File Number:

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

BETWEEN:

WAYNE PENNER

Applicant(Applicant/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 APPLICANT - APPLICATION FOR LEAVE TO APPEAL

OVERVIEW

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

2. Ironically, answering the above question in the affirmative will effectively put the police complaints system out of reach and ultimately out of business, as competent legal advice would rarely include recommending an election in favour of a police adjudicator (with very narrow powers) chosen by and acting under the authority of a chief of police[1]

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

over an independent member of the judiciary (with broad remedial powers) with no connection to the police.

3. Respectfully, in a decision that is without precedent, the Ontario Court of Appeal applied the doctrine of issue estoppel to adverse legal and factual findings made by a retired police superintendent in the course of a police disciplinary hearing. In so doing the Court barred the applicant from challenging the legality of his forcible arrest by the police defendants' before a judge in civil proceedings.

4. The applicant respectfully submits that the Court of Appeal's application of issue estoppel in this case both failed to account for the unique role of the judiciary as "guardian of the Constitution" and misconstrued the nature of police discipline proceedings under the *Police Services Act*. Ultimately, the Court erred in failing to find that, pursuant to established legal principles on issue estoppel, it would create an injustice to apply issue estoppel to police use of force specifically and police misconduct generally.

5. Put simply, hearings run by police officer adjudicators (appointed by Police Chiefs) and prosecuted by police officers (appointed by and often acting under the instruction of Chiefs of Police during the hearings) cannot replace our Honourable Courts. Respectfully, given the prevalence of complaints processes across the country and the ramifications of the Court of Appeal's decision in the area of police accountability, it is apparent that the proposed appeal raises issues of national and public importance.

PART I- FACTS

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

(a) The events giving rise to the action

7. On January 28, 2003, the Applicant was arrested by Constables Federkow, Parker and Koscinkski for allegedly causing a disturbance while attending a *Provincial Offences Act* trial involving his wife. The arrest was effected within the court room, and in the absence of any instruction or request by the presiding Justice of the Peace. In the course of the arrest, the Applicant suffered multiple injuries including a black right eye, an injury to his right wrist and bruising to his right temple. [2]

8. The Respondent officers charged the Applicant with causing a disturbance, assault resist arrest, and breach of probation contrary to the *Criminal Code of Canada*. The charges were withdrawn at the request of the Crown on June 23, 2003. [3]

9. On July 22, 2003, the Applicant commenced a civil proceeding by way of statement of claim against the Respondents. The claim sought damages for *inter alia*

[2] Statement of Claim, paragraph 35, Tab 12 of the Application Record
[3] Decision of the Court of Appeal for Ontario, paragraphs 8-9, Tab 5 of the Application Record

malicious prosecution, false arrest, and false imprisonment, and for an allegedly unlawful strip search.

(b) The Police Discipline Hearing

10. Following his arrest, the Applicant filed a complaint under the *Police Services Act* (the *"Act")*, R.S.O. 1990, ch. P. 15, alleging misconduct by Constables Koscinski and Parker. He claimed that the arrest was unlawful and that unnecessary force was used during and subsequent to the arrest. [4]

11. Following the Applicant's complaint, the Niagara Regional Police Services Board referred the matter for a Disciplinary Hearing in respect of Constables Koscinski and Parker. The matter was prosecuted on behalf of the Niagara Regional Police Service by an Ontario Provincial Police Inspector. As a complainant, the Applicant enjoyed standing at the hearing as provided by the *Act*. He was entitled to, and in fact did, cross-examine witnesses and make legal submissions at the hearing. The Applicant was self-represented throughout.

12. Evidence was heard over several days in March and April 2004 before a retired police superintendant. The Hearing Officer's decision, rendered on June 28, 2004, found both officers not guilty of the disciplinary charges.[5]

[4] Decision of the Court of Appeal for Ontario, paragraph 2, Tab 5 of the Application Record
[5] Decision of Superintendant Fitches dated June 28, 2004, Tab 9 of the Application Record

(c) The Appeal to the Ontario Commission on Police Services

13. The Applicant appealed, pursuant to section 70(1) of the *Act* from the decision of the Hearing Officer to the Ontario Civilian Commission on Police Services ("Commission").

