HUMAN RIGHTS TRIBUNAL OF ONTARIO

B E T W E E N:

Durrell Claybourn

Applicant

-and-

Toronto Police Service and Toronto Police Services Board

Respondents

-and-

African Canadian Legal Clinic, Metro Toronto Chinese & Southeast Asian Legal Clinic, South Asian Legal Clinic of Ontario, Ontario Human Rights Commission, Independent Police Review Director, and Regional Municipality of Peel Police Services Board

Intervenors

A N D B E T W E E N:

Dave Ferguson

Applicant

-and-

Toronto Police Services Board

Respondent

A N D B E T W E E N:

Dean de Lottinville

Applicant

-and-

Her Majesty the Queen in Right of Ontario as Represented by the Minister of Community Safety and Correctional Services (Ontario Provincial Police)

Respondent

INTERIM DECISION

Panel: David A. Wright, Mark Hart and Judith Keene

Date: July 25, 2013

File Numbers: 2009-04292-I; 2010-07146-I; 2011-08205-I

Citation: 2013 HRTO 1298

Indexed as: **Claybourn v. Toronto Police Services Board**

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Durrell Claybourn and Dave Ferguson, Applicants	)	Bruce Best, Counsel
Dean de Lottinville, Applicant	)	Self-represented
Toronto Police Service and Toronto Police Services Board, Respondents	)	Robert Baldwin and Andrea Denovan, Counsel
Her Majesty the Queen in Right of Ontario as Represented by the Minister of Community Safety and Correctional Services (Ontario Provincial Police), Respondent	)	Marnie Corbold and Jinan Kubursi, Counsel
African Canadian Legal Clinic, Metro Toronto Chinese & Southeast Asian Legal Clinic and South Asian Legal Clinic of Ontario, Intervenors	)	Avvy Yao-Yao Go and Virginia Nelder, Counsel
Ontario Human Rights Commission, Intervenor	)	Cathy Pike and Sunil Gurmukh, Counsel

Independent Police Review Director, Intervenor	)	Jean Iu, Counsel
Regional Municipality of Peel Police Services Board, Intervenor	)	Patricia Murray, Counsel

David A. Wright and Mark Hart:

INTRODUCTION

[1] Section 45.1 of the *Human Rights Code*, R.S.O. 1990, c. H.19, as amended (the "*Code*"), gives this Tribunal the authority to dismiss all or part of an application where the substance of the application has been appropriately dealt with in another proceeding. In this Interim Decision, we re-examine this Tribunal's approach to the interpretation and application of s. 45.1 when an applicant previously filed a public complaint about the conduct of a police officer under the *Police Services Act*, R.S.O. 1990, c. P.15, as amended (the "*PSA*").

[2] In *Penner v. Niagara (Regional Police Services Board)*, 2013 SCC 19, the Supreme Court held in an analogous situation, applying the common law doctrine of issue estoppel, that it would be unfair to preclude a public complainant from pursuing a subsequent civil claim because of the findings in the Ontario police officer discipline process. 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. In light of the guidance of the Court about the unfairness that would result from dismissing a human rights application based on previous police disciplinary proceedings, these Applications must proceed.

PROCEDURAL BACKGROUND

[3] In 2009 and 2010, a number of Tribunal decisions were issued finding that the public complaints process under the *PSA* was a "proceeding" within the meaning of s. 45.1 and dismissing applications that were found to have been appropriately dealt with through the *PSA* process. Given the significance of this issue, the Tribunal drew several further cases to the community's attention and set deadlines for interested parties to intervene. Five Applications, covering a range of different situations and different police services, were case managed and heard together and a panel of three adjudicators was appointed to hear the section 45.1 preliminary issue: see *Claybourn v. Toronto Police*

Services Board, 2011 HRTO 1406; *Shallow v. Toronto Police Services Board*, 2011 HRTO 1407; *Leong v. Peel Regional Police Services Board*, 2011 HRTO 1741; *de Lottinville v. Ontario (Community Safety and Correctional Services*), 2011 HRTO 1742*;* and *Ferguson v. Toronto Police Services Board*, 2011 HRTO 1785.

[4] One of the five Applications, *Shallow*, was removed from the joint hearing after applicant's counsel did not meet the timelines for filing materials. This Application was subsequently dismissed in part on other grounds and deferred pending a civil proceeding: *Shallow v. Toronto Police Services Board*, 2013 HRTO 834. Another was dismissed as abandoned after the hearing, as the applicant failed to make written submissions or appear at the hearing: *Leong v. Peel (Regional Police Services Board)*, 2012 HRTO 1085. The remaining three Applications are addressed in this Interim Decision.

[5] Prior to the hearing, the African Canadian Legal Clinic, the Metro Toronto Chinese & Southeast Asian Legal Clinic and the South Asian Legal Clinic of Ontario (the "Coalition"), the Ontario Human Rights Commission (the "Commission"), and the Independent Police Review Director (the "IPRD") were granted leave to intervene in the Claybourn Application: 2011 HRTO 1904. The Regional Municipality of Peel Police Services Board ("Peel PSB") was originally a respondent to the *Leong* application and made argument at the hearing. It also sought to make written submissions on the application of *Penner*, and this was unopposed by the other parties. The Peel PSB is granted leave to intervene in the Claybourn Application.

[6] Since the respondents in these cases asked for them to be dismissed under s. 45.1, the Supreme Court has twice made significant decisions affecting the relevant legal principles. In October 2011, the Supreme Court of Canada released its decision in *British Columbia (Workers' Compensation Board) v. Figliola*, 2011 SCC 52. After the extensive written submissions and oral hearing on May 14 and 15, 2012, the panel decided to wait to release its Decision until the Supreme Court's decision in *Penner*, which had at that point been argued. *Penner* was released on April 5, 2013. The parties

made written submissions regarding the impact of the *Penner* decision, which were filed by May 17, 2013.

[7] We have been made aware that the applicant Mr. de Lottinville has experienced a significant medical condition that prevented him from filing written submissions in response to the *Penner* decision. Since his Application will not be dismissed, this has not caused him prejudice.

DECISION

[8] The Tribunal is obliged to consider the principles underlying the doctrine of issue estoppel as articulated by the majority in *Penner* when interpreting and applying s. 45.1 of the *Code*. That case held that in light of the statutory provisions in the *PSA* that expressly contemplate parallel civil proceedings, the lack of any personal remedy or "financial stake" for complainants in the *PSA* disciplinary process, and the broader policy considerations, it would be unfair to preclude a public complainant from pursuing a civil action arising from the same facts. It found that doing so would be "a serious affront to basic principles of fairness" (para. 66).

[9] In our view, s. 45.1 cannot and should not be interpreted to bar a *Code* Application where do to so would result in an affront to basic principles of fairness. In such circumstances the substance of the Application cannot be found to have been "appropriately dealt with". In light of the holding in *Penner,* s. 45.1 should not be applied to dismiss an application on the basis that the same underlying allegations of misconduct have been addressed as a result of a complaint filed under the *PSA*. Accordingly, we do not dismiss these Applications under s. 45.1.

THE PUBLIC COMPLAINTS PROCESS UNDER THE *PSA*

[10] The *PSA* was amended effective October 19, 2009 to establish the IPRD and a revised public complaints process. The *PSA* as it existed prior to these amendments is relevant to the de Lottinville Application and will be referred to as the "former *PSA*". The *PSA* as it currently exists is relevant to the Claybourn and Ferguson Applications and

will be referred to as the "current *PSA*". Where the amendments are not material to the matters discussed in this decision, we refer generally to the *PSA* public complaints process.

a) The Public Complaints Process under the former PSA

[11] Pursuant to Part V of the former *PSA*, any member of the public could make a complaint about the conduct of a police officer: s. 56(1). Subject to certain limited exceptions, the chief of police was required to cause every complaint about the conduct of a police officer to be investigated and the investigation reported in a written report: s. 64(1). If, at the conclusion of the investigation and upon review of the written report, the chief of police was of the opinion that the complaint was unsubstantiated, then no action was to be taken in response to the complaint and the complainant was to be so notified and advised of the right to ask the Ontario Civilian Commission on Police Services ("OCCPS", which is now the OCPC) to review this decision: s. 64(6). Alternatively, if the chief of police was of the opinion that the police officer's conduct may constitute misconduct or unsatisfactory work performance, then a hearing was held: s. 64(7). Pursuant to s. 69(1), this hearing was required to be conducted in accordance with the *Statutory Powers Procedure Act*, R.S.O. 1990, c. S.22, as amended ("*SPPA*"), and the complainant was a party at the hearing. The prosecutor and the hearing officer were both appointed by the Chief of Police.

[12] If a complainant was notified that his or her complaint was unsubstantiated, the complainant had the right to ask OCCPS to review this decision: s. 72(5). The OCCPS was an independent statutory agency with broad powers to oversee and review police services in the province, including the specific responsibility to conduct reviews, at the request of a complainant, of a finding that a complaint was unsubstantiated: s. 22(e.1). Members of the OCCPS were appointed by the Lieutenant Governor in Council: s. 21(2).

[13] Upon a complainant's request, OCCPS was required to review the decision that the complaint was unsubstantiated, taking into account any material provided by the

complainant and the police, but was not required to, and generally did not hold a hearing: s. 72(7). Upon completion of its review, OCCPS could confirm the decision, direct the police to process the complaint as it specifies, or assign the review or investigation of the complaint or the conduct of a hearing to another police service: s. 72(8). The decision by OCCPS was final and binding and could not be appealed: s. 72(12).

[14] The standard to be applied by a chief of police and OCCPS in determining whether a hearing into a complaint of police misconduct was the subject of the decision by the Ontario Court of Appeal in *Canadian Civil Liberties Assn. v. Ontario Civilian Commission on Police Services*, (2002) 61 O.R. (3d) 649. Justice Weiler held that if one of the permissible inferences to be drawn from all of the circumstances surrounding the complaint is that misconduct has occurred, then the statutory requirement has been met and a hearing must be held (para. 67). While the complaint must contain more than a "self-serving bald allegation", there need only be a "reasonable basis or an 'air of reality' to the evidence before proceeding to the next stage" (para. 67). Further, in deciding whether a hearing should be held, the evidence is not to be weighed as it would be by the trier of fact. The exercise is to determine whether misconduct may have been committed, not whether it has been committed (para. 70).

[15] "Misconduct" was defined in s. 74 of the former *PSA* to include the commission of an offence described in a prescribed code of conduct: s. 74(1)(a). This code of conduct was prescribed by O. Reg. 123/98, and included a failure "to treat or protect a person equally without discrimination with respect to police services because of that person's race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, marital status, same-sex partnership status, family status or handicap".

[16] The former *PSA* included provisions that "no person shall be required to testify in a civil proceeding with regard to information obtained in the course of his or her duties, except at a hearing held under this Part" (s. 69(8)) and that "no document prepared as the result of a complaint is admissible in a civil proceeding, except at a hearing held under this Part" (s. 69(9)).

b) The Public Complaints Process under the current PSA

[17] The Independent Police Review Director ("IPRD") was established by s. 26.1 of the current *PSA*, whose functions include the management of complaints made to him or her by members of the public in accordance with Part V and the regulations: s. 26.2. The Director is appointed by the Lieutenant Governor in Council, on the recommendation of the Attorney General (s. 26.1(1)), and cannot be a police officer or former police officer (s. 26.1(2)). The Director has the power to appoint such employees as he or she considers necessary to carry out his or her duties (s. 26.1(4)).

[18] The former *PSA* complaint process is largely continued in the current *PSA* pursuant to Part V of the Act. Any member of the public can make a complaint about the conduct of a police officer, although the complaint is now to be made to the Office of the IPRD ("OIPRD"): s. 58(1). Complaints made at a police station are sent to the OIPRD. The OIPRD then reviews the complaint, and has the power not to deal with the complaint in specified circumstances: ss. 59, 60. Where the OIPRD proceeds with a complaint, it has certain options available in respect of the complaint as specified in s. 61. For complaints of police misconduct, the OIPRD has the power: to refer the complaint to the chief of police of the police service to which the complaint relates; to refer the complaint to the chief of police of another municipal police service; or to retain the complaint: s. 61(5).

[19] Information provided to us by the OIPRD indicates that, between October 19, 2009 and March 31, 2010, the OIPRD received 544 public complaints and retained 50 investigations of conduct complaints and between April 1, 2010 and March 31, 2011, the OIPRD received 4083 public complaints and retained 259 investigations of conduct complaints in addition to one other conduct complaint from the prior period. The majority of cases retained during the period between April 1, 2010 and March 31, 2011 related to events that took place during the G20 Summit in Toronto in June 2010.

[20] The OIPRD states that the majority of conduct complaints are referred for investigation to the chief of police of the police service to which the complaint relates.

Between October 19, 2009 and March 31, 2010, the OIPRD referred 327 investigations of conduct complaints to chiefs of police, and from April 1, 2010 to March 31, 2011, the OIPRD referred 1584 investigations of conduct complaints to chiefs of police in addition to 66 investigations of conduct complaints received during the prior period.

[21] Where a conduct complaint is referred by the OIPRD to the chief of police of the police service to which the complaint relates, the chief of police is required to cause the complaint to be investigated and the investigation reported in a written report: s. 66(1). If, at the conclusion of the investigation and upon review of the written report, the chief of police is of the opinion that the complaint is unsubstantiated, then no action is to be taken in response to the complaint and the complainant, the police officer who is the subject of the complaint and the OIPRD must be notified in writing, together with a copy of the investigation report, and the complainant must be advised of the right to ask the IPRD to review this decision: s. 66(2). If the chief of police believes on reasonable grounds that the police officer's conduct may constitute misconduct or unsatisfactory work performance, then a hearing must be held: s. 66(3). Alternatively, if the chief of police is of the opinion that the misconduct was not of a serious nature, the chief of police may resolve the matter informally without holding a hearing, if the police officer and the complainant consent to the proposed resolution: s. 66(4).

