



**SUPREME COURT OF CANADA**

**CITATION:** Penner v. Niagara (Regional Police Services Board), **DATE:** 20130405  
2013 SCC 19 **DOCKET:** 33959

**BETWEEN:**

**Wayne Penner**

Appellant

and

**Regional Municipality of Niagara Regional Police Services Board, Gary E.  
Nicholls, Nathan Parker, Paul Koscinski and Roy Federkow**

Respondents

- and -

**Attorney General of Ontario, Urban Alliance on Race Relations, Criminal  
Lawyers' Association (Ontario), British Columbia Civil Liberties Association,  
Canadian Police Association and Canadian Civil Liberties Association**

Interveners

**CORAM:** McLachlin C.J. and LeBel, Fish, Abella, Rothstein, Cromwell and  
Karakatsanis JJ.

**REASONS FOR JUDGMENT:** Cromwell and Karakatsanis JJ. (McLachlin C.J. and Fish J.  
(paras. 1 to 72) concurring)

**DISSENTING REASONS:** LeBel and Abella JJ. (Rothstein J. concurring)  
(paras. 73 to 127)

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PENNER v. NIAGARA (REGIONAL POLICE SERVICES BOARD)

**Wayne Penner**

*Appellant*

v.

**Regional Municipality of Niagara Regional Police Services Board, Gary E. Nicholls, Nathan Parker, Paul Koscinski and Roy Federkow**

*Respondents*

and

**Attorney General of Ontario, Urban Alliance on Race Relations, Criminal Lawyers' Association (Ontario), British Columbia Civil Liberties Association, Canadian Police Association and Canadian Civil Liberties Association**

*Interveners*

**Indexed as: Penner v. Niagara (Regional Police Services Board)**

**2013 SCC 19**

File No.: 33959.

2012: January 11; 2013: April 5.

Present: McLachlin C.J. and LeBel, Fish, Abella, Rothstein, Cromwell and Karakatsanis JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

*Civil procedure — Issue estoppel — Administrative law — Police disciplinary proceedings — Complaint alleging police misconduct brought under Police Services Act, R.S.O. 1990, c. P.15 (“PSA”) — Civil action for damages arising from same incident also commenced — PSA hearing officer finding no misconduct and dismissing complaint — Motion judge and Court of Appeal exercising discretion to apply issue estoppel to bar civil claims on basis of hearing officer’s decision — Whether public policy rule precluding applicability of issue estoppel to police disciplinary hearings should be created — Whether unfairness arises from application of issue estoppel in this case.*

P was arrested for disruptive behaviour in an Ontario courtroom. He filed a complaint against two police officers under the *PSA*, alleging unlawful arrest and unnecessary use of force. He also started a civil action claiming damages arising out of the same incident. The hearing officer appointed by the Chief of Police under the *PSA* found the police officers not guilty of misconduct and dismissed the complaint. That decision was reversed on appeal by the Ontario Civilian Commission on Police Services on the basis that the arrest was unlawful. On further appeal, the Ontario Divisional Court concluded that the officers had legal authority to make the arrest and restored the hearing officer’s decision. The police respondents then successfully moved in the Superior Court of Justice to have many of the claims in the civil action struck on the basis of issue estoppel. While finding several factors

weighed against the application of issue estoppel, the Ontario Court of Appeal concluded that applying the doctrine would not work an injustice in this case and dismissed P's appeal.

*Held* (LeBel, Abella and Rothstein JJ., dissenting): The appeal should be allowed.

*Per* McLachlin C.J. and Fish, **Cromwell** and **Karakatsanis** JJ.: It is neither necessary nor desirable to create a rule of public policy excluding police disciplinary hearings from the application of issue estoppel. The doctrine of issue estoppel allows for the exercise of discretion to ensure that no injustice results; it calls for a case-by-case review of the circumstances to determine whether its application would be unfair or unjust even where, as here, the preconditions for its application have been met. There is no reason to depart from that approach. However, in the circumstances of this case, it was unfair to P to apply issue estoppel to bar his civil action on the basis of the hearing officer's decision. The Court of Appeal erred in its analysis of the significant differences between the purpose and scope of the two proceedings, and failed to consider the reasonable expectations of the parties about the impact of the proceedings on their broader legal rights.

The legal framework governing the exercise of the discretion not to apply issue estoppel is set out in *Danyluk v. Ainsworth Technologies*, 2001 SCC 44, [2001] 2 S.C.R. 460. This framework has not been overtaken by this Court's subsequent jurisprudence. While finality is important both to the parties and to the judicial

system, unfairness in applying issue estoppel may nonetheless arise. First, the prior proceedings may have been unfair. Second, even where the prior proceedings were conducted fairly, it may be unfair to use the results of that process to preclude the subsequent claim, for example, where there is a significant difference between the purposes, processes or stakes involved in the two proceedings. The text and purpose of the legislative scheme shape the parties' reasonable expectations in relation to the scope and effect of the administrative proceedings. They guide how and to what extent the parties participate in the process. Where the legislative scheme contemplates multiple proceedings and the purposes of those proceedings are widely divergent, the application of the doctrine might not only upset the parties' legitimate and reasonable expectations but may also undermine the efficacy and policy goals of the administrative proceedings, by either encouraging more formality and protraction or discouraging access to the administrative proceedings altogether. These considerations are also relevant to weighing the procedural safeguards available to the parties. A decision whether to take advantage of those procedural protections available in the prior proceeding cannot be divorced from the party's reasonable expectations about what is at stake in those proceedings or the fundamentally different purposes between them. The connections between the relevant considerations must be viewed as a whole.

In this case, the disciplinary hearing was itself fair and P participated in a meaningful way, however, the Court of Appeal failed to fully analyze the fairness of using the results of that process to preclude P's civil action. Nothing in the legislative

text gives rise to an expectation that the disciplinary hearing would be conclusive of P's legal rights in his civil action: the standards of proof required, and the purposes of the two proceedings, are significantly different; and, unlike a civil action, the disciplinary process provides no remedy or costs for the complainant. Another important policy consideration arises in this case; the risk of adding to the complexity and length of administrative proceedings by attaching undue weight to their results through applying issue estoppel. P could have participated more fully by hiring counsel, however that would also have meant that the officers would effectively have been forced to face two prosecutors rather than one. This would enhance neither the efficacy nor the fairness to the officers in a disciplinary hearing and potential complainants may not come forward with public complaints in order to avoid prejudicing their civil actions. These are important considerations and the Court of Appeal did not take them into account in assessing the weight of other factors, such as P's status as a party and the procedural protections afforded by the administrative process. Finally, the application of issue estoppel had the effect of using the decision of the Chief of Police's designate to exonerate the Chief in the civil claim and is therefore a serious affront to basic principles of fairness.

*Per LeBel, Abella and Rothstein JJ. (dissenting):* The doctrine of issue estoppel seeks to protect the finality of litigation by precluding the relitigation of issues that have been conclusively determined in a prior proceeding. The finality of litigation is a fundamental principle assuring the fairness and efficacy of the justice system in Canada. The doctrine of issue estoppel seeks to protect the reasonable

expectation of litigants that they can rely on the outcome of a decision made by an authoritative adjudicator, regardless of whether that decision was made in the context of a court or an administrative proceeding. In applying issue estoppel in the context of administrative adjudicative bodies, differences in the process or procedures used by the administrative tribunal, including procedures that do not mirror traditional court procedures, should not be used as an excuse to override the principle of finality. The purposes and procedures may vary, but the principle of finality should be maintained.

The applicable approach to issue estoppel in the context of prior administrative proceedings was most recently articulated by this Court in 2011 in *British Columbia (Workers' Compensation Board) v. Figliola*, 2011 SCC 52, [2011] 3 S.C.R. 422. This is the precedent that governs the application of the doctrine in this case. The key relevant aspect of this precedent is that it moved away from the approach to issue estoppel taken in *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44, [2001] 2 S.C.R. 460, which had held that a different and far wider discretion should apply in the context of administrative tribunals than the “very limited” discretion applied to courts.

The twin principles which underlie the doctrine of issue estoppel — that there should be an end to litigation and that the same party shall not be harassed twice for the same cause — are core principles which focus on achieving fairness and preventing injustice *by preserving the finality of litigation*. The ultimate goal of issue

estoppel is to protect the fairness *of* finality in decision-making and the avoidance of the relitigation of issues already decided by a decision-maker with the authority to resolve them. As the Court said in *Figliola*, this is the case whether we are dealing with courts or administrative tribunals. An approach that fails to safeguard the finality of litigation undermines these principles and risks uniquely transforming issue estoppel in the case of administrative tribunals into a free-floating inquiry. This revives the *Danyluk* approach that the Court refused to apply in *Figliola*.

This Court's recent affirmation of the principle of finality underlying issue estoppel in *Figliola* is also crucial to preserving the principles underlying our modern approach to administrative law. The Court's residual discretion to refuse to apply issue estoppel, should not be used to impose a particular model of adjudication in a manner inconsistent with the principles of deference that lie at the core of administrative law. Where an adjudicative tribunal has the authority to make a decision, it would run counter to the principles of deference to uniquely broaden the court's discretion in a way that would, in most cases, permit an unsuccessful party to circumvent judicial review and turn instead to the courts for a re-adjudication of the merits.

