Res Judicata of Administrative Tribunals: Is the Criminal Injuries Compensation Board Binding on Civil Trials?

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Innovative lawyers are constantly thinking of new arguments to advance their client’s cause.. Recently arguments have arisen as to whether findings of administrative tribunals in general, and the Criminal Injuries Compensation Board in particular, are binding determinations on subsequent civil actions. Essentially counsel argue a CICB decision is *res judicata* which binds subsequent civil actions. In situations where no criminal conviction has been entered against the defendant, but the plaintiff has obtained compensation from the CICB, the defendant is likely to face arguments that the decision of the board to pay money is binding on the defendant in the civil action. However, as of now, no Court has ever found a CICB decision alone to be *res judicata* on a subsequent civil action.

Before we get into the nitty gritty of CICB jurisdiction, it will be useful to look at the doctrine overall. The 2010 Irwin Law text, *Civil Litigation,* by Janet Walker and Lorne Sossin, provides a useful overview of the theory as follows:

The requirements of *res judicata* are: that the same cause of action has been decided; that the judicial decision which is said to create the estoppel was final; and that the parties to the judicial decision are the same persons as the parties to the proceedings in which the question of estoppel is raised…. *Res judicata* reduces the likelihood that contrasting judgments will be given in identical cases, thereby promoting consistency, predictability, and faith in the legal system. (p. 109)

*Res Judicata* has spawned three distinct doctrinal streams in Canada – cause of action estoppel, issue estoppel, and abuse of process. Cause of action estoppel precludes a litigant from asserting a claim or defence that it asserted or had an opportunity of asserting in past proceedings. Issue estoppel precludes a litigant from asserting a position that is inconsistent or contrary to a fundamental point decided in a past proceeding. “Abuse of process” is utilized where subsequent litigation would call the administration of justice into disrepute in light of the original litigation. (p. 110)

As discussed below, the Supreme Court has discussed the concepts of abuse of process and issue estoppel a number of times. While the theories are similar, abuse of process can be more widely applied and does not have the same strict test as issue estoppel, as such counsel have moved towards arguments based on abuse of process and away from issue estoppel.

The leading case on the law is the Supreme Court decision in *Toronto v. C.U.P.E.*, 2003 SCC 63, wherein the court discusses both abuse of process and issue estoppel. You may recall that in this case a City of Toronto employee was convicted of molesting a young boy. The City of Toronto fired the man, the union grieved, and the arbitrator rejected the criminal conviction of the man and found that he could not be fired for the molestation because it did not happen. The City of Toronto appealed to the Supreme Court and the Court found that the criminal conviction was *res judicata* and binding on the arbitrator. The Supreme Court outlined the theory of abuse of process as follows:

**35**  Judges have an inherent and residual discretion to prevent an abuse of the court's process. This concept of abuse of process was described at common law as proceedings "unfair to the point that they are contrary to the interest of justice … and as "oppressive treatment"…

1. ... abuse of process may be established where: (1) the proceedings are oppressive or vexatious; and, (2) violate the fundamental principles of justice underlying the community's sense of fair play and decency. The concepts of oppressiveness and vexatiousness underline the interest of the accused in a fair trial. But the doctrine evokes as well the public interest in a fair and just trial process and the proper administration of justice.

**37**  In the context that interests us here, the doctrine of abuse of process engages "the inherent power of the court to prevent the misuse of its procedure, in a way that would ... bring the administration of justice into disrepute" …:

1. The doctrine of abuse of process engages the inherent power of the court to prevent the misuse of its procedure, in a way that would be manifestly unfair to a party to the litigation before it or would in some other way bring the administration of justice into disrepute. It is a flexible doctrine unencumbered by the specific requirements of concepts such as issue estoppel. …
2. One circumstance in which abuse of process has been applied is where the litigation before the court is found to be in essence an attempt to relitigate a claim which the court has already determined.

**51**  Rather than focus on the motive or status of the parties, the doctrine of abuse of process concentrates on the integrity of the adjudicative process. Three preliminary observations are useful in that respect. First, there can be no assumption that relitigation will yield a more accurate result than the original proceeding. Second, if the same result is reached in the subsequent proceeding, the relitigation will prove to have been a waste of judicial resources as well as an unnecessary expense for the parties and possibly an additional hardship for some witnesses. Finally, if the result in the subsequent proceeding is different from the conclusion reached in the first on the very same issue, the inconsistency, in and of itself, will undermine the credibility of the entire judicial process, thereby diminishing its authority, its credibility and its aim of finality.

