

ISSUE ESTOPPEL WHIPLASH: SUPREME COURT DIVIDED ON FAIRNESS

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The recently released split decision of the Supreme Court of Canada in *Penner v Niagara (Regional Police Services Board)*¹ dealt with the proper analytical framework for application of the rule against collateral attack of a judicial decision issued by an administrative body.

A comparison of the majority and the dissenting judgments in *Penner* starkly reveals the enduring tension between two fundamental, but often competing, interests of our judicial process: finality and fairness. Reading *Penner*, one cannot help but note the irony that our highest court has shifted course, in a material way, three times in a dozen years (including twice within the past two years) on the question of how the interest of finality of judicial decisions should be promoted and, at the same time, reconciled with that of fairness of the result.

To properly understand *Penner*, some context is needed.

A fundamental principle of our system of justice is that a case involving a given point should be decided in the same way as another case involving the same point. This rationale is concerned with promotion of the interests of certainty, predictability, finality and respect for the administration of justice. As it was put by Benjamin Cardozo in his seminal treatise, “[a]dherence to precedent must then be the rule rather than the exception if litigants are to have faith in the even-handed administration of justice in the courts.”²

This rationale underlies, in somewhat different ways, both the doctrine of *stare decisis* and that of *res judicata*, of which issue estoppel is one form. The latter has been even more broadly expressed as the rule against

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¹ 2013 SCC 19, (2013), 356 DLR (4th) 595 [*Penner*].

² Benjamin N Cardozo, *The Nature of the Judicial Process* (New Haven and London: Yale University Press, 1921) at 33-34.

collateral attack on a judicial decision.³ The applications of both doctrines often conflict, however, with another interest of our system of justice – the fairness of the judicial decision according to the perception of the losing litigant, regarded by some as the most important person in the courtroom.⁴

These competing interests were front and centre in the *Penner* decision of April 2013, the most recent in a series of decisions of the Supreme Court of Canada where the Court has been required to wrestle with how adjudicative tribunals in Canada should reconcile the interest of finality with that of fairness of judicial decisions, in particular those made by administrative authorities rather than courts.

For the purposes of this note, the story begins in 2001 with the unanimous decision of the Supreme Court of Canada in *Danyluk v Ainsworth Technologies*.⁵ In that case, an administrative tribunal had decided that an applicant for statutory payments arising from her alleged dismissal had in fact resigned, and dismissed the application. Before the tribunal's decision was made, the employee commenced a civil action for damages for wrongful dismissal. The employee did not respond to the position advanced by the employer in the administrative proceeding, and failed to avail herself of the statutory right of judicial review; there was in this case no appeal as of right. The question was whether the court action was properly barred by application of the doctrine of issue estoppel.

Binnie J, writing for the Court, noted the compelling importance of finality in litigation but held that, given the circumstances of the case, a re-examination of basic principles was warranted. He concluded that this was not a proper case for application of the doctrine of issue estoppel, observing that “a judicial doctrine developed to serve the ends of justice should not be applied mechanically to work an injustice.”⁶ Binnie J held that even where the well-established requirements for issue estoppel apply, the court must still determine, as a matter of discretion, whether issue estoppel ought to be applied.

Although holding that the preconditions to issue estoppel were met, Binnie J concluded that judicial discretion to refuse to apply issue estoppel

³ See *Danyluk v Ainsworth Technologies*, [2001] 2 SCR 460 at 474 [*Danyluk*] for a description of the relationships between these expressions of the doctrine of *stare decisis*.

⁴ This observation was made by Sir Robert Megarry, eminent British jurist, author and lecturer, and was quoted with approval by Catzman JA in *R v Brown* (2002), 61 OR (3d) 619 (CA).

⁵ *Danyluk*, *supra* note 3.

⁶ *Ibid* at para 1.

was necessarily broader in relation to prior decisions of administrative tribunals than decisions of courts. He held that the list of factors that may properly be considered in the exercise of this discretion was open, and that the objective was to ensure that the operation of issue estoppel promoted the orderly administration of justice but not at the cost of real injustice in the particular case.⁷ Binnie J exercised his discretion to refuse to apply issue estoppel in the circumstances, and all of the six other members of the Court agreed.

