DANYLUK REVISITED

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PART I - Introduction

Almost six years have passed since the decision of the Supreme Court of Canada in Danyluk v. Ainsworth Technologies[1] caused the employment law bar to sit at attention and watch to see how the aftermath would unfold. How would the Court's interpretation of administrative decisions change in light of this decision? Would decisions of the Employment Insurance Tribunal and Human Rights Tribunal be binding upon the parties to civil proceedings? A review of the cases which have followed in Ontario illustrates reluctance by the Courts to apply the doctrine of issue estoppel to prevent full defence or pursuit of a cause of action on the merits in an employment law action. However, there are no hard and fast rules and counsel must remain cognizant of the possibility of an issue estoppel in appropriate circumstances. This paper will consider the evolution of the Danyluk decision and review its impact upon Court decisions following sister proceedings before Employment Insurance and Human Rights Tribunals in Ontario.

PART II - Pre-Danyluk

The doctrine of issue estoppel has its roots in Roman law. The concept is that once a dispute has been determined with finality it ought not be subject to further relitigation. This bar extends to both the cause of action, as well as determinations of fact. This concept has been extended to decisions of a judicial or quasi-judicial nature of administrative officers and tribunals.[2]

The essential elements of the issue estoppel doctrine were set out by the Supreme Court of Canada in *Angle v. Minister of National Revenue*[3] as:

(1) the same question has been decided;
(2) the judicial decision said to create the estoppel was final; and,
(3) the parties to the judicial decision or their privies were the same persons as the parties or privies to the proceedings in which the estoppel is raised.[4]

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[1] [2001] S.C.R. 460. (hereinafter referred to as "*Danyluk"*)

[2] Binnie J. in *Danyluk* at par. 20-22.

[3] [1975] 2 S.C.R. 248.

[4] *Angle* at pg. 254.
A comprehensive review of these factors as well as the relationship between issue estoppel and abuse of process, can be found in the paper written by Craig Flood and David Rosenfeld entitled "Estoppel and *Res*

The Court of Appeal considered the application of the issue estoppel doctrine in relation to the findings of an Employment Standards officer[5] in the case of *Rasanen v. Rosemount Instruments Ltd.*[6] Abella J.A. writing the decision for the majority adopted the test for determination of issue estoppel enunciated by the Supreme Court of Canada in *Angle*.[7]

The Court held that the question to be decided in the civil action was the same as that decided in the *Employment Standards* proceeding, namely: was there any entitlement by the employee to compensation from the employer arising from the termination of his employment? The Court stated that the "different linguistic and quantitative formulation" between the common law and the *Employment Standards Act* did not mean that the question was different.[8]

Judicata: When is it really over" presented at the Ontario Bar Association Institute 2005 program "Ten Intimidating Torts – A Ten Year Update".

[5] This is an issue which no longer exits in view of enactment of section of the *Employment Standards Act, 2000.*section 97 which provides:

> "s.97(1) An employee who files a complaint under this Act with respect to an alleged failure to pay wages or comply with Part XIII (Benefit Plans) may not commence a civil proceeding with respect to the same matter.
>
> (2) An employee who files a complaint under this Act alleging an entitlement to termination pay or severance pay may not commence a civil proceeding for wrongful dismissal if the complaint and the proceeding would relate to the same termination or severance of employment.
>
> (3) Subsections (1) and (2) apply even if,
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> > (a) the amount alleged to be owing to the employee is greater than the amount for which an order can be issued under this Act; or,
> >
> > (b) in the civil proceeding, the employee is claiming only that part of the amount alleged to be owing that is in excess of the amount for which an order can be issued under this Act.
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> (4) Despite subsections (1) and (2), an employee who has filed a complaint may commence a civil proceeding with respect to a matter described in those subsections if he or she withdraws the complaint within two weeks after it is filed."

This amount is capped at $10,000 pursuant to section 103(4) of the Employment Standards Act, 2000, S.O. 2000, as amended.

[6] (1993), 17 O.R. (3d) 267 (Ont.C.A.).

[7] *ibid*, para. 28-29 and adopting the reasoning of the House of Lords in *Carl-Zeiss0Stiftung v. Rayner & Keeler Ltd. (No.2),* [1967] 1A.C. 853 (H.L)., as was adopted by the Supreme Court of Canada in *Angle v. Minister of National Revenue* (1974), [1975] 2 S.C.R. 248 (S.C.C.) at p. 255

[8] *supra note* 6 at par. 30.

As to whether the decision of the Employment Standards Referee was "judicial" the Court stated:

> "Tribunals are bound by the rules of natural justice and, at a minimum, the parties are entitled to know the case they have to meet and to have an opportunity to meet it. The methodology of dispute resolution in these tribunals may appear unorthodox to those accustomed only to the Courtroom's topography, but while unfamiliar to a consumer of judicial justice, it is no less a form and forum of justice to its consumers…..
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> "As long as the hearing process in the tribunal provides parties with an opportunity to know and meet the case against them, and so long as the decision is within the tribunal's jurisdiction, then regardless of how closely the process mirrors a trial or its procedural antecedents, I can see no principled basis for exempting issues adjudicated by tribunals from the operation of issue estoppel in a subsequent action."[9]

The decision, being final, the Court found the second criterion also to be met.

In respect to whether the parties were the same, the Court held that there was no issue that the employee was a party or a privy to the proceeding having initiated the complaint, participated in the investigation, attended at the hearing and having participated fully therein.[10]

The Court therefore held the employee to be estopped from asserting that he was constructively dismissed in the civil action. No consideration was afforded as to whether or not the doctrine of issue estoppel ought to be applied.

