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Section 45.1 of the *Code* and Issue Estoppel at the HRTO Post *Penner* and *Claybourn*

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I. Introduction

Overview

The Ontario *Human Rights Code* is quasi-constitutional law.[1] As such, non-human rights tribunals have the jurisdiction and duty to apply the *Code* when issues of discrimination properly arise in proceedings before them.[2] This raises the issue of whether a litigant can file an application to the Human Rights Tribunal of Ontario (HRTO) alleging discrimination after he or she has already raised the issue, and that issue has been decided, by another proceeding.

Section 45.1 of the *Code* expressly deals with this scenario by giving the HRTO the discretion to dismiss an application before it is heard on its merits if the substance of the application has been appropriately dealt with by another proceeding. The section reads:

> **Dismissal in accordance with rules**
> 45.1 The Tribunal may dismiss an application, in whole or in part, in accordance with its rules if the Tribunal is of the opinion that another proceeding has appropriately dealt with the substance of the application.

In 2013, two decisions were issued that impacted the law of issue estoppel and how the HRTO exercises its discretion under s. 45.1 of the *Code*, respectively: *Penner v Niagara (Regional Police Services Board)*[3] and *Claybourn v Toronto Police Services Board*.[4] These decisions built on the Supreme Court's earlier decisions in *British Columbia (Workers' Compensation Board) v Figliola*[5] and *Danyluk v Ainsworth Technologies Inc.*[6]

This article addresses the *Penner* and *Claybourn* decisions and how they have affected the HRTO's statutory power to dismiss applications under s. 45.1 of the *Code*. We will review the law of issue estoppel and s. 45.1 of the *Code*, brief the principal cases under consideration, and assess the HRTO's interpretation and application of s. 45.1 in light of these developments in the law.

From our analysis of the cases and development of the law, certain themes have emerged:

1) As the Supreme Court of Canada remains split on the balance between the principles of finality and fairness in applying issue estoppel, we're likely to see this issue arise again.
2) Since *Penner* was issued, civil courts have tended not to cite *Figliola* as a case regarding issue estoppel directly. *Figliola* appears now to be used more narrowly with regard to administrative tribunals interpreting their statutory authority, if any, to dismiss a matter that has been dealt with by a another proceeding.

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[1] *Human Rights Code*, RSO 1990, c H.19 ["*Code*"].
[2] *Tranchemontagne v Ontario (Director, Disability Support Program)*, 2006 SCC 14.
[3] 2013 SCC 19 ["*Penner*"].
[4] 2013 HRTO 1298 ["*Claybourn*"].
[5] 2011 SCC 52 ["*Figliola*"].
[6] 2001 SCC 44 ["*Danyluk*"].

3) The HRTO has reconciled *Penner* with *Figliola* and with previous HRTO cases interpreting and applying s. 45.1. *Penner* now adds the overriding concern of fairness to the HRTO's statutory discretion.

Based on our assessment of HRTO decisions since *Claybourn*, it appears that it may now be harder for respondents to meet the threshold for dismissing applications since *Penner* gives a broader discretion to the HRTO to permit applications to proceed where it would be unfair to bar an application given the circumstances of the particular case. Most if not all of the subsequent s. 45.1 cases at the HRTO have decided not to dismiss applications. Moreover, the question that emerges for the HRTO following *Penner* and *Claybourn* is whether and how s. 45.1 applies to proceedings other than police disciplinary proceedings (which was the other proceeding in the *Claybourn* applications), such as WSIB, labour arbitrations, civil cases, and other regulatory or disciplinary proceedings.

Summary of the Current State of the Law

In light of *Penner*, the HRTO has now stated that "the appropriate interpretation of s. 45.1 does not permit the dismissal of a human rights application when this would lead to unfairness, given the nature of the other process and the difference in the issues at stake in that process."[7]

The starting point for the analysis under s. 45.1 of the *Code* remains the same: (1) was there another proceeding; and (2) if so, did it appropriately deal with the substance of the application?

The HRTO will continue to ask itself the three questions posed by the majority in *Figliola*: (1) was there concurrent jurisdiction to decide human right issues; (2) was the previously decided legal issue essentially the same as what is before the HRTO; and (3) was there an opportunity for the applicant to know the case to be met and have a chance to meet it at the prior proceeding?

Now, post-*Penner*, the HRTO will consider the overriding concern of fairness both with respect to the fairness of the prior proceeding and the fairness of using the result of a prior proceeding to bar an application before HRTO.

Whether an application has been "appropriately dealt with" for the purposes of s. 45.1, the HRTO will examine the following factors: (1) the reasonable expectations of the parties including whether the statutory scheme contemplates parallel proceedings; (2) the availability of a remedy or "financial stake" for the complainant in the disciplinary proceeding; and (3) the broader policy implications of applying s. 45.1.

Issue Estoppel: A Review

Issue estoppel is a judicial doctrine of public policy aimed at preventing an unsuccessful party from re-litigating the same matter before another court or tribunal. It seeks to prevent "duplicative litigation, potential inconsistent results, undue costs, and inconclusive proceedings."[8] As Binnie J. colourfully described issue estoppel in the case of *Danyluk*: "A

[7] *Claybourn* at para. 2.
[8] *Danyluk* at para. 18.

litigant … is only entitled to one bite at the cherry."[9] Issue estoppel balances the compelling goal of finality to litigation with the interests of justice. However, "A judicial doctrine developed to serve the ends of justice should not be applied mechanically to work an injustice."[10]

In *Danyluk*, a unanimous Supreme Court of Canada confirmed the application of issue estoppel is a **two-step process**. A court or tribunal must ask:

1) Are the three preconditions to the operation of issue estoppel met; and
2) If so, should the court nonetheless use its discretion not to apply issue estoppel if it would work to create an injustice in the circumstances?