[22] Misconduct must be proven on the standard of clear and convincing evidence: s. 84. The hearing is conducted in accordance with the *SPPA* and the complainant is a party: s. 83. The prosecutor and the hearing officer are appointed by the chief of police: s. 66(3), 82, 83.

[23] If a complainant is notified that his or her complaint is unsubstantiated or that any misconduct is regarded as being of a less serious nature, the complainant has the right to ask the IPRD to review this decision: s. 71. Upon a complainant's request, the IPRD is required to review the decision that the complaint was unsubstantiated or was of a less serious nature, taking into account any material provided by the complainant or the chief of police, but is not required to hold a hearing: s. 71(2). Upon completion of its review, the IPRD may confirm the decision, direct the chief of police to deal with the

complaint as it specifies, assign the investigation of the complaint or the conduct of a hearing to another police service, take over the investigation of the complaint, or take any other action it considers necessary: s. 71(3). Where the OIPRD retains a conduct complaint for investigation and finds the complaint to be unsubstantiated, there is no statutory right of appeal or review.

[24] The OIPRD states that even without a request for review, its Case Management Branch reviews every investigation report received from a police service to ensure that the complaint has been thoroughly investigated. Each investigation report is reviewed by either an investigator or a lawyer or law clerk. If the report does not reflect a thorough investigation into the complaint, the IPRD will send the complaint back to the police service with directions for further investigation.

[25] "Misconduct" is defined in s. 80 of the current *PSA* to include the commission of an offence described in a prescribed code of conduct: s. 80(1)(a). The code of conduct now appears as a schedule to O. Reg. 268/10, and continues to include a failure "to treat or protect a person equally without discrimination with respect to police services because of that person's race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, marital status, family status or disability".

[26] The current *PSA* continues to include provisions that "no person shall be required to testify in a civil proceeding with regard to information obtained in the course of his or her duties under [Part V], except at a hearing held under this Part" (s. 83(7)) and that "no document prepared as the result of a complaint is admissible in a civil proceeding, except at a hearing held under this Part" (s. 83(8)). Similar provisions apply to the IPRD, and employees and investigators appointed by the IPRD: see ss. 26.1(10) and (11).

FACTS OF INDIVIDUAL APPLICATIONS

a) De Lottinville Application

[27] Mr. de Lottinville's Application arises out of incidents alleged to have occurred in late April 2009 at a bar and hotel in Elliott Lake, which is serviced by the Ontario

Provincial Police ("OPP"). As it relates to the actions of the OPP, Mr. de Lottinville's Application raises the following allegations of racial discrimination: that on the evening of April 25, 2009, while in the washroom at a bar in Elliott Lake called Cheers, he was kicked in the leg by an OPP officer and was told to leave town; that on April 27, 2009, several OPP police officers responded to a call from the hotel owner requesting their assistance in getting Mr. de Lottinville to leave the hotel; and that while escorting Mr. de Lottinville and his companion from the hotel, one of the officers used a racial slur towards him.

[28] Mr. de Lottinville made a complaint under the *PSA*. A Detective Sergeant with the OPP's Professional Standards Bureau investigated this complaint, and conducted interviews with Mr. de Lottinville, his companion and numerous other relevant witnesses, as well as a review of relevant OPP recordings and documents. At the conclusion of the investigation, he found that Mr. de Lottinville's allegations were unsubstantiated. As a result, a letter dated October 26, 2009 advised Mr. de Lottinville that no further action would be taken.

[29] As was his right under the *PSA* as it existed at that time, Mr. de Lottinville sought a review of this decision by the OCPC. By letter dated December 6, 2010, the OCPC advised Mr. de Lottinville that his request had been submitted to a review panel, which had considered the contents of the file including his original complaint, the correspondence he had sent to the OCPC for review, the complaint file provided by the OPP Professional Standards Bureau, and the decision. The OCPC advised Mr. de Lottinville that, having examined his complaint in detail, the panel was satisfied that the conclusions reached by the OPP were not unreasonable. Accordingly, it confirmed the decision that Mr. de Lottinville's complaint was unsubstantiated.

[30] The respondent OPP seeks dismissal of the Application pursuant to s. 45.1 of the *Code* on the basis that the substance of the Application already has been appropriately dealt with by the investigation under the *PSA*, the initial decision that the allegations were unsubstantiated, and the OCPC's confirmation of that decision.

b) Claybourn Application

[31] The Application filed by Mr. Claybourn dated October 18, 2010 arises out of an incident that occurred on January 25, 2010, when Mr. Claybourn was stopped, searched and questioned by two undercover police officers with the Toronto Police Service ("TPS"). Mr. Claybourn alleges that he was racially profiled as a drug suspect on the basis of stereotypes associated with his age and skin colour.

[32] The amendments to the *PSA* discussed above took effect between the time of Mr. de Lottinville's public complaint and that of Mr. Claybourn. Mr. Claybourn filed a complaint with the IPRD alleging officer misconduct. The IPRD referred it to the TPS for investigation. A detective from 14 Division conducted the investigation and prepared a report finding that Mr. Claybourn's complaints about insulting language and racial profiling were unsubstantiated, but that his complaint about being searched without justification was substantiated.

[33] By letter dated May 7, 2010, an inspector with the TPS, acting as the Liaison Officer for the Chief of Police, advised Mr. Claybourn that he had reviewed the results of the investigation and concurred with the investigator's findings. With regard to the allegation that had been substantiated, the inspector concluded that the misconduct committed by the officers was of a less serious nature. The letter advised Mr. Claybourn of his right to request a review by the IPRD, but Mr. Claybourn did not do so.

[34] The respondents TPS and the Toronto Police Services Board ("TPSB") seek dismissal of the Application pursuant to s. 45.1 of the *Code* on the basis that the substance of the Application already has been appropriately dealt with by the investigation under the *PSA* and the decision confirming the findings of the investigation.

c) Ferguson Application

[35] Mr. Ferguson's Application dated February 24, 2011 arises out of incidents on March 3 and September 3, 2010. On March 3, 2010, Mr. Ferguson was stopped by two

TPS officers after he spit on the sidewalk and was pulled by his coat by one of the officers. On September 3, 2010, Mr. Ferguson was approached by two TPS officers when he was smoking a cigar outside the building where his wife and children lived and was given a ticket for loitering. Mr. Ferguson alleges that he was treated and spoken to inappropriately by these officers and by two other TPS officers who arrived later. Mr. Ferguson alleges that he is being mistreated by police and stopped repeatedly because he is a Black Jamaican man with dreads.

[36] Mr. Ferguson filed a complaint under the current *PSA* in relation to the March 3, 2010 incident. This complaint was assigned to the TPS for investigation. The investigation was completed without interviewing Mr. Ferguson. The TPS states that it made numerous unsuccessful attempts to contact Mr. Ferguson. Mr. Ferguson disputes this. The investigation report found that Mr. Ferguson's complaint was unsubstantiated. Mr. Ferguson did not request review by the IPRD.

[37] With regard to the September 3, 2010 incident, Mr. Ferguson filed a *PSA* complaint with the IPRD, but withdrew it before any investigation was conducted.

[38] The respondent TPSB seeks dismissal of the March 3, 2010 allegation as raised in Mr. Ferguson's Application pursuant to s. 45.1 of the *Code* on the basis that the substance of this allegation has been appropriately dealt with by the investigation under the *PSA*.

SECTION 45.1 OF THE *CODE* AND THIS TRIBUNAL'S CASE LAW RE *PSA* COMPLAINTS

[39] Section 45.1 of the Code provides as follows:

> 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.

[40] In *Campbell v. Toronto District School Board*, 2008 HRTO 62, this Tribunal held that it was helpful to consider s. 45.1 in two parts: (1) whether there was another

"proceeding" and (2) if so, whether it "appropriately dealt with" the substance of the application.

[41] This Tribunal's decision in *Qiu v. Neilson*, 2009 HRTO 2187, was the first case to consider the application of s. 45.1 of the *Code* in the context of a complaint made under the *PSA*. In that case, the applicant had filed a complaint under the *PSA* alleging misconduct by certain police officers, which was investigated by the police service and found to be unsubstantiated. The applicant then sought review by OCCPS, which confirmed the decision of the chief of police.

[42] In *Qiu*, it was determined that the complaint and investigation process under the PSA, including a review by OCCPS, constituted a "proceeding" within the meaning of s. 45.1 of the *Code*.

[43] The *Qiu* decision went on to consider whether the *PSA* complaints process had appropriately dealt with the substance of the applicant's allegations. While the applicant had not expressly asserted his *Code* rights in his *PSA* complaint and had not expressly alleged that he had experienced discrimination as a result of the officer's alleged conduct, it was found that the investigation and decision under the *PSA* nonetheless had addressed the same factual allegations as raised by the applicant in his human rights application and thereby deprived the applicant of the necessary "factual underpinning" to support his allegations of discrimination: see paras. 34 to 39. Accordingly, it was found that the substance of the applicant's allegations as raised in his *PSA* complaint were in pith and substance essentially the same as raised in his human rights application, and it was further found that these allegations had been appropriately dealt with in the *PSA* complaints process. Accordingly, the Application as against the police service and the named police officers was dismissed pursuant to s. 45.1 of the *Code*.

[44] This issue was next considered by this Tribunal in *Pamula v. Ontario Provincial Police*, 2010 HRTO 73, which relied upon the *Qiu* decision to find that a complaint and investigation under the *PSA* together with a review by OCCPS constituted a

"proceeding" and that the substance of the Application already had been appropriately dealt with through the PSA complaint process. Similar conclusions were reached by this Tribunal in *Ghafourian v. Toronto Police Services Board*, 2010 HRTO 1620, *Kampe v. Regional Municipality of York Regional Police Services Board*, 2010 HRTO 1741, and *Claybourn v. Toronto Police Services Board*, 2010 HRTO 1575.

[45] In *A.F. v. Durham Regional Police Services Board*, 2010 HRTO 1508, this Tribunal found that a complaint and investigation under the *PSA* constituted a "proceeding" within the meaning of s. 45.1 even in circumstances where the applicant did not seek a review of the decision by OCCPS: see paras. 8 to 14. This determination was subsequently followed in *Kau v. Regional Municipality of Waterloo Police Services Board*, 2011 HRTO 1873.

THE *FIGLIOLA* DECISION

[46] In *Figliola*, three workers who suffered from chronic pain challenged a policy of the British Columbia Workers' Compensation Board ("WCB") that limited benefits for chronic pain to 2.5% of total disability as being contrary to the B.C. *Human Rights Code*, R.S.B.C. 1996, c. 210. This issue was considered by a WCB Review Officer, who conducted a written hearing. The Review Officer found that the WCB policy did not violate the *Human Rights Code*. While the workers filed an appeal to the Workers' Compensation Appeals Tribunal ("WCAT"), the B.C. Legislature amended the governing statute to remove the WCAT's ability to consider and apply the *Human Rights Code*. As a result, the workers abandoned their appeal and filed complaints before the BC Human Rights Tribunal ("BCHRT") raising the same alleged violation of the *Human Rights Code* as they had raised before the Review Officer.

[47] The WCB sought dismissal of the human rights complaints pursuant to s. 27(1)(f) of the BC *Human Rights Code*, which provides that the BCHRT may dismiss a complaint, in whole or in part, if "the substance of the complaint or that part of the complaint has been appropriately dealt with in another proceeding". In its decision (*Figliola and others v. Workers' Compensation Board (No. 2)*, 2008 BCHRT 374), the

BCHRT applied the principles that had been developed by the Supreme Court of Canada in *Danyluk v. Ainsworth Technologies Inc.*, [2001] 2 S.C.R. 460, in relation to the court doctrine of issue estoppel. The BCHRT found that the Review Officer, as an employee of the WCB, lacked the necessary independence to consider whether a WCB policy violated the *Human Rights Code*, that the Review Officer failed to appropriately apply human rights principles in relation to his finding that there was a *bona fide* justification for the policy, and that the Review Officer's decision was not a final decision at the time it was rendered. Accordingly, the BCHRT determined that the complaint had not been appropriately dealt with in the proceeding before the WCB Review Officer, and denied the WCB's request to dismiss the complaints. The BCHRT's decision was set aside on judicial review, but subsequently restored by the B.C. Court of Appeal.

[48] On appeal to the Supreme Court, the BCHRT's decision was set aside and the majority of the Court decided that, rather than remitting the matter back to the BCHRT for a re-determination of the issue, it was appropriate to dismiss the complaints. In making this determination, the majority of the Court was highly critical of the approach taken by the BCHRT to the interpretation and application of s. 27(1)(f). The Court stated that s. 27(1)(f) is the statutory reflection of the collective principles underlying the doctrines of issue estoppel, collateral attack, and abuse of process, doctrines used by the common law as vehicles to transport and deliver to the litigation process principles of finality, the avoidance of multiplicity of proceedings, and protection for the integrity of the administration of justice, all in the name of fairness: see para. 25.

[49] The majority identified the common underlying principles of these doctrines as follows (at para. 34):

- It is in the interests of the public and the parties that the finality of a decision can be relied on.
- 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; on the other hand, relitigation of issues that have been previously decided in an appropriate forum may undermine

confidence in this fairness and integrity by creating inconsistent results and unnecessarily duplicative proceedings.

- 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.

- Avoiding unnecessary relitigation avoids an unnecessary expenditure of resources.

