Court File No. 33959

SUPREME COURT OF CANADA
(On Appeal From the Court Of Appeal for Ontario)

B E T W E E N:

WAYNE PENNER

Appellant
(Appellant/Plaintiff)

- and -

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

Respondents
(Respondents/Defendants)

FACTUM OF THE INTERVENOR, URBAN ALLIANCE ON RACE RELATIONS

(Pursuant to Rules 37 and 42 of the *Rules of the Supreme Court of Canada*)

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FACTUM OF THE INTERVENOR, URBAN ALLIANCE ON RACE RELATIONS
(Pursuant to Rules 37 and 42 of the *Rules of the Supreme Court of Canada*)

PART I - OVERVIEW

1. By Order dated October 7, 2011, this Honourable Court granted the Urban Alliance on Race Relations ("UARR") leave to intervene in this Appeal. The UARR is a thirty-five year old, non-profit, multi-racial public interest organization. The Urban Alliance has a long history of fostering communication between the police and racialized groups.

2. The fundamental question in this case is whether it is appropriate to apply issue estoppel to a civil action against police, based on determinations made by an administrative decision-maker in a police complaint. The answer lies in the weighing of two fundamental civil rights; the rights of individuals to access a superior court of justice for civil disputes and the rights of litigants in those courts to achieve finality. Divining the answer is not easy and indeed, this Honourable Court has been divided on the relative weight of these two fundamental rights in its adjudication of issue estoppel cases in the last 10 years.

PART II - INTERVENOR'S POSITION ON THE QUESTION

3. The UARR respectfully submits that it is not appropriate to apply issue estoppel in this case or to cases like it. In particular, the UARR respectfully submits that in weighing finality versus access to civil courts, the scale tilts to access to civil courts because such access has the vital salutary effect of promoting police accountability. The UARR submits that, by definition, police accountability is lessened if the right to a civil suit is truncated. Since police accountability is a cardinal feature of our Canadian democracy, it trumps finality in these circumstances and differentiates this appeal from other cases at this Court where issue estoppel has been ordered.

PART III - INTERVENOR'S ARGUMENT

I. Issue Estoppel – The Test

4. The rules governing issue estoppel should not be "mechanically applied"[1] but are subject to a two step process. The first step is to establish the pre-conditions of issue estoppel. These pre-conditions are that the decision be judicial and that the following three-part test be met: (1) the same question has been decided; (2) the judicial decision which is said to create the estoppel was final; and (3) the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised or their privies.[2]

5. The second step is to determine whether, as a matter of discretion – once all of the pre-conditions have been met – issue estoppel ought to be applied.[3]

A. Step One: The Pre-Conditions - Mutuality

6. The UARR proposes to focus its submissions in respect of the pre-conditions to pre-condition (3) – mutuality. Mutuality has been described by Arbour J. as a "long-standing requirement",[4] and, it is submitted, is not met in the circumstances of this case. Mr. Penner was not a party at the complaint hearing, within the meaning of that word in the issue estoppel jurisprudence.

7. Specifically, despite s. 69(3) of the *Police Services Act* (the "Act")[5] which stipulates that the appellant was a "party" at the hearing, it was not his case and he was not a genuine party. To determine the question of whether one is a party for issue estoppel purposes one must look beyond mere participation and focus on the degree of the participation that the individual had in the process (see *dicta* of Laskin, J.A. in *Minott v. O'Shanter Development Co.*,

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[1] *Danyluk v. Ainsworth Technologies Inc.*, [2001] 2 S.C.R. 460 [*Danyluk*], at para. 33, Appellant's Book of Authorities, Tab 9.

[2] *Toronto (City) v. Canadian Union of Public Employees (C.U.P.E.), Local 79*, [2003] 3 S.C.R. 77 [*Toronto v. C.U.P.E.*], at para. 23, UARR's Book of Authorities, Tab 2; see also *British Columbia (Workers' Compensation Board) v. Figliola*, 2011 SCC 52 [*Figliola*], at para. 27, UARR's Book of Authorities, Tab 3.

[3] *Danyluk, supra*, at para. 33, Appellant's Book of Authorities, Tab 9; see also *Angle v. Canada (Minister of National Revenue – M.N.R.)*., [1975] 2 S.C.R. 248, UARR's Book of Authorities, Tab 1.

[4] *Toronto v. C.U.P.E., supra*, at para. 32, UARR's Book of Authorities, Tab 2.

[5] *Police Services Act*, R.S.O. 1990, c. P. 15, section 69(3), Appellant's Book of Authorities, Tab 53.

infra).[6] Arbour J. in *Toronto v. C.U.P.E.* outlines the policy tensions discussed in Professor Watson's leading article on mutuality, "Duplicative Litigation: Issue Estoppel, Abuse of Process and the Death of Mutuality".[7] In particular, Arbour J. and Professor Watson refer to specific situations of unfairness in the application of the mutuality test. Examples include where the defendant may have little incentive to defend the first action vigorously (perhaps where sued for nominal damages or where future litigation was unforeseeable) or where the second action affords to the defendant procedural opportunities unavailable in the first action that could readily result in a different outcome. Professor Watson specifically makes reference to a situation where the first action afforded a far more limited discovery than the second action.[8]