**52**  In contrast, proper review by way of appeal increases confidence in the ultimate result and affirms both the authority of the process as well as the finality of the result. It is therefore apparent that from the system's point of view, relitigation carries serious detrimental effects and should be avoided unless the circumstances dictate that relitigation is in fact necessary to enhance the credibility and the effectiveness of the adjudicative process as a whole. There may be instances where relitigation will enhance, rather than impeach, the integrity of the judicial system, for example: (1) when the first proceeding is tainted by fraud or dishonesty; (2) when fresh, new evidence, previously unavailable, conclusively impeaches the original results; or (3) when fairness dictates that the original result should not be binding in the new context…

53 The discretionary factors that apply to prevent the doctrine of issue estoppel from operating in an unjust or unfair way are equally available to prevent the doctrine of abuse of process from achieving a similar undesirable result. There are many circumstances in which the bar against relitigation, either through the doctrine of *res judicata* or that of abuse of process, would create unfairness. If, for instance, the stakes in the original proceeding were too minor to generate a full and robust response, while the subsequent stakes were considerable, fairness would dictate that the administration of justice would be better served by permitting the second proceeding to go forward than by insisting that finality should prevail. An inadequate incentive to defend, the discovery of new evidence in appropriate circumstances, or a tainted original process may all overcome the interest in maintaining the finality of the original decision…

While *Toronto v. CUPE* is interesting, most of us already knew that criminal convictions are binding *res judicata* on subsequent civil actions for the factual elements necessary for the charge. We also know that criminal acquittals are not binding *res judicata* on subsequent civil actions because not guilty findings only prove that guilt beyond a reasonable doubt was not proved, not whether the act occurred on the balance of probabilities (see for instance *Polgrain Estate v. Toronto East General Hospital*, 2008 ONCA 427).

A more interesting question is whether findings of administrative tribunals are *res judicata* on civil actions. The Supreme Court of Canada decision *Danyluk v. Ainsworth Technologies Inc*., 2001 SCC 44, deals with this exact question and finds that in at least some instances they are not. *Danyluk* was decided two years before *Toronto v. CUPE* but it is still good law and the two cases mesh nicely.

In *Danyluk*, a woman was wrongfully dismissed and lost $300,000 in commissions. The employer claimed that the woman resigned. Just prior to the firing the employee brought an Employment Standards Act application to the tribunal and had a one hour interview with the ESA officer. She then abandoned the claim and proceeded with a civil action instead. The employer completed the ESA claim and made written submissions to the board. The ESA officer did not advise the employee she could make responding submissions and decided that the woman resigned. The woman had a right to appeal the ESA decision, but chose to proceed with the civil action instead. The employer pled issue estoppel and the motions judge agreed. The Ontario Court of Appeal dismissed the woman’s appeal, but the Supreme Court allowed her appeal and said while the factors of issue estoppel might apply, the court has an overriding discretion to reject issue estoppel. The court considered a number of factors on whether an administrative tribunal would bind a civil action;

**18**  The law rightly seeks a finality to litigation. To advance that objective, it requires litigants to put their best foot forward to establish the truth of their allegations when first called upon to do so. A litigant, to use the vernacular, is only entitled to one bite at the cherry. The appellant chose the ESA as her forum. She lost. An issue, once decided, should not generally be re-litigated to the benefit of the losing party and the harassment of the winner. A person should only be vexed once in the same cause. Duplicative litigation, potential inconsistent results, undue costs, and inconclusive proceedings are to be avoided.

