25, Appellant's Record, Tab 3.

[50] *Supra* note 1 at paras. 75 and 76, Respondents' Book of Authorities, Tab 7.

[51] Court of Appeal Decision at paras. 46 - 51, Appellant's Record, Tab 3.

hallmarks of trial" - was expressly rejected by Justice Abella (as she then was) of the Court of Appeal for Ontario in *Rasanen*:

> [38] The appellant is unable to identify any specific disadvantage resulting from the procedure in the referee hearing, other than noting that traditional tools like discovery, production or costs are unavailable under the Employment Standards Act scheme. He had -- and took -- full opportunity to make his case and respond to that of his adversary. His argument, in my view, rests more on the theoretical proposition that an adjudicated decision made anywhere except by a judge in a court-room is inherently less reliable, and therefore not binding in another proceeding.
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> [39] This is a proposition many courts have already rejected: see, for example, Benincasa v. Ballentine (1978), 7 C.P.C. 81 (Ont. H.C.J.); Yee v. Gim (1978), 87 D.L.R. (3d) 67, [1978] 3 W.W.R. 733 (B.C.S.C.); Daniel v. Hess (1965), 54 W.W.R. 290 (Sask. Div. Ct.); Parklane Hosiery Co. v. Shore, 439 U.S. 322 (1979). Nor is it responsive to the required flexibility and uniqueness of tribunal adjudication. *Within their areas of expertise and jurisdiction, these tribunals are the courts for their intended beneficiaries, are perceived by these beneficiaries to be making enforceable decisions, and are expected by these beneficiaries to be making such decisions far more expeditiously but no less reliably and determinatively than the courts.* These are, in my view, reasonable expectations.
>
> [40] *There is no basis for restricting the application of issue estoppel to decisions made by judges in the ordinary course of litigation.* By analogy, the hearing by the referee, if not technically "judicial", is designed to be an independent, fair, impartial and binding adjudicative process, and therefore satisfies the spirit of the requirement. It was a decision made in a hearing in which the appellant knew the case he had to meet, had a chance to meet it, and lost. Had he won, the decision would have been no less binding.[52] [Emphasis added]

59. Similar to the appellant in *Rasanen*, the Appellant on this appeal advances theoretical arguments of the *potential* procedural unfairness to complainants in general. However, it is not enough to simply highlight, as the Appellant has, the perceived deficiencies with a particular administrative tribunal and then make assertions that the application of issue estoppel based on

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[52] *Rasanen v. Rosemount Instruments Ltd.*, [1994] O.J. No. 200 at paras. 38-40 (C.A.), Respondents' Book of Authorities, Tab 20.

decisions emanating from that tribunal is unjust. As was stated by the Court of Appeal for Ontario in *Schweneke*,

> The party must go further and show that in the circumstances of the particular case shortcomings in the procedures of the tribunal, whose finding is relied on in support of an issue estoppel claim, were such that it would be unjust to give effect to that finding in subsequent civil litigation.[53]

60. At its core, the Appellant's position fails to appreciate that by necessity administrative tribunals cannot (and were never intended to) mirror the procedure, structure, or mandate of the court system. This, nevertheless, does not render administrative tribunals any less credible. Nor is it fatal to the application of issue estoppel in a tribunal-to-court context. Provided relevant considerations are identified and addressed, as they were in this case, issue estoppel may apply. As the Court of Appeal below recognized, and the Respondents agree, where the administrative proceeding at issue was intended to be a quick and inexpensive way to obtain a decision and where not many or all of the procedural guarantees associated with a trial are present, issue estoppel may not apply. Those are not the facts of this case.

61. Most administrative tribunals in Ontario, including police disciplinary hearings under the *PSA*, are afforded the exact same procedural safeguards. The *Statutory Powers Procedure Act*[54] (the "***SPPA***") outlines numerous rules by which the procedures of all administrative tribunals in Ontario must abide, such as:

- Rights to notice of a proceeding (s. 6);
- Right of representation (s. 10);
- Every party has the right to call and cross-examine witnesses (s. 10.1);
- All relevant evidence may be admitted provided it is not inadmissible due to privilege or for another reason in the enabling statute (s. 15);

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[53] *Schweneke, supra* note 26, at para. 41, Respondents' Book of Authorities, Tab 31.

[54] R.S.O. 1990, c S.22, Respondents' Book of Authorities, Tab 39. According to s. 83(1) of the *PSA, supra* note 2, Appellant's Book of Authorities, Tab 54, police discipline complaints are governed by the *SPPA*.

- Notice of decision (s. 18)

If the Appellant is not satisfied with the level of natural justice he received at the *PSA* hearing, he is implicitly attacking the procedural safeguards available to most Ontario tribunals through the *SPPA*. If his argument succeeds, it will in effect defeat the well-established principle that permits the application of issue estoppel from the tribunal-to-court context when the tribunal is governed by the *SPPA*.

62. Contrary to the Appellant's assertion, the *PSA* at the time of the original police discipline hearing provided for disclosure rights to both the subject officers *and* the complainant in the context of a public complaint. While the Appellant's factum, at para. 46, is correct in that s. 69(5) gave the officer an opportunity to examine evidence produced at a hearing, the very next provision states that "If the hearing is being conducted as a result of a public complaint, the complainant shall be given an opportunity to examine evidence and reports before the hearing."[55] The *PSA* does not simply brush off a public complainant in favour of the officer.

63. On the facts of this case, the Appellant had the opportunity for disclosure far greater than most other complainants may receive because of the parallel criminal proceeding stemming from his arrest. During his criminal proceeding, the Appellant was entitled to even broader disclosure of evidence surrounding his arrest than he otherwise would have received under the police discipline proceedings and civil litigation.[56]

The Hearing Officer was not biased

64. The Appellant further argues that police discipline proceedings lack an independent and unbiased adjudicator. In this respect, the Appellant raises the issue of bias *de novo* on the

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[55] *PSA* (historical version for the period June 1, 2003 and March 8, 2005), *supra* note 2, Appellant's Book of Authorities, Tab 53. Under the current version of the PSA, ss. 69(5) and (6) have been combined into s. 83(5), which reads: "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." See: *PSA*, R.S.O. 1990, c. P-15 (current version), Appellant's Book of Authorities, Tab 54.