8. In the instant case, the lower court justifies a finding that the appellant was a party by pointing to his participation at the discipline hearing. An analysis of the circumstances surrounding the discipline hearing, however, with respect, mitigates against this finding. Once the complaint was initiated, the appellant's role was passive and reliant on the police force to conduct a meaningful investigation of one of its own. The appellant had no way of driving the investigation, demanding production of documents or conducting any pre-hearing discovery. The appellant had no right to access any statements made by the defendant police officer or by anyone else with respect to the matters or incident at issue. The appellant was permitted to see the documents or evidence on which the prosecutor, a police officer, intended to rely[9] but the appellant had no right to see the documents or evidence on which the prosecutor did not intend to rely. The prosecutor, not the appellant, drove, directed and controlled the case. It was the prosecutor's discipline hearing and the appellant had the limited role of being able to ask questions the day of the hearing but without the benefit of full information about the investigation.[10]

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[6] *Minott v. O'Shanter Development Co.* (1999), 42 O.R. (3d) 321 (C.A.), para. 46, Appellant's Book of Authorities, Tab 17.

[7] Garry D. Watson, "Duplicative Litigation: Issue Estoppel, Abuse of Process and the Death of Mutuality" (1990) 69 Can. Bar. Rev. 623 at 632, UARR's Book of Authorities, Tab 4.

[8] *Ibid.* at 632.

[9] *Police Services Act, supra,* section 83(5), Appellant's Book of Authorities, Tab 53.

[10] See discussion by Charlotte Chiba, Julian Falconer and Antoni Shelton "Police Shootings and Racism: Getting at the Truth" (1994) 8:2 Currents 26 in which the authors analyze the critical importance to police accountability of being able to fully access and scrutinize the facts of an incident, UARR's Book of Authorities, Tab 5.

B. Step Two: The Court's Discretion

(i) The Factors to be Considered in the Exercise of the Court's Discretion

9. If the arguments on the respondents' failure to meet the pre-conditions fail, the respondents must still satisfy this Court that, as a matter of judicial discretion, issue estoppel should be applied. In *Danyluk v. Ainsworth Technoligies Inc.*, Binnie J. noted that issue estoppel is a public policy doctrine designed to advance the interests of justice.[11] To assist decision makers in achieving the appropriate balance, the court set out a detailed (although non-exhaustive) list of factors to consider when exercising the judicial discretion at step two: the wording of the statute from which the power to issue the administrative order derives; the purpose of the legislation; the availability of an appeal; the safeguards available to the parties in the administrative procedures; the expertise of the administrative decision makers; the circumstances giving rise to the administrative proceedings; and "as a final and most important factor", the potential injustice.[12] Invariably, the exercise of discretion under step two will entail a considerable policy dimension. In this appeal, it is submitted that the controlling policy dimension is the desirability of enhanced police accountability.

a) Police Accountability – The Controlling Policy Dimension

10. The police enjoy enormous power, possessing legally sanctioned rights to stop, search, arrest, charge, use force and kill.[13] Officers are outfitted with weapons and are trained to use them when they deem it appropriate.[14] Police powers go to the heart of the right to life, liberty and security of the person[15] and police accountability goes to the heart of the citizen-state relationship.

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[11] *Danyluk, supra*, at paras. 66-67, Appellant's Book of Authorities, Tab 9.

[12] *Ibid.* at paras. 68-80, Appellant's Book of Authorities, Tab 9.

[13] Irina Ceric, "Organizing for Accountability: Community Legal Clinics and Police Complaints" (2001) 16 J. L. & Soc. Pol'y 241 at 241, UARR's Book of Authorities, Tab 6.

[14] Ian D. Scott, "Legal Framework of Use of Force by Police in Ontario" (2008) 53 Crim. L.Q. 331 at 331, UARR's Book of Authorities, Tab 7.

[15] *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11, s. 7, UARR's Book of Authorities, Tab 8.

11. Civil actions serve a unique and important role in society by dealing openly with the conduct of public officials and promoting police accountability. A.M Linden argues that tort law is a key mechanism for facilitating police accountability in his article "Tort Law as Ombudsman".[16] Similarly, commentator Erika Chamberlain points out that the value of the right to "openly chastise" the actions of public officials (including police) has informed the development of the tort of misfeasance in public office.[17]

12. Thus, it is not surprising that there are numerous institutions that are charged with police oversight, since extensive police oversight is considered sound democratic policy. The current director of the Special Investigations Unit, Ian Scott, in a 2008 article entitled "Legal Framework of Use of Force by Police in Ontario" outlines the four legal mechanisms available to hold police accountable: (1) the criminal law; (2) internal disciplinary procedures; (3) civil law suits including *Charter* remedies; and (4) inquests or public inquiries.[18] Scott concludes that the inefficiencies inherent in fostering all four of the legal mechanisms are a price that a democracy "committed to the rule of law" has to pay:

> As well as having different societal objectives, the various proceedings are initiated and sustained by disparate forces – investigators and prosecutors in the criminal forum; police management for the disciplinary hearing; the victim in the civil proceeding; the coroner for the inquest; and for those rare public inquiries, the government of the day. Each of these entities has its own reasons for triggering a mechanism of accountability when allegations of excessive use of police force are made – to seek criminal justice, to discipline an errant employee, to receive financial compensation or to fulfil a recommendatory function. *This complex overlay of legal mechanisms may be the price a democracy committed to the rule of law must pay when concerns over officer and public safety come into conflict.*[19][emphasis added]

13. Thus, with the policy goal of police accountability firmly in mind, the UARR submits as follows in respect of the application of the *Danyluk* factors pertaining to step two – the exercise of discretion. The UARR will focus on the wording of the statute, the purpose of the

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[16] A.M. Linden, "Tort Law As Ombudsman" (1973) 51 Can.Bar Rev. 155 at 161-162, UARR's Book of Authorities, Tab 11.

