Recent Appellate Decisions on Issue Estoppel and Abuse of Process

When does a prior decision by another court or tribunal bar a tort or contract action?

There have been a flurry of recent decisions at all levels of court as to when a tort or contract action is barred because of prior proceedings in a criminal court or by an administrative tribunal.

The most recent decision is *Aba-Alkhail v. University of Ottawa*, 2013 ONCA 633, released Oct. 18, 2013.

The plaintiffs in that case were three university lecturers who sued the University of Ottawa for damages alleging they had unfairly been denied promotion or had unfairly been dismissed. The university was successful on a motion to have the claims struck as an abuse of process on the grounds that the plaintiffs were attempting to use the courts to re-litigate issue that they had already lost in hearings in the university's appeals process.

The plaintiffs appealed to the Court of Appeal arguing that the court action should be allowed to proceed because there was no available remedy of damages before the tribunal. The Court of Appeal held:

> [9] …the whole purpose of the University academic discipline procedure in which the appellants engaged was to determine the academic consequences for the appellants and the ramifications for their careers as specialist physicians. The process and the remedies it provides directly affected the appellants. In our view, there is no basis upon which one could say in these circumstances that it would be unfair to use the results of the discipline proceedings to preclude a civil suit in which the same conduct is in issue, even though a different remedy is now being sought.

The Court also noted:

> [12] … the abuse of process doctrine can apply not only to bar re- litigation of issues that were actually determined in the administrative process, but also to issues that could have been determined.

Earlier this year a similar issue arose at in a summary judgment motion in *Bhattacherjee v. Marianayagam et al, 2013 ONSC 40* . This was a dispute between two sets of codefendants involving a t-bone intersection collision between their two vehicles. The northbound defendant ("G") claimed to have entered the intersection on a green light, whereas the driver ("M") of the westbound vehicle in which the plaintiff was a

passenger claimed to have entered the intersection on a amber signal, which, if true, would have meant the light was red for G. The plaintiff took no position on the motion.

This is not the sort of fact situation one would have thought to be ripe for a summary judgment motion. However M had pleaded guilty in traffic court to a charge of "Disobey Traffic Signal – Red" under s. 144(18) of the *Highway Traffic Act*. Notwithstanding the fact that M testified that she had done so on legal advice to plea bargain down the original charge of Careless Driving, Justice O'Connor found the prior traffic court decision was determinative of the issue as to whether M's vehicle had entered the intersection on a red light.

It seems to us a bit unfair to G, who may have pleaded to the charge of running the light for purely economic or practical reasons, to have this visited on her in the civil suit.

Unfortunately the motions court judge did not, in his reasons, go into as much detail as one might have liked as to whether his conclusion was based on issue estoppel or abuse of process and the decision does not appear to have been appealed.

In *Aba-Alkhail,* the Court of Appeal was careful to distinguish between issue estoppel and abuse of process. The Court of Appeal quoted from the decision of LeBel J, in *Behn v. Moulton Contracting Ltd.*, 2013 SCC 26, 2013 SCC 26, 357 D.L.R. (4th) 236, as follows:

> [40] The doctrine of abuse of process is characterized by its flexibility. Unlike the concepts of res judicata and issue estoppel, abuse of process is unencumbered by specific requirements. In *Canam Enterprises Inc. v. Coles* (2000), 51 O.R. (3d) 481 (Ont. C.A.), Goudge J.A., who was dissenting, but whose reasons this Court subsequently approved (2002 SCC 63, [2002] 3 S.C.R. 307 (S.C.C.)), stated at paras. 55-56 that the doctrine of abuse of process
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> > engages the inherent power of the court to prevent the misuse of its procedure, in a way that would be manifestly unfair to a party to the litigation before it or would in some other way bring the administration of justice into disrepute. It is a flexible doctrine unencumbered by the specific requirements of concepts such as issue estoppel. See *House of Spring Gardens Ltd. v. Waite*, [1990] 3 W.L.R. 347 [C.A.], at p. 358.
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> > One circumstance in which abuse of process has been applied is where the litigation before the court is found to be in essence an attempt to relitigate a claim which the court has already determined. See *Solomon v. Smith*, supra. It is on that basis that Nordheimer J. found that this third party claim ought to be terminated as an abuse of process. [Emphasis added by LeBel J.]

Just a month prior to the *Behn* decision, the Supreme Court of Canada decided *Penner v. Niagara (Regional Police Services* 2013 SCC 19. That was a case in which the plaintiff started a civil action against police for false arrest and unnecessary use of force as well

as bringing a complaint under the Police Services Act. When the complaint under the P.S.A. was dismissed, the police brought a successful motion to have the tort action dismissed based on issue estoppel and this was subsequently upheld by the Ontario Court of Appeal.

The Supreme Court of Canada, in a 4 - 3 decision overruled the decision of the Ontario Court of Appeal. The Court held that, although the three requirements for issue estoppel had been met, this was a case in which court ought to have exercised its discretion not to apply issue estoppel on grounds of fairness.

The court stated the three requirements for issue estoppel are that:

> 1. The prior hearing was judicial and the hearing fulfilled the requirements of procedural fairness;
> 2. The prior decision was final; and
> 3. The same parties to the civil action were also engaged in the prior hearing.

However, even if these prerequisites for issue estoppel are met, the court may exercise its discretion not to apply issue estoppel.
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The majority noted:

> [31] Issue estoppel, with its residual discretion, applies to administrative tribunal decisions…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… However, as this Court said in *Danyluk* [*Danyluk v. Ainsworth Technologies,* 2001 SCC 44, [2001] 2 S.C.R. 460], 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."

However, in this case the Supreme Court held that the discretion ought to have been exercised. The court noted:

> [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)* [*Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63, [2003] 3 S.C.R. 77], at para. 53.
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> [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* [*Minott v. O'Shanter Development Co.* (1999), 42 O.R. (3d) 321], at p. 341; and *Danyluk*, at para. 73. In the context of this appeal, it might discourage citizens from filing complaints about police misconduct.
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> [58] … 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.
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> [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.

In light of the *Penner* decision, one might wonder about the correctness of *Bhattacherjee.*

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