**19**  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.

**20**  The law has developed a number of techniques to prevent abuse of the decision-making process. One of the oldest is the doctrine estoppel per rem judicatem with its roots in Roman law, the idea that a dispute once judged with finality is not subject to relitigation... The bar extends both to the cause of action thus adjudicated (variously referred to as claim or cause of action or action estoppel), as well as precluding relitigation of the constituent issues or material facts necessarily embraced therein (usually called issue estoppel) ... Another aspect of the judicial policy favouring finality is the rule against collateral attack, i.e., that a judicial order pronounced by a court of competent jurisdiction should not be brought into question in subsequent proceedings except those provided by law for the express purpose of attacking it…

**21**  These rules were initially developed in the context of prior court proceedings. They have since been extended, with some necessary modifications, to decisions classified as being of a judicial or quasi-judicial nature pronounced by administrative officers and tribunals. In that context the more specific objective is to balance fairness to the parties with the protection of the administrative decision-making process, whose integrity would be undermined by too readily permitting collateral attack or relitigation of issues once decided.

**25**  The preconditions to the operation of issue estoppel were…:

1. that the same question has been decided;
2. that the judicial decision which is said to create the estoppel was final; and,
3. that 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.

62 The appellant submitted that the Court should nevertheless refuse to apply estoppel as a matter of discretion. There is no doubt that such a discretion exists… "such a discretion must be very limited in application". In my view the discretion is necessarily broader in relation to the prior decisions of administrative tribunals because of the enormous range and diversity of the structures, mandates and procedures of administrative decision makers.

1. The Purpose of the Legislation

**73**  Nevertheless, 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 such 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 fulfilment of the purpose of the legislation.

1. The Availability of an Appeal

**74**  This factor corresponds to the "adequate alternative remedy" issue in judicial review... Here the employee had no right of appeal, but the existence of a potential administrative review and her failure to take advantage of it must be counted against her:

1. The Safeguards Available to the Parties in the Administrative Procedure

**75**  As already mentioned, quick and expeditious procedures suitable to accomplish the objectives of the ESA scheme may simply be inadequate to deal with complex issues of fact or law. Administrative bodies, being masters of their own procedures, may exclude evidence the court thinks probative, or act on evidence the court considers less than reliable. If it has done so, this may be a factor in the exercise of the court's discretion. Here the breach of natural justice is a key factor in the appellant's favour.

1. The Expertise of the Administrative Decision Maker

**77**  In this case the ESA officer was a non-legally trained individual asked to decide a potentially complex issue of contract law. The rough-and-ready approach suitable to getting things done in the vast majority of ESA claims is not the expertise required here...

**78**  In the appellant's favour, it may be said that she invoked the ESA procedure at a time of personal vulnerability with her dismissal looming. It is unlikely the legislature intended a summary procedure for smallish claims to become a barrier to closer consideration of more substantial claims.

**80**  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.

In essence, the Supreme Court in *Danyluk*, finds that *res judicata* for administrative tribunal decisions can apply to civil action. However, even where the specific requirements of issue estoppel exist, the court has residual discretion under the abuse of process doctrine to determine whether it would be fair to apply in the circumstances. In *Danyluk*, those court indicated whether *res judicata* is appropriate in the circumstance depends on i) the purpose of the tribunal decision, ii) the stakes at issue, iii) the procedure employed (i.e. laws of evidence), iv) the right of appeal, and v) the overall fairness of the situation.

The abuse of process doctrine was further elaborated upon by the Supreme Court of Canada in *Penner v. Niagara (Regional Police Services Board)*, 2013 SCC 19. In *Penner*, the plaintiff alleged that the police assaulted him in the courthouse. Penner started a complaint under the *Police Services Act* and also a civil law suit. The PSA complaint was dismissed. The police officers then moved to dismiss the civil law suit on the basis that issue estoppel already decided the matter and was binding. The motions judge and Court of Appeal agreed issue estoppel applied and barred the civil suit. The Supreme Court said that the factors of issue estoppel were met, but they exercised their discretion to find that issue estoppel could not bar the civil suit. The Supreme Court reiterated the *Danyluk* was still good law, but that the factors enumerated were not exhaustive, rather they were simply part of a general fairness inquiry. The Court indicated the discretion must consider the i ) Fairness of prior proceedings, and ii) Differences in purposes, processes or stakes involved in the two proceedings. The Court Summary states:

The legal framework governing the exercise of the discretion not to apply issue estoppel is set out in *Danyluk v. Ainsworth Technologies*, 2001 SCC 44, [2001] 2 S.C.R. 460. This framework has not been overtaken by this Court's subsequent jurisprudence. While finality is important both to the parties and to the judicial system, unfairness in applying issue estoppel may nonetheless arise. First, the prior proceedings may have been unfair. Second, even where the prior proceedings were conducted fairly, it may be unfair to use the results of that process to preclude the subsequent claim, for example, where there is a significant difference between the purposes, processes or stakes involved in the two proceedings. The text and purpose of the legislative scheme shape the parties' reasonable expectations in relation to the scope and effect of the administrative proceedings. They guide how and to what extent the parties participate in the process. Where the legislative scheme contemplates multiple proceedings and the purposes of those proceedings are widely divergent, the application of the doctrine might not only upset the parties' legitimate and reasonable expectations but may also undermine the efficacy and policy goals of the administrative proceedings, by either encouraging more formality and protraction or discouraging access to the administrative proceedings altogether. These considerations are also relevant to weighing the procedural safeguards available to the parties. A decision whether to take advantage of those procedural protections available in the prior proceeding cannot be divorced from the party's reasonable expectations about what is at stake in those proceedings or the fundamentally different purposes between them. The connections between the relevant considerations must be viewed as a whole.

So this is the state of the law with respect to *res judicata* of administrative tribunals on civil actions. The test is generally one of fairness that depends on the i) fairness of the proceeding, ii) stakes at issue, iii) nature of the procedure, iv) expectations of the parties, v) right to appeal. Moreover, it seems likely that some decisions of a specific tribunal could be binding, while other decisions of the same tribunal could not. This would depend on the specific factors of each decision, not the nature of the board itself.

While the overarching law is relatively clear, no case in Canada has been faced with the task of determining whether a decision of the Criminal Injury Compensation Board is binding and dispositive of a subsequent civil action. At this point in time, I think it is fair to assume that in most circumstances a CICB decision will not be binding on a subsequent civil action, but in a select few situations, if the above criteria are met, a CICB decision could theoretically be binding. It will just depend on the circumstances.

In the loose leaf textbook, *Personal Injury Practice Manual*, by Firestone, Gluckstein, and Samis, the purpose, stakes, and procedures of the Criminal Injuries Compensation Board are described as follows:

11.1 … As there is no express code of practice or procedure for the Board, proceedings before the Board must be seen in light of general principles of tribunal practice.

11.6 … It is the Board which must decide whether a relevant offence has taken place, and the matter is not determined by the initial categorization of the offence by police, by the charges laid against the offender or by the decision of a criminal court.

11.28 The CICB is subrogated to all rights of the person to whom payment is made under the *Compensation for Victims of Crime Act*, to recover damages civil proceedings in respect of the injury or death, and may maintain an action in the name of such person against any person against whom such action lies.

11.34 The standard to be applied by the Board to the behavior of victims is that of a ‘reasonable and prudent person. The law of negligence is not applicable to an application, and the Board is not to assess varying degrees of civil liability for certain damages.

11.49 The applicant is required to prove his or her case on the balance of probabilities. While evidence is given under oath, the Board conducts the hearing in an informal manner. There is no adherence to the strict rules of evidence, and hearsay evidence is admissible. If a person is convicted of a criminal offence in respect of an act or omission on which a claim is based, proof of the conviction shall, after the time for an appeal has expired, or if an appeal was taken, after it has been dismissed and no further appeal is available, be taken as conclusive proof that the offence has been committed.

11.57 The reasons of the CICB are not to be held to the same level of scrutiny as that of judges, as the Board’s members are not legally trained. …

Given that the test for *res judicata* of an administrative action is essentially based on expectations, fairness, stakes, procedure, and the right to appeal, it seems likely that most CICB decisions would not be found to have met the threshold required for abuse of process. The officers are not legally trained and do not follow the rules of evidence. On the other hand, the CICB can award up to $365,000 in damages for ongoing criminal acts (although this is extraordinarily rare), can subrogate against the offending defendant, and permits the defendant to testify at the hearing. A CICB decision can also be appealed to the Divisional Court.

On the balance of fairness it is unlikely that a court would find that the decision of the CICB is binding on a subsequent civil action, especially because no case has ever found that before and no defendants expects that it would be binding. Nevertheless, enterprising lawyers will continue to make the arguments that it should be and one day they may very well succeed.