[56] *R. v. Stinchcombe*, [1991] 3 S.C.R. 326, Respondents' Book of Authorities, Tab 28. Disclosure in the criminal context may also extend to an officer's discipline history: *R. v. McNeil*, [2009] 1 S.C.R. 66, Respondents' Book of Authorities, Tab 27. Civil litigants, on the other hand, do not have access to this information: *Andrushko v. Ontario*, 2011 ONSC 1107 (Div. Ct.), Appellant's Book of Authorities, Tab 4.

ultimate appeal of this matter. There was no request that the Hearing Officer recuse himself from the discipline proceeding on the basis of bias, nor was this allegation made on appeal to the Commission or on judicial review to the Divisional Court. Without any previous suggestion of bias in this case, the Appellant should not now be allowed to raise this issue for the first time.

65. In the absence of actual (or even alleged) bias in the circumstances of the Appellant's case, the Appellant is left to argue abstractly about the potential for bias and resulting injustice whenever a complaint proceeds to a formal hearing. The Appellant points to an institutional bias inherent in all disciplinary hearings in support of the argument that it is unjust to apply issue estoppel in his case. At para. 39 of his factum, the Appellant cites *Sharma v. Waterloo Regional Police Services* as authority for the proposition that appointing a retired superintendent to adjudicate a disciplinary hearing under the *PSA* creates a permissible institutional bias. With respect, this is not an accurate representation of the finding of the Divisional Court in that case. Rather, the Divisional Court found the legislature had allowed for institutional bias in *determining the manner of appointment of a hearing officer* under s. 76(1) of the *PSA*.[57] The appointment of the hearing officer in *Sharma*, however, did not raise a question of procedural unfairness or reasonable apprehension of bias because the hearing officer appointed in that case was not associated with the defendant police service.[58] In essence, because s. 76(1) of the *PSA* allowed for the appointment of retired police officers (or retired judges) who had no association with a particular police service, there was sufficient independence on the part of the hearing officer which negated any inherent institutional bias.

66. Ultimately, whether other or future police disciplinary hearings *may* be subject to bias is a concern better addressed by the legislature. Certainly, the courts ought to consider issues of bias when they are alleged on a case-by-case basis but this is not one of those cases.

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[57] *Sharma v. Waterloo Regional Police Services*, [2006] O.J. No. 2948 at para. 27 (Div. Ct.), Respondents' Book of Authorities, Tab 32.

[58] *Ibid.* at paras. 28-30, Respondents' Book of Authorities, Tab 32.

Any lack of independence allegations are moot

67. The Appellant argues that the public lacks confidence in the independence of the public complaint system in Ontario. He extensively cites a selection of concerns expressed by certain interest groups to the Honourable Justice LeSage for his review of the police complaints system in Ontario as commissioned by the Government of Ontario. The Appellant raises concern that the application of issue estoppel in this case will erode public confidence in the complaints process.

68. With respect, these concerns are misguided. In fact, only a small percentage of complaints result in hearings where issue estoppel could potentially occur. For example, in 2009 there were 2,625 complaints reported and only 20 hearings.[59] Coincidentally, of the 12 disciplinary hearings appealed to the Commission in 2009, the majority of these appeals involved convictions of officers. The substantial majority of these convictions were upheld on appeal.[60]

69. Since the release of the *LeSage Report*, the Government of Ontario has taken steps to implement most of the recommendations made by its author.[61] Specifically, the Office of the Independent Police Review Director has been established, which permits complaints to be made to and investigated by an independent body.[62] This government action effectively addresses the concerns raised by the Appellant at para. 74 of his factum. It also supports the proposition that any reform proposals should be addressed with the legislature and not the courts.

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[59] Ontario Civilian Police Commission, *Annual Report 2009* (Toronto: The Queen's Printer of Ontario) at p. 115, Respondents' Book of Authorities, Tab 45. See also previous annual reports from the Commission (2005 - 2008), Respondents' Book of Authorities, Tabs 41-44, which provide the following statistics: 2005: 2,868 complaints/76 hearings (at p. 54); 2006: 2,613 complaints/91 hearings (at p. 67); 2007: 2,623 complaints/28 hearings (at p. 87); and 2008: 2,644 complaints/35 hearings (at p. 68).

[60] *Ibid.*, p. 43 - 46, Respondents' Book of Authorities, Tab 45.

[61] Ontario, Legislative Assembly, *Official Report of Debates (Hansard)*, (October 16, 2006) (Hon. Michael Bryant (Attorney General)), Respondents' Book of Authorities, Tab 40. The *Independent Police Review Act, 2007*, which ultimately amended the *PSA* is at Respondents' Book of Authorities, Tab 36.

[62] Office of the Independent Police Review Director, *Statement of Operations October 19, 2009 - March 31, 2010* at p. 3, Respondents' Book of Authorities, Tab 46.

The clear and convincing standard is immaterial in the Appellant's case

70. The Appellant's abstract argument on the differing burdens of proof between police discipline proceedings and civil proceedings overlooks the actual findings of the Hearing Officer. As the Court of Appeal correctly identified, the Hearing Officer did not resort to a higher standard of proof in making his findings of fact. Rather, he found that there was *no* evidence to support the Appellant's allegations.[63]

71. The Appellant's reliance on the *Porter v. York (Regional Municipality) Police* case for the burden of proof issue is misplaced because the facts in *Porter* are clearly not analogous to the circumstances of the Appellant's case. In *Porter*, the plaintiff police officer brought a motion to prevent the defendants from adducing evidence at the civil trial that was not before a hearing officer at a prior *PSA* disciplinary hearing wherein the plaintiff was acquitted of misconduct. Although the hearing officer found that the plaintiff breached a lawful order of the Chief he also found "that there wasn't clear and convincing evidence that the plaintiff committed an offence". On the plaintiff's motion to estop the defendants, it was important to Justice Hermiston's ruling that the hearing officer's decision in that case "was determined by a high standard of proof and might have been different if it had been decided based on the lower civil standard." Justice Hermiston was clear that it was specifically "the reasons given for the [hearing officer's] verdict" that established there could be no issue estoppel in that case.[64]

72. Unlike the hearing officer's ruling in *Porter*, the Hearing Officer in the Appellant's case *did not* determine his findings on a higher standard of proof. He found that there was "nothing to indicate…that the arrest [of the Appellant] was unlawful." Furthermore, he was "unable to see any evidence whatsoever" that any excessive or unnecessary force was used on the Appellant during and subsequent to his arrest. The Hearing Officer found that the use of force was "totally justified" and that:

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[63] Decision of the Hearing Officer at p. xiv, xvi, and xvii, Appellant's Record, Tab 12A.