The **three preconditions** of issue estoppel are:

a) The same question has been decided;
b) The judicial decision which is said to create the estoppel was final; and
c) The parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised or their privies.[11]

In *Danyluk*, the Court enumerated **seven relevant factors** when considering step two of the test:

1) The wording of the statute from which the power to issue the administrative order derives (here the Court had in mind whether the legislature intended the original proceeding to be an exclusive forum);
2) The purpose of the legislation (where the focus of the two proceedings may be entirely different even though the issues may be the same);
3) The availability of an appeal;
4) The safeguards available to the parties in the administrative procedure (e.g. the fullness of the original hearing; the particular tribunal's inclusion or exclusion of evidence that another procedure may treat differently; procedural and natural justice concerns);
5) The expertise of the administrative decision maker (some decision makers are non-legally trained individuals);
6) The circumstances giving rise to the prior administrative proceedings (in *Danyluk*, for example, the Court noted the appellant's personal vulnerability when deciding to pursue an *ESA* claim and the unlikeliness that the legislature intended a summary procedure for small claims to cause barrier to consideration of larger claims); and
7) The potential injustice ("As a final and most important factor, the Court should stand back and, taking into account the entirety of the circumstances, consider whether application of issue estoppel in the particular case would work an injustice.")[12]

However, since *Danyluk* the Supreme Court has fractured over how issue estoppel should be applied and the factors a tribunal should consider when it has been empowered by statute to dismiss cases before it when another proceeding has already purportedly addressed and decided

[9] Ibid.
[10] *Danyluk* at para. 1.
[11] *Danyluk* at para. 25, citing *Angle v Minister of National Revenue*, [1975] 2 SCR 248.
[12] *Danyluk* at para. 80.

the same issue. One camp, led by Justice Abella, holds finality of litigation to be the primary factor and espouses a narrow and limited discretion for administrative tribunals to apply their statutory discretion to dismiss matters already dealt with by another proceeding. The other camp, led by Justice Cromwell, states that the overriding fairness of applying issue estoppel should carry the day. The HRTO reconciled these two cases with its approach to s. 45.1 in *Claybourn*.

Section 45.1 of the* Code: *A Review

Section 45.1 of the *Code* was introduced as part of the reforms of the *Human Rights Code Amendment Act, 2006*, SO 2006, c. 30, s. 5.

It appears that s. 45.1 was first interpreted and applied by the HRTO in the case of *Campbell v Toronto District School Board*.[13] This was a case about a student with autism spectrum disorder who alleged that the TDSB discriminated against him and failed to accommodate his disability. The TDSB argued that some of the issues had already been decided by the Special Education Tribunal under the authority of the *Education Act*. The respondent sought to have the application dismissed under issue estoppel, abuse of process, and section 45.1 of the *Code*.

The HRTO began by setting out some guiding principles:

- The *Code* is an important public policy statute, protecting rights which are quasi-constitutional in nature, which would be meaningless without access to a mechanism for their enforcement.
- Responsibility for the administration of justice and the enforcement of legal rights in Ontario is spread across a panoply of courts and tribunals, some of which have overlapping jurisdiction and may have considerable expertise in particular areas of law. The HRTO must undertake its own work with an appreciation of its role in the broader scheme of administrative justice, providing leadership in the interpretation and application of the *Code* while respecting the legitimacy of decision-making by other tribunals with their own mandates.
- Both public and private interests require finality in litigation.
- The coherence of the administration of justice and the need for finality in litigation means that the HRTO does not act as an appellate court from a decision of another tribunal (the rule against "collateral attack").[14]

Specifically with regard to s. 45.1, the HRTO stated:

> In addition to issue estoppel and abuse of process, section 45.1 provides a basis for the Tribunal to preclude the re-litigation of issues that have been dealt with in another forum. This provision, along with other parts of the *Code*, gives expression to a legislative intention to avoid the duplication of proceedings. The meaning to be given to section 45.1 remains to be developed by this Tribunal, and it is unnecessary to give any

[13] 2008 HRTO 62. See also *Dunn v Sault Ste. Marie (City)*, 2008 HRTO 149 at paras. 23-24 where the HRTO summaries the principles from *Campbell.*
[14] *Campbell* at paras. 29-31.

> definitive opinion on it here. My conclusion for the purposes of this case is that section 45.1 provides a discretion to the Tribunal which is at least as broad as the doctrines of issue estoppel and abuse of process. On the facts of this case, the bases for my finding that abuse of process applies to prevent the re-litigation of certain issues equally support the application of section 45.1.[15]

The HRTO parsed s. 45.1 into the following two step conceptual analysis:

1) Was there another proceeding?
2) If so, did it appropriately deal with the substance of the application?[16]

The HRTO held that a "proceeding" includes an adjudicative process established under a statutory regime.[17] And, with respect to the second part, the HRTO reasoned on the basis of a BC Human Rights Tribunal case interpreting an similar statutory provision that:

> … the question of whether a matter has been dealt with "in substance" does not turn on technical considerations, nor is it dependent on the kind of criteria applied under legal doctrines such as issue estoppel. Further, a decision about whether a matter has been dealt with "appropriately" does not require this Tribunal to be satisfied that it would have reached the same conclusion as that reached in the other forum. Section 45.1 does not require the Tribunal to act like an appellate court.[18]

In arriving at its decision to dismiss those parts of the application that were decided by the Special Education Tribunal on the basis of both abuse of process and s. 45.1 of the *Code*, the HRTO considered the following factors, which went on to inform the HRTO's process and analysis under s. 45.1 of the *Code*:

- The purpose of the statutory scheme governing the other proceeding;
- Whether the same question was decided;
- Whether human rights principles were applied; and
- The safeguards available to the parties in the other administrative procedure.

Since *Campbell* set the stage for the HRTO's analysis under s. 45.1 of the *Code*, two key decisions have come down from the Supreme Court of Canada – *Figliola* and *Penner* – which have caused the HRTO to refine its analysis and application of its statutory discretion under s. 45.1 of the *Code*. The following section, and remainder of this paper, will address these cases and assess the HRTO's current approach.