[17] Erika Chamberlain, "What is the Role of Misfeasance in a Public Office in Modern Day Canadian Tort Law?" (2009) 88 Can. Bar Rev. 579 at 581, UARR's Book of Authorities, Tab 12.

[18] Scott, *supra*, UARR's Book of Authorities, Tab 7.

[19] *Ibid.* at 358-359, UARR's Book of Authorities, Tab 7.

statute, the available safeguards, the circumstances giving rise to the administrative proceedings and the risk of injustice. The UARR is in general agreement with the submissions of the appellant on these issues.

b) The Wording of the Statute

14. The wording of the Act specifically contemplates a civil proceeding and the statutory privilege provisions of the Act, by necessary implication, it is submitted, preclude the application of issue estoppel. Section 69 of the Act prohibits the use of information produced as a result of an investigation or a disciplinary hearing and section 80 of the Act mandates confidentiality with respect to all complaints and discipline matters.[20] In an Ontario Divisional Court case, *Andrushko v. Ontario*, MacKinnon J. noted that the policy rationale for the above statutory confidentiality is to encourage the reporting of complaints and to ensure that those complaints are fully investigated and fairly decided without any participant in the proceedings fearing that a document prepared for the proceedings could be used in a later civil action.[21] It stands to reason that the legislature did not intend that the complainant fear that the internal proceeding itself would bar a later civil action.

c) The Purpose of The Statute

15. The primary purpose of the police discipline process is to discipline police officers.[22] It is an opportunity for individuals to invoke regulatory oversight, akin to a law society or medical college.[23] It is not an opportunity (let alone the "only" opportunity) for individuals to pursue their personal interests. The civil system focuses on the individual's personal interests and its purpose is to compensate victims. The purposes are both necessary with different parties and interests at stake and are equally important aspects of addressing police misconduct.

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[20] *Police Services Act, supra*, ss. 69 and 80, Appellant's Book of Authorities Tab 53.

[21] *Andrushko v. Ontario*, 2011 ONSC 1107, at para. 6, Appellant's Book of Authorities, Tab 4.

[22] *Abbott et al. v. Collins et al.* (2003), 64 O.R. (3d) 789 (C.A.), at para 27, Appellant's Book of Authorities, Tab 1.

[23] *Kernohan v. Ontario*, [2009] O.J. No. 3000 (S.C.J.), Appellant's Book of Authorities, Tab 16, citing *M.F. v. Sutherland* (2000), 188 D.L.R. (4th) 296 (Ont. C.A.), Appellant's Book of Authorities, Tab 19, and *Middleton v. Sun Media* (2006), 268 D.L.R. (4th) 347 (Ont. Div. Ct.), Appellant's Book of Authorities, Tab 20.

16. Thus, the purpose of the complaints process, as compared to the purpose behind a civil action, informs the reasonable expectations of those involved. Abella J. recently emphasized the court's role in protecting the expectations of the parties with respect to finality when applying issue estoppel.[24] With respect, the police are a public body with exceptional powers and they should not have a reasonable expectation that a finding in an internal discipline hearing will bar a civil action. Further, in the instant case, the civil action was commenced before the discipline hearing took place and, as in *Danyluk*, the respondent was aware that there were two separate proceedings.[25]

d) Available Safeguards

17. The availability of procedural safeguards must be examined in the context of the particular hearing. As set out above, the lower court did not consider the value of processes such as disclosure, discovery and the opportunity to properly present one's own case. Further, the opportunity to cross-examine the police officer defendant, arguably the most important procedural safeguard in the context of police accountability, is entirely at the discretion of that police officer under the provisions of the Act. Pursuant to section 83(6) of the Act, the police officer could choose not to give evidence at the hearing.[26] In contrast, in an Ontario civil action, the plaintiff can compel and cross-examine a defendant in examinations for discovery (see Rule 31 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194) and at trial (see Rule 53.07).

e) The Circumstance Giving Rise to the Police Complaint

18. A complaint gives rise to the disciplinary hearings at issue. Cromwell J. in his concurring decision in *Figliola, supra*, states that if there is a serious risk of substantial injustice, poor procedural choices by the complainant should generally not be fatal."[27] In *Danyluk, supra*, Binnie J. considers the appellant's choice of the *Employment Standards Act* forum and finds that applying issue estoppel would likely compel the parties to "mount a full-scale trial type offence

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[24] *Figliola, supra*, paras. 34-36, UARR's Book of Authorities, Tab 3.
[25] *Danyluk, supra*, para. 70, Appellant's Book of Authorities, Tab 9.
[26] *Police Services Act, supra*, section 83(6), Appellant's Book of Authorities, Tab 53.
[27] *Figliola, supra*, para. 95, UARR's Book of Authorities, Tab 3.

and defence, thus tending to defeat the expeditious operation of the *ESA* scheme as a whole".[28] In the case at bar, the appellant did not "choose" the forum of a disciplinary hearing over the forum of a civil action; the appellant lodged a complaint with the police officer's employer. A finding that the appellant chose the complaint process forum over the civil litigation forum would not be a fair interpretation of that conduct.

f) Potential Injustice

19. If individuals are informed of the fact that an adverse decision in the complaints process could estop his or her civil claim, it mitigates against the likelihood that such a complaint will be filed. Given the two processes available to an individual, the deficiencies in the complaints process (as outlined above) and the procedural rights available to a plaintiff in the civil process, why would a reasonable person risk an estoppel of a civil claim as a result of a complaints process (which affords them no genuine opportunity to direct the case or to prepare for the case prior to the hearing)? There will be many individuals who will be discouraged from making a police complaint in order to avoid compromising a civil claim. This outcome is inconsistent with the legislative intent of encouraging complaints.[29] In addition, this outcome would mean less community and professional scrutiny of police conduct, which would be a step backward from all that has been achieved with respect to police accountability in recent years.