[64] [2001] O.J. No. 5970 at paras. 5, 11, and 16 (S.C.J.), Respondents' Book of Authorities, Tab 18. Note: It is unclear from Justice Hermiston's decision in *Porter* whether the 3 part test for issue estoppel was not met on the facts of that case or whether the court refused to give effect to issue estoppel in the exercise of its discretion.

> The evidence indicates that the force that was applied during the arrest was in keeping with the use of force continuum or wheel....I am convinced that ...[the Appellant] was exhibiting behaviour that would be consistent with escalating hostility. Based on the evidence I have examined during this hearing and during my deliberations, the force that was used during ...[the Appellant's] arrest was totally justified. It is indeed unfortunate that ... [the Appellant] suffered any injuries at all, but his injuries and the evidence do not convince me that there was any improper or excessive force used by these officers.[65]

73. In this case, the difference in the standard of proof between the disciplinary hearing and a civil action was not essential to the Hearing Officer's decision. As recognized by the Court of Appeal, the Hearing Officer would have made the same findings of fact on a balance of probabilities. These factual findings were first affirmed by the Commission and then ultimately by the Divisional Court.[66]

PSA statutory privilege does not bar issue estoppel

74. The Appellant argues that the statutory privilege and confidentiality provisions of the *PSA* by implication preclude the application of issue estoppel. To support this argument, the Appellant draws comparisons between the admissibility of evidence provisions between the *PSA* and the *Regulated Health Professions Act, 1991*. Not only are these authorities silent on the application of issue estoppel, the *Regulated Health Professions Act, 1991* and the *PSA* cannot be compared in the context of this case. Specifically, s. 36(3) of the *Regulated Health Professions Act, 1991* goes much further than the *PSA* regarding the inadmissibility of orders and findings made by the tribunal:

> No record of a proceeding under this Act, a heath 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

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[65] Decision of the Hearing Officer at p. xiii, xiv and xvii, Appellant's Record, Tab 12A.

[66] Commission Decision at p. 15, Appellant's Record, Tab 12B; Divisional Court Endorsement at para. 34, Appellant's Record, Tab 12C.

> proceeding relating to an order under section 11.1 or 11.2 of the *Ontario Drug Benefit Act.*[67] [Emphasis added]

The *PSA* does not contemplate the admissibility of orders or decisions made under Part V discipline proceedings and is therefore substantially different from the statute governing the medical profession.

75. The two cases relied upon by the Appellant[68] that deal with the interpretation of the *PSA* provisions in question were cases in which the plaintiff's allegations would require production and ultimately the admission in civil proceedings of unrelated complaints and/or disciplinary files in an effort to prove similar fact evidence. It is in this context that the courts concluded that the *PSA* provisions would prevent not only the admissibility of such evidence in a civil proceeding but also their production. Neither case dealt with circumstances, as in this appeal, where the Appellant's own complaint on the facts of his own case has been determined.

76. It is noteworthy that even the Ontario Court of Appeal decision in *M.F. v. Sutherland*[69], relied upon by the Appellant, in the context of the *Regulated Health Professions Act* deals with whether documentation created in the context of a settlement of a disciplinary proceeding can be used to support an allegation as pleaded.

77. This is distinct from the circumstances here where the Respondents seek to apply an equitable doctrine as a shield by using the previous findings of a final and judicial decision. The Respondents submit that had the legislature intended that issue estoppel not apply to the decision of the hearing officers that there would have been express language included in the *PSA* to foreclose this possibility. Unlike the *Regulated Health Professions Act*, the legislature has not made the decisions and findings of hearing officers inadmissible in civil proceedings.

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[67] S.O. 1991, c. 18, s. 36(3), Respondents' Book of Authorities, Tab 37.

[68] *Kernohan v. Ontario*, [2009] O.J. No. 3000 (S.C.J.), Appellant's Book of Authorities, Tab 16; *Andrushko v. Ontario*, [2011] ONSC 1107 (S.C.J. - Div. Ct.), Appellant's Book of Authorities, Tab 4.

[69] (2000), 188 D.L.R. (4th) 296 (C.A.), Appellant's Book of Authorities, Tab 19.

78. A careful reading of sections 69 and 80 (now 83) of the *PSA* shows that these provisions do not apply to evidence that exists at the time of the alleged incident giving rise to the complaint and which most frequently form the basis of subsequent civil proceedings. A review of the key evidence relied upon by the Hearing Officer in this case will show that it is not evidence that would have been made inadmissible by these *PSA* provisions. For example, evidence produced from the Appellant (such as photographs of his injuries) or the *viva voce* evidence of eye witnesses to the alleged false arrests and assaults, as well as the audio recording taken by the court reporter would be admissible in the subsequent civil action. Also admissible is the video surveillance at the police station that was heavily relied upon in the Hearing Officer's determination that the Appellant's allegations of assault at the station were unfounded. In reality, therefore, in this case the effects of the statutory privilege and confidentiality provisions are minimal if not non-existent.

79. However, if the Appellant's argument were to succeed and issue estoppel is barred on the basis of these provisions, then by extension, issue estoppel could not be applied by a plaintiff, even if the officer had been convicted of the very misconduct alleged in the claim. This would result in the need to relitigate issues, which may lead to inconsistent results.

80. As previously indicated, the Ontario Court of Appeal has found that the purpose of the *PSA* is to increase confidence in the provision of police services, including the processing of complaints. As the Court indicated, the introduction of a review mechanism (*i.e.* the Commission) in 1997 was done to create a check or balance, to ensure that key decisions that are made by the Chief can be reviewed by a provincial body and determined whether they should stand or be changed.[70] The Respondents submit that an inconsistent result not only with the decision of the Hearing Officer but also the Commission and the Divisional Court would be contrary to the purpose of the *PSA*. In particular, an inconsistent result would lead to a decrease in the confidence in the complaints process.