The Court of Appeal revisited the issue estoppel question in the 1999 decision of *Minott v. O'Shanter Development Co.*[11] In this case the employee had applied for Employment Insurance Benefits after he was terminated for failure to report to work following a two day suspension. The Board of Referees allowed the employee's application for benefits, subject to a three week disqualification as a result of his misconduct. The employer sought to rely upon issue estoppel in defence of the employee's civil action for wrongful dismissal.

The Court of Appeal applied the same three criteria. However, here it was concluded that the question of whether there had been a termination for cause was not the same one as whether the employee had been guilty of misconduct. It held that misconduct for the purpose of the *Employment Insurance Act*,[12] does not automatically equate to just cause for dismissal at common law.[13]

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[9] *ibid* at par. 36-37.

[10] *ibid* at par. 44.

[11] (1999), 42 O.R. (3d) 321 (Ont.C.A.).

[12] S.C. 1996, c.23.

The Court distinguished the *Rasanen* case however by finding its application was case specific and only because the issue was the same in both proceedings. The Court held that this would not always be the situation, even in other *Employment Standards* cases. Each case must be considered within its own factual context.[14]

The Court went on to consider the second criteria and found that the decision was both final and judicial. It held that provided the tribunal's procedures meet fairness requirements and provide the tribunal was carrying out a judicial function, the decision should be considered a judicial one.[15]

With respect to whether the parties were the same, the Court held that this condition had also not been met. The employer did not participate in the Employment Insurance hearing and therefore the Court stated it could not be said to be a party, and could not be bound by the determination as to whether or not the employee's termination was justified in a later civil proceeding[16] (they also can not take advantage of a favorable result[17]). Where employers fully participate, they will have made themselves a party and will be bound by the determination of the issue, subject to the other criteria for the application of issue estoppel being met.[18]

The Court noted that employers do not typically participate on applications for Employment Insurance benefits or appeals, because the stakes are small and they do not have any direct financial interest in the outcome.[19] Laskin J.A. wrote:

> "Thus to give employers in O'Shanter's position party status for the purpose of issue estoppel would provide a perverse incentive for employers to participate actively in hearings before the Board of Referees or before an Umpire."[20]

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[13] *supra note* 11 at par. 27.

[14] *ibid* at par. 32.

[15] *ibid* at par. 35.

[16] *ibid* at par. 39.

[17] *ibid* at par 48.

[18] *ibid* at par. 23-32 & 39.

[19] *ibid*, par 47.

[20] *ibid* at par. 47

In *obiter* however, Laskin J.A. made reference to the discretionary element of issue estoppel:

> "Even had the three requirements been met, however, in my view the Court has always retained discretion to refuse to apply issue estoppel when to do so would cause unfairness or work an injustice……
>
> "Issue estoppel is a rule of public policy and, as a rule of public policy, it seeks to balance the public interest in the finality of litigation with the private interest in achieving justice between litigants. Sometimes these two interests will be in conflict, or, at least there will be tension between them. Judicial discretion is required to achieve practical justice without undermining the principles on which issue estoppel is founded. Issue estoppel should be applied flexibly where an unyielding application of it would be unfair to a party who is precluded from relitigating an issue."[21]

A host of concerns in the application of the issue estoppel doctrine to findings in the *Employment Insurance* context were expressed. The Court concluded that had the criteria been met, discretion would likely have been exercised and the doctrine not applied.[22]

Shortly thereafter, the Court of Appeal addressed these concerns in the case of *Schweneke v. Ontario* [23]. The Court again considered whether the determination of an Umpire under the *Unemployment Insurance Act* which determined that the employee had lost his employment by reason of his own misconduct, was binding in the civil context. The employee was terminated upon discovery by his employer that he had also be purporting to work for the German government full-time and had been collecting simultaneously two salaries and sets of benefits for a period of some eight years.

The Court concluded that notwithstanding the questions to be answered, the decision of the Umpire included findings of fact on the very issue raised between the parties in the civil action, namely, whether there was just cause for the dismissal. The Court in this case found that there was not reason to refuse to apply the doctrine of issue estoppel. Doherty J.A. in delivering the decision wrote:

> "The discretion cannot swallow whole the rule that makes the doctrine applicable to findings made by tribunals whose processes, although judicial, are less elaborate than those employed in civil litigation…."[24]

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[21] *ibid* at par 49-50.

[22] *ibid* at par. 60.

[23] (2000), 47 O.R. (3d) 97 (Ont.C.A.).

[24] *ibid* at par 40.

> "In our view, a party seeking to invoke the discretion cannot simply rely on the potential for the kind of injustice described in the above quoted passage from *Minott* but must demonstrate that the situation described in that passage actually arose in the particular case. The discretion must respond to the realities of each case and not to abstract concerns that arise in virtually every case where the finding relied on to support the doctrine was made by a tribunal and not a Court…."[25]

The Court concluded that the appellant knew exactly the case he had to meet before the Board and the Umpire, had every opportunity to present his case and, in fact, did so before both the Board and the Umpire. It was not shown by the employee that the absence of various procedural mechanisms (such as discovery and cross-examination of witnesses) worked any injustice in this case.[26] Accordingly, the Court refused to exercise it's discretion to refuse to apply the issue estoppel doctrine.

The discretionary element of the application of the issue estoppel doctrine coupled with the very fact-specific analysis of the doctrine and the discretionary elements showed a large degree of unpredictability. It was not until *Danyluk* that any guidance was offered as to how the discretionary element was to be applied or attempted to set out any considerations relevant to its application. [27]

PART III - Danyluk

Danyluk involved a motion to dismiss the claim by an employee for wrongful dismissal following the determination of an *ESA* claim in the employer's favor. The issue for the Court to determine was whether the denial of a claim for $300,000 in outstanding commissions alleged to be owed by the employer was binding upon the employee in the civil action.