20. Further, even if the impact of the estoppel does not have a chilling effect, and individuals continue to bring police complaints as frequently as would otherwise be the case, the UARR is concerned that they will be doing so without being properly informed. This is because people who are vulnerable to police misconduct, including racialized individuals, are also vulnerable to other disadvantages, such as poverty. As a consequence they lack access to legal advice, particularly in civil matters.[30] If the outcome of filing a police complaint is not widely known (which is likely to be the case), then individuals are likely to bring complaints without realizing the significant impact on their rights in a potential civil claim.

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[28] *Danyluk, supra*, paras. 72-73, Appellant's Book of Authorities, Tab 9.

[29] *Andrushko*, supra, at para. 6, Appellant's Book of Authorities, Tab 4.

[30] *Understanding the Racialization of Poverty in Ontario, Fact Sheet #1*, Colour of Poverty (2007), online: <http://www.colourofpoverty.ca>, UARR's Book of Authorities, Tab 13.

21. As a result, the decision at issue will have two possible outcomes: (1) there will be fewer police complaints as a result of individuals not wanting to compromise a civil claim; and/or (2) individuals will continue to make police complaints without being properly informed of the potential effects on a civil claim. These results are not mutually exclusive and are both devastating to the current legislative framework for police accountability.

22. Finally, there is substantial potential for injustice. Applying estoppel means that police conduct will not be subject to scrutiny by an independent judiciary, or to testing through a civil process that, as noted above, includes full disclosure, discovery, and the opportunity for the aggrieved party to make a case on his or her own behalf. The absence of judicial consideration, with its attendant civil processes, is not consistent with the courts' constitutional mandate to protect citizens against abuse of public powers. This mandate should be especially safeguarded – not diminished – in the context of potential police abuses, given the nature and extent of the police powers.

C. Other Crucial Policy Considerations – Enhanced Race Relations

23. Enhanced police accountability promotes a better democracy. It also promotes better race relations. Racialized communities perceive themselves to be particularly vulnerable to police abuses. This belief is consistent with the findings of various studies over the years. For example,

(a) In 1992, the Metropolitan Toronto Police asked the City's auditor to conduct an audit of policies, procedures and practices that impact on racial minorities and the police race relations climate. The preface to the auditor's report stated that, despite a series of reports and studies, "tension between the [Police] Force and segments of [racialized] communities still exists."[31]

(b) In 1995, the Province of Ontario held a Royal Commission on System Racism in the Ontario Criminal Justice system. The report of this Commission found a very strong perception, in the minds of community members, that various actors within the justice system, including the police, administer justice unequally according to race. The Commission also found evidence tending to support this perception, noting that although

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[31] Alan Andrews, *Review of Race Relations Practices of the Metropolitan Toronto Police Force* (Toronto: Metropolitan Audit Department, 1992), Preface, UARR's Book of Authorities, Tab 9.

racial bias is not intended, race does appear to have an influence on decisions made by police.[32]

24. Racialized communities generally view the system of police oversight with suspicion. Traditional structures of police governance are perceived as not being effective, accountable, or accessible to the community.[33] The ability of these structures to prevent or control abuse is considered highly questionable, particularly given the continuing role that police themselves play in investigating and resolving complaints. As a result, police accountability, and racialized communities' perception of police accountability, is essential to the public's trust in the integrity of the administration of justice. It follows that the increased police accountability that flows from allowing a plaintiff access to the civil courts will have a beneficial effect on race relations above the beneficial effect that will flow in respect of enhanced police accountability.

PART IV - SUBMISSION ON COSTS

25. The UARR does not request costs and requests that no costs be awarded against it.

PART V - REQUEST FOR PERMISSION TO PRESENT ORAL ARGUMENT

26. The UARR requests permission to present oral argument not to exceed ten (10) minutes. The issues in this appeal will have a profound effect on both police accountability and the perception of police accountability by vulnerable communities in the Province of Ontario. It is important that the UARR have the opportunity to make oral submissions.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

December 2, 2011

Maureen Whelton and Richard Macklin
Lawyers for the Urban Alliance on Race Relations

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[32] Ontario, Commission on Systemic Racism in the Ontario Criminal Justice System (Toronto: Queen's Printer, 1995) (Co-Chairs: Margaret Gittens, David Cole) at 35-36, UARR's Book of Authorities, Tab 10.

[33] Charlotte Chiba, "The Justice System: Is it Serving or Failing Minorities?", 8:2 Currents 41 at 45, UARR's Book of Authorities, Tab 5.