Under the principles set out in *Figliola*, issue estoppel should apply. The difference between the standard of proof required to establish misconduct under the *Police Services Act* and that required in a civil trial is irrelevant in this case. The hearing officer made unequivocal findings that there was virtually no evidence to



support P's claims. That means that there is simply no evidence to support P's claims whatever standard of proof is applied. P should not be allowed to circumvent the clear findings of the hearing officer and put the parties through a duplicative proceeding which would inevitably yield the same result.

The disciplinary hearing conducted by the hearing officer was conducted in accordance with the requirements prescribed by the statute and principles of procedural fairness. The hearing officer's decision was made in circumstances in which P knew the case he had to meet, had a full opportunity to meet it, and lost. Had he won, the hearing officer's decision would have been no less binding and the application of issue estoppel would have assisted him in a subsequent civil action for damages by relieving him of having to prove liability.

Preventing the courts from applying issue estoppel in the context of these disciplinary proceedings means that decisions would not be final or binding and would be open to relitigation and potentially inconsistent results. This would undermine public confidence in the reliability of the complaints process and in the integrity of the administrative decision-making process more broadly.

Nor does the method used to appoint an adjudicator in this case provide a basis for exercising the discretion in a way that precludes the application of issue estoppel. The Chief of Police designated an outside prosecutor and an independent adjudicator. Similar methods of appointment are quite common in other parts of the

law and are not seen as an obstacle to independent adjudication. Tenure is not the sole marker and condition of adjudicative independence.

### **Cases Cited**

By Cromwell and Karakatsanis JJ.

**Applied:** *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44, [2001] 2 S.C.R. 460; **referred to:** *Parker v. Niagara Regional Police Service* (2008), 232 O.A.C. 317; *Elsom v. Elsom*, [1989] 1 S.C.R. 1367; *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3; *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63, [2003] 3 S.C.R. 77; *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190; *Sharma v. Waterloo Regional Police Service* (2006), 213 O.A.C. 371; *Minott v. O'Shanter Development Co.* (1999), 42 O.R. (3d) 321; *Schweneke v. Ontario* (2000), 47 O.R. (3d) 97; *British Columbia (Minister of Forests) v. Bugbusters Pest Management Inc.* (1998), 50 B.C.L.R. (3d) 1; *Burchill v. Yukon (Commissioner)*, 2002 YKCA 4, [2002] Y.J. No. 19 (QL); *Porter v. York (Regional Municipality) Police*, [2001] O.J. No. 5970 (QL).

By LeBel and Abella JJ (dissenting)

*British Columbia (Workers' Compensation Board) v. Figliola*, 2011 SCC 52, [2011] 3 S.C.R. 422; *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44, [2001] 2 S.C.R. 460; *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190;

*Smith v. Alliance Pipeline Ltd.*, 2011 SCC 7, [2011] 1 S.C.R. 160; *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2011 SCC 53, [2011] 3 S.C.R. 471; *Carl Zeiss Stiftung v. Rayner & Keeler Ltd. (No. 2)*, [1967] 1 A.C. 853; *Parker v. Niagara Regional Police Service* (2008), 232 O.A.C. 317; *EnerNorth Industries Inc., Re*, 2009 ONCA 536, 96 O.R. (3d) 1; *Tsaoussis (Litigation Guardian of) v. Baetz* (1998), 41 O.R. (3d) 257, leave to appeal refused, [1999] 1 S.C.R. xiv; *Revane v. Homersham*, 2006 BCCA 8, 53 B.C.L.R. (4th) 76; *Angle v. Minister of National Revenue*, [1975] 2 S.C.R. 248; *Boucher v. Stelco Inc.*, 2005 SCC 64, [2005] 3 S.C.R. 279; *Rasanen v. Rosemount Instruments Ltd.* (1994), 17 O.R. (3d) 267; *Schweneke v. Ontario* (2000), 47 O.R. (3d) 97; *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 S.C.R. 708; *Wong v. Shell Canada Ltd.* (1995), 174 A.R. 287, leave to appeal refused, [1996] 3 S.C.R. xiv; *Porter v. York (Regional Municipality) Police*, [2001] O.J. No. 5970 (QL).

### **Statutes and Regulations Cited**

*General*, O. Reg. 123/98 (*Police Services Act*), Part V, *Code of Conduct*, Sch., s. 2(1)(g)(i), (ii).

*Police Services Act*, R.S.O. 1990, c. P.15, Part II, Part V, ss. 56, 57, 60(4), 64(1), (7) to (10), 68(1), (5), 69(3), (4), (7), (8), (9), 70(1), 71(1), 76, 80, 83(7), (8), 95.

*Provincial Offences Act*, R.S.O. 1990, c. P.33.

*Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, r. 21.01.

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

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Lange, Donald J. *The Doctrine of Res Judicata in Canada*, 3rd ed. Markham, Ont.: LexisNexis Canada, 2010.

Lesage, Patrick J. *Report on the Police Complaints System in Ontario*. Toronto: Ministry of the Attorney General, 2005.

APPEAL from a judgment of the Ontario Court of Appeal (Laskin, Moldaver and Armstrong JJ.A.), 2010 ONCA 616, 102 O.R. (3d) 688, 267 O.A.C. 259, 325 D.L.R. (4th) 488, 94 C.P.C. (6th) 262, [2010] O.J. No. 4046 (QL), 2010 CarswellOnt 7164, affirming a decision of Fedak J., 2009 CarswellOnt 9420. Appeal allowed, LeBel, Abella and Rothstein JJ. dissenting.

*Julian N. Falconer, Julian K. Roy and Sunil S. Mathai*, for the appellant.

*Eugene G. Mazzuca, Kerry Nash and Rafal Szymanski*, for the respondents.

*Malliha Wilson, Dennis W. Brown, Q.C., and Christopher P. Thompson*, for the intervener the Attorney General of Ontario.

*Maureen Whelton and Richard Macklin*, for the intervener the Urban Alliance on Race Relations.

*Louis Sokolov and Daniel Iny*, for the intervener the Criminal Lawyers' Association (Ontario).

*Robert D. Holmes, Q.C.*, for the intervener the British Columbia Civil Liberties Association.

*Ian J. Roland and Michael Fenrick*, for the intervener the Canadian Police Association.

*Tim Gleason and Sean Dewart*, for the intervener the Canadian Civil Liberties Association.

The judgment of the Chief Justice and Fish, Cromwell and Karakatsanis JJ. was delivered by

CROMWELL AND KARAKATSANIS JJ. —

[1] This appeal focuses on the discretionary application of issue estoppel. More particularly, the question is whether the Ontario courts erred by striking many of the claims in the appellant's civil action against the police on the basis that his complaint of police misconduct arising out of the same facts had been dismissed by a police disciplinary tribunal.

[2] The appellant, Wayne Penner, was arrested for disruptive behaviour in an Ontario courtroom. He filed a complaint against two police officers under the *Police Services Act*, R.S.O. 1990, c. P.15 (“PSA”), alleging unlawful arrest and use of unnecessary force. He also started a civil action against the Court Security Officer, the two police officers, their Chief of Police, and the Regional Municipality of Niagara Regional Police Services Board (the “Police Services Board”) in the Superior Court of Justice, claiming damages arising out of the same incident.

[3] Mr. Penner’s complaint under the *PSA* were referred by the Chief of Police to a disciplinary hearing presided over by a retired police superintendent. The police officers were found not guilty of misconduct. Mr. Penner was a party to the disciplinary hearing and the subsequent appeals to the Ontario Civilian Commission on Police Services (the “Commission”) and the Divisional Court.

[4] The respondents applied to have the civil action dismissed on the basis of issue estoppel because, in their view, the disciplinary hearing had finally resolved the key issues underpinning Mr. Penner’s civil claims.

[5] Many of Mr. Penner’s civil claims were struck on the basis of issue estoppel. The Ontario Court of Appeal agreed with the motion judge, and determined that the application of issue estoppel would not work an injustice in this case.

[6] On appeal to this Court, the appellant did not seriously challenge that the preconditions of issue estoppel had been met. The issue is whether the Court of

Appeal erred in exercising its discretion to apply issue estoppel to bar Mr. Penner's civil claims. Mr. Penner contends that the application of issue estoppel in this context would work an injustice or unfairness because of the public interest in promoting police accountability. He submits that the courts, as guardians of the Constitution and of individual rights and freedoms, must oversee the exercise of police powers: the importance of this judicial oversight requires that issue estoppel not apply to a disciplinary hearing decision under the *PSA*.

[7] The respondents reply that this case turns upon its own exceptional circumstances; that the civil suit represents a collateral attack on the final decision of the complaints process; and that the courts below were right to apply issue estoppel in order to preclude relitigation of the same issues finally decided in the disciplinary proceedings.

[8] We conclude that there is not and should not be a rule of public policy precluding the applicability of issue estoppel to police disciplinary hearings based upon judicial oversight of police accountability. The flexible approach to issue estoppel provides the court with the discretion to refuse to apply issue estoppel if it will work an injustice, even where the preconditions for its application have been met. However, in our respectful view, the Court of Appeal erred in its analysis of the significant differences between the purpose and scope of the two proceedings, and failed to consider the reasonable expectations of the parties about the impact of the proceedings on their broader legal rights. Further, it is unfair to use the decision of the

Chief of Police's designate to exonerate the Chief in a subsequent civil action. In the circumstances of this case, it was unfair to the appellant to apply issue estoppel to bar his civil action. We would allow the appeal.