[50] In applying these principles to the proper interpretation and application of s. 27(1)(f) of the BC *Human Rights Code*, the majority stated (at paras. 36 to 38):

> Read as a whole, s. 27(1)(f) does not codify the actual doctrines or their technical explications, it embraces their underlying principles in pursuit of finality, fairness, and the integrity of the justice system by preventing unnecessary inconsistency, multiplicity and delay. That means the Tribunal should be guided less by precise doctrinal catechisms and more by the goals of the fairness of finality in decision-making and the avoidance of the relitigation of issues already decided by a decision-maker with the authority to resolve them. Justice is enhanced by protecting the expectation that parties will not be subjected to the relitigation in a different forum of matters they thought had been conclusively resolved. Forum shopping for a different and better result can be dressed up in many attractive adjectives, but fairness is not among them.
>
> Relying on these underlying principles leads to the Tribunal asking itself whether there was concurrent jurisdiction to decide human rights issues; whether the previously decided legal issue was essentially the same as what is being complained of to the Tribunal; and 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. All of these questions go to determining whether the substance of a complaint has been "appropriately dealt with". At the end of the day, it is really a question of whether it makes sense to expend public and private resources on the relitigation of what is essentially the same dispute.
>
> What I do not see s. 27(1)(f) as representing is a statutory invitation either to "judicially review" another tribunal's decision, or to reconsider a legitimately decided issue in order to explore whether it might yield a different outcome. The section is oriented instead towards creating

> territorial respect among neighbouring tribunals, including respect for their right to have their own vertical lines of review protected from lateral adjudicative poaching. When an adjudicative body decides an issue within its jurisdiction, it and the parties who participated in the process are entitled to assume that, subject to appellate or judicial review, its decision will not only be final, it will be treated as such by other adjudicative bodies. The procedural or substantive correctness of the previous proceeding is not meant to be bait for another tribunal with a concurrent mandate.

[51] The majority held that the BCHRT's discretion under s. 27(1)(f) was "limited" and was not intended by the legislature to give the BCHRT a "wide berth". The majority criticized the BCHRT for conducting a technical application of the *Danyluk* factors relating to the court doctrine of issue estoppel, which the majority regarded as "an overly formalistic interpretation of the section, particularly of the phrase 'appropriately dealt with'". The majority concluded that doing so "had the effect of obstructing rather than implementing the goal of avoiding unnecessary relitigation": see para. 46.

[52] The majority held that the BCHRT's decision had been driven by irrelevant considerations, including:

- questioning whether the Review Officer's process met the necessary procedural requirements, which was characterized as a "classic judicial review question" not within the mandate of a concurrent decision-maker (para. 49);
- criticizing the Review Officer for how he interpreted his human rights mandate, which was regarded as grounds for judicial review and not for a collateral attack by the BCHRT (para. 50);
- finding that the Review Officer's decision was not "final" and concluding that the parties before the WCB were not the same as before the BCHRT, which was regarded as representing the strict application of issue estoppel rather than having regarded to the principles underlying the doctrines of issue estoppel, collateral attack and abuse of process (paras. 51-52);
- finding that the Review Officer lacked human rights expertise, which was stated to be inconsistent to the Supreme Court's approach to concurrent jurisdiction by administrative tribunals over human rights issues as expressed in *Tranchemontagne v. Ontario (Director, Disability Support Program)*, [2006] 1 S.C.R. 513 (para. 53).

As a result, the majority found that the BCHRT's decision was patently unreasonable.

[53] The minority in *Figliola* concurred in the finding that the BCHRT's decision was patently unreasonable and needed to be set aside, but would have remitted the matter back for proper determination. The main point of difference between the majority and minority decisions is that the minority would have recognized that the BCHRT had a broader scope for exercising discretion when applying s. 27(1)(f). Nonetheless, the minority found that it was irrelevant for the BCHRT to base its decision on the alleged lack of independence of the Review Officer, to ignore the potential availability of judicial review to remedy any procedural defects, to fail to consider whether the "substance" of the complaint had been addressed and thereby fail to take this threshold statutory requirement into account, and to fail to have regard to the fundamental fairness or otherwise of the earlier proceeding. As stated by the minority: "All of this led the Tribunal to give no weight at all to the interests of finality and to largely focus instead on irrelevant considerations of whether the strict elements of issue estoppel were present": see para. 97.

[54] This Tribunal addressed the application of the *Figliola* decision to the interpretation and application of s. 45.1 of the *Code* in *Gomez v. Sobeys Milton Retail Support Centre*, 2011 HRTO 2297, which concluded (at para. 4):

> . . . the Court's reasoning in *Figliola* applies equally to the interpretation of s. 45.1 of the Ontario *Code*, and to whether an application should be dismissed when the issues have previously been addressed in another proceeding in which the parties have had the opportunity to know the case to be met and meet it. *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 on the basis that it was appropriately dealt with in the other proceeding.

[55] In *Okoduwa v. Husky Injection Molding Systems Ltd.*, 2012 HRTO 443, this Tribunal stated (at paras. 25-26):

> The Supreme Court of Canada's decision in *Figliola* provides guidance as to the interpretation of "appropriately dealt with" as it appears in s. 45.1. 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 for the Tribunal to use s. 45.1 as a vehicle for a collateral attack on the merits of another decision-making process; the appropriate route for challenging another decision is through the appeal or judicial review routes available in the other 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 applicant has already had an opportunity to have the human rights claim considered by an adjudicator who had jurisdiction to interpret and apply the *Code* . . .

[56] To date, the approach taken by this Tribunal in the *Gomez* and *Okoduwa* decisions to the interpretation and application of s. 45.1 of the *Code* in light of the *Figliola* decision has been consistently followed, including in the context of public complaints and investigations in statutory discipline proceedings before other administrative tribunals: see *V.N. v. Bartlett*, 2012 HRTO 1947; *Griffith v. Hurst*, 2013 HRTO 367; *Hillier v. Benteler Automotive Canada Corporation*, 2013 HRTO 655.

THE *PENNER* DECISION

[57] In *Penner*, the plaintiff, Mr. Penner, filed a complaint of misconduct under the *PSA* against two police officers, alleging unlawful arrest and unnecessary use of force when he was removed from a court room while his wife was on trial for a traffic ticket. Mr. Penner's complaint was investigated and found to be substantiated. As a result, his complaint was referred to a disciplinary hearing under the *PSA*. By statute, Mr. Penner was a party to the disciplinary hearing, and so had the opportunity to present evidence and question witnesses, but carriage of the disciplinary hearing resided with the prosecutor. The Chief of Police appointed a retired OPP superintendent to conduct the disciplinary hearing. After hearing several days of evidence, the hearing officer dismissed the misconduct allegations.

[58] As was his right as a party to the disciplinary proceeding, Mr. Penner appealed the hearing officer's decision to OCCPS. On review, OCCPS overturned the hearing officer's decision that there was no lawful arrest. On further appeal by the police officers to the Divisional Court, the hearing officer's findings were restored.

[59] Mr. Penner also filed a civil action claiming compensation arising out of the very same incident and allegations. Following the Divisional Court ruling, the police service brought a motion seeking to have the civil action dismissed on the basis of issue estoppel as a result of the findings of the disciplinary hearing. The police service was successful both before the motions judge and on appeal to the Court of Appeal.

[60] On appeal to the Supreme Court, the majority held that these decisions should be set aside and that Mr. Penner should be allowed to proceed with his civil action notwithstanding the findings in the disciplinary hearing process, primarily on the basis of the court's exercise of residual discretion in applying the doctrine of issue estoppel.

[61] The majority stated that unfairness in applying the doctrine of issue estoppel may arise in one of two main ways: first, the unfairness of applying issue estoppel may arise from the unfairness of the prior proceedings; and second, even where the prior proceedings were conducted fairly and properly having regard to their purposes, it may nonetheless be unfair to use the results of that process to preclude the subsequent claim: para. 39.

[62] The majority held that the facts of the case before the Court fell into the latter category. The majority found that it would be unfair to use the results of the police disciplinary process to preclude Mr. Penner's civil action for the following reasons:

- there were several provisions in the *PSA* that expressly contemplate parallel proceedings (paras. 50 to 52)
- the reasonable expectations of the parties would not be that a disciplinary hearing where Mr. Penner had no access to a personal remedy would preclude a civil action for substantial damages (paras. 53 to 58)

- Mr. Penner had no "financial stake" in the disciplinary hearing (paras. 59 to 61)

- there were important policy considerations at stake in these circumstances, namely the risk of adding to the complexity and length of disciplinary proceedings by attaching undue weight to their results through applying issue estoppel or the significant risk that potential complainants will simply not come forward with public complaints in order to avoid prejudicing their civil actions (paras. 62 to 63)

- applying issue estoppel against Mr. Penner would have the effect of permitting the chief of police to become the judge of his own case, with the result that his designate's decision had the effect of exonerating the chief and his police service from civil liability, which the majority regarded as a serious affront to basic principles of fairness (paras. 64 to 68).

[63] A strong dissent was written on behalf of three justices, expressing their view that the majority was departing from the principles that had just recently been articulated in the *Figliola* decision and from the Court's jurisprudence regarding the deference to be accorded to administrative tribunals.

[64] This is the first case at this Tribunal to consider the *Penner* decision and whether it needs to be reconciled with the *Figliola* decision, and if so, how.

RECONCILING *FIGLIOLA* AND *PENNER*

[65] We have been invited by the Commission to find that *Figliola* is no longer good law in light of the decision in *Penner*. In our view, it is not necessary to address this submission to dispose of the issue before us. Rather, we will focus on reconciling the principles expressed by the majority in the *Figliola* decision with the approach taken by the majority in *Penner*.

[66] The respondents have submitted that the *Penner* decision has no application to the issue before this Tribunal, as *Penner* is concerned with the application by the courts of the doctrine of issue estoppel, while the issue that arises in the instant case relates to

the interpretation and application of a statutory provision by this Tribunal as an administrative tribunal. We do not accept this submission for three primary reasons.

[67] First, the majority in *Figliola* was very clear in stating that, while the role of a human rights tribunal called upon to interpret and apply a statutory provision like s. 45.1 of the *Code* was not to apply the technical requirements of court doctrines such as issue estoppel, collateral attack or abuse of process, the approach to the interpretation and application of such a provision needed to have regard to the principles underlying these court doctrines. *Penner* provides a further elaboration of the principles underlying the court doctrine of issue estoppel. The considerations that led the Court not to apply issue estoppel in *Penner* were fundamentally different from the types of factors that were found to be irrelevant and inappropriate in *Figliola.* Given that the Court's elaboration of these underlying principles was not an issue in *Figliola*, we believe that it is necessary for this Tribunal to consider the elaboration of the principles underlying issue estoppel as described in the *Penner* decision when considering the proper interpretation and application of s. 45.1 of the *Code*.

[68] Second, the Court in *Penner* concluded that applying the doctrine of issue estoppel to bar the assertion of a subsequent claim in circumstances like these would lead to a serious affront to basic principles of fairness. To interpret s. 45.1 without regard to *Penner* as the respondents suggest would be to find that the Legislature intended, in s. 45.1, to have the Tribunal dismiss an application even if this would lead to such unfairness. Neither a purposive and contextual interpretation of s. 45.1 nor a reading of *Figliola* supports the conclusion that the legislation should be interpreted in such a manner.

[69] Third, as a result of the amendments to the *Code* that came into effect on June 30, 2008, a person who believes that her or his rights under the *Code* have been infringed is entitled to raise this allegation directly in a civil action, provided that the civil action is not solely based on the infringement of a *Code* right: s. 46.1. For example, a person who alleges that she or he was assaulted by a police officer and that the assault arose out of an incident of racial profiling can commence a civil action for the tort of

battery and also for racial discrimination in violation of the *Code*. If that person also had filed a complaint regarding this same police conduct under the *PSA* which was found to be unsubstantiated, and if the police as defendant to the civil action sought to have the civil action dismissed on the basis of issue estoppel, it appears the court would necessarily have regard to the principles enunciated in the *Penner* decision in determining whether the civil action should be allowed to proceed.

[70] In our view, it would be anomalous if such a person would have the issue of whether she or he was allowed to proceed with a civil action alleging a violation of a *Code* right determined on the basis of the principles enunciated in *Penner*, while the same person would have an application to this Tribunal based on the same allegation dismissed under s. 45.1 of the *Code* without consideration of the principles enunciated in *Penner*. In our view, the Legislature did not intend that the effect of a prior *PSA* complaint on a *Code* claim would be fundamentally different depending on whether the claim was brought in the courts or at the Tribunal. This would lead to the consequence of driving those who allege that their *Code* rights had been violated by the police and who had filed a complaint under the *PSA*, to seek recourse for their *Code* rights in the courts rather than at this Tribunal. This would be inconsistent with the purposes of the *Code* and the intention to establish this Tribunal as an accessible forum for the resolution of human rights disputes.

[71] As a result, the principles regarding issue estoppel and the fairness of relitigation where a party has made a public complaint alleging misconduct, as now enriched by the decision in *Penner*, are important in determining the proper interpretation and application of s. 45.1 of the *Code*.

[72] The majority in *Figliola* articulated a three-part test in order to determine whether the substance of an application before a human rights tribunal has already been "appropriately dealt with" in another proceeding. The three parts to this test were articulated as being: (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: see *Figliola* at para. 37.

[73] However, when identifying the factors to be considered when assessing whether the substance of an application has been "appropriately dealt with", the majority in *Figliola* was not confronted with the kind of statutory discipline scheme addressed in *Penner*. In *Figliola*, the Court was confronted by a decision of the B.C. Human Rights Tribunal that applied the discretionary factors identified in the *Danyluk* decision, and clearly directed that this was not an appropriate exercise for that Tribunal to undertake. However, the majority in *Figliola* did not consider the additional principles identified by the majority in *Penner* as underlying the doctrine of issue estoppel, as these concerns simply did not arise from the facts before the Court in *Figliola*. In *Figliola*, the parties and the consequences for the parties and their interests in the claim in the WCB scheme were essentially the same as those before the BCHRT.

[74] The Court was not dealing, as was the situation in *Penner* and in this case, with the different interests and circumstances of the parties as between a statutory discipline proceeding resulting from a public complaint and a claim for personal remedies. In our view, the *Figliola* decision does not preclude this Tribunal from considering the underlying principles identified by the majority in *Penner* when the factual circumstances that gave rise to the articulation of these principles simply were not before the Court in *Figliola*.