PART VI - TABLE OF AUTHORITIES

Cases

Angle v. Canada (Minister of National Revenue – M.N.R)., [1975] 2 S.C.R. 248

British Columbia (Workers' Compensation Board) v. Figliola, 2011 SCC 52

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Other Authorities

A.M. Linden, "Tort Law As Ombudsman" (1973) 51 Can.Bar Rev. 155

Alan Andrews, *Review of Race Relations Practices of the Metropolitan Toronto Police Force* (Toronto: Metropolitan Audit Department, 1992), Preface

Charlotte Chiba, "The Justice System: Is it Serving or Failing Minorities?", 8:2 Currents 41

Charlotte Chiba, Julian Falconer and Antoni Shelton "Police Shootings and Racism: Getting at the Truth" (1994) 8:2 Currents 26

Erika Chamberlain, "What is the Role of Misfeasance in a Public Office in Modern Day Canadian Tort Law?" (2009) 88 Can. Bar Rev. 579

Ian D. Scott, "Legal Framework of Use of Force by Police in Ontario" (2008) 53 Crim. L.Q. 331

Irina Ceric, "*Organizing for Accountability: Community Legal Clinics and Police Complaints*" (2001) 16 J. L. & Soc. Pol'y 241

Ontario, Commission on Systemic Racism in the Ontario Criminal Justice System (Toronto: Queen's Printer, 1995) (Co-Chairs: Margaret Gittens, David Cole)

Understanding the Racialization of Poverty in Ontario, Fact Sheet #1, Colour of Poverty (2007), online: <http://www.colourofpoverty.ca>

PART VII - STATUTES AND REGULATIONS

Statutes

Canadian Charter of Rights and Freedoms, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11, s. 7

Life, liberty and security of person

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

Police Services Act, R.S.O. 1990, c. P. 15, sections 69, 69(3), 80 and 83(5)

Complaints about municipal chief's, municipal deputy chief's conduct

69. (1) The board shall review every complaint referred to it by the Independent Police Review Director under subsection 61 (8). 2007, c. 5, s. 10.

Investigation by Independent Police Review Director

(2) If at the conclusion of the review the board is of the opinion that the conduct of the chief of police or deputy chief of police who is the subject of the complaint may constitute an offence under a law of Canada or of a province or territory, or misconduct as defined in section 80 or unsatisfactory work performance, the board shall ask the Independent Police Review Director to cause the complaint to be investigated and the investigation to be reported on in a written report. 2007, c. 5, s. 10.

Same

(3) The board shall pay the costs of an investigation conducted under subsection (2). 2007, c. 5, s. 10.

Notice, no action taken

(4) If at the conclusion of the review the board is of the opinion that the conduct of the chief of police or deputy chief of police who is the subject of the complaint is not of a type described in subsection (2), the board shall take no action in response to the complaint and shall notify the complainant, the chief of police or deputy chief of police and the Independent Police Review Director in writing of the decision, with reasons. 2007, c. 5, s. 10.

Unsubstantiated complaint

(5) If at the conclusion of the investigation of a complaint under subsection (2) the Independent Police Review Director is of the opinion that the complaint is unsubstantiated, he or she shall report that opinion in writing to the board and the board shall take no action in response to the complaint and shall notify the complainant and the chief of police or deputy chief of police who is the subject of the complaint in writing of the decision, together with a copy of the written report. 2007, c. 5, s. 10.

Matter referred to board

(6) If at the conclusion of the investigation the Independent Police Review Director believes on reasonable grounds that the conduct of the chief of police or deputy chief of police constitutes misconduct or unsatisfactory work performance, he or she shall refer the matter, together with the written report, to the board. 2007, c. 5, s. 10.

Same

(7) If the Independent Police Review Director is of the opinion that the conduct of the chief of police or deputy chief of police constitutes misconduct or unsatisfactory work performance that is not of a serious nature, he or she, in referring the matter to the board under subsection (6), shall so indicate. 2007, c. 5, s. 10.

Board or Commission to hold hearing

(8) Subject to subsection (9), the board shall hold a hearing into a matter referred to it under subsection (6) or may refer the matter to the Commission to hold the hearing. 2007, c. 5, s. 10.

Informal resolution

(9) If on a review of the written report the board is of the opinion that there was misconduct or unsatisfactory work performance but that it was not of a serious nature, the board may resolve the matter informally without holding a hearing if the chief of police or deputy chief of police and the complainant consent to the proposed resolution. 2007, c. 5, s. 10.

Consent of chief, deputy chief or complainant

(10) A chief of police or deputy chief of police or a complainant who consents to a proposed resolution under subsection (9) may revoke the consent by notifying the board in writing of the revocation no later than 12 business days after the day on which the consent is given. 2007, c. 5, s. 10.

Notice

(11) If a chief of police or deputy chief of police and a complainant consent to the informal resolution of a matter and the consent is not revoked by the chief of police, deputy chief of police or complainant within the period referred to in subsection (10), the board shall give notice of the resolution to the Independent Police Review Director, and

shall provide to the Independent Police Review Director any other information respecting the resolution that the Independent Police Review Director may require. 2007, c. 5, s. 10.

Disposition without a hearing

(12) If consent to the informal resolution of a matter is not given or is revoked under subsection (10), the following rules apply:

1. The board shall provide the chief of police or deputy chief of police with reasonable information concerning the matter and shall give him or her an opportunity to reply, orally or in writing.

2. Subject to paragraph 3, the board may impose on the chief of police or deputy chief of police a penalty described in clause 85 (2) (d), (e) or (f) or any combination thereof and may take any other action described in subsection 85 (7) and may cause an entry concerning the matter, the penalty imposed or action taken and the chief of police's or deputy chief of police's reply to be made in his or her employment record.