## I. Background

[9] In January 2003, Mr. Penner was sitting in a Provincial Offences Court while his wife was on trial for a traffic ticket issued by Constable Nathan Parker. It was alleged that Mr. Penner disrupted the proceedings, refused to stop interrupting and to leave when asked to do so, and resisted arrest by Constable Nathan Parker. Constables Parker and Koscinski used force to remove him from the courtroom. Once outside the courtroom, they again used force and handcuffed him. Handcuffed, Mr. Penner was then taken to the Niagara Regional Police station by Constable Parker, where he was strip-searched and put into a holding cell. He sustained a black eye, numerous scrapes, a bruised knee, and a sore wrist, elbow and sore ribs. Mr. Penner was escorted by police to a hospital where he was examined and treated for injuries he had sustained during the arrest. Mr. Penner was subsequently returned to the police station and charged with causing a disturbance, breach of probation and resisting arrest. All charges were withdrawn by the Crown some five months later, in June 2003.

[10] After his arrest, Mr. Penner filed a public complaint under ss. 56 and 57 of the *PSA* against Constables Parker and Koscinski, alleging unlawful or unnecessary arrest, as well as use of unnecessary force. This led to a disciplinary



hearing for both police officers. In addition, in July 2003, Mr. Penner filed a statement of claim in the Ontario Superior Court of Justice in relation to the same arrest, by which a civil action was commenced against the Police Services Board, Constables Parker and Kosciński, the Chief of Police and the Court Security Officer. Mr. Penner claimed damages for unlawful arrest, false imprisonment, use of unnecessary force during and after the arrest, an unnecessary strip-search, failure on the part of other officers to prevent his mistreatment, failure to provide timely medical assistance, improper use of handcuffs, malicious prosecution and failure to co-operate with the investigation of his allegations.

## II. Summary of the Complaint Proceedings

### A. *Disciplinary Hearing Under the PSA (Decision of Superintendent R. J. Fitches, dated June 28, 2004; A.R. at pp. 99-116)*

[11] Under the *PSA*, a complaint is referred to the Chief of Police: s. 60(4). (All statutory references are to the legislation as it existed at the relevant time.) The Chief is obliged to have the complaint investigated (with some exceptions not relevant here) and, in light of the results, to order a hearing into the matter if he or she is of the opinion that the officer's conduct could constitute misconduct: ss. 64(1) and (7). If a hearing is ordered, it is conducted by the Chief or a designate on his or her behalf: ss. 64(7) and 76. The Chief also appoints the prosecutor: s. 64(8). The complainant is made a party by statute and has participatory rights (ss. 69(3) and (4); *Statutory Powers Procedure Act*, R.S.O. 1990, c. S.22, ss. 10 and 10.1), but no access

to discovery or production of documents beyond what the prosecution relies on, and there is no right to compel the officer in question to testify: *PSA*, s. 69(7). The issue at the hearing is whether the alleged misconduct has been “proved on clear and convincing evidence” (s. 64(10)) and, if so, what penalty is to be imposed on the officer under ss. 68(1) and (5). No remedy or costs may be awarded to the complainant.

[12] Here, disciplinary charges of unnecessary and unlawful arrest and use of unnecessary force were laid against two police officers: *General*, O. Reg. 123/98, Part V, *Code of Conduct*, Sch., s. 2(1)(g)(i) and (ii). The Chief appointed a retired police superintendent of the Ontario Provincial Police to conduct the hearing on his behalf. The hearing took place over the course of several days in 2004. Mr. Penner represented himself. As the complainant, he led evidence, cross-examined witnesses and made submissions. Several individuals who were present in the courtroom at the time of Mr. Penner’s arrest gave evidence before the hearing officer at the disciplinary hearing: the Prosecutor, Clerk of the court, Court Security Officer, two lay people awaiting their own respective trials, Mr. Penner, his wife, and Constables Parker and Koscinski.

[13] The hearing officer rejected much of the Penners’ testimony. Instead, he relied primarily on the testimony of other witnesses regarding the events surrounding Mr. Penner’s arrest and concluded that Constables Parker and Koscinski had reasonable grounds to arrest Mr. Penner for causing a disturbance in a public place.

On the issue of whether the officers had the lawful authority to make an arrest in a courtroom under the *Provincial Offences Act*, R.S.O. 1990, c. P.33, while a Justice of the Peace was presiding, the hearing officer concluded that the prosecutor had failed to provide sufficient evidence to show, “in any clear and cogent way, that Mr. Penner’s arrest was not authorized by statute” (p. 13; A.R., at p. 111). The hearing officer therefore dismissed the allegation of unlawful arrest and found the Constables not guilty of misconduct on this count.

[14] Turning to the allegation of unnecessary use of force, the hearing officer found that the Constables used a level of force that was necessary to gain control over Mr. Penner. Relying upon his review of the video record at the police station, he found that there was “no clear, convincing, or cogent evidence whatsoever” of unnecessary force there either (p. 16; A.R., at p. 114).

B. *Appeal Before the Commission (Decision dated April 22, 2005; A.R. at pp. 117-130)*

[15] As a party to the disciplinary hearing, Mr. Penner appealed the decision of the hearing officer to the Commission pursuant to s. 70(1) of the *PSA*. He took the position before the Commission that there were no legal grounds for his arrest.

[16] The Commission concluded that the arrest in the courtroom was unlawful because the Justice of the Peace gave no direction to the Constables to arrest Mr. Penner. The Commission was satisfied that there was clear and convincing

evidence that Constables Parker and Koscinski were guilty of misconduct due to an unlawful and unnecessary arrest, and thus any force used was unjustified and unnecessary.

C. *Appeal Before the Ontario Superior Court of Justice — Divisional Court (Parker v. Niagara Regional Police Service (2008), 232 O.A.C. 317)*

[17] On a further appeal by the Constables pursuant to s. 71(1) of the *PSA*, the Divisional Court held that the Commission unreasonably ignored findings of fact made by the hearing officer, and that the Commission was not justified in substituting their own findings. The Divisional Court concluded that the officers had legal authority to make the arrest and restored the hearing officer's finding that the Constables were not guilty of misconduct.

III. History of the Civil Action

[18] Mr. Penner initiated a civil action in July 2003 based on the same events that formed the subject matter of the disciplinary hearing, alleging, among other things, unlawful arrest and use of excessive force. After the decision from the disciplinary hearing was reinstated by the Divisional Court in January 2008, the respondents filed a motion to dismiss the civil action on the basis of issue estoppel.

A. *Ontario Superior Court of Justice (Fedak J.; 2009 CarswellOnt 9420)*

[19] The motion judge concluded that Mr. Penner was estopped from bringing these claims. Mr. Penner's civil action raised, among others, the same two questions that were already decided by the disciplinary hearing and restated by the Divisional Court: (1) was the arrest lawful; and (2) was unnecessary force used, either at the court or at the police station? The judge applied the test outlined in *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44, [2001] 2 S.C.R. 460, and concluded that the three preconditions for issue estoppel had been met.

[20] First, the hearing officer's decision was judicial and the hearing fulfilled the requirements of procedural fairness because Mr. Penner made the complaint, appeared before the decision maker, led evidence, examined witnesses and made written submissions. Second, the decision was final. And third, the same parties to the civil action were also engaged in the disciplinary hearing.

[21] As to the second part of the *Danyluk* test, the motion judge stated that there were no grounds to exercise his discretion to not apply issue estoppel.

[22] We are assuming but not deciding that the decision of the hearing officer was admissible before the motion judge for the purpose of considering issue estoppel. This issue was not addressed in the decisions below. Given our disposition, it is not necessary to decide the issue.

B. *Ontario Court of Appeal (Laskin J.A., Moldaver and Armstrong J.J.A. concurring; 2010 ONCA 616, 102 O.R. (3d) 688)*

[23] The Court of Appeal agreed with the motion judge that the three preconditions for issue estoppel had been met. However, the Court of Appeal found that the motion judge erred in failing to explain why there were no grounds to exercise his discretion to not apply issue estoppel. Accordingly, the Court of Appeal considered whether it would be unfair or unjust to apply issue estoppel despite the satisfaction of the three preconditions.

[24] The Court of Appeal acknowledged that the different purposes of the disciplinary hearing and the civil action weighed against the application of issue estoppel. The Court of Appeal concluded that the legislature did not intend to preclude Mr. Penner's civil action simply because he filed a public complaint under the *PSA* (para. 42). Further, the Court of Appeal considered that Mr. Penner had no financial stake in the disciplinary hearing (as the statute does not provide for compensation to a public complainant affected by police misconduct), although the strength of that factor was diminished, in its view, by the potential benefit to Mr. Penner had there been a finding of misconduct. Despite these factors weighing against the application of issue estoppel, the Court of Appeal concluded that they were not determinative considerations in the discretionary analysis.

[25] The Court of Appeal ultimately concluded that applying issue estoppel would not work an injustice and decided against exercising its discretion to not apply the doctrine based on the following factors:

- on issues of reasonable and probable grounds for arrest, as well as the use of excessive force during arrest, the hearing officer had as much expertise as a court (at para. 45);
- the disciplinary hearing had “all the hallmarks of an ordinary civil trial”, and, in this case, the different standards of proof in police disciplinary hearings and in civil actions are immaterial (at paras. 48-51);
- Mr. Penner actively participated in the disciplinary hearing (at para. 52); and
- the *PSA* provides an aggrieved party with the right to appeal to the Commission, a right which Mr. Penner exercised (at para. 53).

[26] Accordingly, the Court of Appeal dismissed the appeal.