[15] *Campbell* at para. 61.
[16] *Campbell* at para. 64.
[17] *Campbell* at para. 66.
[18] *Campbell* at para. 68.

II. Case Review

Figliola - 2011 SCC 52

In the case of *Figliola*, the Supreme Court of Canada decided that it was patently unreasonable for the BC Human Rights Tribunal not to dismiss three applications before it, the substance of which had already been decided by a Review Officer of the BC Workers' Compensation Board. Although the Court split 5 to 4, both the majority and minority agreed that the statutory provision giving authority to the BC Tribunal's discretion to dismiss a case already tried in another forum embodied the common law principles of issue estoppel, collateral attack, and abuse of process. The Court split on the proper interpretation and application of the principles of issue estoppel by an administrative tribunal such as the BC Human Rights Tribunal.

In the majority decision, Abella J. (writing for LeBel, Deschamps, Charron and Rothstein) held that s. 27(1)(f) of the BC *Human Rights Code*[19] was a reflection of the principles underlying issue estoppel, collateral attack, and abuse of process, but that the BC Tribunal was wrong to apply a technical analysis of issue estoppel, including the *Danyluk* factors. For the majority, with respect to issue estoppel generally, the primary consideration was the finality of litigation. Abella J. summarized the applicable principles:

- It is in the interest of the public and parties that the finality of a decision can be relied upon.
- Respect for the finality of a judicial or administrative decision increases fairness and the integrity of the courts, administrative tribunals and the administration of justice.
- The method of challenging the validity or correctness of a judicial or administrative decision should be through the appeal or judicial review mechanisms that are intended by the legislature.
- Parties should not circumvent the appropriate review mechanism by using other forums to challenge a judicial or administrative decision.[20]

However, the majority noted that s. 27(1)(f) embodies more than just issue estoppel and the BC Human Rights Tribunal should not have singled out issue estoppel and applied its technical analysis from *Danyluk* under its statutory authority to dismiss complaints. Instead, when faced with the question of whether another proceeding has already decided the issue, the BC Tribunal should ask itself three questions:

1) Whether there was concurrent jurisdiction to decide human rights issues;
2) Whether the previously decided legal issue was essentially the same as what is being complained of to the Tribunal; and
3) Whether there was an opportunity for the complainants or their privies to know the case to be met and have the chance to meet it, regardless of how closely the previous process procedurally mirrored the one the Tribunal prefers or uses itself.[21]

[19] RSBC 1996, c 210 ["BC *Code*"].
[20] *Figliola* at para. 34.
[21] *Figliola* at para. 37.

The majority was clear that the BC Tribunal was not empowered to judicially review another tribunal's decision, or to decide the issue again and determine whether it might produce a different result.[22] The Tribunal's statutory discretion is a narrow one, and does not call for a technical application of issue estoppel.

In the minority's concurring reasons, Cromwell J. (writing for McLachlin C.J. and Binnie and Fish JJ.) held that s. 27(1)(f) of the BC *Code* conferred a broader discretion than suggested by the majority and the Tribunal must balance the principles of finality and fairness when deciding whether to dismiss an application on the basis that another proceeding has appropriately dealt with the substance of the matter.[23] The minority construed the Tribunal's task as follows:

- If the Tribunal concludes that the substance of the complaint has not been appropriately dealt with by another proceeding, then its inquiry under s. 27(1)(f) is complete and there is no basis upon which to dismiss the complaint;
- If, on the other hand, the Tribunal concludes that the substance of the complaint has been dealt with by another proceeding, it must then consider the interests of finality, proper review mechanisms, and whether it should exercise its discretion to dismiss the complaint given the particular circumstances of the case. A Tribunal should consider the seven *Danyluk* factors enumerated in the section above.[24]

***Penner* – 2013 SCC 19**

The concurring minority decision in *Figliola* became the majority decision in *Penner*; and the majority decision in *Figliola* became a strong dissent. The balance of power in the Court on this issue reversed, and has departed from the unanimous decision of *Danyluk*. Given this, we're likely to see issue estoppel arise again.

In *Penner*, the Supreme Court revisited the proper approach to applying issue estoppel, this time with regard to whether a litigant could advance a civil action on the same issue after having already filed a complaint against a police officer under the *Police Services Act* (*PSA*).[25] The majority reasons this time were written by Cromwell and Karakatsanis JJ. (with McLachlin C.J. and Fish J.) with strongly dissenting reasons written by LeBel and Abella JJ. (with Rothstein J.).

The appellant, Mr. Penner, did not contest that the three pre-conditions of issue estoppel were met; rather, he submitted that the discretionary application of issue estoppel in his case would work an injustice or unfairness due to the public interest in promoting police accountability. The Respondents argued that the civil action constituted a collateral attack and the courts below were right to apply issue estoppel to prevent re-litigation of the same matter in another forum.

The majority held that "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

[22] *Figliola* at para. 38.
[23] *Figliola* at para. 58.
[24] *Figliola* at paras. 92-95.
[25] RSO 1990, c P.15 ["*PSA*"].

preconditions for its application have been met."[26] The majority found that the Ontario Court of Appeal erred by not appreciating the differences between the purpose and scope of the proceedings under the *PSA* as compared to the civil action, and failed to consider the reasonable expectations of the parties regarding the impact of the proceedings on their legal rights.

The majority stated that issue estoppel "balances judicial finality and economy and other considerations of fairness to the parties."[27] The essential question is whether it is fair in the circumstances to apply issue estoppel when the preconditions have been met. The majority enumerated two key considerations:

1) Fairness of prior the proceeding. "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."[28]

   Factors to consider in this category include procedural safeguards, availability of appeal, and expertise of decision maker, which go to whether there was a fair opportunity for the parties to put forward their respective positions, a fair opportunity to adjudicate the issue(s), and a means to have the decision reviewed.