14. The Commission found the arrest to be unlawful and revoked the finding of the Hearing Officer to the contrary. Since the Applicant's arrest was found to be unlawful, the Commission also found that any force in effecting the arrest was unjustified. [6]

(d) The Appeal from the Commission's Decision to the Divisional Court

15. Constables Parker and Koscinski judicially reviewed the decision of the Commission to the Superior Court of Justice – Divisional Court.[7]

16. Relying on the deference afforded to the Hearing Officer on judicial review, the Divisional Court found that there was "no manifest error, no ignoring of conclusive or relative evidence, nor any indication he [the Hearing Officer] misunderstood the evidence or drew erroneous conclusions from it"[8]. The Divisional Court held that the arrest of the Applicant was lawful in spite of the fact that the presiding Justice of Peace did not instruct the Respondents to arrest the Applicant. As a result, the Divisional Court set aside the decision of the Commission and restored that of the Hearing Officer.[9]

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[6] Decision of Commission dated April 22, 2005, Tab 10 of the Application Record
[7] Endorsement of Divisional Court dated January 16, 2008, Tab 11 of the Application Record
[8] Endorsement of Divisional Court dated January 16, 2008 at para. 28, Tab 11 of the Application Record

[9] Endorsement of Divisional Court dated January 16, 2008, Tab 11 of the Application Record

(e) Rule 21 Motion Brought by the Respondents

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

18. In Reasons for Decision dated October 27, 2009 the learned Motions Judge held that the requirements of issue estoppel had been met with respect to the claims brought by the Applicant for unlawful arrest, the use of unnecessary force during and subsequent to his arrest, and malicious prosecution. The Applicant appealed the Motions Judge's decision to the Ontario Court of Appeal.[10]

19. The Ontario Court of Appeal dismissed the appeal. The Court found that the three requirements for issue estoppel established by this Honourable Court in *Danyluk v. Ainsworth Technologies Inc.*[11] had been satisfied by the police discipline hearing. The Court of Appeal declined to exercise its discretion not to apply issue estoppel. It held that the operation of the doctrine, in the circumstances of this case, would not work an injustice. [12]

[10] Endorsement of Divisional Court dated January 16, 2008, Tab 11 of the Application Record
[11] [2001] 2 S.C.R. 460
[12] Reasons of the Ontario Court of Appeal, dated September 27, 2010, Tab 5 of the Application Record

PART II: QUESTION IN ISSUE

20. The issue to be determined in the proposed appeal is whether it was unjust and therefore legal error to apply issue estoppel to the Applicant's civil claims by virtue of findings by the Police Hearing Officer appointed under to the *Police Services Act*.

PART III: STATEMENT OF ARGUMENT

21. The applicant respectfully submits that it was unjust to apply issue estoppel to the findings of the Hearings Officer concerning the Applicant's complaint made under the *Police Services Act*.

22. The applicant respectfully submits that the Court of Appeal erred in two respects in its analysis of the court's discretion to refuse to apply issue estoppel. First, the Court of Appeal's analysis failed to appreciate the unique role of judges as "guardian(s) of the Constitution"[13] and "the foremost defenders of individual freedoms and human rights"[14]. Second, the Court of Appeal misapprehended the nature and purpose of police discipline proceedings under the *Police Services Act*.