Danyluk filed a complaint under the *ESA* in October 1993 and had a few conversations with an Employment Standards Officer ("ESO") prior to commencing an action for wrongful dismissal in the Court in 1994. The employer, Ainsworth then responded to the *ESA* complaint and defended the civil action.

Danyluk was not provided with a copy of the employer's submissions or given a right to respond.

In October 1994, the ESO found that Danyluk was entitled to two weeks pay in lieu of notice as prescribed under the ESA as her minimal entitlement and rejected her claim to outstanding commissions. While a right of appeal to the Director of

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[26] *ibid* at par. 61

[27] *supra note* 1 at par. 62.

Employment Standards existed, and Danyluk was advised of that right, she declined to appeal and proceeded with the civil action commenced a short time prior to the decision.

Ainsworth brought a motion to dismiss the action on the basis of that Danyluk's claim was barred by issue estoppel as it had already been rejected by the ESO. The motion's Court judge accepted Ainsworth's argument and dismissed Danyluk's action. That decision was upheld on appeal, notwithstanding the determination by the Court of Appeal that the ESO had failed to observe procedural fairness. Danyluk had failed to seek review of the ESO's decision. As a result, she was subsequently bound. Danyluk sought leave to appeal to the Supreme Court of Canada which appeal was heard in October 2000.

The Supreme Court of Canada overturned the decision of the Court of Appeal and refused to apply the doctrine of issue estoppel on the basis that to do so would lead to an unjust result. The Honourable Mr. Justice Binnie writing for the majority stated:

> "Finality is thus a compelling consideration and judicial decisions should generally be conclusive of the issues decided unless and until reversed on appeal. However, estoppel is a doctrine of public policy that is designed to advance the interests of justice. Where, as here, its application bars the Courthouse door against the appellant's $300,000 claim because of an administrative decision taken in a manner which was manifestly improper and unfair (as found by the Court of Appeal itself), a re-examination of some basic principles is warranted."

The Court held that the test for the application of the doctrine of issue estoppel is two-tiered. **First**, the Court must consider whether all three basis criteria for the application of the test are met; namely, (1) the issues are the same; (2) the parties are the same; and (3) was the decision was a final judicial decision. **Second**, the Court must consider whether despite the foregoing affirmative answers, discretion should be exercised against the application of the doctrine.[28]

In this first comment by the Supreme Court of Canada on the application of the discretionary element of the issue estoppel doctrine the Court made the following comments relevant to the exercise of such discretion:

> (a) the discretion is necessarily broader in relation to administrative tribunals because of the enormous range and diversity of the structures, mandates and procedures of administrative decision makers;[29]
>
> (b) It is an equitable doctrine closely related to abuse of process and is designed as an implement of justice and a protection against injustice;[30]

[28] *ibid* at par. 33-34.

[29] *ibid* at par. 62.

(c) whether there is anything in the circumstances of the case such that the usual operation of the doctrine of issue estoppel would work an injustice;[31] and,

(d) the discretion must respond to the realities of each case and not to abstract concerns that arise in virtually every case where the finding relied on to support the doctrine was made by a tribunal and not a Court."[32]

Binnie J.A. then set out a non-exhaustive[33] list of factors to the Court for consideration in the exercise of such discretion, namely:

(a) wording of the statute; [34]

(b) purpose of the legislative scheme;[35]

(c) availability of an appeal; [36]

(d) safeguards;[37]

(e) expertise of the decision maker;[38]

(f) circumstances giving rise to the earlier determination;[39] and,

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[30] *ibid* at par. 63.

[31] *ibid* at par. 63.

[32] *ibid* at par. 14.

[33] The Court noted expressly that the list of factors is open (at par. 67).

[34] Here the Court noted that the legislation did not purport to be an exclusive remedy and that the employer was aware that it would be responding to parallel and overlapping proceedings at the time the decision was made.

[35] Binnie J. (at par. 73) stated:

> "the purpose of the ESA is to provide a relatively quick and cheap means of resolving employment disputes. Putting excessive weight on the ESA decision in terms of issue estoppel would likely compel the parties in cases to mount a full-scale trial-type offence and defence, thus tending to defeat the expeditious operation of the ESA scheme as a whole. This would undermine fulfillment of the purpose of the legislation."

[36] Binnie J. (at par. 74) noted that the failure of a party to take advantage of an available appeal will be counted against them.

[37] The Court noted here that the adherence to the principals of natural justice will be considered (at par. 75).

[38] The Court noted in this respect that ESA officers are often non-legally trained individuals determining complex issues of contract law (at par. 77).

(g) potential injustice.[40]

The Court concluded that considering the above factors, the Court's discretion should be exercised to refuse to apply the issue estoppel doctrine. The appeal was allowed.

PART IV - Post Danyluk

Prior to the hearing of the *Danyluk* case by the Supreme Court of Canada the ESA had been amended. There was and is now, a provision which deems the filing of an ESA complaint to be a bar to the commencement of a civil proceedings. The only exception is where the complaint is withdrawn within two weeks of having been filed.[41] However, the *Danyluk* decision does still have application today. As stated by Sean C. Doyle in "*The Discretionary Aspect of Issue Estoppel: What Does Danyluk Add?*":

> "Perhaps most importantly, the Court held that the failure of an administrative decision-maker to act judicially does not necessarily deprive the decision of its judicial character for the purpose of issue estoppel. Provided the decision-maker was vested with adjudicative authority and the decision was required to be reached in a judicial manner, any procedural deficiencies, including violations of natural justice, are properly remedied through the exercise of discretion."[42]

In particular, the decision has been applied to the consideration of issue estoppel in many contexts outside of the employment law realm. Although reaching beyond the scope of this paper, it is interesting to note that the case has received consideration in hundreds of cases across Canada since its release in 2001, many outside the area of employment

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[39] The Court stated (at par. 78):

> "It is unlikely the legislature intended a summary procedure for smallish claims to become a barrier to closer consideration of more substantial claims. (The legislature's subsequent reduction of the monetary limit of an ESA claim to $10,000 is consistent with this view.) "

The Court also stated it would consider both Danyluk's vulnerability at the time she filed the ESA complaint and the fact that she included a complaint for $300,000 in commissions.