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[70] *CCLA, supra* note 36 at para. 35, Respondents' Book of Authorities, Tab 6.

(f) The Appellant's active participation

81. The Court of Appeal correctly considered the level of the Appellant's participation not only throughout the disciplinary hearings but on appeal to the Commission and judicial review to the Divisional Court. The analysis in *Rasanen* supports the Court of Appeal's reasoning in the Appellant's case. In *Rasanen*, the appellant was a privy in an earlier hearing under the Ontario *Employment Standards Act*. Like the Appellant, Mr. Rasanen initiated his complaint and participated in the subsequent investigation, was represented by an individual appointed to prosecute his complaint, and had notice of every step in the process and hearing. He was also present at the hearing, gave evidence, heard the evidence and argument of all parties and contributed his own documents. Under those circumstances, it was determined that the application of issue estoppel was appropriate.[71] In this case, unlike Mr. Rasanen, the Appellant actively participated in the tribunal hearing, including cross-examining witnesses and making legal arguments in addition to those made by the prosecutor.

(g) The right of appeal

82. The Court of Appeal correctly noted that the Appellant exercised his right to appeal the Hearing Officer's decision to the Commission, which was subsequently reviewed by the Divisional Court. Further, leave to appeal to the Ontario Court of Appeal and ultimately the Supreme Court of Canada was available but not sought by the Appellant. This factor weighs in favour of applying issue estoppel because it provides appropriate oversight - both civilian (the Commission) and judicial (the Divisional Court) to protect the rights of the parties, including the Appellant.

(iii) The application of issue estoppel in the case accords with underlying policy considerations

83. This is precisely the type of claim that should be disposed of at the early stage of litigation. In this case, the Hearing Officer, an individual with particular expertise with the issue being estopped, had extensive first-hand exposure to the evidence presented by both the Appellant and prosecutor on behalf of the Appellant. After hearing the testimony of no fewer

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[71] *Rasanen, supra* note 52 at paras 44 and 56, Respondents' Book of Authorities, Tab 20.

than 13 witnesses, reviewing 32 exhibits, audio recordings, and video footage, the Hearing Officer made unequivocal findings of fact and credibility against the Appellant. Allowing this action to continue on the same issues previously determined would run afoul of the policy reasons underpinning both motions to strike a claim and the concept of finality to judicial decisions.

84. Most recently, the Supreme Court of Canada offered the following insight into the value of motions to strike a claim, such as the Rule 21 motion to strike used in this action:

> Striking out claims that have no reasonable prospect of success promotes litigation efficiency, reducing time and cost. The litigants can focus on serious claims, without devoting days and sometimes weeks of evidence and argument to claims that are in any event hopeless. The same applies to judges and juries, whose attention is focused where it should be - on claims that have a reasonable chance of success. The efficiency gained by weeding out unmeritorious claims in turn contributes to better justice.[72]

85. The policy reasons supporting issue estoppel and *res judicata* in general were aptly summarized by Laskin J. (as he then was) in *Angle*:

- it is "founded on considerations of justice and good sense";
- it is "founded upon the twin principles so frequently expressed in Latin that there should be an end to litigation and justice demands that the same party shall not be harassed twice for the same cause"; and
- it is founded on "the general interest of the community in the termination of disputes, and in the finality and conclusiveness of judicial decisions; and ... the right of the individual to be protected from vexatious multiplication of suits and prosecutions".[73]

86. In *Danyluk*, Justice Binnie elaborated on the policy reasons for the application of issue estoppel in the tribunal-to-court context:

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[72] *R. v. Imperial Tobacco Canada*, [2011] S.C.J. No. 42 at para. 20, Respondents' Book of Authorities, Tab 26.

[73] *Angle, supra* note 38 (QL), Respondents' Book of Authorities, Tab 1.

> An issue, once decided, should not generally be re-litigated to the benefit of the losing party and the harassment of the winner. A person should only be vexed once in the same cause. Duplicative litigation, potential inconsistent results, undue costs, and inconclusive proceedings are to be avoided.[74]

87. These policy principles apply equally to the administrative tribunal context. Although the doctrine of issue estoppel finds its origins in previous court proceedings, it has been extended to apply to decisions classified as judicial or quasi-judicial in nature, which includes those made by administrative officers and tribunals. Justice Binnie added another policy consideration that deals specifically with the application of tribunal decisions:

> In that context the more specific objective is to balance fairness to the parties with the protection of the administrative decision-making process, whose integrity would be undermined by too readily permitting collateral attack or relitigation of issues once decided.[75]

88. If the Appellant is permitted to proceed to trial and ultimately challenge the lawfulness of his arrest and the conduct of police, he would essentially be permitted to amount a collateral attack on the previous factual findings of a judicial decision. A judicial decision pronounced by a court of competent jurisdiction should not be brought into question. The rule against collateral attack

> has long been a fundamental rule that a court order, made by a court having jurisdiction to make it, stands and is binding and conclusive unless it is set aside on appeal or lawfully quashed. It is also well settled in the authorities that such an order may not be attacked collaterally -- and a collateral attack may be described as an attack made in proceedings other than those whose specific object is the reversal, variation, or nullification of the order or judgment.[76]

89. In light of these policy considerations, it is respectfully submitted that if this Honourable Court finds the Court of Appeal erred in exercising its discretion to apply issue estoppel, the

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[74] *Danyluk, supra* note 1 at para. 18, Respondents' Book of Authorities, Tab 7.

[75] *Ibid.* at para. 21, Respondents' Book of Authorities, Tab 7.

[76] *R. v. Wilson*, [1983] 2 S.C.R. 594 (QL), Respondents' Book of Authorities, Tab 30. See also: *Danyluk, supra* note 1, at para. 20, Respondents' Book of Authorities, Tab 7.

Appellant's claims with respect to unlawful arrest and use of unnecessary force are nevertheless barred on the basis that relitigating these claims would represent an abuse of process and bring the administration of justice into disrepute.