#### IV. Standard of Review

[27] A discretionary decision of a lower court will be reversible where that court misdirected itself or came to a decision that is so clearly wrong that it amounts to an injustice: *Elsom v. Elsom*, [1989] 1 S.C.R. 1367, at p. 1375. Reversing a lower court’s discretionary decision is also appropriate where the lower court gives no or

insufficient weight to relevant considerations: *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3, at pp. 76-77.

## V. Analysis

### A. *Issue Estoppel: The Legal Framework*

[28] Relitigation of an issue wastes resources, makes it risky for parties to rely on the results of their prior litigation, unfairly exposes parties to additional costs, raises the spectre of inconsistent adjudicative determinations and, where the initial decision maker is in the administrative law field, may undermine the legislature's intent in setting up the administrative scheme. For these reasons, the law has adopted a number of doctrines to limit relitigation.

[29] The one relevant on this appeal is the doctrine of issue estoppel. It balances judicial finality and economy and other considerations of fairness to the parties. It holds that a party may not relitigate an issue that was finally decided in prior judicial proceedings between the same parties or those who stand in their place. However, even if these elements are present, the court retains discretion to not apply issue estoppel when its application would work an injustice.

[30] The principle underpinning this discretion is that "[a] judicial doctrine developed to serve the ends of justice should not be applied mechanically to work an



injustice”: *Danyluk*, at para. 1; see also *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63, [2003] 3 S.C.R. 77, at paras. 52-53.

[31] Issue estoppel, with its residual discretion, applies to administrative tribunal decisions. The legal framework governing the exercise of this discretion is set out in *Danyluk*. In our view, this framework has not been overtaken by this Court’s subsequent jurisprudence. The discretion requires the courts to take into account the range and diversity of structures, mandates and procedures of administrative decision makers however, the discretion must not be exercised so as to, in effect, sanction collateral attack, or to undermine the integrity of the administrative scheme. As highlighted in this Court’s jurisprudence, particularly since *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, legislation establishing administrative tribunals reflects the policy choices of the legislators and administrative decision making must be treated with respect by the courts. However, as this Court said in *Danyluk*, at para. 67: “The objective is to ensure that the operation of issue estoppel promotes the orderly administration of justice but not at the cost of real injustice in the particular case.”

B. *No Public Policy Rule Precluding Issue Estoppel with Respect to Police Disciplinary Hearings*

[32] The Ontario Court of Appeal applied a conventional analysis of issue estoppel, analyzing the various factors identified in *Danyluk*. Mr. Penner and a number of interveners ask this Court, as a matter of public policy, to prohibit the

application of issue estoppel to findings made in a police disciplinary hearing if it prevents a complainant from accessing the courts for damages on the same claims. They submit that the application of issue estoppel to police disciplinary hearings usurps the role of the courts as guardians of the Constitution and the rule of law, and that public policy requires that police accountability be subject to judicial oversight. These submissions were raised overtly for the first time before this Court.

[33] Police oversight is a complex issue that attracts intense public attention and differing public policy responses. Over time, legislative frameworks have been revised with the stated goals of promoting efficient police services and increasing the transparency and accountability of the public complaints process. In a 2006 case, the Ontario Divisional Court concluded that the legislature allowed for “institutional bias” in the manner of appointing a hearing officer under s. 76(1) of the *PSA*: *Sharma v. Waterloo Regional Police Service* (2006), 213 O.A.C. 371, at para. 27. The parties in this case do not contest that this is a legitimate exercise of the legislature’s authority, and the Divisional Court in *Sharma*, at para. 28, concluded that the ability to appoint “retired police officers not associated with this force is capable of founding such independence as necessary”. See also the Honourable Patrick J. Lesage, *Report on the Police Complaints System in Ontario* (2005), at pp. 77-78.

[34] The public complaints process incorporates a number of features to enhance public participation and accountability. For instance, pursuant to Part II of

the *PSA*, the Commission, as an agency comprised of civilian members, provides independent oversight of police services in Ontario to ensure fairness and accountability to the public. Part V sets out a comprehensive public complaints process by which members of the public can file official complaints against policies or services. Judicial oversight of disciplinary hearings under the *PSA* is available by statutory right of appeal to the Commission and then to the Divisional Court: see ss. 70(1) and 71(1).

[35] We are not persuaded that it is either necessary or desirable to create a rule of public policy excluding police disciplinary hearings from the application of issue estoppel. The doctrine of issue estoppel allows for the exercise of discretion to ensure that no injustice results; it calls for a case-by-case review of the circumstances to determine whether its application would be unfair or unjust.

### *C. Discretionary Application of Issue Estoppel*

#### (1) Approach to the Exercise of Discretion

[36] We agree with the decisions of the courts below that all three preconditions for issue estoppel are established in this case. Thus, this case turns upon the Court of Appeal's exercise of discretion in determining whether it would be unjust to apply the doctrine of issue estoppel in this case.

[37] This Court in *Danyluk*, at paras. 68-80, recognized several factors identified by Laskin J.A. in *Minott v. O'Shanter Development Co.* (1999), 42 O.R. (3d) 321 (C.A.), that are relevant to the discretionary analysis in the context of a prior administrative tribunal proceeding.

[38] The list of factors in *Danyluk* merely indicates some circumstances that may be relevant in a particular case to determine whether, on the whole, it is fair to apply issue estoppel. The list is not exhaustive. It is neither a checklist nor an invitation to engage in a mechanical analysis.

[39] Broadly speaking, the factors identified in the jurisprudence illustrate that unfairness may arise in two main ways which overlap and are not mutually exclusive. First, the unfairness of applying issue estoppel may arise from the unfairness of the prior proceedings. Second, even where the prior proceedings were conducted fairly and properly having regard to their purposes, it may nonetheless be unfair to use the results of that process to preclude the subsequent claim.

(a) *Fairness of the Prior Proceedings*

[40] If the prior proceedings were unfair to a party, it will likely compound the unfairness to hold that party to its results for the purposes of a subsequent proceeding. For example, in *Danyluk*, the prior administrative decision resulted from a process in which Ms. Danyluk had not received notice of the other party's allegations or been given a chance to respond to them.

[41] Many of the factors identified in the jurisprudence, including the procedural safeguards, the availability of an appeal, and the expertise of the decision maker, speak to the opportunity to participate in and the fairness of the administrative proceeding. These considerations are important because they address the question of whether there was a fair opportunity for the parties to put forward their position, a fair opportunity to adjudicate the issues in the prior proceedings and a means to have the decision reviewed. If there was not, it may well be unfair to hold the parties to the results of that adjudication for the purposes of different proceedings.

(b) *The Fairness of Using the Results of the Prior Proceedings to Bar Subsequent Proceedings*

[42] The second way in which the operation of issue estoppel may be unfair is not so much concerned with the fairness of the prior proceedings but with the fairness of *using their results* to preclude the subsequent proceedings. Fairness, in this second sense, is a much more nuanced enquiry. On the one hand, a party is expected to raise all appropriate issues and is not permitted multiple opportunities to obtain a favourable judicial determination. Finality is important both to the parties and to the judicial system. However, even if the prior proceeding was conducted fairly and properly having regard to its purpose, injustice may arise from using the results to preclude the subsequent proceedings. This may occur, for example, where there is a significant difference between the purposes, processes or stakes involved in the two proceedings. We recognize that there will always be differences in purpose, process and stakes between administrative and court proceedings. In order to establish

unfairness in the second sense we have described, such differences must be significant and assessed in light of this Court's recognition that finality is an objective that is also important in the administrative law context. As Doherty and Feldman J.J.A. wrote in *Schweneke v. Ontario* (2000), 47 O.R. (3d) 97 (C.A.), at para. 39, if courts routinely declined to apply issue estoppel because the procedural protections in the administrative proceedings do not match those available in the courts, issue estoppel would become the exception rather than the rule.

[43] Two factors discussed in *Danyluk* — the “wording of the statute from which the power to issue the administrative order derives” (paras. 68-70) and “the purpose of the legislation” (paras. 71-73), including the degree of financial stakes involved — are highly relevant here to the fairness analysis in this second sense. They take into account the intention of the legislature in creating the administrative proceedings and they shape the reasonable expectations of the parties about the scope and effect of the proceedings and their impact on the parties' broader legal rights: *Minott*, at pp. 341-42.

[44] For example, in *British Columbia (Minister of Forests) v. Bugbusters Pest Management Inc.* (1998), 50 B.C.L.R. (3d) 1 (C.A.), a defendant in a civil action relied on the decision of a Deputy Chief Forester to preclude the Crown's civil action for damages caused by a forest fire. The Court of Appeal upheld the chambers judge's decision to exercise discretion against applying issue estoppel. As the statute did not contemplate that the Deputy Chief Forester's decision about the cause of a fire

would be a final resolution of that issue, it followed that it “was not within the reasonable expectation of either party at the time of those proceedings” that it would be: *Bugbusters*, at para. 30.

[45] Thus, where the purposes of the two proceedings diverge significantly, applying issue estoppel may be unfair even though the prior proceeding was conducted with scrupulous fairness, having regard to the purposes of the legislative scheme that governs the prior proceeding. For example, where little is at stake for a litigant in the prior proceeding, there may be little incentive to participate in it with full vigour: *Toronto (City)*, at para. 53.

[46] There is also a general policy concern linked to the purpose of the legislative scheme which governs the prior proceeding. To apply issue estoppel based on a proceeding in which a party reasonably expected that little was at stake risks inducing future litigants to either avoid the proceeding altogether or to participate more actively and vigorously than would otherwise make sense. This could undermine the expeditiousness and efficiency of administrative regimes and therefore undermine the purpose of creating the tribunal: *Burchill v. Yukon (Commissioner)*, 2002 YKCA 4, [2002] Y.J. No. 19 (QL), at para. 28; *Minott*, at p. 341; and *Danyluk*, at para. 73. In the context of this appeal, it might discourage citizens from filing complaints about police misconduct.

