



Issue Estoppel: Concurrent Disciplinary and Civil Proceedings

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It is a well-established principle that litigants – both plaintiffs and defendants – may not relitigate issues that have been previously adjudicated upon. This principle was recently considered by the Court of Appeal in *Penner v. Niagara (Police Services Board)*, [2010] O.J. No. 4046 (C.A.), in which the Court affirmed the decision to strike parts of the action which had been previously adjudicated upon in a police discipline proceeding.

The facts of *Penner* are somewhat unique and lent themselves to the application of issue estoppel. In September 2002, Mr. Penner attended his wife's trial over a traffic infraction. He sat in the back of the courtroom and disrupted proceedings. When he was asked to leave by an officer, he refused. When that officer then attempted to arrest him, a struggle ensued and the courtroom "dissolved into pandemonium". Following this incident, Mr. Penner filed a complaint under the *Police Services Act*, R.S.O. 1990, c.P.15 and started a civil action against the arresting officers. In both instances, he claimed to be the victim of excessive force, unlawful arrest, false imprisonment, and malicious prosecution.

The parties agreed to await the outcome of the disciplinary proceeding before continuing with the litigation. The hearing progressed over a number of days and had all the hallmarks of a trial, including evidence from 13 witnesses (examined in-chief and cross-examined), 32 exhibits, and legal arguments. Mr. Penner was an active participant in support of his complaint. At the conclusion of this hearing, significant credibility findings were made against Mr. Penner and the officers were ultimately cleared of wrongdoing. Mr. Penner successfully appealed this decision to the Ontario Civilian Commission on Police Services where the presiding members concluded that the officers did not have the jurisdiction to arrest him in a courtroom and therefore any use of force was unjustified. Judicial review before the Divisional Court was successful. The three judge panel unanimously affirmed that the officers' conduct was proper.

Once the police discipline proceedings had concluded, the defendant officers and Board brought a motion to strike Mr. Penner's claim in the civil action on the basis of issue estoppel. Eugene Mazzuca of this law firm successfully argued that Mr. Penner could not litigate issues in the civil action that had already been decided. The motion judge held that the three-part issue estoppel test had been satisfied in the circumstances: the same question was considered in both proceedings, the conclusions of the police discipline hearing were final after several appeals, and the same parties were involved in both cases. Here, the motion judge reasoned, the application of issue estoppel would not operate an injustice. This decision was unanimously upheld by the Ontario Court of Appeal.

Penner is the first known case where the findings of a police discipline hearing have precluded subsequent civil litigation on the basis of issue estoppel. However, this case entailed a unique set of circumstances. It is unusual for a police discipline hearing to include the active participation of a complainant in the way Mr. Penner was involved. Not only did he testify in support of his complaint, but he also cross-examined other witnesses and made legal submissions on his own behalf. In short, he was fully engaged in the proceedings. If the hearing had proceeded in the usual course, it is less likely that the “same parties” requirement of the issue estoppel test would have been satisfied.

Also of significance were the clear findings of fact as they relate to the different standards of proof between police discipline proceedings and civil litigation. Where the “clear and convincing” standard may not be satisfied in police discipline proceedings, the same evidence may be sufficient for the “balance of probabilities” standard in civil litigation. Here, however, the burden of proof issue was moot. The hearing officer made clear findings of fact that there was no evidence to support Mr. Penner’s complaints. Accordingly, it did not matter which burden of proof was applied: even the lowest standard could not be satisfied. Had these factual findings not been so overwhelmingly in favour of one party, issue estoppel may not have applied.

In this case, the outcome of the police discipline hearing worked in the officers’ favour. However, this may not always be the case. Issue estoppel works both ways. If Mr. Penner had been successful in the police discipline proceedings, the officers would have been similarly limited by issue estoppel with respect to the defences they had available to them in the civil action. In light of *Penner*, therefore, greater attention will need to be paid to discipline proceedings where subsequent civil proceedings are contemplated.

Recently, Mr. Penner has been granted leave to appeal the Court of Appeal’s decision by the Supreme Court of Canada. ■