[75] Further, the majority in *Figliola* recognized that the fact that the word "may" is used in the preamble to the statutory provision at issue "means that the Tribunal does have an element of discretion in deciding whether to dismiss these complaints", although the majority goes on to say that it would be counter-intuitive to think that the Legislature intended to afford the Tribunal a "wide berth" in the exercise of this discretion: see para. 40.

[76] In this regard, we note that s. 45.1 of the *Code*, like the statutory provision at issue in *Figliola*, also includes the word "may". In our view, the majority in *Figliola* confirms that there is an element of discretion to be exercised in the application of this kind of statutory provision, and that the test must be applied with an appreciation of the context of the type of process at issue. We say this not only on the basis of *Figliola*, but because words in a statutory provision must have meaning. If it was the Legislature's intention to exhaust the Tribunal's role after consideration of whether a matter had been "appropriately dealt with" in another proceeding, then there would be no meaning or content left for the word "may" in the opening language of s. 45.1.

[77] The view of the majority in *Figliola* that the Legislature did not intend to leave a "wide berth" for the exercise of discretion by a human rights tribunal in interpreting and applying a provision like s. 45.1 of the *Code* derives from the nature of the issue before the Court and the Court's assessment of the reasonable expectations of the parties in such circumstances. That the majority in *Figliola* considered the expectations of the parties to be an important factor in articulating its approach to the proper interpretation and application of a provision like s. 45.1 is evident from the Court's express reference to the parties' expectations at para. 36:

> Read as a whole, s. 27(1)(f) does not codify the actual doctrines or their technical explications, it embraces their underlying principles in pursuit of finality, fairness, and the integrity of the justice system by preventing unnecessary inconsistency, multiplicity and delay. That means the Tribunal should be guided less by precise doctrinal catechisms and more by the goals of the fairness of finality in decision-making and the avoidance of the relitigation of issues already decided by a decision-maker with the authority to resolve them. Justice is enhanced by protecting the expectation that parties will not be subjected to the relitigation in a different forum of matters they thought had been conclusively resolved. Forum shopping for a different and better result can be dressed up in many attractive adjectives, but fairness is not among them. (emphasis added)

[78] In this regard, the context in which the issue arose in *Figliola* is important. The issue raised before the WCB Review Officer was exactly the same as the issue raised before the BCHRT, namely that the policy restricting awards for chronic pain to 2.5% of

total disability violated the BC *Human Rights Code*. The applicants sought remedies for themselves: that the WCB policy be set aside and that the workers' entitlement to benefits be assessed without regard to this restriction. In these circumstances, the majority in *Figliola* was of the view that the parties reasonably would regard the issue as having been conclusively determined, such that their reasonable expectation would be that there would not be re-litigation of essentially the same issue, between the same parties, in another forum.

[79] In *Penner*, the circumstances for considering the reasonable expectations of the parties were fundamentally different and are the same as those in this case. The majority did not believe that the parties could be regarded as having a reasonable expectation that this finding would preclude a civil action, on the basis of the statutory scheme that expressly contemplated parallel civil proceedings, the lack of any remedy or "financial stake" for the complainant in the disciplinary proceeding, and the broader policy implications of barring a subsequent claim in this context.

[80] These observations about the reasonable expectations of the parties apply equally in the context of a human rights proceeding before this Tribunal. The statutory scheme that applied to Mr. de Lottinville's police complaint is the same as that considered by the Court in *Penner*. While the *PSA* had been amended by the time of the complaints filed by Mr. Claybourn and Mr. Ferguson, the amended version of the PSA continues to include provisions such as s. 83(7), which protects persons who carry out duties in the complaint process from having to testify in any civil proceeding about information obtained in the course of their duties, and s. 83(8), which provides that documents generated during the complaint process are not admissible in any civil proceeding. It is not necessary for us to rule on the issue of whether a human rights proceeding is a "civil proceeding" within the meaning of these provisions. As expressed by the majority in *Penner*, the underlying point is that, as part of assessing the reasonable expectations of the parties, these *PSA* provisions clearly contemplate that that there may be civil proceedings beyond any disciplinary hearing as a result of the complaints process. If the reasonable expectation of the parties has been found to be

that a civil proceeding is not precluded by a disciplinary hearing as a result of the complaints process, it is our view that it similarly would be the reasonable expectation of the parties that a proceeding at this Tribunal would not be precluded. This certainly was the expectation of Mr. de Lottinville, who raised with the OPP his intention to file a human rights application at the very same time as he made his complaint of police misconduct under the *PSA*.

[81] As in *Penner*, a human rights applicant can seek no personal remedy and has no "financial stake" in the public complaints process under the *PSA*. The issue at the end of an investigation is whether the complaint is unsubstantiated or whether there are reasonable grounds to believe that misconduct may have occurred. If there are reasonable grounds to believe that misconduct may have occurred, a disciplinary hearing will be ordered, at the conclusion of which a penalty may be imposed on the officer. The *PSA* proceeding is about the police officer's employment and whether there should be penalties imposed on the officer. There is no provision for a remedy for the complainant. As with the civil action at issue in *Penner*, a proceeding before this Tribunal can, if a violation of the *Code* is found, result in personal remedies for the complainant, including orders for compensation and restitution, and remedies for future compliance. For the reasons expressed by the majority in *Penner*, it is our view that, given the lack of any personal remedy or financial stake for the complainant in the *PSA* complaints process, it cannot be regarded as a reasonable expectation of the parties that a finding under the *PSA* that such a complaint is unsubstantiated would preclude the complainant's ability to seek a personal remedy before a human rights tribunal.

[82] The broader policy implications identified by the majority in *Penner* apply equally in the context of a human rights proceeding. In *Penner*, the majority expressed concern that applying issue estoppel in the context of a disciplinary hearing under the *PSA* would have the negative effect either of causing *PSA* complainants to participate more vigorously in the discipline proceeding in the interest of seeking a favourable result, as the result of the discipline proceeding would determine their ability to seek personal compensation in a civil claim, or would cause potential complainants to avoid filing a

PSA complaint altogether in order to avoid the potential impact of an adverse finding on a civil claim.

[83] The impact of a rule precluding human rights applications where a person makes a complaint under the *PSA* may be to discourage persons who believe that a police officer has discriminated against them from filing *PSA* complaints altogether. Alternatively, they may unwittingly file a *PSA* complaint without understanding and appreciating the potential impact of doing so on their ability to proceed with a human rights application. *Penner* makes clear that the disciplinary process under the *PSA* and the ability of police services to hold their officers to account is not served if potential human rights applicants avoid that process altogether in order to protect their ability to seek a personal remedy under the *Code*. Further, the important public interests served by the *Code* are not served if potential human rights applicants unwittingly risk having their human rights claims extinguished by filing a complaint under the *PSA*.

[84] Finally, the Court's concerns about the fairness of a hearing officer appointed by the chief of police making findings that can preclude subsequent liability of the police services board apply equally in this context. The Tribunal's mandate is not only to determine financial liability, but in appropriate cases to order public interest remedies, that may include systemic changes in appropriate cases. For the same reasons as the Court expressed in *Penner*, this would allow a chief of police "to become the judge of his own case", with the result that his or her delegate's decision could have the effect of exonerating the chief of police and the police service from human rights liability and remedies that may be necessary to ensure future compliance with the *Code*.

[85] For all of these reasons, we find that this Tribunal is obliged to consider the principles underlying the doctrine of issue estoppel as articulated by the majority in *Penner* when interpreting and applying s. 45.1 of the *Code* in the context of the disciplinary process under the *PSA*. We appreciate the concern raised by the respondents that this Tribunal should not depart from its own established case law in the absence of a clear indication that this case law is manifestly wrong. However, as sometimes happens in the context of developing jurisprudence, this Tribunal's decisions

must be guided by the courts and in particular by pronouncements of the Supreme Court of Canada that bear directly upon the issues that come before us. We appreciate that certainty and consistency in the Tribunal's case law is an important interest; however, this Tribunal must also remain open to the development of its jurisprudence as a result of higher court decisions that necessitate a departure from existing approaches.

APPLICATION TO INDIVIDUAL CASES

[86] In its existing case law under s. 45.1 of the *Code*, this Tribunal has adopted a two-part test: first considering whether the other process at issue is a "proceeding" within the meaning of s. 45.1; and second considering whether the other proceeding "appropriately dealt with" the substance of the application.

[87] We have been invited by the applicants and intervenors to find that the complaints process under the *PSA* is not a "proceeding" within the meaning of s. 45.1 of the *Code*. In light of our decision in this matter, we do not find it necessary to rule on this issue and we decline to do so.

[88] We find that the factors to be considered when determining whether the substance of a human rights application has been "appropriately dealt with", at least in the context of the statutory discipline process under the *PSA*, encompass the principles articulated in *Penner* which require consideration of the reasonable expectations of the parties, including whether the statutory scheme contemplates parallel proceedings, the availability of any remedy or "financial stake" for the complainant in the disciplinary proceeding, and the broader policy implications of applying s. 45.1 in this context. In addition, we find that any residual discretion this Tribunal may have under s. 45.1 similarly would require consideration of these underlying principles.

[89] In our view, in light of the statutory provisions in the *PSA* that expressly contemplate parallel civil proceedings, the lack of any personal remedy or "financial stake" for complainants in the *PSA* disciplinary process, the broader policy considerations regarding the application of s. 45.1 of the *Code* to prevent applicants

from proceeding with human rights applications where they have filed a complaint of misconduct under the *PSA* which has been found to be unsubstantiated, and the role of the chief of police in the process, we find that it is not in accordance with the reasonable expectations of the parties to apply s. 45.1 to dismiss an application on the basis that the same underlying allegations of misconduct have been addressed as a result of a complaint filed under the *PSA*. Accordingly, in respect of all three Applications before us, we find that these Applications cannot be regarded as having been "appropriately dealt with" under s. 45.1 of the *Code* and exercise our discretion not to dismiss these Applications but to allow them to proceed in the Tribunal's process.

THE CONCURRING REASONS

[90] We have had the benefit of reading the concurring reasons of our colleague. We will not address the issues canvassed in detail, but make the following brief points. We believe that *Figliola* applies to the interpretation of s. 45.1 of the *Code*, which has the identical wording to the British Columbia legislation considered in that case. We rely upon the Tribunal's established case law in this regard, in particular *Gomez*, above and the numerous cases that have applied it.

[91] We also believe that it is unnecessary in this case to re-evaluate the Tribunal's existing jurisprudence that an "investigation" process under statute may constitute a proceeding. In particular, we note that many cases have found that statutory decisions made following investigations can be "proceedings" for the purposes of s. 45.1, and that *Danyluk*, above, at para. 41 suggested that a gathering of facts by an investigator who then applies an objective legal standard to those facts may lead to issue estoppel. The analysis of whether there must have been a formal hearing for s. 45.1 to apply affects not only police public complaints and those made to other professional discipline bodies but also Employment Standards Officers under the *Employment Standards Act, 2000*, S.O. 2000, c. 41. See, for example, *Chen v. Harris Rebar*, 2009 HRTO 227; *James v. Kuehne & Nagel*, 2011 HRTO 2317; *Windrem v. JF Moore Lithographers Inc*., 2012 HRTO 785; and *Law v. Noonan*, 2013 HRTO 437.

OPPORTUNITY FOR MEDIATION

[92] These three Applications were joined for the purpose of hearing argument on the issue under s. 45.1, but will now proceed separately as they each give rise to distinct factual issues. The parties to each Application are directed to advise the Tribunal within 14 calendar days of this decision whether or not they wish to participate in mediation. If not, or if any party fails to advise the Tribunal within this timeframe, the matter will be scheduled for a hearing.

ORDER

[93] For all of the above reasons, we make the following order:

a. The respondents' requests to dismiss these Applications pursuant to s. 45.1 of the *Code* are denied;

b. Each Application will now proceed separately in the Tribunal's process;

c. The parties to each Application shall advise the Tribunal within 14 calendar days of this decision whether or not they wish to participate in mediation. If not or if any party fails to advise the Tribunal within this timeframe, the matter will be scheduled for a hearing.

Dated at Toronto, this 25th day of July, 2013.

"Signed by"

_____

David A. Wright
Associate Chair

"Signed by"

_____

Mark Hart
Vice-chair

Judith Keene:

INTRODUCTION

[94] I agree with the disposition proposed for these Applications by my colleagues. However, I do so on grounds, and on an analysis, that are different. In light of the significance of the issues, and out of respect for the thoughtful and detailed submissions made to us by the parties and the intervenors, I consider it important to explain those differences.

[95] In my view, where a timely application within our jurisdiction alleges facts that, if proven, could constitute a breach of the *Code*, the jurisdiction of this Tribunal to dismiss without a hearing on the merits must be exercised in a way that gives effect to the intention of the Legislature when it made fundamental changes to Ontario's human rights procedures in 2006.

[96] In particular, I find that the precondition for the exercise of the power to dismiss without a hearing under s. 45.1 – that the matter has been dealt with in "another proceeding" – is not met when all that has transpired is an investigation and a decision whether or not to refer a matter to an adjudicative process. In making the 2006 changes to procedure under the *Code*, the Ontario Legislature specifically rejected a "gatekeeper" function and opted for a system that emphasizes access to an adjudicative process and a decision on the merits. For the reasons that follow, I would have dismissed the respondents' request to bar the Applications before us on the basis that the appropriate interpretation of s. 45.1 would not impede access to a decision on the merits of an application by defining "another proceeding" as including a purely investigative process.

[97] If I am wrong in my interpretation of what the Legislature intended by "another proceeding", I also find that the "substance" of the Applications before us was not addressed in the *PSA* investigative process, because neither the respective Chiefs of Police nor the OCCPS/IPRD, in fulfilling their responsibilities under the *PSA*, address or

resolve, as a matter of law, the question that is before this tribunal: whether the respondents breached the *Code* in the course of their duties as police officers, in the ways alleged in the Applications before us. That question can be addressed and resolved in a disciplinary tribunal under the *PSA*, but the applicants' complaints were not referred to a disciplinary tribunal.