[47] Thus, the text and purpose of the legislative scheme shape the parties’ reasonable expectations in relation to the scope and effect of the administrative

proceedings. They guide how and to what extent the parties participate in the process. Where the legislative scheme contemplates multiple proceedings and the purposes of those proceedings are widely divergent, the application of the doctrine in such circumstances might not only upset the parties' legitimate and reasonable expectations but may also undermine the efficacy and policy goals of the administrative proceedings by either encouraging more formality and protraction or even discouraging access to the administrative proceedings altogether.

[48] These considerations are also relevant to weighing another factor identified in *Danyluk*: the procedural safeguards available to the parties in the prior administrative process. The consideration of a party's decision whether to take advantage of procedural protections available in the prior proceeding cannot be divorced from the consideration of the party's reasonable expectations about what is at stake in those proceedings or the fundamentally different purposes of the two proceedings. The connections between the relevant considerations must be viewed as a whole.

(2) Fairness of Using the Disciplinary Finding to Preclude a Civil Action in this Case

[49] In our respectful view, the Court of Appeal failed to focus on fairness in the second sense we have just described. We do not quarrel with the finding of the Court of Appeal that the disciplinary hearing was itself fair and that Mr. Penner participated in a meaningful way. However, while the court thoroughly assessed the



fairness of the disciplinary proceeding itself, it failed to fully analyze the fairness of using the results of that process to preclude the appellant's civil claims, having regard to the nature and scope of those earlier proceedings and the parties' reasonable expectations in relation to them.

(a) *The Legislation Establishing the Disciplinary Hearing*

[50] As the Court of Appeal pointed out, “the legislature did not intend to foreclose [Mr. Penner’s] civil action simply because he filed a complaint under the [PSA]” (para. 42). The *PSA* features statutory privilege provisions, three of which are noteworthy here. Documents generated during the complaint process are inadmissible in civil proceedings: s. 69(9). Persons who carry out duties in the complaint process cannot be forced to testify in civil proceedings about information obtained in the course of their duties: s. 69(8). Finally, persons engaged in the administration of the complaints process are obligated to keep information obtained during the process confidential, subject to certain exceptions: s. 80. These provisions specifically contemplate parallel proceedings in relation to the same subject matter.

[51] Here, as recognized by the Court of Appeal, the legislation does not intend to foreclose parallel proceedings when a member of the public files a complaint. This would shape the reasonable expectations of the parties and the nature and extent of their participation in the process.

[52] Nothing in the legislative text, therefore, could give rise to a reasonable expectation that the disciplinary hearing would be conclusive of Mr. Penner's legal rights against the Constables, the Chief of Police or the Police Services Board in his civil action.

(b) *Reasonable Expectations of the Parties: Different Purposes of the Proceedings and Other Considerations*

[53] The Court of Appeal recognized that the purposes of a police disciplinary proceeding and a civil action were different and that this weighed against the application of issue estoppel.

[54] The police disciplinary hearing is part of the process through which the officers' employer decides whether to impose employment-related discipline on them. By making the complainant a party, the *PSA* promotes transparency and public accountability. However, this process provides no remedy or costs for the complainant. A civil action, on the other hand, provides a forum in which a party that has suffered a wrong may obtain compensation for that wrong.

[55] In addition to the legislative text, several other facts point to the same conclusion about the parties' reasonable expectations about the impact of the disciplinary hearing on the civil action.

[56] First, Mr. Penner's civil action was filed in July 2003; almost a year before the hearing officer released his decision on June 28, 2004. In *Danyluk*, the

civil proceedings had commenced before the administrative proceedings concluded. Binnie J. reasoned that this weighed against applying issue estoppel because “the respondents were well aware, in law and in fact, that they were expected to respond to parallel and to some extent overlapping proceedings” (para. 70).

[57] Second, Hermiston J., in the most pertinent Ontario case on the question of issue estoppel in the police disciplinary hearing context at the time, *Porter v. York (Regional Municipality) Police*, [2001] O.J. No. 5970 (QL) (S.C.J.), stated that an acquittal of an officer at a disciplinary hearing *did not* give rise to issue estoppel in relation to the same issues in a subsequent civil action.

[58] Third, a person in Mr. Penner’s position might well think it unlikely that a proceeding in which he or she had no personal or financial stake could preclude a claim for significant damages in his or her civil action.

(c) *Financial Stake in the Disciplinary Hearing*

[59] The Court of Appeal noted that the lack of a financial stake in the administrative proceeding, on its own, does not ordinarily resolve how the court should exercise its discretion in applying issue estoppel in a civil action. However, the Court of Appeal went further. With respect to the absence of a financial stake in the outcome of the disciplinary hearing, the court said, at para. 43:

This is an important consideration weighing against applying issue estoppel, but its strength is diminished by the potential indirect benefit to Mr. Penner from the disciplinary proceedings. If, for example, the hearing officer had found that the two police officers did not have reasonable and probable grounds to arrest Mr. Penner or used excessive force on him, those findings would likely have estopped the officers from asserting otherwise in Mr. Penner's civil action. In other words, issue estoppel works both ways.

[60] In our view, this analysis is flawed. It cannot necessarily be said that issue estoppel "works both ways" here. As the Court of Appeal recognized, because the *PSA* requires that misconduct by a police officer be "proved on clear and convincing evidence" (s. 64(10)), it follows that such a conclusion might, depending upon the nature of the factual findings, properly preclude relitigation of the issue of liability in a civil action where the balance of probabilities — a lower standard of proof — would apply. However, this cannot be said in the case of an acquittal. The prosecutor's failure to prove the charges by "clear and convincing evidence" does not necessarily mean that those same allegations could not be established on a balance of probabilities. Given the different standards of proof, there would have been no reason for a complainant to expect that issue estoppel would apply if the officers were acquitted. Indeed, in *Porter*, at para. 11, the court refused to apply issue estoppel following an acquittal in a police disciplinary hearing because the hearing officer's decision "was determined by a high standard of proof and might have been different if it had been decided based on the lower civil standard". Thus, the parties could not reasonably have contemplated that the acquittal of the officers at the disciplinary hearing would be determinative of the outcome of Mr. Penner's civil action.

[61] By assuming that issue estoppel “works both ways”, the Court of Appeal attached too little weight to the fact that Mr. Penner had no financial stake in the disciplinary hearing and wrongly concluded that he had more at stake than he could reasonably have thought at the time.

(d) *Issue Estoppel May Work to Undermine the Purpose of Administrative Proceedings*

[62] Another important policy consideration referred to earlier arises in this case: the risk of adding to the complexity and length of administrative proceedings by attaching undue weight to their results through applying issue estoppel. It is true that Mr. Penner could have participated even more fully in the proceedings by hiring counsel in an attempt to obtain a finding of misconduct so as to assist his civil action. But accepting this line of argument too readily may lead to unintended and undesirable results. It risks turning the administrative process into a proxy for Mr. Penner’s civil action. If it is before the hearing officer, and not the court, that an action for damages is to be won or lost, litigants in Mr. Penner’s position will have every incentive to mount a full-scale case, which would tend to defeat the expeditious operation of the disciplinary hearing.

[63] In the context of this appeal, it would also mean that the officers, who have much at stake in the hearing, would effectively be forced to face two prosecutors rather than one, given the presence of counsel for the complainant. We doubt that this would enhance either the efficacy of or the fairness to the officers in the

disciplinary hearing. Finally, a further significant risk is that potential complainants will simply not come forward with public complaints in order to avoid prejudicing their civil actions.

(e) *The Role of the Chief of Police*

[64] Under the public complaints process of the *PSA* at the relevant time, the Chief of Police investigated and determined whether a hearing was required following the submission of a public complaint. The Chief of Police appointed the investigator, the prosecutor and the hearing officer.

[65] It has been recognized that these arrangements are not objectionable for the purposes of a disciplinary hearing (as in *Sharma*). However, in our view, the fact that this decision was made by the designate of the Chief of Police should be taken into account is assessing the fairness of using the results of the disciplinary process to preclude Mr. Penner's civil claims. While this point was not clearly placed before the Court of Appeal, we think it is an important one.

[66] Applying issue estoppel against the complainant here had the effect of permitting the Chief of Police to become the judge of his own case, with the result that his designate's decision had the effect of exonerating the Chief and his police service from civil liability. In our view, applying issue estoppel here is a serious affront to basic principles of fairness.

[67] We emphasize that this unfairness does not reside in the Chief of Police carrying out his statutory duties. The parties accept that, given the statutory framework, there is no objection on fairness grounds to the role of the Chief and there is certainly no suggestion that he failed in any way to carry out his statutory duties. Further, no obvious unfairness arises if the disciplinary decision finds police misconduct, as this is a decision against the interests of the Chief or the Police Services Board. The unfairness that concerns us only arises at the point that the Chief's (or his designate's) decision that there was no police misconduct in a disciplinary context is used for the quite different purpose of exonerating him, by means of issue estoppel, from civil liability relating to the same matter.

[68] Had the Court of Appeal been given the opportunity to fully consider the importance of these points, our view is that it would have seen that applying issue estoppel against the appellant in the circumstances of this case was fundamentally unfair.