Newly raised constitutional issue and the assertion that the role of the judiciary has been supplanted

90. The Appellant challenges that the application of issue estoppel to police discipline hearings and, by extension, all administrative tribunals, usurps the role of the judiciary and pre-empts the judiciary's responsibility for keeping in check the power of the state. In this respect, the Appellant for the first time argues that the Court of Appeal failed to appreciate the unique role of the judiciary as 'guardians of the Constitution' in allowing the application of issue estoppel in this case. This argument fails for three reasons.

91. First, the Appellant has not advanced any *Charter* claims in this case. The action was pleaded and defended in tort.[77] The Statement of Claim does not expressly allege any *Charter* violations and to the extent that one could now imply such allegations the pleading is devoid of any particulars in support of any alleged breaches of the *Charter*. Further, the Statement of Claim does not seek any constitutional remedies and in particular no damages were claimed pursuant to s. 24 of the *Charter*. The only reference made to the *Charter* in the Statement of Claim is at the very end of the claim, almost as an afterthought, and appears to have been raised to inform the standard to be applied in the tort claims as opposed to as an independent claim for a *Charter* remedy. In the absence of these particulars there can be no valid claim based on a *Charter* breach.[78]

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[77] Statement of Claim at paras. 1 and 50, Appellant's Record, Tab 8; Amended Statement of Defence, Appellant's Record, Tab 9.

[78] *McQuaid v. Canada (Royal Canadian Mounted Police)*, [2009] P.E.I.J. No. 69 at para. 13 (S.C.), Respondents' Book of Authorities, Tab 13: the assertions in the statements of claim a *Charter* breach were struck because the plaintiff provided no particulars. He did not name a section or sections of the *Charter*, nor did he say how those sections were violated. Where a plaintiff claims a *Charter* violation but does not specify both the section(s) of the *Charter* (or words from which the section(s) is/are made quite clear), and particulars of how the section(s) was/were violated, that part of the claim was struck as disclosing no cause of action. In Justice Taylor's view, it was no different than claiming an unspecified tort violation without particulars. See also: *Chmielewski v. Niagara (Regional Municipality) Police Services Board*, [2007] O.J. No. 3052 (S.C.J.), Respondents' Book of Authorities, Tab 4, where it was difficult for the defendant OPP to answer a *Charter* claim without the plaintiff pleading a specific *Charter* breach, the *Charter* claim was dismissed in its entirety.

92. Second, in this particular case, there was judicial consideration of the issues. The Hearing Officer's decision was reviewed by the Commission and further by a three-justice panel of the Ontario Superior Court of Justice - Divisional Court. The Appellant had the opportunity to appeal further to the Court of Appeal and ultimately to the Supreme Court of Canada, but opted not to. The effect of these avenues of appeal provides considerable judicial oversight to the Hearing Officer. Moreover, it was open for all of these appellate venues to overturn the key factual findings of the Hearing Officer but all *affirmed* those findings.

93. Third, the suggestion that allowing administrative tribunals to determine constitutional issues usurps the judiciary was considered and rejected by this Honourable Court in *Nova Scotia (Workers' Compensation Board) v. Martin*.[79] In *Martin*, this Court unanimously emphasised the principles and policies in support of allowing administrative tribunals to make constitutional determinations and explicitly held that "allowing administrative tribunals to decide *Charter* issues does not undermine the role of the courts as final arbiters of constitutionality in Canada."[80] This Court quoted with approval the following portion of the dissent of McLachlin J. (as she then was) in *Cooper v. Canada (Human Rights Commission)*:

> The Charter is not some holy grail which only judicial initiates of the superior courts may touch. The Charter belongs to the people. All laws and law-makers that touch the people must conform to it. Tribunals and commissions charged with deciding legal issues are no exception. Many more citizens have their rights determined by these tribunals than by the courts. If the Charter is to be meaningful to ordinary people, then it must find its expression in the decisions of these tribunals.[81]

94. As this Court recently stated in *R. v. Conway*, after reviewing the jurisprudence relating to the jurisdiction of administrative tribunals to decide *Charter* issues:

> [78] The jurisprudence evolution leads to the following two observations: first, that administrative tribunals with the power to decide questions of law, and from

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[79] [2003] 2 S.C.R. 404 ["*Martin*"], Respondents' Book of Authorities, Tab 17.

[80] *Ibid.*, at para. 31, Respondents' Book of Authorities, Tab 17. See also: *R. v. Conway*, [2010] 1 S.C.R. 765, Respondents' Book of Authorities, Tab 22.

[81] *Ibid.*, at para. 29, Respondents' Book of Authorities, Tab 17.

> whom constitutional jurisprudence has not been clearly withdrawn, have the authority to resolve constitutional questions that are linked to matters, properly before them. And secondly, they must act consistently with the Charter and its values when exercising their statutory functions. It strikes me as somewhat unhelpful, therefore, to subject every such tribunal from which a Charter remedy is sought to an inquiry asking whether it is "competent" to grant a particular remedy within the meaning of s. 24(1).
>
> ...
>
> [81] Building on the jurisprudence, therefore, when a remedy is sought from an administrative tribunal under s. 24(1), the proper initial inquiry is whether the tribunal can grant Charter remedies generally. To make this determination, the first question is whether the administrative tribunal has jurisdiction, explicitly or implied, to decide questions of law. If it does, and unless it is clearly demonstrated that the legislature intended to exclude the Charter from the tribunal's jurisdiction, the tribunal is a court of competent jurisdiction and can consider and apply the Charter - and Charter remedies- when resolving matters properly before it.[82]

95. Similar to this appeal, the issue of whether *Charter* issues can be determined by an administrative tribunal (*i.e.* the Commission) as constituted by the *PSA* was squarely put to the Ontario Court of Appeal in the *CCLA* case.[83] Relying upon prior authority from this Court, the Court of Appeal noted that "In the absence of language to the contrary, it must be inferred that the legislature intended the Commission to apply the Charter in exercising its powers."[84] Not only is there an absence of language to the contrary, but the *PSA* expressly provides jurisdiction to consider the *Charter* pursuant to Item 2 of the Declaration of Principles in s.1 of the *PSA*, which expressly requires the consideration of *Charter* rights.[85] In fact, the legislature intended that disciplinary proceedings be subject to the *Charter* and that the *Charter* rights of complainants be considered, where appropriate.[86]

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[82] *Conway, supra* note 93, at paras. 78 and 81, Respondents' Book of Authorities, Tab 22.