The *Danyluk* decision was not the last word. In a 2003 decision in *Toronto (City) v CUPE, Local 79*,⁸ Arbour J, writing for a majority of the Supreme Court of Canada,⁹ decided that a criminal conviction should be taken as conclusively proving the underlying conduct so as to preclude relitigation where to permit relitigation would violate such principles as judicial economy, consistency, finality and the integrity of the administration of justice. The Court applied the doctrine of abuse of process (where the mutuality requirement for issue estoppel was absent) to preclude a collateral attack on the initial decision, and held that the discretionary factors described in *Danyluk* to prevent issue estoppel from operating in an unfair way were equally available to prevent the abuse of process doctrine from achieving a similarly undesirable result.

In 2005, the question arose again in the Supreme Court of Canada in *Boucher v Stelco*¹⁰ where LeBel J, writing for the Court, held that the type of action brought by the appellants involved an impermissible collateral attack on the decision of the statutory body. Nothing was said in the reasons for judgment about the second stage of the process as described in *Danyluk*, the exercise of discretion to refuse to apply issue estoppel where required by the interest of fairness.

In 2011, however, in *British Columbia (Workers Compensation Board) v Figliola*,¹¹ the Supreme Court of Canada was called upon again to revisit the two-stage analytical framework established in *Danyluk*. In that case, the complainants sought compensation from a statutory board for chronic pain and they received a fixed compensation award. They appealed to the board's Review Division, arguing that the award was discriminatory under the British Columbia *Human Rights Code*.¹² The Review Division

⁷ *Ibid* at para 67.

⁸ [2003] 3 SCR 77 [*CUPE*].

⁹ A concurring judgment was written by LeBel J in *CUPE, ibid*, concurred in by Deschamps J, that also addressed other issues in addition to the abuse of process doctrine.

¹⁰ [2005] 3 SCR 279 [*Boucher*].

¹¹ [2011] 3 SCR 422 [*Figliola*].

¹² RSBC 1996, c 210.

disagreed and dismissed the appeal. The complainants appealed further to an administrative appeal tribunal but, before the appeal was heard, the enabling legislation was amended, removing the appeal tribunal's authority to apply the Code. Judicial review was still available. Instead of applying for judicial review, however, the complainants filed new complaints with the Human Rights Tribunal, repeating the same arguments that had been made before the Review Division. The Human Rights Tribunal dismissed an application (founded upon the conclusive effect of the prior decision of the Review Division) to challenge its jurisdiction, and held that a full hearing was appropriate. This decision was set aside through a judicial review application, but restored by the British Columbia Court of Appeal. The Supreme Court of Canada appeal followed.

The composition of the nine-justice panel that heard and decided *Figliola* was very different from the panel that had decided *Danyluk* one decade earlier.¹³ In *Figliola*, unlike in *Danyluk*, *CUPE* and *Boucher*, the result was divided. The decision was split five to four, and two justices who had been part of the unanimous panel in *Danyluk*, McLachlin CJC and Binnie J, were now in the minority.

Abella J wrote the majority judgment and concluded that the statutorily conferred discretion not to hear a complaint that has been “appropriately dealt with in another proceeding” (the language of the statutory provision) should be applied narrowly:

Read as a whole, s. 27(1)(f) does not codify the actual doctrines or their technical explications, it embraces their underlying principles in pursuit of finality, fairness, and the integrity of the justice system by preventing unnecessary inconsistency, multiplicity and delay. That means the Tribunal 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 the relitigation of issues already decided by a decision-maker with the authority to resolve them. 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.¹⁴

This passage shows the differences in approach, though perhaps not a full-fledged rift, that had developed within the Court. The concern addressed by Binnie J in *Danyluk* about fairness of the result (achieved through discretion not to strictly apply the doctrine of issue estoppel) was

¹³ Only three of nine justices had been members of the panel that decided *Danyluk*, *supra* note 3: McLachlin CJC and Binnie and LeBel JJ.