[40] In this respect Binnie J. held (at par. 80):

> "As a final and most important factor, the Court should stand bank and, taking into account the entirety of the circumstances, consider whether application of issue estoppel in the particular case would work an injustice."

He went on to state:

> "Whatever the appellant's various procedural mistakes in this case, the stubborn fact remains that her claim to commissions worth $300,000 has simply never been properly considered and adjudicated."

[41] *supra note* 5.

[42] Cnd. Labour & Employment Law Journal (**year)** 9 C.L.E.L.J. 296.

including: immigration, cross-border litigation, consideration of findings in criminal proceedings and subsequent related actions[43].

However, within the area of employment, the decision is of application in Ontario to the areas of employment insurance and Human Rights Complaint decisions. It would appear from a reading of Danyluk that the Supreme Court of Canada lessened the risk to employees in pursuit of administrative remedies; however, it is important to remember that it was in the context of a rejection of the claim by an employment standards officer. The legal world sat and waited to see what would happen where there was a full appeal or in processes with complete hearings having been conducted.

A. Employment Insurance Findings

The issue was first considered in Ontario in *Lemay v. Canada Post Corp.* [44] which involved a civil action for constructive dismissal. Following all evidence being led by both parties at trial, the employee attempted unsuccessfully to argue that the employer should be barred from taking the position that he had not been constructively dismissed. The Board of Referees under the *Employment Insurance Act* had concluded that the employee was justified in the resignation of his employment and therefore was eligible to receive benefits.

The *Employment Insurance* proceedings followed the decision of an insurance agent in favor of the employee, which the employer appealed. The employer fully participated in the appeal and called three witnesses, the same three as were called at trial.

The Court first considered whether the three requirements for the application of issue estoppel had been met. It first concluded that the parties were the same. Smith J. then went on to consider whether the issues were the same:

> "The purpose and the financial consequences to the parties in the employment insurance proceeding were very different from those in the constructive dismissal action. In the EI proceeding, the issue concerned the penalty period of eight weeks which would apply if Mr. Lemay had resigned without cause and the amount claimed in the constructive dismissal action in the initial Statement of Claim was for an amount in excess of $300,000.00."[45]

Notwithstanding this commentary, it was concluded that the issue of whether or not Mr. Lemay had just cause for voluntarily leaving his employment based upon the

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[43] The relationship of determinations in criminal proceedings to other actions involves the application of the doctrine of abuse of process, the topic of the paper written by Craig Flood and David Rosenfeld entitled "Estoppel and *Res Judicata*: When is it really over" presented at the Ontario Bar Association Institute 2005 program "Ten Intimidating Torts – A Ten Year Update".

[44] (2003), 26 C.C.E.L. (3d) 241 (Ont.S.C.J.), per Smith J.

[45] *ibid* at par 157.

modification of terms and conditions respecting wages and salary was essentially the same question as whether the employer had made a unilateral change to a fundamental term to the employment contract, which was not accepted by the employee.[46]

The Court then considered the factors set out by the Supreme Court of Canada in *Danyluk* In that respect some comments which will likely carry forward into other cases in this area in the future include:

- Wording of the Statute: no provision relates to the remedies of an employee against his or her employer.[47]
- Purpose of the Legislation: the purpose is to provide benefits to unemployed individuals, which is a completely different purpose from compensating individuals by awarding damages for a civil claim of wrongful dismissal or constructive dismissal.[48]
- Availability of an Appeal: the employer had a further unexercised right of appeal available.[49]
- Safeguards to Parties in the Administrative Process: the facts were very complex and unsuited to the summary procedure. The lack of available cross-examination was a key factor which prevented the employer's position from being accepted.[50]
- Expertise of the Administrative Decision Maker: the real issue upon which the Board of Referees made its decision was credibility. It possessed no expertise in the assessment of credibility.[51]
- Circumstances Giving Rise to the Prior Administrative Proceedings: there was no expectation by the parties that the issue of the constructive dismissal be determined by the Board of Referees. The employee did not raise the argument of issue estoppel until following the completion of submission of evidence at trial.[52]
- Potential Injustice: there is no protection from vexatious multiplication of suits where the party seeking the benefit launched the second proceeding and carried it through to trial.[53]

It was concluded that the employee had not been constructively dismissed. One wonders if the analysis may have been different had the matter been dealt with on a motion, been

[46] *ibid* at par. 178.

[47] *ibid* at par. 183.

[48] *ibid* at par. 184.

[49] *ibid* at par. 187.

[50] *ibid* at par. 188-189.

[51] *ibid* at par. 191-192.

[52] *ibid* at par. 193-194.

[53] *ibid* at par. 197.

raised at an earlier stage, or had different facts. It is fair to say that any one of those things may have altered the outcome.

The issue arose a few months later in *D'Aoust v. 1374202 Ontario Inc.*[54] which, like *Lemay,* involved a civil action for constructive dismissal and argument at trial by the employee that the employer was estopped from a denial of the constructive dismissal because of the findings of under the *Employment Insurance Act* determined in the employee's favor. In this case however, the employer's only participation in the process was to respond to a written inquiry from the appointed insurance agent in writing which set forth the employer's position.