## VI. Conclusion

[69] Issue estoppel is about balancing judicial economy and finality and other considerations of fairness to the parties. It is a flexible doctrine that permits the court to respond to the equities of a particular case. We see no reason to depart from that approach and create a rule of public policy to preclude the application of issue estoppel in the context of public complaints against the police.

[70] Given the legislative scheme and the widely divergent purposes and financial stakes in the two proceedings, the parties could not reasonably have contemplated that the acquittal of the officers at the disciplinary hearing would determine the outcome of Mr. Penner's civil action. These are important considerations and the Court of Appeal did not take them into account in assessing the weight of other factors, such as Mr. Penner's status as a party and the procedural protections afforded by the administrative process. Further, the application of issue estoppel had the effect of using the decision of the Chief of Police's designate to exonerate the Chief in the civil claim.

[71] Applying issue estoppel against Mr. Penner to preclude his civil claim for damages in the circumstances of this case was fundamentally unfair.

## VII. Disposition

[72] We would allow the appeal with costs to the appellant throughout.

The reasons of LeBel, Abella and Rothstein JJ. were delivered by

LEBEL AND ABELLA JJ. —

[73] Litigation must come to an end, in the interests of the litigants themselves, the justice system and of our society. The finality of litigation is a



fundamental principle assuring the fairness and efficacy of the justice system in Canada. The doctrine of issue estoppel advances this principle. It seeks to protect the reasonable expectation of litigants that they are able to rely on the outcome of a decision made by an authoritative adjudicator, regardless of whether that decision was made in the context of a court or an administrative proceeding. The purposes of proceedings may vary like the governing procedures, but the principle of finality of litigation should be maintained.

[74] This appeal concerns the proper approach to the discretionary application of issue estoppel in the context of prior administrative proceedings dealing with police conduct.

[75] The applicable approach to issue estoppel was most recently articulated by this Court in 2011 in *British Columbia (Workers' Compensation Board) v. Figliola*, 2011 SCC 52, [2011] 3 S.C.R. 422. This is the precedent, therefore, that governs the application of the doctrine in this case.

[76] The key relevant aspect of this precedent is that it moved away from the approach taken in *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44, [2001] 2 S.C.R. 460, which enunciated a different test for the discretionary application of issue estoppel in the context of administrative tribunals. In so doing, *Danyluk* said that the approach should be “fairness” and set out a number of factors for assessing how “fairness” applied. In our view, these factors can no longer play the same role, nor be given the same weight, based on this Court’s subsequent jurisprudence starting with

*Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190. These factors have largely been overtaken by the Court's subsequent jurisprudence. For example, the breach of natural justice factor based on the procedural differences between courts and administrative tribunals and the expertise of the decision maker focus on concepts eschewed by this Court in *Dunsmuir* and *Smith v. Alliance Pipeline Ltd.*, 2011 SCC 7, [2011] 1 S.C.R. 160. The factors dealing with the wording of the statute and the purpose of the legislation are now referred to as the tribunal's mandate (*Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2011 SCC 53, [2011] 3 SCR 471).

[77] The approach of our colleagues is not only inconsistent with recent developments in the law of judicial review, it also raises potential difficulties in the branch of judicial review which is concerned with procedural fairness. Inasmuch as a process is considered to be unfair, the proper way to attack it would be to challenge it, under the principles of natural justice. In addition, the position of our colleagues may also ignore the ability of legislatures to design administrative processes and define the nature and limits of procedural fairness in the absence of constitutional considerations. Finally, the justice system faces important difficulties in respect of access to civil and criminal justice. To hold that the traditional model of civil and criminal justice is the golden standard against which the fairness of administrative justice is to be measured clearly does not meet the needs of the times from a policy perspective.

[78] The “twin principles” which underlie the doctrine of issue estoppel — “that there should be an end to litigation and . . . that the same party shall not be harassed twice for the same cause” (*Carl Zeiss Stiftung v. Rayner & Keeler Ltd. (No. 2)*, [1967] 1 A.C. 853 (H.L.), at p. 946) — are core principles which focus on achieving fairness and preventing injustice *by preserving the finality of litigation*. This, as the majority said in *Figliola*, is the case whether we are dealing with courts or administrative tribunals. Our colleagues’ approach undermines these principles and risks transforming issue estoppel into a free-floating inquiry into “fairness” and “injustice” for administrative tribunals and revives an approach that our Court refused to apply in *Figliola*.

#### I. Background

[79] The appellant, Wayne Penner, filed a public complaint against two police officers alleging that the officers were guilty of police misconduct under the *Police Services Act*, R.S.O. 1990, c. P.15, and the *Code of Conduct (General, O. Reg. 123/98, Part V, Sch.)*. His complaint alleged that the officers made an unlawful arrest and used unnecessary force, both during the arrest and at the police station. Mr. Penner also commenced a civil action in the Ontario Superior Court of Justice seeking damages against the same police officers for unlawful arrest, use of unnecessary force, false imprisonment, and malicious prosecution.

[80] In 2004, Mr. Penner’s complaint under the *Police Services Act* proceeded to a disciplinary hearing before a hearing officer, a retired superintendent of the

Ontario Provincial Police, who was appointed by the Chief of Police. The hearing took place over the course of several days, during which time 13 witnesses were called, exhibits were filed, including audio and video recordings of the relevant events, and each party including Mr. Penner had the opportunity to make submissions on points of law. Mr. Penner, as the complainant, had the option to retain legal counsel but chose to represent himself. He was active in the proceedings: he testified, participated in cross-examination, and provided written submissions.

[81] The hearing officer gave written reasons for his decision. In his reasons, he dismissed Mr. Penner's complaint and found the police officers not guilty of any misconduct, rejecting most of Mr. Penner's evidence, and preferring the testimony of the other witnesses, as well as the audio and video recordings of the events.

[82] He made the following findings of fact:

- He “was unable to see any evidence whatsoever of any excessive or unnecessary force used on Mr. Penner” (A.R., at p. 112 (emphasis added));
- “there is no clear, convincing or cogent evidence whatsoever to indicate that Mr. Penner was the victim of the unnecessary or unlawful application of force while in custody at the police station” (A.R., at p. 114 (emphasis added)); and
- he was “convinced that Mr. Penner was exhibiting behaviour that would be consistent with escalating hostility” and that therefore “the force that was used

during Mr. Penner's arrest was totally justified" (A.R., at p. 115) (emphasis added)).

[83] Mr. Penner appealed on the basis of these findings to the Ontario Civilian Commission on Police Services. The Commission overturned the decision of the hearing officer for the reason that the officers did not have the lawful authority to arrest Mr. Penner in a courtroom presided over by a Justice of the Peace.

[84] The respondents sought judicial review of the Commission's decision in the Ontario Divisional Court. The Divisional Court unanimously found the Commission's decision to be unreasonable and restored the hearing officer's decision (*Parker v. Niagara Regional Police Service* (2008), 232 O.A.C. 317). The Divisional Court found that the findings of fact made by the hearing officer were based on an "ample evidentiary foundation" and that there was "no manifest error, no ignoring of conclusive or relative evidence, nor any indication he misunderstood the evidence or drew erroneous conclusions from it" (para. 28). Mr. Penner did not appeal the decision of the Divisional Court to the Ontario Court of Appeal.

[85] Following the conclusion of the judicial review proceedings, the respondents (who are defendants in the civil action) brought a motion under Rule 21.01 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, to dismiss Mr. Penner's civil claims for unlawful arrest, use of unnecessary force, false imprisonment and malicious prosecution, all on the basis of issue estoppel. The

motion judge granted the Rule 21 motion and struck these allegations from Mr. Penner's statement of claim.

[86] The Ontario Court of Appeal dismissed Mr. Penner's appeal (2010 ONCA 616, 102 O.R. (3d) 688). The Court of Appeal agreed with the motion judge that the preconditions for issue estoppel had been met and found that there were no grounds to exercise their discretion not to apply the doctrine in this case.

[87] In his appeal to this Court, Mr. Penner does not directly challenge the Court of Appeal's finding that the preconditions for issue estoppel are satisfied. Rather, his appeal focuses on whether the Court of Appeal properly exercised its discretion to apply issue estoppel and argues that it should have declined to do so.

## II. Analysis

### A. *The Role of Issue Estoppel*

[88] The doctrine of issue estoppel seeks to protect the finality of litigation by precluding the relitigation of issues that have been conclusively determined in a prior proceeding. It arose as a doctrinal response to the "twin principles . . . that there should be an end to litigation and . . . that the same party shall not be harassed twice for the same cause" (*Carl Zeiss Stiftung*, at p. 946; K. R. Handley, *Spencer Bower and Handley: Res Judicata* (4th ed. 2009), at p. 4; Donald J. Lange, *The Doctrine of Res Judicata in Canada* (3rd ed. 2010), at pp. 4-7).

[89] These twin principles are often expressed in terms of the public interest in ensuring the finality of litigation, whether it is civil, criminal or administrative, and the individual interests of protecting the parties against the unfairness of repeated suits and prosecutions (see *EnerNorth Industries Inc., Re*, 2009 ONCA 536, 96 O.R. (3d) 1, at para. 53; *Handley*, at p. 4; *Lange*, at p. 7). However, it is clear that the overarching goal underlying both principles is to protect the fairness and integrity of the justice system by preventing duplicative proceedings. In other words, these principles are not competing values, but are fundamentally linked. As this Court recently recognized in *Figliola*, the ultimate goal of issue estoppel is not achieved by simply balancing fairness and finality, but in seeking to protect the “fairness of finality in decision-making and the avoidance of the relitigation of issues already decided by a decision-maker with the authority to resolve them” (para. 36 (emphasis added)).