(a) The Court of Appeal failed to appreciate the unique role of the judiciary in adjudicating allegations of police misconduct

23. This Honourable Court has consistently recognized the singular role of judges within the Canadian constitutional order. In addition to arbitrating disputes between private parties and preserving the division of federal and provincial constitutional powers, our courts have assumed a pre-eminent role (especially since the advent of the *Canadian*

[13] *Ell v. Alberta*, [2003] 1 S.C.R. 857 at para. 23
[14] *Therrien (Re)*, [2001] 2 S.C.R. 3 at para.108

Charter of Rights and Freedoms) as the protector of individual rights and freedoms from unwarranted state intrusion:

> The judiciary occupies an indispensable role in upholding the integrity of our constitutional structure: see *Provincial Court Judges Reference*, *supra*, at para. 108. In Canada, like other federal states, courts adjudicate on disputes between the federal and provincial governments, and serve to safeguard the constitutional distribution of powers. Courts also ensure that the power of the state is exercised in accordance with the rule of law and the provisions of our Constitution. In this capacity, courts act as a shield against unwarranted deprivations by the state of the rights and freedoms of individuals. Dickson C.J. described this role in *Beauregard*, *supra*, at p. 70:
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> > [Courts act as] protector of the Constitution and the fundamental values embodied in it -- rule of law, fundamental justice, equality, preservation of the democratic process, to name perhaps the most important.[15]

While "the Constitution does not belong to the Courts", our courts remain the "ultimat[e] … guardians of constitutional rules, principles and values when all else fails"[16].

24. Judges play a critical role in the maintenance of public confidence in the administration of justice: "The judge is the pillar of our entire justice system, and of the rights and freedoms which that system is designed to promote and protect."[17] The judiciary's constitutional mandate requires that it maintain strict independence from the executive and legislative branches of government: "Without the perception of independence, the judiciary is unable to "claim any legitimacy or command the respect and acceptance that are essential to it"… The principle requires the judiciary to be independent both in fact and perception."[18]

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[15] *Ell, supra*, at para.22
[16] *R. v. Kang-Brown*, [2008] 1 S.C.R. 456
[17] *Therrien (Re), supra* at para.108
[18] *Ell, supra* at para. 23

25. The adjudication of allegations of police misconduct across a variety of settings is central to the judiciary's function as "guardian of the Constitution". Be it the assessment of whether evidence should be excluded pursuant to section 24(2) of the *Charter*[19], the imposition of sentence under Part XXIII of the *Criminal Code*[20], or the determination of claims for constitutional damages[21], the courts are necessarily the pre-eminent forum in which allegations of police misconduct are adjudicated.

26. Tort law, including actions in negligence[22] and misfeasance in public office[23], is an essential weapon in the court's arsenal to deter and redress misconduct by police in the exercise of their powers. As stated by this Honourable Court in *Hill, supra*, "To deny a remedy in tort is, quite literally, to deny justice. This supports recognition of the tort of negligent police investigation, in order to complete the arsenal of already existing common law and statutory remedies." When all other common law and statutory mechanisms fail, tort law represents the ultimate means for the individual to invoke the judiciary's protection from police misconduct.

27. The Court of Appeal's application of issue estoppel in this case effectively ceded the judiciary's role and responsibility to definitively adjudicate allegations of police misconduct to a retired police superintendent appointed by a police chief.

28. The Court of Appeal's reasons are devoid of any consideration of the judiciary's unique responsibility as "guardian of the Constitution". The doctrine of issue estoppel was applied generically, without any regard to the role of the judiciary and the subject

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[19] *R. v. Grant*, [2009] 2 S.C.R. 353 at paras. 72-75
[20] *R. v. Nasogaluak*, [2010] 1 S.C.R. 206 at para. 32: "Courts must guard against the illegitimate use of power by the police against members of our society, given its grave consequences."
[21] *Vancouver (City) v. Ward*, 2010 SCC 27
[22] *Hill v. Hamilton-Wentworth Regional Police Services Board*, 2007 SCC 41, [2007] 3 S.C.R. 129
[23] *Odhavji Estate v. Woodhouse*, [2003] 3 S.C.R. 263

matter in issue i.e. allegations of police misconduct. The Court of Appeal went so far as to equate the expertise of the court and a police officer in the assessing the exercise of police powers:

> The hearing officer was not legally trained; he was a retired police superintendent. If the issues claimed to give rise to issue estoppel turned on, for example, a question of contract interpretation, then his lack of legal training would favour not applying issue estoppel. But the findings for which issue estoppel is sought are reasonable and probable grounds for arrest and the use of excessive or unnecessary force. For making these findings, a senior and experienced police officer has as much expertise as a court would have.