[98] Further, I find that in discharging our unquestioned duty to review "another proceeding" to determine whether it has appropriately dealt with the substance of an Application before us, we must focus on fairness, having regard to how the other proceeding addressed the human rights issues that are raised in the Application before us and the remedies that could be available if we heard the matter. For the reasons set out below, I do not think that the majority decision of the Supreme Court in *British Columbia (Workers' Compensation Board) v. Figliola*, 2011 SCC 52 ("*Figliola*"), governs the determination of this case, given the differences in the facts before us, and considering the fundamentally different legislative context of Ontario's s. 45.1. However, *Figliola* confirms unanimously that issue estoppel is among the issues to be considered when a human rights tribunal is asked to dismiss a matter without a hearing, and the Supreme Court in *Penner v. Niagara (Regional Police Services Board)*, 2013 SCC 19 ("*Penner*"), directs that the consideration of fairness is a paramount issue in making this decision. When the application of s. 45.1 is in issue, we must fulfill the responsibility identified by the Supreme Court in *Penner* to avoid creating or continuing an injustice by dismissing the matter without a hearing.

[99] Before providing my reasons for these conclusions, I wish to be clear that I am in agreement with the following conclusions of my colleagues:

- 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. (See para. 2, above.)

- s. 45.1 cannot and should not be interpreted to bar a *Code* application where do to so would result in an affront to basic principles of fairness. In such circumstances the substance of the application cannot be

found to have been "appropriately dealt with". In light of the holding in *Penner,* s. 45.1 should not be applied to dismiss an application on the basis that the same underlying allegations of misconduct have been dealt with as a result of a complaint filed under the *PSA*. (See para.9, above.)

- to interpret s. 45.1 without regard to *Penner* as the respondents suggest would be to find that the Legislature intended, in s. 45.1, to have the Tribunal dismiss an application even if this would lead to such unfairness. Neither a purposive and contextual interpretation of s. 45.1 nor a reading of *Figliola* supports the conclusion that the legislation should be interpreted in such a manner. (See para. 68, above.)

ANALYSIS

Section 45.1 of the *Code*: Statutory Context

[100] This case is fundamentally about statutory construction, in particular the construction of this Tribunal's "home statute". The Supreme Court of Canada in at least 25 decisions has directed that human rights statutes are to be interpreted broadly with an eye to the quasi-constitutional nature of human rights, and that exceptions and limits are to be construed narrowly. In addition, in construing any statute, we have been repeatedly directed by the Supreme Court to seek out the intention of the Legislature, and to go beyond the literal meaning of the words and phrases in issue to consider the statutory and legislative context within which they have been used. The general rules of statutory interpretation apply here in tandem with the rules established by the Supreme Court to apply specifically to human rights legislation.

Interpretation of human rights legislation

[101] Human rights tribunals and the Courts have long recognized the special "quasi-constitutional" status of human rights legislation. The *Code* must be interpreted and applied in a large, liberal and purposive manner. The approach to human rights adjudication should never be overly legalistic and technical, but rather should enhance accessibility and ensure that determinations are made on the true merits of the case: see *Canadian National Railway Co. v. Canada (Canadian Human Rights Commission),* [1987] 1 S.C.R. 1114, *Quebec (Commission des droits de la personne et des droits de*

la jeunesse) v. Boisbriand (City), [2000] 1 S.C.R. 665 ("*Boisbriand*"), and *B. v. Ontario (Human Rights Commission)*, [2002] 3 S.C.R. 403 at para. 44. In "considering a motion to dismiss a case without a hearing, or to strike pleadings, or to otherwise narrow the inquiry into a complaint, it is important to bear in mind [these]…fundamental and well established principles of human rights law": *Chornyj v. Trus Joist, a Division of Weyerhaeuser*, 2006 HRTO 10.

[102] The decision of the Supreme Court in *Tranchemontagne v. Ontario (Director, Disability Support Program*), [2006] 1 S.C.R. 513, 2006 SCC 14 is one of the more recent decisions in which this approach is maintained; in that decision, the Court also emphasized the value of access by the public to the rights protected in the *Code*, and to a process in which these rights may be adjudicated:

> The most important characteristic of the Code for the purposes of this appeal is that it is fundamental, quasi-constitutional law: see *Battlefords and District Co-operative Ltd. v. Gibbs*…; *Insurance Corp. of British Columbia v. Heerspink*... at p. 158. Accordingly, **it is to be interpreted in a liberal and purposive manner, with a view towards broadly protecting the human rights of those to whom it applies**: see *B v. Ontario (Human Rights Commission)*… at para. 44. And not only must the content of the Code be understood in the context of its purpose, but like the Canadian Charter of Rights and Freedoms, it must be recognized as being the law of the people: see *Cooper v. Canada (Human Rights Commission)*…at para. 70, aff'd in *Martin*… at para. 29, and *Quebec (Attorney General) v. Quebec (Human Rights Tribunal)*… at para. 28. **Accordingly, it must not only be given expansive meaning, but also offered accessible application**. (at para. 33, citations omitted, emphasis added)

[103] The *Tranchemontagne* decision promoted access to the protections offered by the *Code* by confirming that, in most cases, an individual need not go to more than one adjudicative tribunal for a determination as to whether, and if so how, human rights legislation affects litigation under another statutory scheme. The advantages of the Court's approach for both access to justice and adjudicative economy are obvious. The consequent increase in the number of decisions in which a statutory adjudicator is called upon to apply human rights legislation to situations arising under a different statute is also obvious. In my view, the Ontario Legislature took into account the

likelihood that other adjudicative tribunals would apply the *Code* in the course of their decisions when it enacted s. 45.1 in 2006, some eight months after the *Tranchemontagne* decision.

Generally applicable rules of interpretation

[104] In *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Montréal (City); Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Boisbriand (City)*, above, at para. 31, the Supreme Court adopted the following excerpt from P.A. Côté, in *Interprétation des lois* (3rd ed. 1999), stated at pp. 355-56:

> [TRANSLATION] Without going so far as to say that words have no intrinsic meaning, their dependence on context for real meaning must be recognized. A dictionary provides a limited assortment of potential meanings, but only within the context is the effective meaning revealed... .

[105] The ordinary meaning of the term "proceeding" is obviously so broad as to cover a huge range of processes. For example, in the *Concise Oxford Dictionary*, 10th edition, revised, Oxford University Press: 2008, "proceedings" is defined as "an event or a series of activities with a set procedure". The breadth of possible meanings when terms are read in the abstract is precisely why the Supreme Court of Canada has repeatedly dictated, as it did in *Chieu v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 3, in *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2011 SCC 53, and in *Figliola*, that the grammatical and ordinary sense of the words is not determinative, and that a contextual interpretation is required. Another relatively recent statement of the general rule is found in In *Pharmascience Inc. v. Binet*, [2006] 2 S.C.R. 513, the Court ruled as follows, at para. 32:

> …it has to be admitted that textual interpretation has its limits… That is why this Court now considers it important, even when a provision seems clear and conclusive, to nevertheless review the overall context of the provision…

[106] While these decisions alone clearly bind us to take that approach, it is significant here that the Supreme Court "walked its own talk" when it had to interpret a provision of the B.C. *Human Rights Code* that is similar to s. 45.1 to resolve the very issue that is before us in this case. Thus, in *Figliola*, the Court considered not just the words in question, but as well the immediately surrounding provisions, the changes from the previous B.C. *Code* and the statements of the responsible Minister when the amendments were before the B.C. Legislature. We can do no less when the same issues are before us.

The intention of the Ontario Legislature

[107] Since the intention of the Legislature is key to several of the conclusions I have reached, I will attempt to minimize repetition by addressing the overall intent behind the 2006 amendments to the *Code* at the outset of these reasons, and simply referring back to this part of the analysis when I deal with specific parts of my analysis.

[108] The 2006 Ontario *Code* amendments made fundamental changes to the procedure governing the enforcement of *Code* rights. The amendments created an entirely new system in which individuals have direct access to the Tribunal and in which the Ontario Human Rights Commission ("the Commission") has been relieved of its gatekeeping function. Subsection 43(2) represents a significant feature of the new system in providing that an application that is within the jurisdiction of the Tribunal "shall not be finally disposed of without affording the parties an opportunity to make oral submissions".

[109] The general rule in Ontario is that a person who files a jurisdictionally-sound application with the HRTO within the applicable limitation period has the right to have the merits of that application determined by the HRTO. This right is a key feature of the removal of the "gatekeeper" role previously played by the Ontario Human Rights Commission, and can fairly be said to lie at the core of the legislative intention behind the creation of the current human rights system in Ontario.

[110] The importance of the right to a hearing by the HRTO was stressed by the Attorney General at Second Reading:

> She [Mary Cornish] goes on in her discussion paper to say, "The commission is not required to deal with all complaints on their merits. The commission can, without a hearing, decide that a complaint will not proceed." **This "without a hearing" is the whole point, arguably, of direct access -- direct access to the human rights tribunal, which is being proposed** in this bill, where you don't go to the commission, wait four years, be one of the 6% of cases that goes before the tribunal and then wait another year to get the results. Instead, you get your day in court. For many, many people, that day in court, that due process is very much part of the justice that they are seeking. Yes, they are seeking a remedy, but they also want to be heard and they want to get their day in court, not five years down the line. That's why we say we're shortening the pipeline for complainants between complaint and hearing and response. We do it in the name of giving that direct access, not only to massively reduce delays in the system and get rid of the duplication in the system at every part, but also to **give people that hearing that 94% of Ontarians who go before the human rights system don't get**.
>
> …There are two changes here that address the issue of systemic discrimination. If all the complaints that come before the tribunal are at least given the opportunity for a hearing -- some people may decide they don't want to have a hearing, and some people may decide they want it to be mediated -- you're not going to have 94% of complainants not getting a hearing. That means that all those complaints that come before the Human Rights Commission right now and are resolved behind closed doors result in either no written decision at all from the Human Rights Commission -- again, it's not their fault; that's the way the statute and regulations work -- or a boilerplate decision is offered.
>
> Because it happens behind closed doors and you don't get a full decision at the end, it is very unfortunate but also a reality that some businesses -- not all, but some -- see human rights complaints to the commission as just a cost of doing business. Why? Because they're not going to be before a tribunal with the media sitting in the gallery, watching their behaviour; they're not going to have their practices considered in an open tribunal by the Human Rights Commission. It's going to be done through a number of witness statement-taking exercises that happen behind closed doors.
>
> So first, you're going to have transparency in a system, which means that if someone brings a complaint against a respondent and you choose to defend yourself, you're going to have to defend yourself in public. That will help address systemic issues.

> (Ontario, Official Report of Debates of the Legislative Assembly (Hansard), 38th Sess., May 8, 2006, at pgs 1620-1621, emphasis added.)

[111] The specific issue of the right of an applicant to a determination by the HRTO where a determination by another tribunal might address the same issues was also addressed during the legislative process. As first introduced, Bill 107 advanced access to a tribunal hearing by removing the power to refuse to deal with a matter that could have been, but had not been, dealt with in another forum. Instead, it required that the other proceeding be concluded, and that it had dealt with the human rights issues "appropriately".

[112] When the matter was considered at the Standing Committee, some witnesses before Committee, including the Police Association of Ontario, sought to roll back this change (see Committee Transcripts: Standing Committee on Justice Policy - August 08, 2006 - Bill 107, Human Rights Code Amendment Act, 2006, at 1100-1120). This proposal was not accepted. Instead, as other witnesses had urged (Standing Committee on Justice Policy - August 9 (1340-1350) and 10 (1200-1210), and November 15 (1010-1030), 2006), not only was the original amendment maintained, but the right of an applicant to a hearing by the HRTO was enhanced by amendments introduced after the public hearings into the Bill. While the First Reading version of the Bill only gave the HRTO the discretion to dismiss or deal with the entirety of an application that had been dealt with in another proceeding, the amendments enlarged this discretion by allowing the HRTO to dismiss the application "in whole or in part". This allows the applicant the right to a hearing in respect of particular claims of discrimination that have not been appropriately dealt with, while allowing HRTO to operate more surgically, strategically and economically. Overall, the amendments to the original Bill reinforced the clear intention to eliminate a broad gatekeeping role and to emphasize the importance of a determination on the merits.

[113] In placing this and some related amendments before the Standing Committee on Nov. 15, 2006, the Attorney General said:

> Lastly, amendments are being proposed to promote greater fairness at the

> Human Rights Tribunal of Ontario. We are entrenching the requirement that the rules of practice of the tribunal and the procedures facilitate fair, just and expeditious resolutions on the merits of the matters before it. Amendments are before you to ensure that all applications to the tribunal are timely, within jurisdiction and would not be finally disposed of without the parties having an opportunity to make oral submissions. Amendments are before you and proposed that would restrict the tribunal's powers to dismiss applications without a hearing, eliminate the tribunal's ability to establish and charge fees, extend the limitation period for filing a claim from six months to one year and, lastly, ensure that the adjudicators at the tribunal have expertise in human rights.
>
> …So the goal here is to provide direct access. We've put into place some procedures and processes that we've heard from people are necessary for them to have confidence in the system.

[114] It is clear that the Legislature wanted to make it easier for the HRTO to deal with the application of the *Code* by another tribunal where a particular human rights issue had not been appropriately dealt with. The amendment referred to above--in enhancing our ability to ensure that *Code* issues raised in an application to the HRTO are appropriately dealt with while minimizing unnecessary re-litigation and respecting to the greatest possible extent the jurisdiction and core expertise of the other decision-making body-- builds on sections 40 to 45 of the Ontario *Code*. These provisions clearly allow the HRTO a great deal of procedural flexibility, allowing it, specifically or through its Rule-making power, to await the decision of another tribunal that may be about to deal with the same or overlapping facts, to narrow the issues with which it will deal in any application and to accept conclusions of fact or law decided elsewhere, in appropriate circumstances**.**

[115] All of this is consistent with and gives effect to the view that the Legislature wanted to ensure that once an intra-jurisdictional application has been filed before the HRTO, it remains the responsibility of the HRTO to deal with the application and ensure that the human rights issues raised in the application are appropriately resolved and that the applicant has the opportunity to be heard on the merits of the application.