The Court here also found that the issue to be determined was the same and the finding sought to be applied was a final and judicial one. However, the Court concluded that the employer could not properly be found to be a party in the Employment Insurance proceeding having only minimal involvement by way of a response to a request for information.[55]

In any event, Reilly J. considered, in the event he was incorrect in his conclusion as to the employer's status as a party, discretion should be exercised to not apply the issue estoppel doctrine. It was concluded that such discretion would be exercised. "To conclude in the circumstances that the defendant would be so barred would be unconscionable and contrary to all principals of fairness, natural justice and common sense." The comments of Reilly J, read in the context in which they appeared, do not purport to be statements concerning the application of issue estoppel generally but rather intended to be limited to the facts of this particular case. The employee's action was dismissed.

The issue was again recently considered by the Court in *Korenberg v. Global Wood Concepts Ltd.*[56]. In this case the employee's initial application for benefits was denied; he appealed to the Board of Referees which appeal was allowed. The employer then appealed to the Umpire who dismissed the appeal.

The facts alleged to constitute "just cause" in the civil action were the same ones raised and rejected by the Umpire. The Court here found that the employer, who appealed and attended the appeal, became a "party" such as that consideration is relevant to the application of the issue estoppel doctrine. The Court found that the three constituent elements of issue estoppel were present and went on to consider whether this was an appropriate case in which to apply the doctrine.
The Court recognized that the Employment Insurance regime is not identical to that of a civil action, and that the scope of compensation and amounts in issue may be greater in a

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[54] (2003), 26 C.C.E.L. (3d) 272 (Ont.S.C.J.), per Reilly J.

[55] *ibid* at par. 48.

[56] (2005), 2006 C.L.L.C. 210-017.

civil action. However, the legal and factual issues at stake in particular cases may be sufficiently similar that the doctrine of issue estoppel is appropriately applied in the interests of achieving finality and ensuring that justice is done.

The Court commented in relation to the first consideration of the wording of the statue and the purpose of the legislative scheme:

> "The mere fact that the purposes are not identical does not necessarily mean that the discretion not to apply issue estoppel should be applied. In this case, the fact that the legal and factual issues are so similar is a factor tending in favor of its application."[57]

The Court next noted that there was an appeal both available and exercised; clearly a factor supporting the application of issue estoppel. There were held to be appropriate safeguards available to the parties within the administrative process, notwithstanding the absence of the right of cross-examination. In order to avoid the impact of issue estoppel it would be necessary that there be "unjust to give effect to that finding in subsequent civil litigation".[58] The expertise of the decision-maker was similarly not found to be lacking.[59]

The Court then considered the final matter of potential injustice which is to be assessed. The Honourable Mr. Justice Binnie in *Danyluk*, described this as being a consideration of the entirety of the circumstances to determine whether the application of the doctrine of issue estoppel would work an injustice. In that regard the Court held:

> "On of the policy concerns about the application of the doctrine of issues estoppel is that it could encourage employers to become involved in and fight the award of EI, thus lengthening the process and undermining the purpose of the legislation. While this is indeed a concern, this present case is one in which the defendant chose to be involved in the hearing to begin with. It is not a situation where the defendant had no involvement at all with the EI process and then finds itself bound by that decision. In *Danyluk,* as Rosenberg J.A. had noted in the Court of Appeal, the appellant plaintiff had received neither notice of the defendant's allegation nor an opportunity to respond. In this case, the defendant had both. To allow it to do so would allow it to relitigate a matter that it had participated in and lost at both the Board and on appeal, and would be unjust to the plaintiff."[60]

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[57] *ibid* at par. 19.

[58] *ibid* at par. 24.

[59] *ibid* par. 27.

[60] *ibid* par. 31.

The Court refused to give weight to the suggestion that the employer did not realize that it could be bound by issue estoppel in this manner by its participation in the employment insurance hearing. It held:

> "Whether the defendant had consulted legal counsel or not before the hearing, it clearly had by the time of the appeal. In any event, it certainly had the resources and access to legal counsel, and it would not serve the interests of justice to allow it to relitigate the facts determined at the hearing and confirmed by the appeal on these grounds."[61]

The Court concluded there to be no reason for it to exercise its discretion in refusing to apply the issue estoppel.

As should be apparent, whether issue estoppel will be applied is a grey area. There is certainly risk to parties to participate in determinations such as those in the nature of employment insurance entitlements. An over zealous employer can certainly be held to the decision of a termination without cause determined in this context. Failure to advise of this could be a source of liability to counsel. Employer participation is best advised to be kept to the bare minimum so that counsel can maintain control of the case, the evidence and the manner in which the final determination is made in any civil litigation.

B. HUMAN RIGHTS TRIBUNAL HEARINGS

In *Danyluk*, the Supreme Court characterized issue estoppel as an inherently harsh doctrine when applied in the administrative law context. Recognizing the Courts reticence to using the doctrine, Professor David J. Mullan noted that issue estoppel is often limited in administrative proceedings. He concluded that:

> The bulk of authority holds that either they have no application or that they apply in a different and less decisive form than they do in the context of regular litigation.[62]

It is arguable that the Court's general reluctance to apply the doctrine of issue estoppel in the administrative law setting is augmented when rights of fundamental importance are at stake. In particular, Human Rights occupy a uniquely protected sphere in the Canadian legal framework that can only be overridden by express and unequivocal legislative language. No one, unless clearly authorized by law to do so,

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[61] *ibid* par. 29.