29. By permitting a retired police superintendant appointed by the police chief of the applicable police service to render what amounts to a final determination as to the propriety of an exercise of police powers, the Court of Appeal effectively turned the constitutional order on its head. Our constitutional order does not empower retired police officials to pre-empt the judiciary's responsibility to "ensure that the power of the state is exercised in accordance with the rule of law and the provisions of our Constitution". Public confidence in the administration of justice requires that our judiciary fulfils this role.

(b) Purposes of the Public Complaints Provision of the *Police Services Act*

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

application of issue estoppel would work an injustice. The Court of Appeal's one paragraph treatment demonstrates that this factor was given insufficient weight. [24]

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

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

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

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

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

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

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

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

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

(h) Pursuant to section 71, a party to a Commission appeal may appeal the Commission's decision to the Divisional Court.[25]

[24] Reasons of the Ontario Court of Appeal, dated September 27, 2010 at para. 42

33. In Ontario, public complaints about police misconduct are investigated, prosecuted and adjudicated by police officers. The hallmarks of independence normally associated with employment discipline tribunals are conspicuously absent in police discipline hearings. As early as 2002, auditors of the police complaints process in Toronto found that "[t]he lack of an investigative process independent of the police is regarded as a significant impediment in regard to public confidence in the system". [26] More recently, Justice Lesage, in his 2005 report entitled *Report on the Police Complaints System in Ontario,* commented on the widespread public concern caused by police investigating their own misconduct:

> From the submissions received for preparation of the report one of the perspectives that emerges from community groups was that the system is not working to effectively resolve complaints and is, in itself, a cause of mistrust of the police. Many said that this mistrust has led to unwillingness by some members of the community to contact or cooperate with the police even in situation were serious crimes have been committed. A fair, effective, and transparent complaints system could be a step toward improving confidence and trust in the police. They suggest that his can only come from implementing a fully independent civilian complaints system could be a step toward improving confidence and trust in the police. They suggest that this can only come from implementing a fully independent civilian complaints system starting from the reception of complaints to the final adjudication and appeal of disciplinary decisions.
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> In addition to the barriers to access the system, most community groups said that the investigation of a complaint by the same police service as the subject of the complaint raises significant concerns over the legitimacy and integrity of the investigation. Many felt that investigators within the same police service cannot be objective in the investigation of civilian complaints and that a police culture of protecting fellow officers eliminates any capacity to carry out thorough investigations. Even where

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[25] *Police Services Act*, R.S.O. 1990, ch. P. 15

[26] City of Toronto, Audit Services, *Performance Audit: The Public Complaints Process Toronto Police Service* , Jeffrey Griffiths (Toronto: Audit Services, City of Toronto: August 2002) at pg. 27

> the investigations are rigorously conducted and are fair, the perception of taint and unfairness will always exist. [27]

34. The lack of independent adjudication of complaints reflects the fact that that the primary purpose of Part V of the *Act* is regulation i.e. the discipline of employees. In Ontario, the Court of Appeal has ruled that the purpose of Part V of the *Act* is to create a complete substantive and procedural code for the discipline of police officers[28]. As such, upon a finding of misconduct, an adjudicator may only impose management-style discipline to a subject officer. An adjudicator does not have the statutory power to provide any form of redress to a public complainant[29].

