
The Broadening Applicability of Issue Estoppel

By Josh Koziebrocki

The Court of Appeal's decision in *Penner v. Regional Municipality of Niagara Regional Police Services Board et al.* (reserved at the Supreme Court, January 11, 2012) gives support for a broader application of issue estoppel. In this case, the Court of Appeal held that findings made in a police Disciplinary Hearing precluded re-litigating those same issues in a civil action.

The appellant (Mr. Penner) was arrested during a courtroom disturbance in the Ontario Court of Justice. He alleged misconduct by the police officers who arrested him, claiming the arrest was unlawful and that the officers used unnecessary force. After proceedings at the Police Disciplinary Hearing and the Ontario Civilian Commission on Police Services, the Divisional Court upheld the original Hearing Officer's decision dismissing Mr. Penner's complaints.

Mr. Penner commenced a civil action against the same parties for unlawful arrest, unnecessary use of force, false imprisonment and malicious prosecution. The respondents moved to strike Mr. Penner's Statement of Claim by way of issue estoppel under Rule 21.01(1) of the *Rules of Civil Procedure*.

The Court of Appeal held that to apply issue estoppel a party must show:

- (1) The same question was decided in the disciplinary proceedings.
- (2) The judicial decision said to create the estoppel is final.
- (3) The parties to the judicial decision are the same as the parties to the proceedings in which the estoppel is raised.

The Court held that all three requirements for issue estoppel were met. The Divisional Court decision was final and had not been appealed. The questions raised in the Disciplinary Hearing were the same as the questions being raised in the civil proceedings and Mr. Penner was an active participant in the Disciplinary Hearing. He had the right to counsel, call witnesses, cross-examine and he was named the respondent in the judicial review application.

The Court of Appeal made clear that despite this favourable ruling for potential defendants in civil actions, the Court still has discretion not to apply issue estoppel if it leads to unfairness or injustice. Courts are to decide the applicability of issue estoppel on a case by case basis taking into account relevant considerations. The Court must ask: "Is there something in the circumstances of this case such that the usual operation of the doctrine of issue estoppel would work an injustice?" (*Schweneke v. Ontario 2000*, 47 O.R. 3d 97 C.A.)

The Court found numerous reasons both for and against applying issue estoppel. In support of applying issue estoppel, the Hearing Officer was well versed in probable grounds for arrest. Mr. Penner had taken full advantage of his standing and appeal privileges in the previous proceedings. Further, the proceedings had all "the hallmarks of a civil procedure". Even though

Mr. Penner argued the standard of proof was different in the two proceedings, the Court of Appeal held that the differing standards would be immaterial on the Hearing Officer's assessment of the evidence.

In support of not applying issue estoppel, the Court found that civil proceedings and the Disciplinary Hearings had different purposes. The civil action was compensatory, while the police Disciplinary Hearings were administrative in nature. Mr. Penner also had a financial stake in the civil proceedings but did not in the Disciplinary Hearings.

Having set out all the considerations, the Court held that in each case it will be necessary to balance the reasons for and against applying issue estoppel. In this instance, applying issue estoppel was not be unfair or unjust as the cumulative weight of the reasons for applying estoppel outweighed those against. The Penner case demonstrates how the Court can use its discretion to apply a broad approach to issue estoppel and avoid the duplication of proceedings.

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