¹⁴ *Figliola*, *supra* note 11 at para 36.

superseded by a different concern expressed by Abella J in *Figliola*, but couched in similar language: “fairness of finality in decision-making.” Through the use of this phrase, the majority in *Figliola* had promoted the virtue of a different form of fairness, in contrast to “fairness of the result,” the sense in which the word was used in *Danyluk*.

Having addressed the statutorily conferred discretion, Abella J turned to the *Danyluk* factors, and commented that, given the statutory framework in that case, it was not clear that these factors even applied. Abella J concluded that, in any event, there were no factors that justified relitigation of the issues that had been decided in the first instance.

In his dissenting judgment in *Figliola*, Cromwell J¹⁵ expressed at the outset his disagreement with Abella J’s understanding that preventing abuse of the decision-making process lies at the heart of the common law finality doctrines, observing that the common law has consistently seen these finality doctrines as being concerned with striking a balance between the important goals of fairness and finality, more broadly considered. He addressed the use by Abella J of the “fairness of finality” construct: “Finality is one aspect of fairness, but it does not exhaust that concept or trump other considerations.”¹⁶ Cromwell J reviewed in detail the non-exhaustive list of factors described in *Danyluk*. He commented on the characterization of *Danyluk* by Abella J as simply emphasizing the importance of finality in litigation, saying this was “an incomplete account of the Court’s approach in that case,”¹⁷ and he criticized the limited consideration by Abella J of the factors identified in *Danyluk* as they bear upon the exercise of discretion.

Cromwell J noted that Arbour J had acknowledged in 2003 in *CUPE* that the *Danyluk* factors applied equally to prevent the doctrine of abuse of process – intended to preclude an improper collateral attack on a judicial decision – from operating in an unjust or unfair way.¹⁸ Cromwell J concluded that the Court’s jurisprudence recognized, in an administrative law context, that common law finality doctrines must be applied flexibly to maintain the necessary balance between finality and fairness. This, he wrote, is done through the exercise of discretion, taking into account a wide variety of factors which are sensitive to the particular administrative law context in which the case arises and to the demands of substantial justice in the particular circumstances of each case.

¹⁵ Joined by McLachlin CJC and by Binnie and Fish JJ.

¹⁶ *Figliola*, *supra* note 11 at para 58.

¹⁷ *Ibid* at para 63.

¹⁸ *Ibid* at para 64.

The philosophical divisions within the Court were now becoming clear.

Abella J in *Figliola* did not purport to expressly overrule *Danyluk*, but questioned its usefulness because of the language of the applicable statute and, having done so, limited its application in that case. Without the reasons given by LeBel and Abella JJ in their dissenting judgment in *Penner*, the decision in *Figliola* might have stood side by side with that in *Danyluk* with little controversy.

Nevertheless, the 2011 decision in *Figliola*, reached by a one-judge majority of the full Court, seemed to have tipped the scales in favour of an approach of promoting the interests of certainty, predictability, and finality of judicial decisions (where the rule against collateral attack was raised) at the expense of the approach in *Danyluk* that favoured a more balanced consideration of non-exhaustive discretionary factors to prevent application of the rule (whether based upon issue estoppel or abuse of process) where necessary to achieve a fair result. The discretion not to apply the rule now appeared to be more limited. The notion of “fairness of finality” expressed in the majority judgment had become part of the judicial lexicon for future cases. Courts and administrative bodies in Canada now had guidance from our highest Court on how to balance the competing interests in such cases. Or did they?

The Supreme Court of Canada has traditionally shown deference to its own decisions, even where the composition of the Court had changed, especially where the precedent is a recent decision, the issues were fully canvassed and relevant underlying circumstances have not materially changed. In a 2011 decision, McLachlin CJC, writing for a majority of the Supreme Court of Canada, noted the seriousness of overturning recent precedents of the Court representing the considered views of firm majorities, particularly those of recent vintage.¹⁹ In his dissenting judgment in the same case, Rothstein J acknowledged that it was not appropriate for the Court to overrule its own precedent simply because of the views of newly appointed judges.²⁰

It would not be long, however, before the Court was again called upon to consider the analytical framework to be applied to balance the interests of finality and fairness in a case involving relitigation of a decision of an administrative body.