2) Fairness of using the results of the prior proceeding to bar subsequent proceedings. "…injustice may arise from using the results to preclude the subsequent proceedings…. for example, where there is a significant difference between the purposes, processes or stakes involved in the two proceedings."[29]

   Such differences are to be assessed in light of the finality of the proceedings. A court must look to the text and purpose of the legislative scheme to determine how it may shape the reasonable expectations of the parties in relation to the scope and effect of the administrative proceedings.

The majority allowed the appeal, thus reversing the Court of Appeal, permitting the appellant to advance his civil action against the respondent.

In dissent, LeBel and Abella JJ. (with Rothstein J.), reiterated their holding in *Figliola* that the doctrine of issue estoppel advances the principle of finality, which assures the fairness and efficacy of the justice system in Canada: "Litigation must come to an end, in the interests of the litigants themselves, the justice system and our society."[30]

For the dissenting judges, the leading case which should now govern the application of issue estoppel was *Figliola*, not *Danyluk*. According to the dissent, *Figliola* departed from *Danyluk* and moved away from the "fairness" approach and "fairness" factors in *Danyluk*, which should

[26] *Penner* at para. 8.
[27] *Penner* at para. 29.
[28] *Penner* at paras. 40-41.
[29] *Penner* at paras. 42-48.
[30] *Penner* at para. 73.

no longer play the same role nor be given the same weight as they once were due to subsequent precedents.[31] Justice Abella wrote:

> 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 injustices *by preserving the finality of litigation*.[32]

The dissenting judges reasoned that the majority's approach was now inconsistent with recent developments in the law of judicial review and raised potential issues regarding procedural fairness. Where a process is considered unfair, the concerned party should challenge it under the principles of natural justice rather than seek to re-litigate the issue in another forum.[33]

The dissenting judges would have dismissed the appeal, thus upholding the Ontario Court of Appeal's decision that the appellant was estopped from bringing his civil action.

Claybourn – 2013 HRTO 1298

Claybourn was an interim decision of the HRTO, joining five separate but similar applications in light of both *Figliola* and *Penner*, to determine the HRTO's approach to interpreting and applying s. 45.1 of the *Code*.[34] *Claybourn* was decided by a three-member panel of the HRTO (David Wright and Mark Hart in the majority, with concurring reasons by Judith Keene). Prior to the hearing in *Claybourn*, one of the five applications (*Shallow*) was removed and dismissed for failure to file materials on time; and another of the applications (*Leong*) was dismissed as abandoned. The three that remained were *Claybourn*, *Ferguson* and *de Lottinville*. Although there were differences in the three remaining applications, they each involved complaints under the *PSA* and/or the Office of the Independent Police Review Director, and contained allegations of racial profiling or discrimination on the basis of race.

The majority ultimately decided that in light of *Penner*, the HRTO must now give high priority to fairness as a factor in exercising its discretion under s. 45.1: "In our view, the appropriate interpretation of s. 45.1 does not permit the dismissal of a human rights application when this would lead to unfairness, given the nature of the other process and the difference in the issues at stake in that process."[35] In its reasons, the majority addressed whether *Penner* should be considered in a s. 45.1 analysis; how *Penner* could be reconciled with *Figliola*; and what the HRTO's application of its discretion under s. 45.1 should be going forward. In the final decision, the respondents' requests to dismiss were denied and the applications were ordered to proceed separately to hearings.

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[31] *Penner* at paras. 75-76.
[32] *Penner* at para. 78, emphasis in original.
[33] *Penner* at para. 77.
[34] *Claybourn v Toronto Police Services Board*, 2011 HRTO 1406 ["*Claybourn*"]; *Shallow v. Toronto Police Services Board*, 2011 HRTO 1407 ["*Shallow*"]; *Leong v Peel Regional Police Services Board*, 2011 HRTO 1741 ["*Leong*"]; *de Lottinville v Ontario (Community Safety and Correctional Services)*, 2011 HRTO 1742 ["*de Lottinville*"]; and *Ferguson v Toronto Police Services Board*, 2011 HRTO 1785 ["*Ferguson*"].
[35] *Claybourn* at para. 2.

Narrow discretion after *Figliola*

Figliola had clarified that, while the discretion granted by s. 45.1 embodies the principles of issue estoppel, collateral attack, and abuse of process, human rights tribunals exercising their discretion under such a provision are not to engage in a technical issue estoppel analysis. *Figliola* directs that human rights tribunals have a narrow statutory discretion within which to dismiss an application in whole or in part where it has been dealt with by another proceeding with the primary factor for consideration being the finality of litigation.

The HRTO applied *Figliola* in two key decisions. First, in *Gomez v Sobeys Milton Retail Support Centre*, 2011 HRTO 2297, the HRTO held:

> *Figliola* instructs this Tribunal not to consider the procedural or substantive correctness of the other proceeding or decision when deciding whether the application or part of the application can proceed. If the reasons in the other decision dispose of the human rights issues before the Tribunal, the application or part of the application must be dismissed….[36]

And, second, in *Okoduwa v Husky Injection Molding Systems Ltd.*, 2012 HRTO 433, the HRTO stated:

> The Court makes clear that the Tribunal's role is not to sit in appeal of other decision-makers in their determination of human rights issues. Nor is it appropriate or the Tribunal to use s. 45.1 as a vehicle for a collateral attack on the merits of another decision-making process… Thus, the Tribunal's principal concern in applying s. 45.1 is not whether parallel litigation has correctly determined the human rights issues, but whether the application has already had an opportunity to have the human rights claim considered by an adjudicator who had jurisdiction to interpret and apply the *Code*….[37]

Fairness factors after *Penner*

In previous decisions, the HRTO had already decided that a public complaint under the *PSA* was a "proceeding" for the purposes of s. 45.1 and the HRTO had dismissed applications found to have been appropriately dealt with by that process.[38]

In *Claybourn*, the HRTO determined that it must take *Penner* into consideration when exercising its discretion under s. 45.1 and that *Penner* could be reconciled with *Figliola*. The three questions enumerated in *Figliola* will still be employed and while it is wrong for a human rights tribunal to apply issue estoppel in a technical way, the principles of issue estoppel apply to the HRTO's exercise of discretion under s. 45.1. *Penner* further elaborated on these principles identifying fairness as a primary concern taking into account the similarities and differences between the two proceedings and the reasonable expectations of the parties. The majority noted that the factual differences between *Figliola* and *Penner* were material; namely, the differences

[36] *Claybourn* at para. 54.
[37] *Claybourn* at para. 55.
[38] See: *Qiu v Neilson*, 2009 HRTO 2187.

in the processes, rights and remedies of the BC Workers' Compensation Board versus a complaint under the Ontario *Police Services Act*.