[83] *Supra* note 36 at paras. 27 and 78, Respondents' Book of Authorities, Tab 6.

[84] *Ibid.* at para. 81, Respondents' Book of Authorities, Tab 6.

[85] *PSA, supra* note 2, s. 1, Appellant's Book of Authorities, Tab 54.

[86] *CCLA, supra* note 36 at paras. 29, 79, and 81, Respondents' Book of Authorities, Tab 6.

96. The Respondents submit that this provision of the *PSA* would apply equally to a hearing officer when considering complaints in which *Charter* values are implicitly raised and must execute their function in accordance with the fundamental rights guaranteed by the *Charter*. For example, in determining whether the Appellant's arrest was unlawful, the Hearing Officer correctly applied the principles espoused by this Court in *R. v. Storrey*[87], a decision that also considered s. 9 of the *Charter*.

(iv) Abuse of Process

97. In the event this Honourable Court were to find that the Appellant's tort claims ought not to have been estopped and/or to the extent that the Appellant has advanced any *Charter* claims, the Respondents submit that these claims are barred on the basis of abuse of process.

98. The doctrine of abuse of process may be applied to preclude relitigation in circumstances where the strict requirements of issue estoppel are not met, but where allowing the litigation to proceed would nonetheless violate such principles as judicial economy, consistency, finality and the integrity of the administration of justice.[88]

99. Abuse of process occurs when: (1) the proceedings are oppressive or vexatious; and (2) violate the fundamental principles of justice underlying the community's sense of fair play and decency.[89]

100. The purpose of the doctrine of abuse of process is to preserve the integrity of the adjudicative functions of the courts. When the focus is thus properly on the integrity of the adjudicative process, the motives of the party who seeks to relitigate cannot be decisive factors in the application of the bar against relitigation.[90]

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[87] [1990] 1 S.C.R. 241, Respondents' Book of Authorities, Tab 29. See also: *Charlton v. St. Thomas Police Services Board*, [2009] O.J. No. 2132 (S.C.J.), Respondents' Book of Authorities, Tab 3.

[88] *Toronto (City) v. Canadian Union of Public Employees (C.U.P.E.), Local 79*, [2003] 3 S.C.R. 77 at para. 37 ["*C.U.P.E.*"], Respondents' Book of Authorities, Tab 33.

[89] *Ibid.* at para. 35, Respondents' Book of Authorities, Tab 33.

[90] *Ibid.* at paras. 43, 45, and 51, Respondents' Book of Authorities, Tab 33.

101. Ultimately, in order for the Appellant's civil claim and/or *Charter* claims to succeed, he would be required to prove the very same allegations that were originally before the Hearing Officer at the disciplinary hearing, which allegations the Hearing Officer held not to be true. The disciplinary hearing was followed by two appeals. Writing for the majority of this Honourable Court on the doctrine of abuse of process in *C.U.P.E.*, Justice Arbour noted that if the result in the subsequent proceeding is different from the conclusion reached in the first on the very same issue, the inconsistency, in and of itself, will undermine the credibility of the entire judicial process, thereby diminishing its authority, its credibility and its aim of finality.[91]

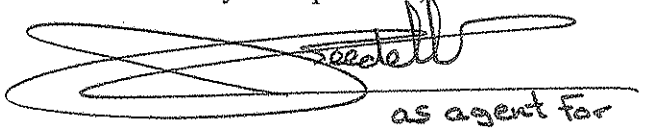
PART IV - SUBMISSIONS ON COSTS

102. The Respondents seek their costs throughout.

PART V - ORDER SOUGHT

103. The Respondents seek an order dismissing this appeal with costs throughout.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 8th day of September, 2011.



Eugene Mazzuca
Kerry Nash
Rafal Szymanski
Counsel for the Respondents, Regional Municipality of Niagara Regional Police Services Board, Gary E. Nicholls, Nathan Parker, Paul Koscinski and Roy Federkow

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[91] *Ibid.* at para. 51, Respondents' Book of Authorities, Tab 33.

PART VI - TABLE OF AUTHORITIES

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PART VII - STATUTES AND REGULATIONS

***Regulated Health Professions Act, 1991*, S.O. 1991, c. 18, s. 36(3)**

Evidence in civil proceedings

36. (3) 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*. 1991, c. 18, s. 36 (3); 1996, c. 1, Sched. G, s. 27 (2).

***Loi de 1991 sur les professions de la santé réglementées*, L.O. 1991, c. 18, s. 36(3)**

Preuves dans les instances civiles

36. (3) Les dossiers des instances introduites aux termes de la présente loi, d'une loi sur une profession de la santé ou de la *Loi sur la réglementation des médicaments et des pharmacies*, les rapports, documents ou choses préparés aux fins de ces instances, les déclarations faites au cours de ces instances, ainsi que les ordonnances ou décisions rendues au cours de ces instances ne sont pas recevables en preuve dans le cadre d'instances civiles qui ne sont pas introduites aux termes de la présente loi, d'une loi sur une profession de la santé ou de la *Loi sur la réglementation des médicaments et des pharmacies* ni dans le cadre d'instances relatives à un arrêté visé à l'article 11.1 ou 11.2 de la *Loi sur le régime de médicaments de l'Ontario*. 1991, chap. 18, par. 36 (3); 1996, chap. 1, annexe G, par. 27 (2).

***Royal Newfoundland Constabulary Act, 1992*, S.N.L. 1992, c. R-17, s. 58(1)**

No bar to other actions

58. (1) Nothing in this Act shall preclude prosecution under an Act of the Parliament of Canada or another Act or the commencement of a civil action arising out of a complaint.

(2) A person is not liable for loss or damage suffered by another person because of anything done or omitted to be done in good faith pursuant to or in the exercise or supposed exercise of the powers conferred by this Act.

***Statutory Powers Procedure Act*, R.S.O. 1990, c. S.22, ss. 6, 10, 10.1, 15, 18**

Notice of hearing

6.(1)The parties to a proceeding shall be given reasonable notice of the hearing by the tribunal. R.S.O. 1990, c. S.22, s. 6 (1).

Statutory authority

(2)A notice of a hearing shall include a reference to the statutory authority under which the hearing will be held.