¹⁹ *Ontario (Attorney General) v Fraser*, [2011] 2 SCR 3 at paras 56-60 [*Fraser*].

²⁰ *Ibid* at para 130.

In *Penner*, the complainant was arrested for disruptive behaviour in an Ontario courtroom. He filed a complaint against two police officers under a provincial statute and also started a civil action claiming damages arising out of the same incident. The hearing officer found the police officers not guilty of misconduct and dismissed the complaint. The decision was appealed to a statutory appeal tribunal which reversed the decision of the hearing officer and then to the Ontario Divisional Court which restored the initial decision. The officers then successfully moved to have many of the claims in the civil action struck on the basis of issue estoppel. The Court of Appeal for Ontario concluded that application of the doctrine of issue estoppel would not work an injustice in this case and upheld its application.

An appeal to the Supreme Court of Canada was heard in January 2012 and decided on April 5, 2013 by a panel of seven. The panel did not include Deschamps and Charron JJ, who had formed part of the majority of the Court in *Figliola*, or Binnie J, who had been part of its minority. It did include a new member of the Court, Karakatsanis J. The five judges who had prevailed in *Figliola* were down to three on the panel deciding *Penner*, the same number as those who had been in the minority in *Figliola*. Karakatsanis J would thus be the swing vote.

The majority judgment was written by Cromwell and Karakatsanis JJ, and was supported by McLachlin CJC and by Fish J. The majority agreed that the preconditions for issue estoppel had been met, and considered whether the Court of Appeal erred in exercising its discretion to apply issue estoppel to bar the civil claims. The appellant had contended that the application of issue estoppel in this context would be unfair because of the public interest in promoting police accountability.

The majority of the Court addressed the doctrine of issue estoppel, and wrote that the principle underlying the exercise of discretion not to apply the doctrine where to do so would work an injustice was the one expressed by Binnie J in *Danyluk*, that the doctrine “should not be applied mechanically to work an injustice.” The majority followed the analytical framework approved in *Danyluk*, which involved a case-by-case review of relevant circumstances to determine whether the application of the doctrine would be unjust or unfair.

Fairness was considered in two ways, first, as arising from the prior proceedings themselves and, second, as related to whether it would be fair to use the results of the prior process to preclude the subsequent claim, particularly where there is a significant difference in purpose, process or stakes between administrative and court proceedings. In addressing factors bearing upon fairness, the majority also considered the wording of the

statute from which the power to issue an administrative order arose, the purpose of the legislation, the reasonable expectations of the parties, the procedural safeguards available in the prior administrative process and the financial stake in the prior process. The majority did not, however, directly consider the question of “fairness of finality,” at least in the way proposed by *Abella J in Figliola*.

The majority held that applying issue estoppel to preclude the civil claim was fundamentally unfair and allowed the appeal.

In its consideration of the two-stage process set forth in *Danyluk*, the majority did not find it necessary to distinguish the much narrower approach to the discretion not to apply issue estoppel that was the basis for the decision in *Figliola*. In an indirect and cursory reference to the possibly conflicting jurisprudence, the majority, in relation to the legal framework set out in *Danyluk*, dismissed the notion of a conflict by simply stating, “In our view, this framework [in *Danyluk*] has not been overtaken by this Court’s subsequent jurisprudence.”²¹ Remarkably, the majority did not even mention the *Figliola* precedent in its lengthy reasons for decision.

The three dissenting judges who participated in *Penner* and who formed part of the majority in *Figliola*, decided only two years earlier, would surely have expected the majority to have attempted to reconcile their decision with the very different approach, emphasizing the “fairness of finality” principle, that was at the heart of the decision in *Figliola*. LeBel and Abella JJ, who wrote the dissenting judgment and were joined by Rothstein J, made it clear that they regarded the failure of the majority to have done so as a serious error.