In light of *Penner*, the HRTO decided that it must now consider the reasonable expectations of the parties based on: (a) whether the statutory scheme contemplates parallel proceedings; (b) the availability of any remedy or 'financial stake' for the complainant in the disciplinary proceeding; and (c) the broader policy implications of applying s. 45.1 in this context.[39]

These policy considerations include (i) causing *PSA* complainants to participate more vigorously in the discipline proceeding in the interest of seeking a favourable result, or causing potential complaints to avoid filing a *PSA* complaint to avoid potential impact of an adverse finding on a civil claim; (ii) discouraging a person from making a complaint under the *PSA* and advancing an allegation of discrimination, or making a *PSA* complaint without appreciating the impact on a potential human rights application; and (iii) the (un)fairness of a hearing officer appointed by the chief of police making findings that can preclude subsequent liability of the police services board.[40]

In her concurring reasons, Judith Keene articulated a different line of reasoning:

1) An investigation under the *PSA* is not "another proceeding" for the purposes of s. 45.1 of the *Code*.
2) In the alternative, the substance of the applications were not addressed in the *PSA* investigative process because it did not address or resolve whether there was discrimination and a breach of the *Code*.
3) Given *Penner*, the HRTO must now focus on fairness vis-à-vis how the other proceeding addressed the human rights issues and remedies that could be available before the HRTO.

Claybourn thus holds that both *Figliola* and *Penner* are now instructive cases informing and guiding the HRTO's exercise of discretion under s. 45.1 to dismiss an application in whole or in part where its substance has already been appropriately dealt with by another proceeding. The three questions enumerated in *Figliola* remain intact and are updated by the key principle of fairness per the majority's reasons in *Penner*. The HRTO has a residual discretion not to dismiss an application where it would be unfair to do so and would work an injustice against an applicant.

The Current Status of the Claybourn *Applications*

After *Claybourn* was decided, the remaining three applications joined together for the purpose of that decision – *Claybourn*, *Ferguson* and *de Lottinville* – went their separate ways. In *de Lottinville*, on December 4, 2013, the respondent filed an application for judicial review of the *Claybourn* interim decision, which is currently making its way through the Superior Court of Justice.[41] As a result, the respondent in both *Claybourn* and *Ferguson* filed a Request for an

[39] *Claybourn* at para. 80.
[40] *Claybourn* at paras. 82-84.
[41] *Her Majesty the Queen in Right of Ontario et al. v. DeLottinville*, Court File No. 534/13.

Order During Proceedings to, in part, defer these applications pending the outcome of the judicial review in *de Lottinville*. Both Requests were denied.[42]

III. Decisions since *Penner* and *Claybourn*

Since *Penner* and *Claybourn*, close to 100 decisions have been rendered in courts and tribunals across Canada regarding issue estoppel and/or s. 45.1 of the *Code*. *Penner* has been cited 22 times in human rights decisions; 6 times in labour or grievance arbitration decisions; and 37 times in civil cases. The HRTO has issued approximately 30 decisions since *Penner* and *Claybourn* on the issue of interpreting and applying s. 45.1 of the *Code*.[43]

Many of these cases merely cite the precedent without much controversy or in-depth analysis. Others engage in a deeper analysis both in terms of how to apply issue estoppel and/or s. 45.1 since *Penner* and *Claybourn*, or in an attempt to reconcile or comment on how these cases impacted the law. This section of the article will canvass these latter cases that shed some light on how *Penner* or *Claybourn* have impacted the law of issue estoppel and s. 45.1, respectively.

Before proceeding, however, it is worthy of reminder that the HRTO's statutory discretion under s. 45.1 is a distinct analysis from the common law doctrine of issue estoppel applied by the courts even though the HRTO may consider the principles of issue estoppel, collateral attack, and abuse of process in its analysis. Moreover, the *Code* permits an applicant to commence his or her case either through an application to the HRTO or an action to the Superior Court with a human rights pleading where there is another stand-alone cause of action. Although our case review did not uncover any civil litigation cases that included a claim of discrimination under the *Code* or an analysis of *Claybourn* in the civil context, the civil cases may still be instructive on how the courts are now interpreting and applying both the principles and doctrine of issue estoppel.

Human Rights

It continues to be the case that the HRTO begins its analysis with the statutory language of s. 45.1 as parsed in *Campbell*, then applies the principles and questions from *Figliola*, and now considers the overriding fairness of dismissing a case per the direction from *Penner*. HRTO decisions since *Claybourn* shed light on how the HRTO is applying *Claybourn* to different

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[42] See 2014 HRTO 367, 2014 HRTO 369, and 2014 HRTO 386. Three other police cases that were held in abeyance while the HRTO considered the application of s. 45.1 in *Claybourn* were put back on track as the HRTO similarly denied Request for Orders by the respondents to either dismiss or defer the applications: *Permaul v. Toronto Police Services Board*, 2014 HRTO 36; *Lawrence v. Ontario Provincial Police*, 2014 HRTO 364; and *Smith v. Toronto Police Services Board*, 2014 HRTO 366.