[62] *Cremasco v. Canada Post Corp.,* 45 C.H.R.R. D/410 at para 60.

may contractually agree to suspend its operation and thereby put oneself beyond the reach of its protection.[63]

In light of the paramount legal status given to Human Rights in Canada, it is generally recognized that complainants should not lightly be stripped of their right to pursue their claims before a Human Rights Tribunal. That being said, there is also a strong public interest in finality, consistency and avoidance of duplicative litigation. What becomes difficult for Courts and administrative tribunals alike is how to reconcile these two legal principles when they come into direct conflict. What appears to be the tentative judicial solution to resolving this conflict is that the amount of procedural fairness afforded in any given case will dictate whether the Human Rights issue has been properly adjudicated.

1. <u>The Impact of Human Rights decision on subsequent civil action</u>

Where fundamental Human Rights Complaint are at stake the Courts have consistently held that the parties must have had the opportunity to know and meet the case against them. Where procedural fairness is overlooked in earlier administrative proceedings, the Courts in a subsequent civil action are reticent to apply the doctrine of issue estoppel particularly where fundamental Human Rights Complaint are at stake.

The foregoing was demonstrated in *Ferrare v. Kingston Interval House*, [64] where the complainants brought a workplace discrimination and harassment claim to the Human Rights Commission of Ontario. The Commission proceeded with a preliminary investigation and employed the services of an investigator whose report held that the complaints were not made out. The plaintiffs did not agree with the reports or the decision of the Commission and subsequently brought a civil action to have the Court decide the entire matter as to whether their services were terminated wrongfully.

The Employer sought to have the pleadings struck in the civil action relying on the doctrine of issue estoppel as enumerated in *Danyluk*. However, the Court ultimately refused to apply issue estoppel because the plaintiffs' were denied natural justice and procedural fairness during the Commission's investigation. Hermiston J. held that "at no time were [the plaintiffs] given a hearing, no sworn evidence was heard by an impartial hearing officer, and no *viva voce* legal submissions were considered." [65] As a result, it was held that this action did not represent duplicate litigation and the fundamental importance of the rights at stake mandated a proper hearing that would give the plaintiffs an opportunity to have access to fundamental justice.

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[63] *See University of British Columbia v. Berg*, [1993] 2 S.C.R. 353, *Zurich Insurance Co. v. Ontario (Human Rights Commission),* [1992] 2 S.C.R. 321, *C.N.R. v. Canada (Human Rights Commission*), [1987] 1 S.C.R. 1114, *Ontario (Human Rights Commission) v. Simpsons-Sears Ltd*., [1985] 2 S.C.R 536, and *Winnipeg School Division No. 1 v. Craton*, [1985] 2 S.C.R. 150.

[64] [2002] O.J. No. 2503.

[65] *ibid* at para. 14.

A similar conclusion was reached by the Court in *Connolly v. Canada Post Corp*.[66] [2005] N.S.J. No. 116, where the appellant believed that he was harassed in the workplace as a result of an unwillingness to accommodate his disabilities. He filed a complaint to the Canadian Human Rights Commission ("CHRC") and subsequently filed a complaint alleging retaliatory acts carried out against him because of the original complaint after the Commission dismissed his complaint. After the Commission dismissed his complaints, he made an application to the Federal Court seeking judicial review. The complaints of harassment and retaliation were dealt with adversely to the complainant by both the Commission and by the Federal Court on judicial review. As a result, when the complainant sought further appeal to the Federal Court of Appeal, the doctrine of issue estoppel was invoked. In applying the seven factors enumerated in *Danyluk*, the Nova Scotia Court of Appeal noted that the safeguards available to the parties in the administrative procedure were fundamentally lacking. In this case there was only an investigation by the Commission, during which the appellant had a right to make a submission, but not a right to confront his opponent, either with the aid of discovery proceedings or trial proceedings.[67] Similar to the finding in *Ferrare*, the complainant was not given an opportunity to properly adjudicate this matter which addressed their fundamental Human Rights. In fact, the Court went on to note that without those procedural safeguard there was a "substantial potential for injustice were issue estoppel to be applied".[68] The Courts have thus demonstrated an unwillingness to estop a Human Rights issue in subsequent civil proceedings without proper procedural safeguards in place.

In addition to ensuring that Human Rights complainants are provided with procedural safeguards, the Courts have also been sensitive to the remedial limitations provided under Human Rights legislation. This concern was demonstrated in *Villeneuve v. Korjus* [69]where the Court carefully examined the penalties imposed in a prior Human Rights proceeding and compared them with the relief claimed in civil action. At the prior proceedings the plaintiff sought and obtained relief in the form of disciplining the defendant for his discriminatory conduct. However in the civil case, the claim was for pecuniary damages in the form of financial compensation for the traditional torts of wrongful interference with contractual relations, defamation, and the other less traditional torts outlined in the statement of claim. The Court expressly noted that financial awards provided under Human Rights Code are severely limited.[70] As a result, the Court would not apply the doctrine of issue estoppel where the relief available via the Court was unavailable in an administrative proceeding. In other words, where the complainant is not made whole in the administrative proceeding, the Courts may not allow parties to invoke

[66] [2005] N.S.J. No. 116 (N.S.S.C.J.).

[67] *ibid* at para. 27.

[68] *ibid* at para. 29.

[69] [2004] O.J. No. 2825.

[70] *Villeneuve v. Korjus [*2004] O.J. No. 2825 at para 22.

the doctrine of issue estoppel to prevent access to remedies that would make the party whole.