35. The standard of proof applicable to police disciplinary hearings also suggests that the purpose of the hearing is regulatory. Pursuant to section 63(10) of the *Act* an adjudicator must find that misconduct is proven on "clear and convincing evidence" before a police officer can be disciplined [30]. The "clear and convincing" standard has been accepted as the relevant standard in the misconduct hearings of many professional bodies and is a higher burden of proof than the balance of probabilities.[31] The higher burden of proof favours police officers and is commensurate with the potential jeopardy for serious professional sanctions:

> The standard of proof used at a hearing was also discussed at length. I heard various arguments that the standard of proof should be changed and arguments that it remain the same. There is no doubt that the standard of

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[27] The Honourable Patrick J. Lesage, *Report on the Police Complaints System in Ontario*, April 22, 2005 at pgs. 39-40
[28] *Abbott et al. v. Collins et al* (2003), 64 O.R. (3d) 789 at para. 27
[29] Police Services Act, R.S.O. 1990, ch. P. 15, section 64(10) and 68
[30] See also *Canadian Civil Liberties Association v. Ontario (Civilian Commission on Police Services)* (2002), 61 O.R. (3d) 649 at para. 50; *Porter v. York (Regional Municipality) Police*, [2001] O.J. No. 5970 (S.C.) at para. 11
[31] R. Steinecke, A Complete Guide To The Regulated Health Professions Act, looseleaf (Aurora, ON: Canada Law Book Inc., 2003) at paras. 6.1170-6.1210; see also *Canadian Civil Liberties Association v. Ontario (Civilian Commission on Police Services)* (2002), 61 O.R. (3d) 649

> proof is of some benefit to police officers. Police officers, by the very nature of their employment, often find themselves in positions of conflict. As a result, complaints are not infrequently filed against them. A finding of misconduct or unsatisfactory work performance based on a "clear and convincing evidence" standard ensures that discipline is not administered without significant proof. On the other hand, it is troubling to many groups with whom I met that a police officer could be found in a civil proceeding to have engaged in misconduct (and a police service ordered to pay significant damages) while the complaint against the officer has been found to be unsubstantiated in a PSA hearing in relation to the same incident.[32]

36. The Applicants respectfully submit the different standard of proof required in police discipline hearings is another factor that militates against the application of issue estoppel. In the only other case in Canada to address the application of issue estoppel to police discipline hearings, the Ontario Superior Court of Justice found that issue estoppel should not apply because of the higher standard of proof in police disciplinary hearings.[33]

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

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[32] The Honourable Patrick J. Lesage, Report on the Police Complaints System in Ontario, April 22, 2005 at pgs. 39-40

[33] *Porter v. York (Regional Municipality) Police*, [2001] O.J. No. 5970 (S.C) at paras. 9-12

> Part III takes its cue from its title, i.e., PUBLIC COMPLAINTS. It creates the office of Public Complaints Commissioner and provides the procedure by which citizens can express dissatisfaction with a particular police action. Once a complaint is made, a citizen ... is in the hands of others. She or he has no control over those whose duty it is to perform the procedures which Part III and the Complaints Regulations require .... It makes no logical sense to frustrate a scheme put in place by the legislature to allow a citizen a user-friendly police complaint procedure by holding that every step along the way is mandatory.[34]

38. Parliament's intention, in allowing a public complainant to participate in a police discipline hearing, was to increase transparency and public confidence in police oversight[35]. It was not, however, meant to address the civil rights of a public complainant. As this Honourable Court found in *Odhavji*, the "public complaints process is no alternative to liability in negligence"[36].

39. The approach adopted by the Court of Appeal in the herein matter will almost inevitably frustrate the purposes of the public complaints system in Ontario. If issue estoppel is to be applied to findings made at police discipline hearings, putative complainants will be left with two unpalatable choices. To avoid subjecting her potential civil claim to a binding determination by a retired police officer, a potential claimant may choose to refrain from advancing her complaint, however meritorious. On the other hand, if she chooses to advance her complaint in the discipline proceedings, she will be required to "put her best foot forward" in an effort to convert the police discipline proceeding into an adjudication of her private rights. Under either scenario, the legislative purpose of maintaining an accessible and expeditious complaint system focused on internal discipline is defeated.