[43] See decisions (not including subsequent *Claybourn*, *Ferguson*, or *de Lottinville*): *K.M.*, 2014 HRTO 526; *Volnyansky*, 2014 HRTO 520 and 2013 HRTO 738; *Tahir*, 2014 HRTO 509; *Smith*, 2014 HRTO 366; *Permaul*, 2014 HRTO 365; *Lawrence*, 2014 HRTO 364; *Sawnhey*, 2014 HRTO 123; *Beausoleil*, 2014 HRTO 123 and 2013 HRTO 1553; *Naughton*, 2014 HRTO 89; *Clunis*, 2014 HRTO 71, 2013 HRTO 2083, and 2013 HRTO 1448; *Riad*, 2013 HRTO 2088; *Shah*, 2013 HRTO 2084; *Islam*, 2013 HRTO 2009; *Clarke*, 2013 HRTO 2002; *Gill*, 2013 HRTO 1881; *Shi*, 2013 HRTO 1865; *McMarter*, 2013 HRTO 1858; *Cohen*, 2013 HRTO 1563; *Borde*, 2013 HRTO 1524; *Sisson*, 2013 HRTO 1494; *Maxwell*, 2013 HRTO 1482; *Butcher*, 2013 HRTO 1327; ***Claybourn*, 2013 HRTO 1298**; *Bosnitch*, 2013 HRTO 876; *Shallow*, 2013 HRTO 834.

factual scenarios and they provide an opportunity to reflect on the role that *Penner* and *Claybourn* now play in the HRTO's analysis of s. 45.1.

HRTO Comments Following *Claybourn*:

- *Claybourn* is not binding on other HRTO decision-makers, although it is the lead case now at the HRTO and there is established law on s. 45.1.[44]

- The relevant considerations for s. 45.1 are those in the statute; namely, whether the application as appropriately dealt with in another proceeding.[45]

- The purpose of s. 45.1 is to avoid the duplication of proceedings and re-litigation of issues that have already been appropriately dealt with elsewhere; the HRTO's approach was clarified and confirmed in *Figliola* and *Claybourn*.[46]

- *Claybourn* set out four factors that must be considered when deciding whether a human rights application has been appropriately dealt with: (1) the reasonable expectations of the parties including whether the statutory scheme contemplates parallel proceedings; (2) the availability of a remedy or "financial stake" for the complainant in the disciplinary proceeding; (3) the broader policy implications of applying s. 45.1; and (4) residual discretion of the HRTO.[47]

- Regarding potentially conflicting tribunal decisions, the "jurisprudence has recently been updated" in light of *Penner* and *Claybourn*; "decisions of the Tribunal based on pre-*Penner* jurisprudence…, which indicate an extremely constrained role for this Tribunal where another tribunal has made findings on some of the facts in an Application, are not helpful in the light of *Penner*. The Tribunal's decision in *Claybourn* indicates that a more nuanced and fact-specific approach, with a primary focus on fairness in keeping with the purpose of the *Code*, is indicated."[48]

A handful of cases subsequent to *Claybourn* engaged in a more fulsome s. 45.1 analysis. It is interesting to note that in all of these cases the HRTO decided that the other proceeding did not appropriately deal with the substance matter of the human rights application. This may lend support to the position that under the arguably broader discretionary scope afforded to the HRTO since *Penner*, it may now be more difficult for respondents to convince the HRTO to dismiss an application on the basis of s. 45.1.

HRTO Decisions since *Claybourn*:

- Where the prior process was a WSIB return to work meeting and work transition assessment, the HRTO decided both that it was not a "proceeding" and that it would be

[44] *Smith* at para. 21.
[45] *Beausoleil* (2014) at para. 24.
[46] *Naughton* at paras. 12 and 14.
[47] *Riad* at para. 44.
[48] *Islam* at para. 220.

unfair to prevent the applicant from pursuing his human rights claim based on the outcome of the WSIB meeting.[49]

- In a subsequent WSIB case, this time where the process was a WSIB decision regarding a work reintegration process, while the HRTO did not definitively rule on whether it was "proceeding," the HRTO did decide that as a disciplinary process (such as in *Claybourn* and *Penner*), a finding of non-cooperation by the WSIB does not result in a direct remedy for the worker. It would not be in accordance with the reasonable expectation of the parties that a decision initiated by the employer for a determination of its obligations could extinguish the Applicant's rights under the *Code*, particularly where the decision had no impact on the applicant's entitlements.[50]

- Where the prior process was a peace bond hearing before a Justice of the Peace as well as two *Police Services Act* complaints, the HRTO decided that that the peace bond hearing did not appropriately deal with whether the applicant's human rights were infringed, but rather focussed on whether the applicant had a reasonable fear for his safety.[51]

- Where the prior process was an appeal before the Vice-Provost of a university, the HRTO decided not to dismiss the human rights application on the basis that the Vice-Provost was not empowered by statute to have concurrent jurisdiction to assess human rights violations, thus failing one of the three questions set out in *Figliola*. Although the applicant conceded that the appeal was a "proceeding" for the purposes of s. 45.1, the HRTO questioned the correctness of that concession.[52]

- The HRTO found a decision of the Vice-Chari of the Grievance Settlement Board as part of a mediation-arbitration procedure under a collective agreement to be a "proceeding" for s. 45.1. However, the HRTO held that it would be unfair to preclude a subsequent human rights application because the Vice-Chair did not make specific human rights findings or assess discrimination under the *Code*.[53]

- Where the prior process was an Inquiries, Complaints and Reports Committee decision of the College of Physicians and Surgeons of Ontario, the HRTO held both that s. 36(3) of the *Regulated Health Professions Act* explicitly barred the respondent from relying on the decision of the Committee to bar a subsequent proceeding, and that the College's process did not appropriately deal with the substance of the human rights application. In this case the respondent argued that *Claybourn* was wrongly decided because *Figliola* confirmed the primacy of finality in litigation and "fairness" in *Penner* was merely a factor to consider rather than a fundamental principle of issue estoppel to be applied in a s. 45.1