In a recent legislative initiative, Bill 107 was passed in Ontario to transform the roles of the Ontario Human Rights Commission and Ontario Human Rights Tribunal. Under the new legislation, individual claims will no longer be filed with the commission, but instead filed directly with the tribunal where the formal Court like proceedings currently occurs. As a result, it is arguable that with the elimination of the Commission as a gatekeeper to the Tribunal, individual complainants may now have the full panoply of procedural safeguards from the outset thereby making the doctrine of issue estoppel more accessible. Consequently, the *Connolly* and *Ferrare* type cases may become wholly obsolete and entirely reconsidered in the context of the new framework. Only time will tell how the Courts will react to this legislative development.

2. The impact of Civil Actions on subsequent Human Rights proceedings

Similar to the concerns enumerated in *Villeneuve*, there is a corresponding concern that certain remedies are only available for complainants at administrative proceedings. The lack of procedural fairness however, is a matter which shows a wider ability for the application of the doctrine. In *Kaiser v. Dural* [71] the Nova Scotia Human Rights Commission appealed from a decision by a Board of Inquiry that the Commission and the respondent Kaiser were estopped from proceeding to a full hearing on Kaiser's Human Rights Complaint based upon adverse findings in a civil action. Kaiser commenced a wrongful dismissal lawsuit and filed a Human Rights Complaint. Kaiser's wrongful dismissal action was heard first and the trial judge awarded him damages in lieu of notice, but found that there had been no discrimination. As a result, the Board of Inquiry determined that the trial judge had finally determined the same issue of discrimination raised by Kaiser in his Human Rights Complaint.

Although the Court ultimately dismissed the appeal, they did note the broad remedial powers that are available to the Human Rights Board of Inquiry that are not concurrently "available to a Supreme Court judge hearing a civil suit for wrongful dismissal." [72] For instance, companies that have been found to be in violation of Human Rights legislation can be ordered to take remedial action to redress systemic problems or to rehire an employee that has been dismissed. In this case these special administrative remedies were not being sought; therefore it was commented that there was no need to rehear issues already adjudicated because the employee was made whole through the remedies afforded at the preceding civil action. As a result, the Court determined that the *Danyluk* test had been met and the issue was thereby estopped from being adjudicated in the Human Rights proceeding.

[71] [2003] N.S.J. No. 418

[72] *ibid* at para. 39.

3. The impact of arbitral findings in Human Rights Proceedings

Where a Human Rights claim involves an alleged breach of a labour relations statute, concurrent proceedings are often instituted before an arbitrator and the Human Rights Tribunal. Consequently, Courts and administrative tribunals often grapple with the issue of when an arbitration award can be relied upon to establish a foundation for issue estoppel in a subsequent proceeding. As previously stated, this situation appears to arise most commonly in the case of alleged violations of Human Rights legislation.

Apart from the issue that the parties in each proceeding are different, thereby violating the mutuality principle enumerated in *Angle*, the applicability of issue estoppel in this context is most often centered on whether the question is the same in both proceedings.

In *Ford Motor Co. of Canada Ltd. v. Ontario (Human Rights Commission)*[73] the Ontario Court of Appeal rejected the contention that issue estoppel should be applied to invalidate a decision by a Human Rights Board of Inquiry arising from the same facts. However, the arbitration award (which had been issued ten years earlier) did not on its face consider that the grievor's discharge was discriminatory.[74] The Court noted:

> "That question raises issues of who is a privy in such circumstances and how the Commission will exercise its discretion under s. 34(1)(a) to prevent duplication and inconsistency."[75]

The issue of parties to the proceeding was dealt with in *Barter v. Insurance Corp. of British Columbia*[76], where a grievor brought a duty of fair representation complaint to the Labour Board and subsequently brought an identical allegation against the Union before the British Columbia Human Rights Tribunal. The Board, in both the original panel's and the reconsideration panel's decisions, dealt with the very issue that was now before the Human Rights Tribunal and decided against the Complainant. In considering all the circumstances the Tribunal found that because the Board had squarely dealt with the Human Rights issue and the grievor was provided with full procedural fairness rights before the Board, the application of issue estoppel would not work an injustice. [77]

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[73] [2001]O.J. No. 4937 (O.C.A).

[74] What was particularly important about this case was that the arbitration award was issued prior to the *Weber v. Ontario Hydro* and subsequent legislative changes that permits Labour Boards and arbitration panels to deal with human rights issues that come before it. [74]As a result, the Court of Appeal foreshadowed the difficulties that would emerge post *Weber* where the labour arbitrator had applied the Human Rights Code and the grievor seeks to have the human rights claim reconsidered under the Code.

[75] *supra note 73* at para. 65.

[76] *Barter v. Insurance Corp. of British Columbia* 2003 BCHRT 9.

[77] *See also Christopherson v. Victoria Shipyard Co*. [2005] B.C.H.R.T.D. No. 193 at para 70-77, in this case the complainant filed a complaint with the British Columbia Human Rights Commission after the exact same issue of discrimination in the workplace was decided before the Labour Relations Board.

An interesting parenthetical note made by the Tribunal in *Barter* addresses the mutuality principle enumerated in the *Angle* and *Danyluk*. The Tribunal noted that "in many jurisdictions the Commission is a party before the tribunal and has carriage of the litigation. As the Commission could not have been a party in previous labour relations proceedings this makes satisfying the third *Angle* criterion difficult if not impossible."[78] Likewise, in some cases the union representing the grievor at labour arbitration may not be deemed the grievor's privy, thereby revoking the application of issue estoppel.[79]

The jurisprudence on this issue was canvassed in M*cKnight v. Insurance Corp. of British Columbia* [80] The Tribunal in *McKnight* noted that Human Rights adjudicators have on several occasions declined to apply issue estoppel to prevent a complainant from pursuing a Human Rights Complaint after arbitration. [81] In those cases the grievors were often left out of the arbitration process and for all intents and purposes were deemed strangers to the proceeding. As a result, the Courts were unwilling to invoke the doctrine of issue estoppel where the complainant did not participate in the arbitration. Once such case is that of *MacRae v. International Forest Products Ltd*. [82] in which the Tribunal noted that:

> "Notwithstanding the Union's exclusive bargaining agency under the Labour Relations Code, Mr. MacRae was in every sense a stranger to the arbitration proceedings. His employment had not been terminated at that time and he was not a grievor in that proceeding. He was not given notice of those proceedings or an opportunity to participate."[83]

In contrast, a union may, in some circumstances, be deemed an employee's privy. The Tribunal will recognize this in cases where the employee was the grievor in previous arbitration proceedings and was given an opportunity to give evidence at the arbitration hearing and actively participated in that process.[84]

Similar to Barter, the Tribunal found that the complainant had received the full panoply of procedural fairness rights at the Labour Board. As a result of the foregoing, Ms. Christopherson was not allowed to proceed with the Human rights complaint before the Commission as a result of the doctrine of issue estoppel.

[78] *supra note 76* at par. 49.

[79] *MacRae v. International Forest Products Ltd*. [2005] B.C.H.R.T.D. No. 462 at para. 79.

[80] 2003 BCHRT 89.

[81] *See Naraine v. Ford Motor Co. of Canada* (No. 2) (1995), 24 C.H.R.R. D/466 (Ont. Bd. Inq.), upheld *Ford Motor Co. of Canada v. Ontario (Human Rights Commission)*, [2001] O.J. No. 4937 (Ont. C.A.).

[82] [2005] B.C.H.R.T.D. No. 462.

[83] *MacRae v. International Forest Products Ltd*. [2005] B.C.H.R.T.D. No. 462 at para. 79.

[84] *McKnight v. Insurance Corp. of British Columbia* 2003 BCHRT 89 at para 61.

The foregoing issues have introduced some unique obstacles to the application of the issue estoppel doctrine to Human Rights findings in the labour arbitration context. For example, the Canadian Human Rights Tribunal in *Cremasco v. Canada Post Corp*.,[85] noted that conditions necessary to apply the doctrine of issue estoppel will "not be met in the majority of arbitration cases that come before the Tribunal, if only because the Commission will not be privy to other litigation." [86]

Based on the foregoing, it becomes clear that Courts are ultimately looking for indicia of procedural fairness and natural justice to determine whether the harsh doctrine of issue estoppel is applicable in proceedings where fundamental rights are in play.

4. The impact of decisions from the WSIB and Independent Third Party Adjudicators on Human Rights Proceedings

The impact of Danyluk on Human Rights proceedings extends to a wide variety of administrative decision making bodies. For example, in the case of *Sherman v. Revenue Canada*,[87] the complainant had a discrimination claim referred to the Canadian Human Rights Tribunal ("Tribunal"). At the Tribunal, the complainant argued that the findings of an independent third party ("ITP") reviewer,[88] who reversed the Canada Revenue Agency's decision to terminate her, should be subsequently binding on the Tribunal's finding. Conversely, the employer argued that the findings of the Workplace Safety and Insurance Board ("WSIB") should bind a subsequent decision of the Tribunal. Both parties relied on the doctrine of issue estoppel to enforce the findings of previous administrative decision makers on subsequent decisions of the Tribunal. However, the decisions of the WSIB and ITP appeared to contradict one another.

After reviewing the principles of issue estoppel enumerated in Danyluk, the Tribunal found that the ITP decision was final and rendered in a judicial manner with all the trappings of procedural fairness and natural justice. In contrast, the Tribunal found that the fundamental issues being determined in three related WSIB proceedings were different from those issues present in the Human Rights that was before the Tribunal. As a result, the Tribunal concluded that the preconditions for issue estoppel were met with regards to the ITP decision, but not with respect to the WSIB decisions.[89]

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[85] *Cremasco v. Canada Post Corp*., 45 C.H.R.R D/410.

[86] *ibid* at para 69.

[87] 54 C.H.R.R. D/496.

[88] ITP is a relatively new process that was developed by the CRA pursuant to the [Canada Customs and Revenue Agency Act] S.C. 1999, c.17. *The process provides for an independent review of grievance relating to terminations, lay-offs and demotions.*

[89] ibid at para 41.

In spite of the foregoing, the Tribunal ultimately concluded that although the criteria for the application of issue estoppel had been met with regards to the ITP decision, this was an appropriate case to exercise their discretion to refuse to apply the doctrine. The Tribunal found that given the multiplicity and complexity of the proceedings and decisions relating to the issues raised in the complaint, they did not believe that the interests of justice would be served by the application of the doctrine of issue estoppel.[90]

In other words, where a case involves a multiplicity of proceedings in numerous forums and the decisions conflict on important points, subsequent adjudicators will be reticent to apply the doctrine of issue estoppel because " it simply cannot provide an expeditious shortcut through the patchwork of decisions and procedures."[91]

PART V - Conclusion

After six years in force, Danyluk has helped clarify the use of issue estoppel and its application in the administrative law context by providing a road map of considerations for decision making bodies. Courts and Administrative tribunals alike have demonstrated a general reluctance in applying this doctrine where important employment rights are at stake and the basic tenets of procedural fairness and natural justice were not clearly present in the initial administrative proceeding. However, in spite of the foregoing judicial reluctance, counsel must remain cognizant of the potential use and resulting consequences of this doctrine in the employment law context. Counsel must take notice of the way administrative decisions are being adjudicated and the scope of the issues being decided by administrative decision makers and be prepared to advise clients and raise issue estoppel arguments appropriately.

[90] Ibid at para 54.

[91] Ibid at para. 51.