3. If the chief of police or deputy chief of police refuses to accept the penalty imposed or action taken, the board shall not impose a penalty or take any other action or cause any entry to be made in the employment record, but shall hold a hearing, or refer the matter to the Commission to hold a hearing, under subsection (8). 2007, c. 5, s. 10.

Notice

(13) The board shall give notice to the Independent Police Review Director of any penalty imposed or action taken under paragraph 2 of subsection (12). 2007, c. 5, s. 10.

Employment record expunged

(14) An entry made in the chief of police's or deputy chief of police's employment record under paragraph 2 of subsection (12) shall be expunged from the record two years after being made if during that time no other entries concerning misconduct or unsatisfactory work performance have been made in the record under this Part. 2007, c. 5, s. 10.

Agreement

(15) Nothing in this section affects agreements between boards and chiefs of police or deputy chiefs of police that permit penalties or actions other than those permitted by this section, if the chief of police or deputy chief of police in question consents, without a hearing under subsection (8). 2007, c. 5, s. 10.

Misconduct

80. (1) A police officer is guilty of misconduct if he or she,

(a) commits an offence described in a prescribed code of conduct;

(b) contravenes section 46 (political activity);

(c) engages in an activity that contravenes subsection 49 (1) (secondary activities) without the permission of his or her chief of police or, in the case of a municipal chief of police, without the permission of the board, being aware that the activity may contravene that subsection;

(d) contravenes subsection 55 (5) (resignation during emergency);

(e) commits an offence described in subsection 79 (1) or (2) (offences, complaints);

(f) contravenes section 81 (inducing misconduct, withholding services);

(g) contravenes section 117 (trade union membership);

(h) deals with personal property, other than money or a firearm, in a manner that is not consistent with section 132;

(i) deals with money in a manner that is not consistent with section 133;

(j) deals with a firearm in a manner that is not consistent with section 134;

(k) contravenes a regulation made under paragraph 15 (equipment), 16 (use of force), 17 (standards of dress, police uniforms), 20 (police pursuits) or 21 (records) of subsection 135 (1). 2007, c. 5, s. 10.

Off-duty conduct

(2) A police officer shall not be found guilty of misconduct under subsection (1) if there is no connection between the conduct and either the occupational requirements for a police officer or the reputation of the police force. 2007, c. 5, s. 10

Examination of evidence

83(5) Before the hearing, the police officer and the complainant, if any, shall each be given an opportunity to examine any physical or documentary evidence that will be produced or any report whose contents will be given in evidence. 2007, c. 5, s. 10.

Rules of Civil Procedure, R.R.O. 1990, Reg. 194, Rules 31 and 53.07

RULE 31EXAMINATION FOR DISCOVERY

DEFINITION

31.01 In rules 31.02 to 31.11,

"document" has the same meaning as in clause 30.01 (1) (a). R.R.O. 1990, Reg. 194, r. 31.01.

FORM OF EXAMINATION

31.02 (1) Subject to subrule (2), an examination for discovery may take the form of an oral examination or, at the option of the examining party, an examination by written questions and answers, but the examining party is not entitled to subject a person to both forms of examination except with leave of the court. R.R.O. 1990, Reg. 194, r. 31.02 (1).

(2) Where more than one party is entitled to examine a person, the examination for discovery shall take the form of an oral examination, unless all the parties entitled to examine the person agree otherwise. R.R.O. 1990, Reg. 194, r. 31.02 (2).

WHO MAY EXAMINE AND BE EXAMINED

Generally

31.03 (1) A party to an action may examine for discovery any other party adverse in interest, once, and may examine that party more than once only with leave of the court, but a party may examine more than one person as permitted by subrules (2) to (8). R.R.O. 1990, Reg. 194, r. 31.03 (1); O. Reg. 438/08, s. 28 (1).

On Behalf of Corporation

(2) Where a corporation may be examined for discovery,

(a) the examining party may examine any officer, director or employee on behalf of the corporation, but the court on motion of the corporation before the examination may order the examining party to examine another officer, director or employee; and

(b) the examining party may examine more than one officer, director or employee only with the consent of the parties or the leave of the court. O. Reg. 132/04, s. 7.

On Behalf of Partnership or Sole Proprietorship

(3) Where an action is brought by or against a partnership or a sole proprietorship using the firm name,

(a) each person who was, or is alleged to have been, a partner or the sole proprietor, as the case may be, at a material time, may be examined on behalf of the partnership or sole proprietorship; and

(b) the examining party may examine one or more employees of the partnership or sole proprietorship only with the consent of the parties or the leave of the court. O. Reg. 132/04, s. 7.

Requirements for Leave

(4) Before making an order under clause (2) (b) or (3) (b), the court shall satisfy itself that,

(a) satisfactory answers respecting all of the issues raised cannot be obtained from only one person without undue expense and inconvenience; and

(b) examination of more than one person would likely expedite the conduct of the action. O. Reg. 438/08, s. 28 (2).

In Place of Person under Disability

(5) Where an action is brought by or against a party under disability,

(a) the litigation guardian may be examined in place of the person under disability; or

(b) at the option of the examining party, the person under disability may be examined if he or she is competent to give evidence,

but where the litigation guardian is the Children's Lawyer or the Public Guardian and Trustee, the litigation guardian may be examined only with leave of the court. R.R.O. 1990, Reg. 194, r. 31.03 (5); O. Reg. 69/95, ss. 18-20.