Oral hearing

(3)A notice of an oral hearing shall include,

(a) a statement of the time, place and purpose of the hearing; and

(b) a statement that if the party notified does not attend at the hearing, the tribunal may proceed in the party's absence and the party will not be entitled to any further notice in the proceeding. 1994, c. 27, s. 56 (13).

Written hearing

(4)A notice of a written hearing shall include,

(a) a statement of the date and purpose of the hearing, and details about the manner in which the hearing will be held;

(b) a statement that the hearing shall not be held as a written hearing if the party satisfies the tribunal that there is good reason for not holding a written hearing (in which case the tribunal is required to hold it as an electronic or oral hearing) and an indication of the procedure to be followed for that purpose;

(c) a statement that if the party notified neither acts under clause (b) nor participates in the hearing in accordance with the notice, the tribunal may proceed without the party's participation and the party will not be entitled to any further notice in the proceeding. 1994, c. 27, s. 56 (13); 1997, c. 23, s. 13 (13); 1999, c. 12, Sched. B, s. 16 (5).

Electronic hearing

(5)A notice of an electronic hearing shall include,

(a) a statement of the time and purpose of the hearing, and details about the manner in which the hearing will be held;

(b) a statement that the only purpose of the hearing is to deal with procedural matters, if that is the case;

(c) if clause (b) does not apply, a statement that the party notified may, by satisfying the tribunal that holding the hearing as an electronic hearing is likely to cause the party significant prejudice, require the tribunal to hold the hearing as an oral hearing, and an indication of the procedure to be followed for that purpose; and

(d) a statement that if the party notified neither acts under clause (c), if applicable, nor participates in the hearing in accordance with the notice, the tribunal may proceed without the party's participation and the party will not be entitled to any further notice in the proceeding. 1994, c. 27, s. 56 (13).

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Right to representation

10. A party to a proceeding may be represented by a representative. 2006, c. 21, Sched. C, s. 134 (3).

Examination of witnesses

10.1A party to a proceeding may, at an oral or electronic hearing,

(a) call and examine witnesses and present evidence and submissions; and

(b) conduct cross-examinations of witnesses at the hearing reasonably required for a full and fair disclosure of all matters relevant to the issues in the proceeding. 1994, c. 27, s. 56 (20).

***

What is admissible in evidence at a hearing

15.(1)Subject to subsections (2) and (3), a tribunal may admit as evidence at a hearing, whether or not given or proven under oath or affirmation or admissible as evidence in a court,

(a) any oral testimony; and

(b) any document or other thing,

relevant to the subject-matter of the proceeding and may act on such evidence, but the tribunal may exclude anything unduly repetitious.

What is inadmissible in evidence at a hearing

(2)Nothing is admissible in evidence at a hearing,

(a) that would be inadmissible in a court by reason of any privilege under the law of evidence; or

(b) that is inadmissible by the statute under which the proceeding arises or any other statute.

Conflicts

(3)Nothing in subsection (1) overrides the provisions of any Act expressly limiting the extent to or purposes for which any oral testimony, documents or things may be admitted or used in evidence in any proceeding.

Copies

(4)Where a tribunal is satisfied as to its authenticity, a copy of a document or other thing may be admitted as evidence at a hearing.

Photocopies

(5)Where a document has been filed in evidence at a hearing, the tribunal may, or the person producing it or entitled to it may with the leave of the tribunal, cause the document to be photocopied and the tribunal may authorize the photocopy to be filed in evidence in the place of

the document filed and release the document filed, or may furnish to the person producing it or the person entitled to it a photocopy of the document filed certified by a member of the tribunal.

Certified copy admissible in evidence

(6)A document purporting to be a copy of a document filed in evidence at a hearing, certified to be a copy thereof by a member of the tribunal, is admissible in evidence in proceedings in which the document is admissible as evidence of the document. R.S.O. 1990, c. S.22, s. 15.

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Notice of decision

18. (1) The tribunal shall send each party who participated in the proceeding, or the party's representative, a copy of its final decision or order, including the reasons if any have been given,

(a) by regular lettermail;

(b) by electronic transmission;

(c) by telephone transmission of a facsimile; or

(d) by some other method that allows proof of receipt, if the tribunal's rules made under section 25.1 deal with the matter. 1994, c. 27, s. 56 (34); 1997, c. 23, s. 13 (19); 2006, c. 21, Sched. C, s. 134 (6).

Use of mail

(2) If the copy is sent by regular lettermail, it shall be sent to the most recent addresses known to the tribunal and shall be deemed to be received by the party on the fifth day after the day it is mailed. 1994, c. 27, s. 56 (34).

Use of electronic or telephone transmission

(3) If the copy is sent by electronic transmission or by telephone transmission of a facsimile, it shall be deemed to be received on the day after it was sent, unless that day is a holiday, in which case the copy shall be deemed to be received on the next day that is not a holiday. 1994, c. 27, s. 56 (34).

Use of other method

(4) If the copy is sent by a method referred to in clause (1) (d), the tribunal's rules made under section 25.1 govern its deemed day of receipt. 1994, c. 27, s. 56 (34).

Failure to receive copy

(5) If a party that acts in good faith does not, through absence, accident, illness or other cause beyond the party's control, receive the copy until a later date than the deemed day of receipt, subsection (2), (3) or (4), as the case may be, does not apply. 1994, c. 27, s. 56 (34).

***Loi sur l'Exercice des competences légales,* L.R.O. 1990, c. S.22, s. 6, 10, 10.1, 15, 18**

Avis d'audience

6. (1) Les parties à une instance reçoivent du tribunal un avis suffisant de la tenue de l'audience. L.R.O. 1990, chap. S.22, par. 6 (1).

Texte législatif

(2) L'avis d'audience mentionne le texte de loi qui autorise l'audience.

Audience orale

(3) L'avis d'audience orale comprend :

a) l'indication de l'heure, de la date, du lieu et de l'objet de l'audience;

b) un avertissement précisant que si la partie recevant l'avis ne comparaît pas à l'audience, le tribunal peut procéder sans elle et qu'elle n'aura pas droit à d'autre avis dans le cadre de l'instance. 1994, chap. 27, par. 56 (13).