[90] The foundational importance of finality to the judicial system and the individual parties was emphatically explained by Doherty J.A. in *Tsaoussis (Litigation Guardian of) v. Baetz* (1998), 41 O.R. (3d) 257 (C.A.), at pp. 264-65, leave to appeal refused, [1999] 1 S.C.R. xiv:

Finality is an important feature of our justice system, both to the parties involved in any specific litigation and on an institutional level to the community at large. For the parties, it is an economic and psychological necessity. For the community, it places some limitation on the economic burden each legal dispute imposes on the system and it gives decisions produced by the system an authority which they could not hope to have if they were subject to constant reassessment and variation: J.I. Jacob, *The Fabric of English Civil Justice*, Hamlyn Lectures 1987, at pp. 23-24.

The parties and the community require that there be a definite and discernible end to legal disputes. There must be a point at which the parties can proceed on the basis that the matter has been decided and their respective rights and obligations have been finally determined. Without a discernible end point, the parties cannot get on with the rest of their lives secure in the knowledge that the issue has finally been determined, but must suffer the considerable economic and psychological burden of indeterminate proceedings in which their respective rights and obligations are revisited and reviewed as circumstances change.

[91] As a species of *res judicata*, issue estoppel is conceptually related to the doctrines of cause of action estoppel, collateral attack, and abuse of process (Lange, at pp. 1-4). Both individually and together, these doctrines are of fundamental importance to the finality principle — they are “not merely . . . technical rule[s]” but rather, “[g]o to the heart of a system of civil justice that strives for the truth of the matter [and] recognizes that perfection is an unattainable goal and finality is a practical necessity” (*Revane v. Homersham*, 2006 BCCA 8, 53 B.C.L.R. (4th) 76, at para. 17).

#### B. *The Test for Issue Estoppel*

[92] The three preconditions for the operation of issue estoppel were set out by Dickson J. in *Angle v. Minister of National Revenue*, [1975] 2 S.C.R. 248: (1) whether the same question has been decided; (2) whether the judicial decision which is said to create the estoppel is final; and (3) whether the parties to the decision or their privies were the same in both proceedings (p. 254).



[93] However, as this Court recognized in *Danyluk*, courts retain a residual discretion not to apply issue estoppel in an individual case. Thus, in that case, this Court set out a two-step test for the application of issue estoppel:

The first step is to determine whether the moving party. . . has established the preconditions to the operation of issue estoppel set out by Dickson J. in *Angle, supra*. If successful, the court must still determine whether, as a matter of discretion, issue estoppel *ought* to be applied. [Emphasis in original; citations omitted; para. 33.]

[94] Although initially developed in the context of prior court proceedings, issue estoppel has long been applied to judicial or quasi-judicial decisions pronounced by administrative boards and tribunals. In the administrative law 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” (*Danyluk*, at para. 21).

[95] Consistent with the principles underlying issue estoppel, the fairness to the parties is focused on preventing parties from undergoing the burden of duplicative litigation — the objective of fairness is linked to the principle of finality. Indeed, in *Danyluk*, Binnie J., writing for the Court, focused on the importance of finality in litigation:

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. [para. 18]

[96] In other words, Binnie J. stated, “[a] litigant . . . is only entitled to one bite at the cherry” (para. 18). Underlying the application of issue estoppel in this context is the theory that “estoppel is a doctrine of public policy that is designed to advance the interests of justice” (para. 19).

[97] This Court revisited the exercise of discretion to apply issue estoppel in the context of prior administrative proceedings in *Boucher v. Stelco Inc.*, 2005 SCC 64, [2005] 3 S.C.R. 279. The Court acknowledged the different purposes of the competing procedures. Nevertheless, in that case considerable emphasis was placed on the stability and finality of decisions and the importance of deference and adequate alternative remedies in the administrative context as crucial considerations in determining whether issue estoppel should be applied in a particular case:

The situation in which the respondent could find itself if the principles of *res judicata* or issue estoppel were not applied illustrates the danger of a collateral attack and of the failure to avail oneself in a timely manner of the recourses against decisions of administrative bodies or courts of law that are available in the Canadian legal system. The stability and finality of judgments are fundamental objectives and are requisite conditions for ensuring that judicial action is effective and that effect is given to the rights of interested parties [Emphasis added; para. 35.]

[98] More recently, in *Figliola*, this Court considered the discretionary application of issue estoppel and its related doctrines in administrative proceedings. In that case, the majority emphasized the importance of the underlying principle of

finality to the integrity of the justice system, noting that the discretionary application of doctrines such as issue estoppel, “should be guided less by precise doctrinal catechisms and more by the goals of the fairness of finality in decision-making and the avoidance of . . . relitigation” (para. 36).

[99] In *Figliola*, the majority explicitly rejected an approach that suggests that fairness and finality are discrete objectives. Rather, the majority embraced the notion that preserving the finality of administrative adjudication and preventing relitigation better protected the fairness and integrity of the justice system and the interests of justice.

Justice is enhanced by protecting the expectation that parties will not be subjected to the relitigation in a different forum of matters they thought had been conclusively resolved. Forum shopping for a different and better result can be dressed up in many attractive adjectives, but fairness is not among them. [para. 36]

[100] This approach is consistent with the longstanding principles underlying issue estoppel and *res judicata* that emphasize and protect the finality of litigation.

### C. *Issue Estoppel and Administrative Decisions*

[101] This Court’s recent affirmation of the principle of finality underlying issue estoppel in *Figliola* is crucial to preserving the principles underlying our modern approach to administrative law. Our colleagues’ failure to safeguard the finality of litigation also substantially undermines these principles. In applying the

doctrine of issue estoppel, there is no reason to treat administrative proceedings differently from court proceedings in the name of “fairness”. To do so would undermine the entire system of administrative law.

[102] In *Rasanen v. Rosemount Instruments Ltd.* (1994), 17 O.R. (3d) 267 (C.A.), the purpose of administrative tribunals was described as follows:

[Administrative tribunals] were expressly created as independent bodies for the purpose of being an alternative to the judicial process, including its procedural panoplies. Designed to be less cumbersome, less expensive, less formal and less delayed, these impartial decision-making bodies were to resolve disputes in their area of specialization more expeditiously and more accessibly, but no less effectively or credibly.

. . . The methodology of dispute resolution in these tribunals may appear unorthodox to those accustomed only to the court-room’s topography, but while unfamiliar to a consumer of judicial justice, it is no less a form and forum of justice to *its* consumers. [Emphasis in original; pp. 279-80.]

[103] In applying issue estoppel in the context of administrative law, differences in the process or procedures used by the administrative body should not be used to override the principle of finality. The different purposes of administrative tribunal proceedings should not be invoked either. Otherwise, every substantive legal issue could be reconsidered in subsequent or concurrent civil proceedings, as it could almost always be said that such proceedings have different purposes. The discretionary application of issue estoppel in the administrative law context recognizes that the full panoply of protections and procedures may not exist in an administrative proceeding, but that neither a lack of such protections nor the different

objectives of an administrative process are, by themselves, sufficient to warrant the exercise of the court's discretion. In other words, the moving party cannot seek to "rely on general fairness concerns which exist whenever the finding relied on emanates from a tribunal whose procedures are summary and whose tasks are narrower than those used and performed by the courts" (*Schweneke v. Ontario* (2000), 47 O.R. (3d) 97 (C.A.), at para. 41).

[104] The majority in *Figliola* consistently referred to tribunal and court decisions together when discussing the applicable principles, including the exercise of discretion, and never distinguished between them. The idea that discretion should be exercised more broadly when dealing with administrative tribunals was found only in the dissent (para. 61).

[105] The policy objectives underlying issue estoppel — avoiding duplicative litigation, inconsistent results, undue costs, and inconclusive proceedings — are enhanced by acknowledging administrative decisions as binding in appropriate circumstances. As this Court recognized in *Figliola*,

[r]espect for the finality of a[n] . . . administrative decision increases fairness and the integrity of . . . administrative tribunals and the administration of justice; on the other hand, relitigation of issues that have been previously decided in an appropriate forum may undermine confidence in this fairness and integrity by creating inconsistent results and unnecessarily duplicative proceedings (*Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63, [2003] 3 S.C.R. 77, at paras. 38 and 51). [para. 34].

[106] Moreover, the principle of finality underlying issue estoppel is directly linked to the principles of deference in the administrative law. The application of issue estoppel recognizes that “[p]arties should be able to rely particularly on the conclusive nature of administrative decisions . . . since administrative regimes are designed to facilitate the expeditious resolution of disputes” (*Figliola*, at para. 27). It also acknowledges the principle of deference which underlies the judicial review jurisprudence of this Court and the importance and values that it attaches to administrative decisions (see, for example, *Newfoundland and Labrador Nurses’ Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 S.C.R. 708, at para. 11). It also gives effect to the “adequate alternative remedy” principle, which requires parties to use the appropriate judicial review or appeal mechanism to challenge the validity or correctness of an administrative decision, by preventing parties from circumventing these processes to seek a different result in a new forum. The broad exercise of the residual discretion not to apply issue estoppel in the present case can hardly be reconciled with the importance of deference to administrative decisions which underlies the judicial review jurisprudence of this Court. In so doing, our colleagues deny the value and importance of administrative adjudication, which this Court has so strongly emphasized on many occasions.