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[34] *Newfoundland and Labrador (Royal Newfoundland Constabulary Public Complaints Commissioner) v. Oates* [2003] N.J. No. 190 (C.A.) at para. 17; see also
[35] *Browne v. Ontario (Civilian Commission on Police Services)*, (2001), 56 O.R. (3d) 673 at para. 60
[36] *Odhavji Estate v. Woodhouse*, [2003] 3 S.C.R. 263 at para. 60

40. The courts in Newfoundland have taken the opposite approach to that articulated by the Ontario Court of Appeal in the herein matter. The Newfoundland and Labrador Supreme Court has recognized that the public complaints system was "established an alternative to the civil court system, one that will be more timely and presumably less costly for determining issues of police accountability, in order to improve public access and participation in the system"[37]. In *Martin* v. *Royal*, Jutice Hall held that the public complaints process did not displace the court's independent jurisdiction over issues of police misconduct:

> Nothing in this legislation takes away the rights of citizens to have access to the existing civil court system which maintains its independent jurisdiction over issues of police misconduct through the law of tort and the law of compensatory remedies.[38]

41. As the Court of Appeal correctly recognized, parliament never intended the police complaints system to displace a plaintiff's entitlement to have allegations of police misconduct determined by a court. To the contrary, the *Act*, by rendering all documents generated in the complaint process inadmissible in civil proceedings, specifically contemplates parallel complaint and civil proceedings in relation to the same subject matter.[39]

42. The Court of Appeal erred in according virtually no weight to this factor in determining whether to apply issue estoppel. Justice cannot be served by the application

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[37] *Martin v.Royal Newfoundland Constabulary Public Complaints Commission*, [2004] N.J. No. 243 at para 39; see also *Newfoundland (Royal Newfoundland Constabulary) v.Newfoundland (Royal Newfoundland Constabulary Public Complaints Commissioner)*, [2002] N.J. No. 203 at para. 15

[38] *Martin v.Royal Newfoundland Constabulary Public Complaints Commission*, [2004] N.J. No. 243 (S.C.) at para. 39

[39] *Police Services Act*, R.S.O. 1990, section 69(9)

of issue estoppel when to do so would frustrate the purposes of the public complaints process.

(c) National Importance

43. The Applicant respectfully submits that the proposed appeal raises issues of public and national importance. Every province in Canada has legislation that provides for public complaints and allows for the public complainant to participate, to various degrees, in a police discipline hearing[40]. The proposed appeal offers this Honourable Court the unique opportunity to address, for the first time, the application of issue estoppel to police discipline hearings initiated by a public complaint and determine whether the Court of Appeal's decision is consistent with the purposes and objectives of Canadian police complaint processes.

44. In addition, the Applicant respectfully submits that the proposed appeal raises issues of public and national importance in that it addresses a novel point of law – the constitutional dimension to applying issue estoppel to civil claims alleging police misconduct by virtue of findings made in police complaints processes. As submitted above, the Ontario Court of Appeal's decision in the herein matter is completely without precedent and appears to conflict with Newfoundland jurisprudence on the court's role as the ultimate arbiter of police misconduct. The Applicant respectfully submits that the proposed appeal provides a unique opportunity for this Honourable Court to address the issue estoppel in view of the role of the judiciary within the Canadian constitutional order.

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[40] Prince Edward Island does not have a provincial or municipal police force. Prince Edward Island is policed by the Royal Canadian Mounted Police. The Royal Canadian Mounted Police Act (R.S., 1985, c. R-10) provides for public complaints and public complainant involvement in discipline hearings

PART IV: SUBMISSIONS ON COSTS

45. The Applicant respectfully requests costs in respect of the herein application.

PART V: ORDER SOUGHT

46. The Applicant respectfully submits that this Honourable Court ought to allow the herein application with costs and grant leave with respect to the following question:

(a) Whether it was unjust and therefore legal error to apply issue estoppel to the Applicant's civil claims by virtue of findings by the Police Hearing Officer appointed under to the *Police Services Act*.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

DATED at Toronto, this 26th, day of November 2010.

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

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

Telephone: (416) 964-3408
Fax: (416) 929-8179

Lawyers for the Applicant