At the beginning of their dissenting judgment, the minority wrote that the applicable approach to issue estoppel was most recently articulated in *Figliola*, and that this precedent, therefore, governed the application of the doctrine of issue estoppel in this case.²² They noted that the key relevant aspect of *Figliola* was that it moved away from the approach taken in *Danyluk*, and enunciated a different test for the discretionary application of issue estoppel in the context of administrative tribunals.²³ They wrote that the factors set out in *Danyluk* had largely been overtaken by the Court’s subsequent jurisprudence, and were critical of the majority for following an approach that was inconsistent with this jurisprudence.²⁴

²¹ *Penner*, *supra* note 1 at para 31.

²² *Ibid* at para 75.

²³ *Ibid* at para 76.

²⁴ *Ibid*.

The minority repeated that the core principles of finality to litigation and protecting a party from exposure twice to the same claim focused on achieving fairness and preventing injustice “*by preserving the finality of litigation.*”²⁵ The minority rejected the “free-floating” inquiry into fairness adopted by the majority as one that undermines these principles and that the Court had refused to apply in *Figliola*.²⁶

The final chapter of the story of how the Supreme Court of Canada will ultimately resolve the disagreement among its current members concerning the proper balance to be struck between the interest of finality and that of fairness of result (in the context of the doctrine of issue estoppel as it applies to relitigation of decisions of administrative bodies) has certainly not been written. The nature of the tension between these interests is such that the policy positions that courts (and the public) will stake out on the spectrum of possible approaches to address this tension will likely vary over time, depending upon the prevailing legal, political and societal conditions.

Of greater importance than the particular disagreement relating to issue estoppel, however, is the exposure by the *Figliola* and *Penner* decisions of the sharply conflicting views among members of Canada’s highest court on broader questions of judicial philosophy that are of fundamental importance to the administration of justice. The more general tension between certainty, predictability and finality, on the one hand, and procedural and substantive fairness, as perceived by the most important person in the courtroom, on the other hand, arises in many and varying legal and factual contexts, and is in play each day in courtrooms across our country. Litigation counsel often struggle to advise clients on how best to handle cases based, to a very significant extent, on their views of how this tension will likely be resolved by the adjudicator on a given case.

The lack of a clear and principled and framework coming from our highest Court, supported by a firm majority of its members, to guide lower courts and tribunals on how to apply the rule against a collateral attack of a judicial decision and, at the same time, accommodate the competing interests at stake, is unfortunate, and will undoubtedly contribute to continued uncertainty and confusion by counsel, administrative tribunals and judges alike. Development of jurisprudence over time to accommodate new societal and legal circumstances and to address different fact situations should promote clarity of understanding of how legal principles

²⁵ *Ibid* at para 78 [emphasis in original].

²⁶ *Ibid*.

should be applied. The *Figliola* and *Penner* decisions have done the opposite.²⁷

The essential point of disagreement between the majority in *Figliola* and the majority in *Penner* is a fundamental one: how much discretion should a judge have to decide a case according to his or her assessment of factors that bear upon the fairness of the result? The *Danyluk* approach, approved in *Penner*, would certainly allow a much more generous scope for the exercise of judicial discretion than the more restrictive approach in *Figliola*. Without question, cases raising a conflict between the interest of finality and that of fairness, in the context of decisions of administrative tribunals, and otherwise, will continue to require adjudication, and it remains to be seen how lower courts, at both the trial and the appellate levels, will apply the doctrine of issue estoppel in such cases.

A more definitive decision by a firm majority of the Supreme Court of Canada that squarely addresses the broader conflict in judicial philosophy revealed by the *Figliola* and *Penner* decisions, and provides a principled framework for how lower courts should balance the competing interests at stake, would be welcome. However, the philosophical division within the Court, as it is presently constituted, may mean that a clarifying decision will not come soon.

²⁷ In *Ivany v Financiere Telco Inc*, 2013 ONSC 6347, 2013 CarswellOnt 5402, Lauwers J wrote at para 31, in reference to the abuse of process doctrine, citing *Penner*, that “the entire area is in some flux.”