[107] The court’s residual discretion not to apply issue estoppel should not be used to impose a particular model of adjudication in a manner inconsistent with principles of deference that lie at the core of administrative law. Where the legislature has provided a tribunal with the requisite authority to make a decision, and

that decision is judicial or quasi-judicial in nature, it would run counter to the principles of deference to broaden the court's discretion in a manner that would, in most cases, permit an unsuccessful party to circumvent judicial review and turn, instead, to the courts for a re-adjudication of the merits. As the Ontario Court of Appeal found in *Schweneke*, an overly broad application of discretion in the administrative context would "swallow whole the rule that makes the doctrine applicable to findings made by tribunals whose processes, although judicial, are less elaborate than those employed in civil litigation" (para. 39).

[108] This leads us to consider how the principles set out in *Figliola* should be applied to this case.

#### D. *Application*

[109] The thrust of Mr. Penner's submissions on appeal is that the police disciplinary proceedings lacked the "hallmarks of an ordinary civil trial". In particular, he emphasizes that he had limited rights of participation as a public complainant, that the statutory scheme is incompatible with the application of issue estoppel, that the hearing officer lacked true independence, and that the standard of proof in the disciplinary proceedings was higher than a civil trial. For these reasons, he argues, the Court should exercise its discretion not to apply issue estoppel in this case.

[110] Mr. Penner's submissions are completely inconsistent with this Court's prior jurisprudence and the approach to issue estoppel recently articulated by this Court in *Figliola*. The Court's residual discretion not to apply issue estoppel should be governed by the interests of fairness in preserving the finality of litigation. It should not be exercised in a manner that would impose a particular model of adjudication, undermine the integrity of administrative tribunals, and deny their decisions the deference owed to them under the jurisprudence of this Court. Applying these principles to the case before us, there is no reason to exercise our discretion not to apply issue estoppel.

[111] The disciplinary hearing conducted by the hearing officer is designed to be an independent, fair, accountable and binding adjudicative process. It was conducted in accordance with the requirements prescribed by the statute and principles of procedural fairness: see *Police Services Act*, ss. 64(7) to (10), 69; *Statutory Powers Procedure Act*, R.S.O. 1990, c. S. 22. The hearing officer considered sworn testimony and written submissions. Mr. Penner, as a party to the proceedings, had the opportunity to lead evidence, cross-examine witnesses, and make submissions. He had the option to retain legal counsel. Judicial oversight of the proceedings was available under a statutory right of appeal — a right Mr. Penner exercised in this case and which ultimately led to a review of the hearing officer's decision by the Divisional Court.



[112] Thus, the hearing officer's decision was made in circumstances in which Mr. Penner knew the case he had to meet, had a full opportunity to meet it, and lost. Had he won, the hearing officer's decision would have been no less binding.

[113] This *quid pro quo* of issue estoppel, in turn, bears directly on Mr. Penner's argument that the purpose of the proceedings was different and that, because the disciplinary hearing did not permit him to seek damages, he should be permitted to pursue a civil action. As the Court of Appeal found, the different purposes of the two proceedings is not determinative in this case, since Mr. Penner had the opportunity to receive an indirect financial benefit in the disciplinary hearing. Had the hearing officer made a positive finding of police misconduct, the application of issue estoppel would have assisted the complainant in a subsequent civil action for damages. Essentially, in such a case, the complainant would be relieved of having to prove liability and the civil case would proceed straight to an assessment of damages. In other words, as the Court of Appeal noted, in the present case, "issue estoppel works both ways" (para. 43).

[114] Mr. Penner further relies on specific provisions of the *Police Services Act*, which he states are incompatible with the application of issue estoppel, since they specifically contemplate parallel civil proceedings. He relies, in particular, on ss. 69(8), 69(9) and 80 (now ss. 83(7), 83(8) and 95), which deal with statutory privilege and confidentiality. We do not find this to be persuasive. These provisions of the *Police Services Act* are designed to ensure the integrity of the disciplinary process.

They do not suggest that issue estoppel cannot apply to bar civil proceedings. As Lange observes, where legislatures intend issue estoppel not to apply to an administrative decision, there should be clear language in the statute to foreclose this possibility (p. 122).

[115] Even in cases where the wording of the statute specifically contemplates corollary civil rights or remedies, the courts have applied issue estoppel. For example, in *Wong v. Shell Canada Ltd* (1995), 174 A.R. 287, leave to appeal refused, [1996] 3 S.C.R. xiv, the Alberta Court of Appeal considered whether s. 9(1)(a) of the *Employment Standards Code*, S.A. 1988, c. E-10.2, precluded the application of issue estoppel. Section 9(1)(a) provided that “[n]othing in this Act affects any civil remedy that an employee has against his employer . . .”. The employee argued that s. 9(1) of the *Code* was intended to preserve a civil action regardless of the fact that he had sought relief under the *Code* and obtained a final decision. The Court of Appeal rejected this interpretation:

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. [para. 14]

(See also *Rasanen*).

[116] Similarly, the provisions relied upon by Mr. Penner in this case, which contemplate civil proceedings, do not specifically preclude the application of issue estoppel by a court.

[117] Moreover, to interpret these provisions in a manner that would preclude the application of issue estoppel would be contrary to the purposes of the *Police Services Act*, which is designed to increase public confidence in the provision of police services, including the processing of complaints. Preventing the courts from applying issue estoppel in the context of disciplinary proceedings would run counter to this purpose — decisions would not be final or binding and would be open to relitigation and potentially inconsistent results. This would undermine public confidence in the complaints process and in integrity of the administrative decision-making process more broadly.

[118] Mr. Penner further takes issue with the independence of the hearing officer in this case. In particular, Mr. Penner submits that because the *Police Services Act* required that the Chief of Police appoint the investigator, prosecutor, and hearing officer to handle the complaint, the disciplinary hearing process lacks an independent and unbiased adjudicator. This issue was raised *de novo* on Mr. Penner's appeal to this Court.

[119] The method used to appoint an adjudicator should not provide a basis for the exercise of the court's discretion not to apply issue estoppel in this case.

[120] In 2004, the Government of Ontario commissioned a report from the Honourable Patrick J. LeSage, Q.C., to review the complaints process under the *Police Services Act* (see the Honourable Patrick J. Lesage, *Report on the Police Complaints System in Ontario* (2005)). The *LeSage Report* was published in 2005 and made a number of recommendations with respect to the investigation and hearing of police complaints. In the *Report*, LeSage explicitly rejected concerns with respect to the independence of investigators and adjudicators in the complaints process:

I also heard submissions advocating an independent hearings process where the matter has arisen from a public complaint. This would include fully independent prosecutions and fully independent adjudication. I appreciate the demands for greater independence in the hearings process. Indeed, there is much merit to the arguments in support of independence. Conflicts of interest need to be avoided. It would be inappropriate for hearings to be staffed entirely by members of the police service who interact with each other on a daily basis. This problem is especially acute in small police services where outside prosecutors and hearing officers would be necessary. This is already addressed in the current legislation by allowing chiefs of police to appoint prosecutors and hearing officers from outside the police service. [Emphasis added; pp. 77-78.]

[121] In short, the *LeSage Report* upheld the method used to appoint investigators and adjudicators under the *Police Services Act*. In fact, LeSage found that concerns with respect to conflicts of interest and independent adjudication were already sufficiently addressed by the very system of appointment Mr. Penner seeks to challenge in this appeal.

[122] In any event, the Chief of Police played no role in the events that formed the basis of the complaints in this case. He designated an outside prosecutor and an

independent adjudicator who was a retired superintendent from another police service. There was no challenge to the hearing officer's impartiality at the disciplinary hearing itself or at any of the proceedings below. There is no evidence that the Chief of Police interfered in any manner with the work of the adjudicator. We must add that similar methods of appointment are quite common in labour law, as well as in other areas of law, and are not seen as an obstacle to independent adjudication. Tenure is not the sole marker and condition of adjudicative independence.

[123] Finally, Mr. Penner argues that issue estoppel should not apply in this case since the burden of proof is different in civil proceedings. The statutory standard of proof under the *Police Services Act* requires that a finding of misconduct against a police officer be "proved on clear and convincing evidence" (s. 64(10); now s. 84(1)). This standard is higher than the balance of probabilities standard required in a civil trial.

[124] Mr. Penner relies on *Porter v. York (Regional Municipality) Police*, [2001] O.J. No. 5970 (QL), where the Ontario Superior Court of Justice reasoned that because the hearing officer's decision "was determined by a high standard of proof and might have been different if it had been decided based on the lower civil standard" (at para. 11), issue estoppel should not preclude a subsequent civil action.

[125] Unlike *Porter*, however, the standard of proof was immaterial to the hearing officer's decision in this case. The hearing officer made unambiguous

findings of fact against Mr. Penner. His findings are unequivocal: he found “no . . . evidence whatsoever” to support Mr. Penner’s claims (A.R., at p. 114 (emphasis added)). On judicial review, the Divisional Court found that there was no error in these factual findings and that they were supported by “an ample evidentiary foundation” (para. 28). The burden of proof is therefore irrelevant in this case — there is simply *no evidence* to support Mr. Penner’s claims on any standard.

[126] We see no reason to allow Mr. Penner to circumvent the clear findings of the hearing officer and put the parties through a duplicative proceeding, which, in this case, would inevitably yield the same result.

[127] We would therefore dismiss the appeal with costs throughout.

*Appeal allowed with costs throughout, LEBEL, ABELLA and ROTHSTEIN JJ. dissenting.*

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