Is an investigation "another proceeding" for the purposes of s. 45.1?

[116] As set out above, access to decisions by the HRTO on the merits of human rights claims was at the heart of the 2006 amendments. In my view, this is an important part of the analysis required to discern what the Legislature intended when it limited our discretion to dismiss jurisdictionally-sound human rights applications without a hearing to situations in which "another proceeding" other than a court proceeding had appropriately dealt with them.

[117] As set out in the Decision of my colleagues, six previous decisions of this Tribunal have found that the investigative phase of the public complaints process pursuant to the *PSA*, in one case absent a review by OCCPS*,* constitutes a proceeding within the meaning of section 45.1 of the *Code*. I appreciate the concern raised by the respondents about consistency in Tribunal decision-making, although, as noted by the Supreme Court in respect of the decision-making process of administrative tribunals

> …precedent is developed by the actual decision makers over a series of decisions. The tribunal hearing a new question may thus render a number of contradictory judgments before a consensus naturally emerges. This of course is a longer process; but there is no indication that the legislature intended it to be otherwise. (*Tremblay v. Quebec (Commission des affaires sociales)*, [1992] 1 S.C.R. 952)

[118] This Tribunal's decisions must develop as new fact situations occur and as new arguments are made. As in this instance, we must be guided by the courts and in particular by pronouncements of the Supreme Court of Canada that bear directly upon the issues that come before us. In the decisions that have applied s. 45.1 to police complaints, this Tribunal has not specifically posited an operative definition of the term "another proceeding" for the purposes of s. 45.1 in the light of the intention of the Legislature, which is explained by the fact that the applicants in those cases were not represented and so the point was not fully argued. In this case, we have had the benefit of the assistance provided by counsel, including counsel for the Ontario Human Rights Commission as intervenor, and by the ability to refer to two recent decisions of the Supreme Court of Canada.

[119] It is instructive that the Legislature used the term “proceeding” more than 25 times in the *Code* in addition to its usage in the term “another proceeding” in s. 45.1, and that these uses overwhelmingly show that the term “proceeding” was used to indicate a process in the nature of a hearing, whether before the HRTO or the Divisional Court. No usage suggests that an investigative process alone lies within the term. This contextual backdrop supports the view that “another proceeding’ must also be referring to an occurrence that is also in the nature of a hearing. See ss. 8, 14(8) and (10), 27(10) and (11), 31.2, 32(10) and (11), 34(4),(6),(11) and (12), 35(4), 42(10), 43(1), 43(3)(b)(ii) and (3)(f), 45.4, 45.5(1),(2) and (7), 45.6(1) and (3), 45.7, 45.8, 45.13, 46.1, and 55(5).

[120] A more significant textual indication of the intent of the Legislature is found in the fact that the term “another proceeding” in section 45.1 not only invites, but in fact directs, a comparison between two possible ways of resolving an issue that involves the interpretation of the *Code*. One way is under the *Code* itself, where the decision will be made after an open, public and procedurally rigorous hearing presided over by an independent adjudicator. In these hearings, evidence is taken under oath or affirmation, is tested by the adjudicator as well as by the parties, and is assessed in a reasoned decision that is open to internal decision review processes before being released. In my view, the two “proceedings” considered under s. 45.1 must be similar enough to give the word “another” a recognizable meaning when applied to both. The statutory use of “another” indicates that the “proceeding” contemplated by the legislature need not be identical but should be at least roughly comparable to that of this Tribunal; a minimum requirement is that it be an adjudicative process rather than simply an investigation.

[121] In most of the matters where 45.1 in issue, this poses no real problems. The kinds of hearings held by other tribunals in Ontario are sufficiently similar to HRTO hearings that no serious question can be raised as to their being ‘another proceeding’. See for example decisions of the Health Professions Appeal and Review Board, which have been accepted by numerous decisions of this Tribunal and by the Divisional Court of Ontario in *College of Nurses v. Trozzi*, 2011 ONSC 4614, to be a “proceeding” for the purposes of s. 45.1.

[122] The Supreme Court's decision in *Figliola* was made in the context of a statutory definition of proceeding that might, read on its own, encompass investigations: "proceeding" is defined for s. 27 of the BC Code as including "a proceeding authorized by another Act and a grievance under a collective agreement". To the extent that *Figliola* may be thought to be of precedential value in relation to the meaning of the term "another proceeding" in Ontario's s. 45.1, however, it is important to note that the other "proceeding" considered in *Figliola* was not an investigative one. Thus the majority in *Figliola* speaks of an "adjudicative body" or "tribunal", not an investigative body, and of "litigation" rather than investigation; (see paragraphs 22, 24, 35, 36, and 38), and an important part of the reasoning in the majority decision is devoted to explaining that the parties had been afforded the opportunity to know the case they had to meet and to argue it fully**.**

[123] Applying the above to the specifics of the process undertaken under the *PSA* in the cases before us, it appears to me that this process was purely investigative and administrative, and therefore is not "another proceeding" for the purposes of s. 45.1.

[124] I agree with the description of the statutory scheme set up to deal with police complaints as set out in the decision of my colleagues, and will not reproduce it here except for the comments noted below.

[125] "Misconduct" as the term is used under both the former and the present *PSA* and the relevant regulations includes a failure "to treat or protect a person equally without discrimination". Both the former and the current regulatory PSA Codes of Conduct refer (assuming that "handicap" and "disability" refer to essentially the same personal characteristic) to 13 of the 15 grounds currently protected under s. 1 of the *Code*. (The former regulation included another: "same-sex partnership status".)

[126] Under both the old and the new *PSA* systems, most conduct complaints are initially dealt with by the Chief of Police of the police service to which the complaint relates. Under both the old and the new system, the Chief of Police is required to cause the complaint to be investigated and the investigation reported in a written report. If, at

the conclusion of the investigation and upon review of the written report, the Chief of Police is of the opinion that the complaint is unsubstantiated, then no action is to be taken in response to the complaint and the complainant. This investigation has none of the features of the HRTO process, to which the Legislature has directed that a comparison be made.

[127] It is only if the Chief of Police decides to hold a hearing, or if the IPRD directs the Chief of Police to hold a hearing, that a hearing is held into whether "misconduct", as defined, has occurred.

[128] The Ontario Court of Appeal in *Corp. of the Canadian Civil Liberties Assn. v. Ontario (Civilian Commission on Police Services*), 2002 CanLII 45090 (ON CA) ("*CCLA v. OCCPS*") held that, in deciding whether a hearing should be held, the evidence is not to be weighed as it would be by the trier of fact. The exercise is to determine whether misconduct may have been committed, **not whether it has been committed** (para. 70).

[129] The IPRD may investigate a complaint. If it does, its task and the question before it is the same as it is for a Chief of Police. The review function of the IPRD is focussed on the thoroughness of the investigation done by the relevant police service. The IPRD does not decide whether misconduct has occurred; its role has been defined by the Divisional Court of Ontario as a "gatekeeping" function (see *Wall v. Independent Police Review Director*, 2013 ONSC 3312, at para. 8).

[130] There is no question that an appreciation of that provision of the Code of Conduct that deals with "discrimination" should inform the investigative process, but it is not until a disciplinary hearing has been held that there can be a finding as to whether misconduct, defined under the PSA to include discrimination as noted above, has occurred. It is the appointed hearing officer alone, if a hearing is ordered after the investigation, who has the authority to make that decision.

[131] Like the Human Rights Commission prior to the procedural changes in Ontario's human rights system, neither the Chief of Police nor the OCCPS/IPRD is empowered to do other than refer the complaint to an adjudicative process (a disciplinary hearing), or to decide that a hearing will not take place. The roles of the Chief of Police or designate, and that of the OCCPS/IPRD in these cases, while extremely important, are limited to the investigative and administrative; neither the Chief nor the relevant reviewing body is empowered to decide on the merits whether the discrimination included in the *PSA*'s regulatory definition of misconduct actually took place. In my view, it would be a clear flouting of legislative intent to effectively permit another "gatekeeping" body to impose an obstacle to the right to a hearing by the HRTO that is such a central part of the new *Code* provisions.

[132] In respect of its effect on the enforcement of *Code* rights, the issue of whether an investigation is "another proceeding" for the purposes of the *Code* is not a small distinction. The wider the net cast by section 45.1, the larger the number of applicants who will face a preliminary hurdle to having their human rights application determined by this Tribunal, a hurdle that applies after the application has passed the screening that ensures that it is timely, raises a human rights issue and alleges facts that, If established, would prove that the *Code* had been breached.

[133] Any procedural barriers to the hearing of an application that is within the Tribunal's jurisdiction disadvantage the most marginalized applicants, who already face numerous informational and other barriers to proceeding with an application. In many cases, an applicant has been through a previous process only because s/he has no choice, or no real choice, to do otherwise (examples include appeals to the Social Benefits Tribunal, matters before the Landlord and Tenant Board initiated by the landlord, and grievances in which a union has carriage). The additional effort of filing a human rights application to get human rights issues addressed can be emotionally draining and can severely tax the resources of the most vulnerable and disadvantaged applicants. What may seem as a small procedural step to us has the potential to sap the will and energy of a marginalized applicant, not to mention placing daunting demands

on the scarce time and resources they have available, in the midst of often high-stress lives, to deal with a complex and often bewildering legal system. In this regard, it is relevant to note that only a small proportion of individuals are represented at the time they file an application; there is a higher incidence of representation at hearings, but many applicants continue on their own against respondents who are represented by counsel.

[134] In my view, the history of the 2006 amendments is inconsistent with widening the net for this second level of screening to include those who have been through only an investigative process. If the Legislature had intended to create this hurdle for a pool of applicants who have had a hearing nowhere else, we would have to give effect to it. However, for the reasons above, the intention is clearly the contrary.

[135] My finding that an investigation is not, for the purposes of s. 45.1, "another proceeding" should not be taken to suggest that the only other proceedings that would meet that test must match the specialized procedural processes that the Legislature has made available to this Tribunal. I accept without question that, as the Supreme Court of Canada said in *Figliola*, we cannot fail to consider requests to dismiss under s. 45.1 simply because another adjudicative body used different procedures. My colleagues have raised concern about previous decisions of this tribunal that have dealt with decisions of Employment Standards Officers. I do not find it necessary to deal with the processes under the *Employment Standards Act* in this decision, other than to reiterate that, in my view, the use of "another" in s. 45.1 indicates that the "proceeding" contemplated by the legislature need not be identical but should be at least roughly comparable to that of this Tribunal; a minimum requirement is that it be an adjudicative process rather than simply an investigation.

Has the substance of the Applications to this Tribunal been appropriately dealt with?

[136] If I am wrong in my analysis of what the Legislature intended by "another proceeding" I must address the question of whether the police investigation in this

matter appropriately dealt with the substance of the Applications that have been made to us.

[137] It is not disputed that these Applications are within the jurisdiction of this tribunal and that they allege facts that, if proven, would constitute breaches of the *Code* and call for consideration of *Code* remedies, including compensatory remedies for financial losses and harm to dignity, as well as systemic remedies. The only issue is whether we should dismiss these Applications without hearing them.

[138] My colleagues and I agree that the *Code* does not permit us to do so. My route to this shared conclusion is, however, significantly different.

[139] My starting point is a search for the intention of the Legislature when it dramatically changed Ontario's human rights procedures to a system founded on of the importance of a fair, just and expeditious determination on the merits. I will not repeat my analysis of the overall intention of the Legislature, but it should be read as integral to what follows.

Should the majority ruling in *Figliola* govern the approach to Ontario's s. 45.1?

[140] Before setting out my analysis of the balance of s.45.1, I will address the argument of the respondents that the majority ruling in *Figliola*, with its emphasis on the supremacy of finality, should govern the Tribunal's analysis, and the argument of the OHRC that the *Figliola* decision does not apply to these Applications.

[141] In *Figliola*, a majority of the Supreme Court interpreted a similarly-worded provision in British Columbia's *Human Rights Code* as conferring only a very narrow discretion to hear the application that had been filed before the BCHRT. In my view, the reasoning behind the majority's decision, to the extent that it is still in force after *Penner*, is not applicable to s. 45.1 of the Ontario *Code*.

[142] In *Figliola*, the Supreme Court overturned a decision of the B.C. Court of Appeal (70 C.H.R.R. D/163), which ruled that it is open to the B.C. Human Rights Tribunal to hear a complaint alleging that the chronic pain policy of the B.C. Workers' Compensation Board is discriminatory, even though the WCB Review Division held that the policy is not discriminatory. The Supreme Court of Canada ultimately agreed that the Tribunal's decision not to dismiss the complaint was patently unreasonable. However, the Court disagreed, in a 5-4 split, on the reasons and on the remedy.

[143] The minority judgement in *Figliola* agreed that the BCHRT's decision was patently unreasonable, on the basis that the BCHRT failed to consider whether the "substance" of the complaint had been addressed, and also failed to have regard to the fundamental fairness or otherwise of the earlier proceeding:

> While in my view, the Tribunal was entitled to take into account the alleged procedural limitations of the proceedings before the Review Officer, it committed a reversible error by basing its decision on the alleged lack of independence of the Review Officer and by ignoring the potential availability of judicial review to remedy any procedural defects. More fundamentally, it failed to consider whether the "substance" of the complaint had been addressed and thereby failed to take this threshold statutory requirement into account. It also, in my view, failed to have regard to the fundamental fairness or otherwise of the earlier proceeding. All of this led the Tribunal to give no weight at all to the interests of finality and to largely focus instead on irrelevant considerations of whether the strict elements of issue estoppel were present. (at para. 97)

[144] The BC provision read as follows:

> 27 (1) A member or panel may, at any time after a complaint is filed and with or without a hearing, dismiss all or part of the complaint if that member or panel determines that any of the following apply
>
> …
>
> (f) the substance of the complaint or that part of the complaint has been appropriately dealt with in another proceeding

[145] The majority decision in *Figliola* is based on the majority's view that, given its legislative context, s. 27(1)(f) indicates an intention of the B.C. Legislature that

complaints under the B.C. *Code* be "easier to dismiss" than they had been prior to the relevant legislative amendments (see paras. 25 and 40-43).