Audience écrite

(4) L'avis d'audience écrite comprend :

a) l'indication de la date et de l'objet de l'audience, ainsi que des détails sur la manière dont l'audience sera tenue;

b) une indication portant que l'audience ne doit pas être une audience écrite si la partie convainc le tribunal qu'il existe un motif valable pour ne pas tenir une telle audience (auquel cas le tribunal doit tenir une audience électronique ou orale), et une indication de la procédure à suivre à cette fin;

c) un avertissement précisant que si la partie recevant l'avis n'agit pas en vertu de l'alinéa b) ni ne participe à l'audience conformément à l'avis, le tribunal peut procéder sans elle et qu'elle n'aura pas droit à d'autre avis dans le cadre de l'instance. 1994, chap. 27, par. 56 (13); 1997, chap. 23, par. 13 (13); 1999, chap. 12, annexe B, par. 16 (5).

Audience électronique

(5) L'avis d'audience électronique comprend :

a) l'indication de l'heure, de la date et de l'objet de l'audience, ainsi que des détails sur la manière dont l'audience sera tenue;

b) l'indication que le seul objet de l'audience est de traiter de questions de procédure, si c'est le cas;

c) si l'alinéa b) ne s'applique pas, une indication portant que la partie recevant l'avis peut, si elle convainc le tribunal que la tenue d'une audience électronique lui causera vraisemblablement un préjudice considérable, exiger que le tribunal tienne une audience orale, et une indication de la procédure à suivre à cette fin;

d) un avertissement précisant que si la partie recevant l'avis n'agit pas en vertu de l'alinéa c), le cas échéant, ni ne participe à l'audience conformément à l'avis, le tribunal peut procéder sans elle et qu'elle n'aura pas droit à d'autre avis dans le cadre de l'instance. 1994, chap. 27, par. 56 (13).

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Droit à la représentation

10. Les parties à une instance ont le droit d'être représentées par un représentant. 2006, chap. 21, annexe C, par. 134 (3).

Interrogatoire des témoins

10.1 Les parties à une instance peuvent, à l'audience orale ou électronique :

a) appeler et interroger des témoins, présenter leur preuve et faire des observations;

b) contre-interroger les témoins dans la mesure raisonnablement nécessaire pour faire toute la lumière sur tout ce qui touche aux questions en litige dans le cadre de l'instance. 1994, chap. 27, par. 56 (20).

***

Ce qui est admissible en preuve à l'audience

15. (1) Sous réserve des paragraphes (2) et (3), le tribunal peut admettre en preuve au cours d'une audience :

a) des preuves testimoniales;

b) des écrits et des objets,

qui sont pertinents à l'objet de l'instance, même s'ils ne sont pas donnés ou prouvés sous serment ou en vertu d'une déclaration solennelle et même s'ils sont inadmissibles en preuve devant un tribunal judiciaire, et peut fonder sa décision sur eux. Il peut toutefois exclure ce qui est inutilement répétitif.

Ce qui est inadmissible en preuve à l'audience

(2) Est inadmissible en preuve au cours d'une audience :

a) ce qui serait inadmissible en preuve devant un tribunal judiciaire en raison d'un privilège reconnu en droit de la preuve;

b) ce qui est inadmissible en vertu de la loi qui donne lieu à l'instance ou d'une autre loi.

Dérogation

(3) Rien dans le paragraphe (1) ne l'emporte sur les dispositions d'une loi qui limite expressément la mesure dans laquelle des preuves testimoniales, des écrits ou des objets peuvent être admis ou utilisés en preuve dans une instance ou les fins auxquelles ils peuvent l'être.

Copies

(4) Est admissible en preuve au cours d'une audience la copie d'un écrit ou d'un objet dont le tribunal est convaincu de l'authenticité.

Photocopies

(5) Lorsqu'un document a été déposé en preuve au cours d'une audience, le tribunal ou, avec son autorisation, la personne qui l'a produit ou qui y a droit, peut faire tirer une photocopie du document. Le tribunal peut soit permettre que la photocopie soit déposée en preuve à la place du document déposé et restituer ce dernier, soit fournir à la personne qui a produit le document

déposé ou qui y a droit une photocopie de ce dernier, certifiée conforme par un membre du tribunal.

Admissibilité de la copie certifiée conforme

(6) Le document qui se présente comme étant la copie, certifiée conforme par un membre du tribunal, d'un document déposé en preuve au cours d'une audience, est admissible pour faire foi de celui-ci dans les instances où le document est admissible. L.R.O. 1990, chap. S.22, art. 15.

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Avis de la décision

18. (1) Le tribunal envoie à chaque partie qui a participé à l'instance, ou à son représentant, une copie de sa décision ou de son ordonnance définitives, accompagnée des motifs, le cas échéant :

a) soit par courrier ordinaire;

b) soit par transmission électronique;

c) soit par télécopie;

d) soit par une autre méthode qui permet d'obtenir un accusé de réception, si les règles que le tribunal a adoptées en vertu de l'article 25.1 traitent de la question. 1994, chap. 27, par. 56 (34); 1997, chap. 23, par. 13 (19); 2006, chap. 21, annexe C, par. 134 (6).

Courrier

(2) Si la copie est envoyée par courrier ordinaire, elle est envoyée à la partie à sa dernière adresse connue du tribunal et la partie est réputée l'avoir reçue le cinquième jour qui suit la date de sa mise à la poste. 1994, chap. 27, par. 56 (34).

Transmission électronique ou télécopie

(3) Si la copie est envoyée par transmission électronique ou par télécopie, elle est réputée avoir été reçue le lendemain de l'envoi, à moins que ce jour-là ne soit un jour férié, auquel cas la copie est réputée avoir été reçue le premier jour non férié qui suit. 1994, chap. 27, par. 56 (34).

Autre méthode

(4) Si la copie est envoyée par une méthode visée à l'alinéa (1) d), les règles que le tribunal a adoptées en vertu de l'article 25.1 régissent le jour de réception réputé. 1994, chap. 27, par. 56 (34).

Non-réception de la copie

(5) Si une partie qui agit de bonne foi ne reçoit la copie, par suite d'absence, d'accident, de maladie ou d'une autre cause indépendante de sa volonté, qu'après la date de réception réputée, le paragraphe (2), (3) ou (4), selon le cas, ne s'applique pas. 1994, chap. 27, par. 56 (34).