Assignee

(6) Where an action is brought by or against an assignee, the assignor may be examined in addition to the assignee. R.R.O. 1990, Reg. 194, r. 31.03 (6).

Trustee in Bankruptcy

(7) Where an action is brought by or against a trustee of the estate of a bankrupt, the bankrupt may be examined in addition to the trustee. R.R.O. 1990, Reg. 194, r. 31.03 (7).

Nominal Party

(8) Where an action is brought or defended for the immediate benefit of a person who is not a party, the person may be examined in addition to the party bringing or defending the action. R.R.O. 1990, Reg. 194, r. 31.03 (8).

Limiting Multiple Examinations

(9) Where a party is entitled to examine for discovery,

(a) more than one person under this rule; or

(b) multiple parties who are in the same interest,

but the court is satisfied that multiple examinations would be oppressive, vexatious or unnecessary, the court may impose such limits on the right of discovery as are just. R.R.O. 1990, Reg. 194, r. 31.03 (9).

WHEN EXAMINATION MAY BE INITIATED

Examination of Plaintiff

31.04 (1) A party who seeks to examine a plaintiff for discovery may serve a notice of examination under rule 34.04 or written questions under rule 35.01 only after delivering a statement of defence and, unless the parties agree otherwise, serving an affidavit of documents. R.R.O. 1990, Reg. 194, r. 31.04 (1).

Examination of Defendant

(2) A party who seeks to examine a defendant for discovery may serve a notice of examination under rule 34.04 or written questions under rule 35.01 only after,

(a) the defendant has delivered a statement of defence and, unless the parties agree otherwise, the examining party has served an affidavit of documents; or

(b) the defendant has been noted in default. R.R.O. 1990, Reg. 194, r. 31.04 (2).

Completion of Examination

(3) The party who first serves on another party a notice of examination under rule 34.04 or written questions under rule 35.01 may examine first and may complete the examination before being examined by another party, unless the court orders otherwise. R.R.O. 1990, Reg. 194, r. 31.04 (3).

ORAL EXAMINATION BY MORE THAN ONE PARTY

31.05 Unless the court orders or the parties agree otherwise, where more than one party is entitled to examine a party or other person for discovery without leave, there shall be only one oral examination, which may be initiated by any party adverse to the party,

(a) who is to be examined; or

(b) on behalf or in place of whom, or in addition to whom, a person is to be examined. R.R.O. 1990, Reg. 194, r. 31.05; O. Reg. 260/05, s. 6.

TIME LIMIT

Not to Exceed Seven Hours

31.05.1 (1) No party shall, in conducting oral examinations for discovery, exceed a total of seven hours of examination, regardless of the number of parties or other persons to be examined, except with the consent of the parties or with leave of the court. O. Reg. 438/08, s. 29.

Considerations for Leave

(2) In determining whether leave should be granted under subrule (1), the court shall consider,

(a) the amount of money in issue;

(b) the complexity of the issues of fact or law;

(c) the amount of time that ought reasonably to be required in the action for oral examinations;

(d) the financial position of each party;

(e) the conduct of any party, including a party's unresponsiveness in any examinations for discovery held previously in the action, such as failure to answer questions on grounds other than privilege or the questions being obviously irrelevant, failure to provide complete answers to questions, or providing answers that are evasive, irrelevant, unresponsive or unduly lengthy;

(f) a party's denial or refusal to admit anything that should have been admitted; and

(g) any other reason that should be considered in the interest of justice. O. Reg. 438/08, s. 29.

SCOPE OF EXAMINATION

General

31.06 (1) A person examined for discovery shall answer, to the best of his or her knowledge, information and belief, any proper question relevant to any matter in issue in the action or to any matter made discoverable by subrules (2) to (4) and no question may be objected to on the ground that,

(a) the information sought is evidence;

(b) the question constitutes cross-examination, unless the question is directed solely to the credibility of the witness; or

(c) the question constitutes cross-examination on the affidavit of documents of the party being examined. R.R.O. 1990, Reg. 194, r. 31.06 (1); O. Reg. 438/08, s. 30 (1).

Identity of Persons Having Knowledge

(2) A party may on an examination for discovery obtain disclosure of the names and addresses of persons who might reasonably be expected to have knowledge of transactions or occurrences in issue in the action, unless the court orders otherwise. R.R.O. 1990, Reg. 194, r. 31.06 (2).

Expert Opinions

(3) A party may on an examination for discovery obtain disclosure of the findings, opinions and conclusions of an expert engaged by or on behalf of the party being examined that are relevant to a matter in issue in the action and of the expert's name and

address, but the party being examined need not disclose the information or the name and address of the expert where,

(a) the findings, opinions and conclusions of the expert relevant to any matter in issue in the action were made or formed in preparation for contemplated or pending litigation and for no other purpose; and

(b) the party being examined undertakes not to call the expert as a witness at the trial. R.R.O. 1990, Reg. 194, r. 31.06 (3); O. Reg. 438/08, s. 30 (2); O. Reg. 453/09, s. 1.

Insurance Policies

(4) A party may on an examination for discovery obtain disclosure of,

(a) the existence and contents of any insurance policy under which an insurer may be liable to satisfy all or part of a judgment in the action or to indemnify or reimburse a party for money paid in satisfaction of all or part of the judgment; and

(b) the amount of money available under the policy, and any conditions affecting its availability. R.R.O. 1990, Reg. 194, r. 31.06 (4).