[49] *Maxwell v Cooper-Standard Automotive Canada Ltd.*, 2013 HRTO 1482.
[50] *McMurter v Goodyear Canada Inc.*, 2013 HRTO 1858.
[51] *Riad v Waterloo (Police Services Board)*, 2013 HRTO 2088.
[52] *Naughton v University of Western Ontario*, 2014 HRTO 89.
[53] *Beausoleil v Ontario (Community Safety and Correctional Services)*, 2013 HRO 1553, request for reconsideration denied, 2014 HRTO 123.

analysis. The HRTO disagreed, confirming "fairness" is indeed a principle of issue estoppel that it must consider and apply within s. 45.1.[54]

Penner has been cited and applied only twice in human rights decisions outside of Ontario – British Columbia and Manitoba. The two tribunals take very different approaches to the application of *Penner*, in no small part due to differences in their legislation. Whereas the BC *Code* has a similar statutory provision as Ontario to dismiss cases, the Manitoba legislation does not.

Human Rights Decisions from BC and Manitoba after *Penner*:

- In *Mahdi v Hertz Canada*, the complainant filed a human rights complaint following several labour grievances. The respondent sought to have the complaint dismissed on the basis that the matter had been dealt with by another proceeding and that adjudicating the complaint would not further the purposes of the BC *Code*. Both arguments stemmed from the statutory authority to dismiss complaints within s. 27 of the BC *Code*. The BC Tribunal decided that the grievance decisions and subsequent settlements did not address issues of discrimination. Therefore, the prior proceedings did not satisfy the requirements for dismissal under s. 27(1)(f) as interpreted by *Figliola*. Moreover, adjudicating the complaint would not have furthered the purposes of the *Code*. The BC Tribunal considered the principles of finality and fairness in light of *Figliola* and *Penner* in coming to its decision.[55]

- In *Dick v The Pepsi Bottling Group (Canada) Co.*, the complainant alleged discrimination in employment on the basis of disability being that the employer failed to accommodate his disabilities and ultimately terminated his employment. The respondent argued that the issue was already decided through a grievance process and should, therefore, be dismissed. The Manitoba Human Rights Board of Adjudication decided to dismiss the complaint on the basis of the common law doctrines of issue estoppel and abuse of process. The Manitoba *Code* does not have a similar statutory provision like BC and Ontario and, therefore, *Figliola* does not have direct application to this case. The Board decided that in the absence of a statutory provision, it must apply the doctrines of issues estoppel, collateral attack and abuse of process, not merely the principles of those doctrines. It went on to do so and found that the application had been dealt with by the prior proceeding.[56]

Labour Arbitration Decisions

There have been six labour arbitration decisions since *Penner*. Three of these decisions simply cite *Penner* as a reference regarding issue estoppel; while the other three comment on *Penner* in a bit more depth.

[54] *K.M. v Kodama*, 2014 HRTO 526.
[55] *Mahdi v Hertz Canada*, 2013 BCHRT 147.
[56] *Dick v The Pepsi Bottling Group (Canada) Co.*, 2014 CanLII 16055.

- In one Alberta grievance arbitration decision, the adjudicator cited *Penner* and held that "a factual finding in the *Police Act* process may not be binding on other proceedings – for example civil litigation or arbitration."[57]

- In a Saskatchewan Labour Relations Board decision regarding the duty of fair representation from a failure to grieve personal harassment, the adjudicator noted that *Penner* was a split decision and "casts some doubt on the Court's decision in *Figliola*, but reasserts the decision in *Danyluk*."[58]

- In a Canadian Labour Arbitration decision dealing with the issue of remedy from an unjust dismissal case referred to it by the Federal Court of Appeal, the adjudicator nicely summarized the key holding from *Penner*:

> In deciding whether to exercise that discretion, the Court or tribunal must determine if it would be unfair to preclude a party from re-litigating an issue having consideration of the expertise of the decision maker in the earlier proceeding, the procedural safeguards in place in the earlier proceeding and whether the stakes in the earlier proceeding in which the litigant had been unsuccessful were significantly less than the stakes involved in the subsequent proceeding.[59]

Although there are only a handful of labour or grievance arbitration decisions, it is clear that *Penner* is being applied to all cases where issue estoppel arises without much controversy.

Civil Cases

Thus far there have been 37 civil cases from across Canada that have applied *Penner*. Similar to the labour cases above, most of the civil cases simply cite *Penner* as an authority on the law of issue estoppel. However, there were some cases where the decision maker either commented on the impact of *Penner* or discussed the *Penner* decision at greater length, giving insight into how lower courts are interpreting and applying *Penner*. These latter cases include the following:

- A motion to certify a proposed class in a class action where the question was whether anything from an Ontario Securities Commission proceeding was admissible in the class action lawsuit. The motion judge cited *Penner* and commented that "the entire area is in some flux."[60]

- An appeal to the Ontario Court of Appeal from a decision of a motions judge to strike the plaintiff's claim in part because the Canadian Human Rights Commission had already decided that the issues were not justiciable. The Court stated that "Since the decision of

[57] *Edmonton Police Service v Edmonton Police Assn. (Dzioba Grievance)* (2013), 234 LAC (4th) 197 (ABGrievArb) at para. 121.
[58] *Cara Banks (Re)*, [2013] SLRBC No. 20 (SKLabRelBd) at para. 74.
[59] *Payne v. Bank of Montreal*, [2014] CLAD No. 32 (CALabArb) at para. 10.
[60] *Ivany v Financiere Telco Inc.*, 2013 ONSC 6347 at para. 31.

the motion judge, the legal landscape has changed with the Supreme Court of Canada's decision in *Penner*."[61]

- A Small Claims Court matter involving issue estoppel from a prior hearing before the Landlord and Tenant Board.[62]