[146] The majority in *Figliola* then ruled that s. 27(1)(f) of the B.C. legislation required consideration of three factors: "whether there was concurrent jurisdiction to decide human rights issues; whether the previously decided legal issue was essentially the same as what is being complained of to the Tribunal; and 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. All of these questions go to determining whether the substance of a complaint has been "appropriately dealt with" (at para. 37).

[147] While indicating that s. 27(1)(f) of the BC legislation is a statutory reflection of the "collective principles underlying the doctrines of issue estoppel, collateral attack, and abuse of process, doctrines used by the common law as vehicles to transport and deliver to the litigation process principles of finality, the avoidance of multiplicity of proceedings, and protection for the integrity of the administration of justice", (see para. 25) the majority in *Figliola* ruled that the BCHRT had focused too heavily on the doctrine of issue estoppel. The majority decision emphasized finality as a primary, if not the primary consideration in this determination. In this too, the minority decision dissented, and their more expansive view of the factors operative in issue estoppel, reflecting the Court's previous decision in *Danyluk v. Ainsworth Technologies Inc*., 2001 SCC 44, [2001] 2 S.C.R. 460 ("*Danyluk*"), has now been restored by the majority in *Penner*, discussed below.

[148] Whatever its ongoing precedential value elsewhere, the ruling in *Figliola* is in my view distinguishable when the interpretation of s. 45.1 is in issue, as it is in the matter before us. This is so for several reasons.

[149] In *Figliola*, the Court considered the words in question, as well as the immediately surrounding provisions, the changes from the previous B.C. *Code* and the

statements of the responsible Minister when the amendments were before the B.C. Legislature. The strictly limited discretion envisioned for the BCHRT by the majority in *Figliola* arose from the interpretation of a legislative context that is very different from that which governs the interpretation of s. 45.1. In the view of the majority, a number of elements of the British Columbia context, including the removal of certain discretionary considerations from s.27(1)(f) and its situation within a list of "circumstances that make hearing the complaint presumptively unwarranted", "lean towards encouraging dismissal":

> Nor does the legislative history of s. 27(1)(f) support the theory that the legislature intended to give the Tribunal a wide discretion to re-hear complaints decided by other tribunals. Formerly, ss. 25(3) and 27(2) of the Code required the Tribunal to consider the subject matter, nature, and available remedies of the earlier proceeding in deciding whether to defer or dismiss a complaint without a hearing…
>
> **The legislature removed these limiting factors in 2002 in the Human Rights Code Amendment Act, 2002, S.B.C. 2002, c. 62. By removing factors which argued against dismissing a complaint, the legislature may well be taken to have intended that a different approach be taken by the Tribunal, namely, one that made it easier to dismiss complaints.** This is consistent with the statement of the then Minister of Government Services, the Hon. U. Dosanjh, on second reading of the Human Rights Amendment Act, 1995, S.B.C. 1995, c. 42, which included s. 22(1), the almost identically worded predecessor to s. 27(1). While he did not specifically refer to each of the subsections of s. 22(1) or their discrete purposes, it is clear that his overriding objective in introducing this legislative package, which included these provisions, was to reduce a substantial backlog and ensure "a system . . . which will be efficient and streamlined":
>
> > In this proposed legislation, you now have the power to defer consideration of a complaint pending the outcome of another proceeding, so that there is no unnecessary overlap in the proceedings
> >
> > . . .
> >
> > **You have the power to dismiss the complaints, as I indicated, and that has been expanded**. [Emphasis added.]
> >
> > (British Columbia, Official Report of Debates of the Legislative

Assembly (Hansard), vol. 21, 4th Sess., 35th Parl., June 22, 1995, at p. 16062)

(*Figliola* para. 42-43 – emphasis added)

[150] While the statutory provision considered by the Court in *Figliola* has wording that is very similar to s. 45.1, the statutory context in Ontario creates some very significant differences in how those words are to be interpreted, as would be expected given the comment of Ontario's Attorney General, cited above, that the Ontario amendments "would **restrict** the tribunal's powers to dismiss applications without a hearing".

[151] Thus, in contrast to the change in the BC *Code* found significant by the majority in *Figliola*, the power to dismiss complaints without a hearing was reduced rather than increased in the 2006 Ontario amendments. Provisions applicable to the Ontario Human Rights Commission and repealed by the 2006 amendments allowed applications (then referred to as complaints) to be dismissed without a hearing. One of these repealed provisions permitted a complaint to be dismissed if another body "could or should" have dealt with it. This obviously did not require an assessment of whether the other body had dealt with the issue at all, much less appropriately. Clearly, the Ontario Legislature, in creating a new system, chose to significantly reduce the power to dismiss applications without hearing them on the merits. The majority decision in *Figliola* is based on the view that the BC legislature had the opposite intention.

[152] As well, the majority in *Figliola* found it significant that the statutory provision at issue in that case was "surrounded [by other provisions that] lean towards encouraging dismissal". The opposite is true of the Ontario *Code*. In fact, after introduction, the Bill was amended to remove what is now s. 45.1 from precisely the kind of provisions found significant by the majority. In the *Code* as enacted after those amendments, s. 45.1 is instead located with provisions that indicate that the Ontario Legislature intended to give the HRTO considerable discretion to deal with allegations of breach of substantive *Code* rights in a variety of circumstances, and using a variety of adjudicative strategies:

- Section 40 of the *Code* states that the Tribunal "shall dispose of

applications made under this Part by adopting the procedures and practices provided for in its rules or otherwise available to the Tribunal which, in its opinion, offer the best opportunity for a fair, just and expeditious resolution of the merits of the applications".

- Section 41 allows "the Tribunal to adopt practices and procedures, including alternatives to traditional adjudicative or adversarial procedures that, in the opinion of the Tribunal, will facilitate fair, just and expeditious resolutions of the merits of the matters before it".

- Section 42 gives the *Code*, the regulations under the *Code* and the HRTO's own rules of procedure primacy over the provisions of the *SPPA*.

- Section 43 (3) sets out a broad and general grant of discretion to the Tribunal to make rules that allow it to "dispose" of the merits of an Application within its jurisdiction using a broad range of adjudicative strategies, some of which are listed in subsection 43 (3).

- Section 45 permits the HRTO to "defer an application in accordance with the Tribunal rules", thus maintaining jurisdiction to deal with an application until it is known whether the other proceeding has dealt appropriately with its substance.

[153] For all of these reasons, it is my view that the majority decision in *Figliola* does not govern the interpretation of s. 45.1 of the Ontario *Code*.

A contextual interpretation of s. 45.1

[154] In my view, the differences between the intentions of the British Columbia and Ontario Legislatures as evidenced by the statutory context of s. 45.1 warrant a much more cautious approach by this Tribunal to dismissing applications without a hearing on the merits than the approach set out in relation to the B.C. legislation by the majority in *Figliola*. The Ontario Legislature has clearly placed a duty on the Tribunal to hear and decide questions of the application of the *Code* except in certain relatively narrow circumstances. The Supreme Court's decision in *Penner*, with its emphasis on fundamental principles of fairness, is instructive in the "appropriately dealt with" determination, and will be discussed below.

[155] Where a timely application raises a human rights issue and alleges facts that, If established, would prove that the *Code* had been breached, the *Code* provides only two exceptions to the right to a hearing.

[156] Subsection 34(11) excludes from the jurisdiction of the Tribunal any matter in which "a civil proceeding has been commenced in a court in which [the would-be applicant] is seeking an order under section 46.1 with respect to the alleged infringement" of a Part 1 right, or "a court has finally determined the issue of whether [a right under Part 1] has been infringed or the matter has been settled". An application may not be made at all in those circumstances, but the *Code* was also amended to give the Courts the power to provide the same kinds of individual remedies that are available from the HRTO.

[157] In enacting s. 34(11), the Ontario Legislature used very clear and narrow language to exclude matters from the HRTO's jurisdiction, and took care to see that individual remedies for breach of *Code* rights were available. There is no reason to believe that a similar approach to declining jurisdiction was not intended where discretion was made part of the other provision that could be used to deny access to a hearing by this Tribunal.

[158] Section 45.1 of the *Code*, the second exception, provides as follows:

> 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.

[159] For the preceding reasons and the ones that follow, it is my view that there are several aspects of the language of s. 45.1 that, especially combined with its legislative history and context, show that the Tribunal's jurisdiction under this provision to dismiss an application without a hearing is to be exercised with caution and with a fundamental focus on fairness.

“the substance of the application”

[160] If the *PSA* investigation process were to be considered a “proceeding” for the purposes of s. 45.1, I would still dismiss the Requests in this matter on the basis that it has not dealt with the “substance” of the Applications that are before us.

[161] Section 45.1 requires not only that “another proceeding” has taken place, but that the proceeding has dealt with the “substance” of the application. It is therefore also important to determine what the Legislature meant when it added this concept to Ontario’s *Code*.

[162] In my view, the “substance” of any intra-jurisdictional application under the *Code* is the question whether the *Code* has been breached as alleged, and if so what remedies, including systemic remedies, are appropriate.

[163] The above questions are neither asked nor answered at the investigatory stage of a *PSA* complaint. Instead, that stage deals with whether the complaint of misconduct is substantiated; that is, whether there are reasonable grounds to believe that misconduct (which may include discrimination) **may have** occurred, and whether the complaint should be sent to a hearing. As noted above, the decisions made by the Chief of Police and the OCCPS/IRPD at the investigative phase are part of a screening function similar to that performed by the Ontario Human Rights Commission prior to the 2006 changes to the *Code*. Police misconduct may include discrimination as defined, but neither the Chief of Police nor the OCCPS/IPRD decides, as a matter of law, if misconduct has taken place, and there is, obviously, no consideration of any remedy. The substance of the application to the HRTO has simply not been dealt with.

[164] In the event that I am wrong in my finding that *Figliola* does not govern the interpretation of s. 45.1, I would still find, applying *Figliola*, that the PSA investigative process had not dealt with the substance of the Applications before us.

[165] In *Figliola*, as noted above, Justice Abella wrote that the BC Tribunal, in

determining whether the substance of a complaint had been appropriately dealt with, should have asked itself; (1) whether there was concurrent jurisdiction to decide human rights issues; (2) whether the previously decided legal issue was essentially the same as what was being complained of to the Tribunal; and (3) whether there was an opportunity for the complainants to know the case to be met and have the chance to meet it. If that test were applicable to this case, there would still, in my view, be no reason to dismiss without a hearing. I agree with the submissions of counsel from the Human Rights Legal Support Centre that the decisions of the Ontario Court of Appeal in *Schweneke v. Ontario*, 2000 CanLII 5655 (ON CA), and *CCLA v. OCCPS* give us guidance on this issue. In this case, neither the Chief nor the OCCPS/IPRD had the jurisdiction to decide whether the respondent officer had breached the *Code* (see *CCLA v. OCCPS*, at para.70); that determination could only be made by the adjudicator at a disciplinary panel. While the role of the Chief of Police and the OCCPS/IPRD differs from that of a judge on a preliminary inquiry, determining whether a disciplinary hearing should be held is different from determining whether misconduct has been committed. There is no concurrent jurisdiction. In addition, the legal issue before the Chief and the OCCPS/IPRD is not "essentially the same" as that before the Tribunal in an application; it is not whether the *Code* has been breached, and, if so, what remedy should be provided, but "whether there is a reasonable basis in the alleged facts on which the complaint is based for proceeding to a hearing" (see *CCLA v. OCCPS*, at para. 2).

[166] Since the jurisdiction is different and the legal issue addressed by the Chief and the OCCPS/IPRD was not essentially the same as the issue before us in these Applications, it would not be necessary to address the third question posed by Abella J.

"appropriately dealt with"

[167] Prior to the 2006 amendments, the Ontario Human Rights Commission could dismiss a complaint with reference to another possible proceeding whether or not it had occurred, and, if it had occurred, without an assessment of how a complaint of discrimination was dealt with. By requiring that the other proceeding have taken place and be finished, and by then requiring an assessment by the HRTO as to whether the

human rights issues in an application before us were appropriately dealt with, the Legislature has sent a very clear signal of intention that the HRTO consider whether and if so how the *Code* was applied in that other proceeding before dismissing an application without a hearing on the merits.

[168] In this regard, it is significant that objections to the change described above were made at Committee, and were not accepted. As noted above, the Police Association of Ontario argued that what was then 41 (g) of Bill 107 was too open-ended and should be replaced by language like that in the (then) existing *Code*: that the allegation is raised, or is more appropriately raised, in another proceeding. This proposal would have removed the "has been appropriately dealt with" inquiry, and although it was squarely put before the Legislature at Committee, it was not accepted by the Legislature, and in fact the HRTO was ultimately given more, not less, discretion to deal with matters that had been before other bodies.

[169] In my view, the language of s.45.1 and its legislative history show that the Legislature intended that an expert human rights tribunal determine whether the matter raised in an application before it was appropriately dealt with in a previous decision, before refusing to hear the application on its merits. In the context of major amendments promoting decisions on the merits in human rights applications, this strongly suggests that such an expert determination must consider whether both the determination on the merits of the human rights issue(s) raised in a particular, jurisdictionally-sound application before the HRTO, and the remedy provided, if any, (together, the "substance of the application") were appropriate.

[170] The crux of a Request to Dismiss under s. 45.1 is that an allegation that the *Code* has been breached made in an application to the HRTO has already been dealt with "appropriately". The applicant's claim before, and the decision of another adjudicative body come under consideration, but only those parts of the claim and the decision that, respectively, raise and consider facts raised in the Application, and allege discrimination and make a finding as to whether the *Code* has been breached.