(5) No information concerning the insurance policy is admissible in evidence unless it is relevant to an issue in the action. R.R.O. 1990, Reg. 194, r. 31.06 (5).

Divided Discovery

(6) Where information may become relevant only after the determination of an issue in the action and the disclosure of the information before the issue is determined would seriously prejudice a party, the court on the party's motion may grant leave to withhold the information until after the issue has been determined. R.R.O. 1990, Reg. 194, r. 31.06 (6).

FAILURE TO ANSWER ON DISCOVERY

Failure to Answer Questions

31.07 (1) A party, or a person examined for discovery on behalf of or in place of a party, fails to answer a question if,

(a) the party or other person refuses to answer the question, whether on the grounds of privilege or otherwise;

(b) the party or other person indicates that the question will be considered or taken under advisement, but no answer is provided within 60 days after the response; or

(c) the party or other person undertakes to answer the question, but no answer is provided within 60 days after the response. O. Reg. 260/05, s. 7.

Effect of Failure to Answer

(2) If a party, or a person examined for discovery on behalf of or in place of a party, fails to answer a question as described in subrule (1), the party may not introduce at the trial the information that was not provided, except with leave of the trial judge. O. Reg. 260/05, s. 7.

Additional Sanction

(3) The sanction provided by subrule (2) is in addition to the sanctions provided by rule 34.15 (sanctions for default in examination). O. Reg. 260/05, s. 7.

Obligatory Status of Undertakings

(4) For greater certainty, nothing in these rules relieves a party or other person who undertakes to answer a question from the obligation to honour the undertaking. O. Reg. 260/05, s. 7.

EFFECT OF LAWYER ANSWERING

31.08 Questions on an oral examination for discovery shall be answered by the person being examined but, where there is no objection, the question may be answered by his or her lawyer and the answer shall be deemed to be the answer of the person being examined unless, before the conclusion of the examination, the person repudiates, contradicts or qualifies the answer. R.R.O. 1990, Reg. 194, r. 31.08; O. Reg. 575/07, s. 4.

INFORMATION SUBSEQUENTLY OBTAINED

Duty to Correct Answers

31.09 (1) Where a party has been examined for discovery or a person has been examined for discovery on behalf or in place of, or in addition to the party, and the party subsequently discovers that the answer to a question on the examination,

(a) was incorrect or incomplete when made; or

(b) is no longer correct and complete,

the party shall forthwith provide the information in writing to every other party. R.R.O. 1990, Reg. 194, r. 31.09 (1).

Consequences of Correcting Answers

(2) Where a party provides information in writing under subrule (1),

(a) the writing may be treated at a hearing as if it formed part of the original examination of the person examined; and

(b) any adverse party may require that the information be verified by affidavit of the party or be the subject of further examination for discovery. R.R.O. 1990, Reg. 194, r. 31.09 (2).

Sanction for Failing to Correct Answers

(3) Where a party has failed to comply with subrule (1) or a requirement under clause (2) (b), and the information subsequently discovered is,

(a) favourable to the party's case, the party may not introduce the information at the trial, except with leave of the trial judge; or

(b) not favourable to the party's case, the court may make such order as is just. R.R.O. 1990, Reg. 194, r. 31.09 (3).

CALLING ADVERSE PARTY AS WITNESS

Persons to Whom Rule Applies

53.07 (1) Subrules (2) to (7) apply in respect of the following persons:

1. An adverse party.

2. An officer, director, employee or sole proprietor of an adverse party.

3. A partner of a partnership that is an adverse party. O. Reg. 536/96, s. 4.

Securing Attendance

(2) A party may secure the attendance of a person referred to in subrule (1) as a witness at a trial,

(a) by serving the person with a summons to witness, or by serving on the adverse party or the lawyer for the adverse party, at least 10 days before the commencement of the trial, a notice of intention to call the person as a witness; and

(b) by paying or tendering attendance money calculated in accordance with Tariff A at the same time. O. Reg. 536/96, s. 4; O. Reg. 575/07, s. 1.

(3) If a person referred to in subrule (1) is in attendance at the trial, it is unnecessary to serve the person with a summons or to pay attendance money to call the person as a witness. O. Reg. 536/96, s. 4.

When Adverse Party may be Called

(4) A party may call a person referred to in subrule (1) as a witness unless,

(a) the person has already testified; or

(b) the adverse party or the adverse party's lawyer undertakes to call the person as a witness. O. Reg. 536/96, s. 4; O. Reg. 575/07, s. 4.

Cross-examination

(5) A person referred to in subrule (1) may be cross-examined by the party who called him or her as a witness and by any other party who is adverse in interest to that person. O. Reg. 536/96, s. 4.

Re-examination

(6) After a cross-examination under subrule (5), the person may be re-examined by any party who is not entitled to cross-examine under that subrule. O. Reg. 536/96, s. 4.

Failure to testify

(7) The court may grant judgment in favour of the party calling the witness, adjourn the trial or make such other order as is just where a person required to testify under this rule,

(a) refuses or neglects to attend at the trial or to remain in attendance at the trial;

(b) refuses to be sworn; or

(c) refuses to answer any proper question put to him or her or to produce any document or other thing that he or she is required to produce. O. Reg. 536/96, s. 4.