- A summary judgment motion seeking dismissal of an action due to issue estoppel from a prior proceeding at the Small Claims Court.[63]

- A Small Claims Court matter where the prior proceeding was related to a provincial offences trial against an inspector who entered the premises of the defendant without a warrant to rescue animals in distress. The defendant subsequently sued in small claims court.[64]

- An appeal to the Ontario Court of Appeal from a decision of a motion judge striking the appellant's claim as an abuse of process where the appellant had commenced a civil action on the same facts and issues previously decided by an academic appeal process.[65]

- An Ontario Court of Appeal decision where the Court held that there is no residual discretion not to apply issue estoppel in criminal cases once the three preconditions of issue estoppel are met.[66]

What is remarkable about these civil cases is that almost none of them cite *Figliola*. It is reasonable to conclude, therefore, that with regard to issue estoppel, the leading cases are *Danyluk* and now *Penner*, with *Figliola* retaining relevance in the context of administrative tribunals applying statutory discretion that may embody the principles of issue estoppel. However, even still, it is arguable that *Penner* eclipses *Figliola* in this regard, swaying the balance toward fairness over finality as the overriding and guiding principle and giving a broader discretion to administrative tribunals.

However, there were two cases, both from the Federal Court, which discussed the relationship between *Figliola* and *Penner* with regard to the current state of the law on issue estoppel.

- In *Khapar v Air Canada*, the applicant sought judicial review of a decision of the Canadian Human Rights Commission, which decided not to hear his complaint because it was not submitted within the time limitation and because it was vexatious. The applicant made a number of submissions including that the Commission's determination that issue estoppel applied was unreasonable. The prior proceeding was a labour arbitration and the

[61] *Guergis v Novak*, 2013 ONCA 449 at para. 17.
[62] *Dodge v Sobczyk*, [2013] OJ No. 3171 (SCJ Sm Cl Ct) at paras. 15-21.
[63] *Soural v Bank of Montreal*, 2013 ONSC 4203 at paras. 24-38.
[64] *Hunter v Ontario Society for the Prevention of Cruelty to Animals*, [2013] OJ No. 6180 (Sm Cl Ct) at paras. 16-18.
[65] *Aba-Alkhail v University of Ottawa*, 2013 ONCA 633, leave to appeal to SCC refused [2013] SCCA No. 491 (QL) at paras. 6-9.
[66] *R. v Thompson*, 2014 ONCA 43.

applicant did not seek judicial review of the arbitrator's decision. The application for judicial review was dismissed. The Federal Court stated that "while *Penner* may encourage the Courts to take a more liberal view of what constitutes unfairness in exercising its discretion to not apply issue estoppel, it does not overthrow the principle that finality in proceedings remains an important objective for the administration of justice. To justify the exercise of discretion to relieve against issue estoppel and other related common law doctrines, an applicant cannot merely assert or speculate about unfairness without any evidence and without any attempt to provide evidence which would support such assertions."[67]

- In *Murray v Canada (Immigration and Refugee Board)*, 2014 FC 139, the applicant, an employee of the Immigration and Refugee Board, filed a complaint to the Canadian Human Rights Commission (referred to the Tribunal) after the matter was heard by the Public Service Staffing Tribunal. The CHRT dismissed the complaint on the basis of issue estoppel and abuse of process. Allowing the application for judicial review, the Federal Court held that *Figliola* did not expand on the fairness analysis whereas *Penner* elaborated on the discretionary application of issue estoppel and the need for flexibility. Moreover, the CHRT erred by not considering whether it would be unfair to apply the doctrines in the specific circumstances. Even though *Penner* had not yet been released, the Federal Court noted that *Danyluk* was still binding regarding the fairness of applying issue estoppel, which *Figliola* did not overturn.

IV. Conclusion

It is clear from a review of the HRTO cases since *Penner* and *Claybourn* that the HRTO's interpretation and application of its statutory discretion to dismiss an application under s. 45.1 of the *Code* has evolved. The two key HRTO decisions are now *Campbell* (an early s. 45.1 case that set out the HRTO's analysis) and *Claybourn* (which reconciles *Figliola* and *Penner* establishing the current state of the law).

In light of *Penner*, the HRTO appears to now give a broader scope to its statutory discretion and consistently considers the fairness of dismissing an application that may have been appropriately dealt with by another proceeding. The HRTO is undertaking a more fact-specific investigation of the particular facts of each situation, including the reasonable expectations of the parties based on (1) whether the statutory scheme contemplates parallel proceedings; (2) the availability of a remedy or "financial stake" for the complainant in the disciplinary proceeding; and (3) the broader policy implications of applying s. 45.1.

It remains to be seen how the HRTO applies *Penner* and *Claybourn* to other prior proceedings that differ from police disciplinary cases as they arise in future applications. Furthermore, given the Supreme Court's split in both *Figliola* and *Penner*, it is an open question if and when the Court may return to issue estoppel another day.

[67] *Khapar v Air Canada*, 2014 FC 138 at para. 10.

In the meantime, for practitioners who work in the human rights field, the following questions and considerations are worth bearing in mind:

- Has the applicant (whether your client is the applicant or respondent) brought the same or similar matter to another decision-making body such as the WSIB, a labour arbitration, a regulatory or disciplinary body, or the civil courts?
- What was the nature of that other proceeding and what context can be gleaned from the governing statute regarding whether the legislature contemplated parallel proceedings?
- Was a human rights allegation advanced and/or addressed by the other proceeding?
- Are there significant differences between the purposes, processes or stakes involved in the two proceedings?
- What are the remedies available, if any, from the prior proceeding as compared to the remedies available from the HRTO?
- Would it be fair in the circumstances to prevent the applicant from proceeding with a human rights application given the other proceeding?

Both issue estoppel and s. 45.1 of the *Code* are aimed at achieving justice for the parties by balancing the finality of litigation with the fairness of permitting a party to advance a matter in more than one proceeding when merited.