[171] Seen in this statutory context, and with due consideration of the quasi-constitutional nature of human rights legislation and its paramountcy over other legislation, it appears to me that the use of the term "appropriate" in s. 45.1 of the *Code* calls for an assessment of the conclusion (result and remedy) in the other proceeding against the applicable provisions of the *Code*, and in light of the legislative intent behind the *Code*.

[172] In determining whether the human rights issue in an application to the HRTO has been appropriately dealt with, much guidance is provided by the recent decision of the Supreme Court in *Penner*. Both the majority and the minority judgements in *Figliola* agreed that the principles of issue estoppel are among the issues relevant to the exercise of discretion in deciding whether to dismiss without a hearing under a provision similar in wording to s. 45.1. The majority judgement of the Supreme Court in *Penner* has overruled a finding in *Figliola* that appeared to narrow the range of considerations relevant to issue estoppel, and to elevate the importance of finality in adjudication to the most important consideration. The majority in *Penner* maintains that the principles of issue estoppel should be applied flexibly and with an eye to fairness and "avoiding injustice" above all.

[173] The majority in *Figliola* had also addressed the Supreme Court's approach to issue estoppel as set out in *Danyluk*. Referring specifically to the BC legislation, Justice Abella opined that relying on the *Danyluk* factors would re-introduce "by judicial fiat the types of factors that the legislature has expressly removed". She went on to say, "it is not clear to me that the *Danyluk* factors even apply. They were developed to assist courts in applying the doctrine of issue estoppel". (para. 44)

[174] Justice Abella enlarged upon this analysis in her dissent in *Penner*:

> [*Figliola*] is the precedent that governs the application of the doctrine in this case. The key relevant aspect of this precedent is that it moved away from the approach to issue estoppel taken in *Danyluk v. Ainsworth Technologies Inc*., 2001 SCC 44, [2001] 2 S.C.R. 460, which had held that a different and far wider discretion should apply in the context of administrative tribunals than the "very limited" discretion applied to courts

> … The ultimate goal of issue estoppel is to protect the fairness *of* finality in decision-making and the avoidance of the relitigation of issues already decided by a decision-maker with the authority to resolve them. As the Court said in *Figliola,* this is the case whether we are dealing with courts or administrative tribunals. An approach that fails to safeguard the finality of litigation undermines these principles and risks uniquely transforming issue estoppel in the case of administrative tribunals into a free-floating inquiry. This revives the *Danyluk* approach that the Court refused to apply in *Figliola*.

[175] In *Penner*, the majority expressly rejected this approach and restored (and strongly buttressed) the *Danyluk* approach to the principles of issue estoppel.

[176] In the *Penner* case, the appellant had been arrested for disruptive behaviour in an Ontario courtroom. His subsequent complaint against two police officers under the *PSA* was ultimately dismissed after a disciplinary hearing. The issue as defined by the Supreme Court in *Penner* was whether the Court of Appeal erred in exercising its discretion to apply issue estoppel to bar Mr. Penner's civil claims because there had been a disciplinary hearing decision under the *PSA*.

[177] In *Penner*, the focus was on issue estoppel. The majority confirmed that

> Issue estoppel, with its residual discretion, applies to administrative tribunal decisions. The legal framework governing the exercise of this discretion is set out in *Danyluk*. In our view, this framework has not been overtaken by this Court's subsequent jurisprudence. The discretion requires the courts to take into account the range and diversity of structures, mandates and procedures of administrative decision makers however, the discretion must not be exercised so as to, in effect, sanction collateral attack, or to undermine the integrity of the administrative scheme. As highlighted in this Court's jurisprudence, particularly since *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, legislation establishing administrative tribunals reflects the policy choices of the legislators and administrative decision making must be treated with respect by the courts. However, as this Court said in *Danyluk*, at para. 67: "The objective is to ensure that the operation of issue estoppel promotes the orderly administration of justice but not at the cost of real injustice in the particular case. (para. 31)

[178] The respondents have invited us to find that the reasoning of the majority in *Penner* represents simply a further explication of the discretionary principles underlying the doctrine of issue estoppel as articulated in the *Danyluk* decision. These submissions contend that, since the majority in *Figliola* rejected the technical application of the *Danyluk* factors in respect of an application to dismiss without a hearing, the *Figliola* decision should be taken by this Tribunal to foreclose reliance upon the elaboration of the *Danyluk* factors contained in the decision of the majority in *Penner*. I do not accept this argument. The majority decision in *Penner* made it clear that the concept of issue estoppel should remain a broad and flexible one, with the most important consideration being fairness:

> …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 preconditions for its application have been met. However, in our respectful view, the Court of Appeal erred in its analysis of the significant differences between the purpose and scope of the two proceedings, and failed to consider the reasonable expectations of the parties about the impact of the proceedings on their broader legal rights. Further, it is unfair to use the decision of the Chief of Police's designate to exonerate the Chief in a subsequent civil action. In the circumstances of this case, it was unfair to the appellant to apply issue estoppel to bar his civil action. (para. 8)

[179] The majority in *Penner* stated that unfairness in applying the doctrine of issue estoppel may arise

> . . . in two main ways which overlap and are not mutually exclusive. First, the unfairness of applying issue estoppel may arise from the unfairness of the prior proceedings. Second, even where the prior proceedings were conducted fairly and properly having regard to their purposes, it may nonetheless be unfair to use the results of that process to preclude the subsequent claim. (para. 39)

[180] The majority held that the facts of the case before them fell into the latter category. The majority decision focussed on the provisions of the *PSA*, and on features of the complaints system created under the *Act*, in finding that it would be unfair to use the results of the police disciplinary process, even though, unlike the cases before us,

that process had included a disciplinary hearing, to preclude Mr. Penner's civil action, for the following reasons:

- there were several provisions in the *PSA* that expressly contemplate parallel proceedings (paras. 50 to 52)
- the reasonable expectations of the parties would not be that a disciplinary hearing where Mr. Penner had no access to a personal remedy would preclude a civil action for substantial damages (paras. 53 to 58)
- Mr. Penner had no "financial stake" in the disciplinary hearing (paras. 59 to 61)
- There were important policy considerations at stake in these circumstances, namely the risk of adding to the complexity and length of disciplinary proceedings by attaching undue weight to their results through applying issue estoppel or the significant risk that potential complainants will simply not come forward with public complaints in order to avoid prejudicing their civil actions (paras. 62 to 63)
- applying issue estoppel against Mr. Penner would have the effect of permitting the chief of police to become the judge of his own case, with the result that his designate's decision had the effect of exonerating the chief and his police service from civil liability, which the majority regarded as a serious affront to basic principles of fairness (paras. 64 to 68).

In my view, *Penner* makes it clear that a matter cannot be found to have been dealt with appropriately when such a finding would result in unfairness.

[181] There has been one decision of the Divisional Court of Ontario that appears to propose a much more limited responsibility arising from s. 45.1. This decision was issued before the decision of the Supreme Court in *Penner*, and in my view is of questionable authority in the light of the *Penner* direction that fairness issues, which include consideration of access both to substantive rights and to remedies, are paramount.

[182] In *Trozzi* (above), two Justices of a Divisional Court panel of three, applying a correctness standard, overturned a decision of this Tribunal that declined to dismiss a

complaint (under the *Code*'s transitional provisions) without a hearing under s. 45.1, on the basis that the HPARB had not appropriately dealt with the substance of the Application. Justices Jennings and Aston concluded that the Tribunal "failed to take into account HPARB's specialized expertise and public protection mandate…[and] …though it purports to ask itself whether HPARB "appropriately" addressed Ms. Trozzi's claims, the Tribunal's reasons actually concern themselves with whether HPARB adequately addressed her claims, using the Human Rights Tribunal's yardstick of "accommodation to the point of undue hardship" (at para 30, emphasis in original). The majority appeared to take the view that what was at issue was competing tribunals rather than access by the applicant to a decision on the merits of the Application by the HRTO.

[183] The majority in *Trozzi* found that, because of the HPARB's "public protection mandate", the HRTO should have recognised that, in considering a complaint of discrimination under the *Code*, the HPARB was entitled to determine "the degree of accommodation that is appropriate in that context" (para 35). This direction appears to be based on the view that the Tribunal, in maintaining that the standard required under the *Code* is accommodation to the point of undue hardship rather than the "reasonable accommodation" standard used by the HPARB, had used its own "yardstick". In fact, this standard is taken directly from sections 11 and 17 of the *Code* itself. Both provide that, absent a specific statutory defence, tribunals and courts may not conclude that there is a defence to a breach of the *Code* unless they are "satisfied that the needs of the group of which the person is a member cannot be accommodated without undue hardship on the person responsible for accommodating those needs, considering the cost, outside sources of funding, if any, and health and safety requirements, if any."

[184] Further, the provisions of the *Code* have paramountcy over other legislation. There is no discussion in the *Trozzi* decision of the quasi-constitutional nature of human rights legislation, nor of the effect of s. 47(2) of the *Code*, which confirms that the *Code* "applies and prevails unless the Act or regulation specifically provides that it is to apply despite this Act".

[185] Justice Lederer, concurring in the result, did "not accept that the expertise of the Human Rights Tribunal is ever disengaged" (see Reasons of the Majority, at para. 42), and concluded that the "wording of s. 45.1 authorizes the Human Rights Tribunal to ensure that any accommodation provided for by a decision of another tribunal is appropriate, but not to deal with issues of the fairness, process or jurisdiction of the other tribunal" (at paras. 66 and 76).

[186] All Justices on the *Trozzi* panel were concerned about the possibility of s. 45.1 raising issues of hierarchy among administrative tribunals. With respect, I suggest that the notion of "competing tribunals" neither reflects the reality among Ontario tribunals nor aids us in understanding what the legislature had in mind in enacting s. 45.1. The statutory recognition of the expertise created by daily dealing with the application of the *Code* is not a grant of special status to the HRTO, nor, in my experience, is it understood to be so by the HRTO (see for example, the comments of my colleague in a situation involving a previous grievance arbitration in *Okoduwa v. Husky Injection Molding Systems Ltd.*, (above), at paras. 25-26). To state the obvious, the Tribunal's task under s. 45.1 is neither an appeal nor a judicial review. The HRTO has no power to overturn the decision of any other tribunal. The record, and sometimes the parties before us, may be different. And the other decision remains in force even if the HRTO makes a different decision on the application of the *Code*. Our task, as amplified in *Penner*, is to avoid creating unfairness by declining to deal with the merits of a matter properly before us.

Application of *Penner* to the Specific Facts of this Case

[187] I agree with my colleagues that this Tribunal is obliged to consider the principles underlying the doctrine of issue estoppel, with fairness as the paramount concern as articulated by the majority in *Penner*, when interpreting and applying s. 45.1 of the *Code*. The application of these principles is made substantially easier in the cases before us, in view of the fact that *Penner* dealt with the very legislation at issue in this case, and that the *Penner* decision turned on the elements of the *PSA* complaint system itself as set out in its governing legislation, rather than the facts of the individual case.

[188] The statutory scheme that applied to Mr. de Lottinville's police complaint is precisely the same as that considered by the Court in *Penner*. While the *PSA* had been amended by the time of the complaints filed by Mr. Claybourn and Mr. Ferguson, the amended version of the *PSA* continues to include provisions such as s. 83(7), which protects persons who carry out duties in the complaint process from having to testify in any civil proceeding about information obtained in the course of their duties, and s. 83(8), which provides that documents generated during the complaint process are not admissible in any civil proceeding. As with s. 45.1 of the *Code*, the *PSA* contemplates other "proceedings".

[189] On the issue of reasonable expectation, it appears to me that there is no reason to limit the term "civil proceeding" as used in the *PSA* to exclude applications under the *Code*. In any event, if the reasonable expectation of parties in the situation of the applicants has been found to be that a civil proceeding is not precluded by a disciplinary hearing as a result of the complaints process, it is my view that it similarly would be the reasonable expectation of the parties that a human rights proceeding would not be precluded. I agree with the point made on behalf of applicants Ferguson and Claybourn that it would be contrary to the overall intent of the *Code* if the test for the application of these principles were to differentiate between courts and tribunals, as *Code* remedies can be pursued in either forum.

[190] I therefore find that the parties in this case can be regarded as having a reasonable expectation that an application under the *Code* could be continued, for the reasons given in *Penner* and discussed in the decision of my colleagues. To the reasons given in *Penner* for this expectation, I would add, in these cases, the fact that no disciplinary hearing has been held, and therefore the applicants might reasonably expect access to an adjudicative proceeding under the *Code*.

[191] The fact that there has been no disciplinary hearing in these cases also raises an aspect of fairness at issue in this case that was not at issue in *Penner*. Because in these cases there has been no disciplinary hearing, the effect of a dismissal by this Tribunal at this stage would be that applications alleging a breach of the *Code* would get

no hearing at all. A dismissal without a hearing by this Tribunal on the basis solely of a decision made pursuant to a "gatekeeping" function (see *Wall v. Independent Police Review Director*, 2013 ONSC 3312, at para. 8) would be manifestly at odds with the intentions of the Legislature in creating the "direct access" system under the *Code*, as well as obviously unfair.

[192] I agree with my colleagues that s. 45.1 cannot and should not be interpreted to bar a *Code* application where do to so would result in an affront to basic principles of fairness. In addition, it appears to me that the use of the term "appropriately" in s. 45.1 of the *Code* calls for an assessment of the conclusion (result and remedy) in the other proceeding against the applicable provisions of the *Code*, and in light of the legislative intent behind the *Code*. In the circumstances of these cases, the substance of the Applications cannot be found to have been "appropriately dealt with".

DISPOSITION

[193] In respect of all three Applications before us, I would exercise my discretion under s. 45.1 of the *Code*, for all of the reasons noted above, to refuse the respondents' Requests to Dismiss these Applications, and to allow them to proceed in the Tribunal's process. I agree with the terms of the Order as set out in the Decision of my colleagues.

Dated at Toronto, this 25th day of July, 2013.

"Signed by"

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Judith Keene
Vice-chair