IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Scott v. British Columbia (The Police Complaint Commissioner),* 2016 BCSC 1970

Date: 20161027
Docket: S164838
Registry: Vancouver

Between:

Jason Scott

Petitioner

And

The Police Complaint Commissioner of British Columbia and The Honourable Ian H. Pitfield

Respondents

Before: The Honourable Mr. Justice Affleck

Reasons for Judgment

Counsel for Petitioner:	D.G. Butcher, Q.C. A.H. Kastanis
Counsel for Respondent, The Police Commissioner of British Columbia:	D.K. Lovett, Q.C.
Counsel for the Respondent, The Honourable Ian H. Pitfield:	No Appearance
Place and Date of Trial/Hearing:	Vancouver, B.C. August 11, 2016
Place and Date of Judgment:	Vancouver, B.C. October 27, 2016

[1] These reasons address an application for judicial review of certain decisions made following a complaint of police misconduct.

[2] The petitioner is a Sergeant in the Abbotsford Police Department. On August 22, 2014, that Police Department received a report that N.D. had assaulted his girlfriend C.J. and taken their five-year-old daughter ("the daughter") to N.D's mother's home in Abbotsford. I will refer to N.D.'s mother as "the complainant".

[3] Shortly after 9:00 p.m. on August 22, 2014 the petitioner, along with three constables, went to the home of the complainant to arrest N.D. for assault and to apprehend the daughter and to return her to her mother.

[4] When the petitioner and the constables arrived at the home of the complainant events took place that led the complainant to email a complaint to the Police Complaint Commission of British Columbia (PCC) on August 24, 2014. The complainant described the incident on August 22, 2014, at her home as follows:

> on Friday approx 930 as i was paying guitar with my granddaughter i looked up to see people at my door. they did not identify at first n so I asked if I could help them? When i got closer to the unclosed door i saw they looked like police,and i said what's going on. 1 Guy said we are here to arrest a[N.D.], i said for what being assaulted? No hes being arrested for assault is he here? I said no, he went for a walk and you dont know the right story cause he was assaulted. At no time did these people say they were police officers. I went to closet the door when the pushed forward and I again said you can not come in here you dont have a warrant: The.The female put her foot into the house and they all moved forward again. I told them to back up several times and the would not. The one guy said, if you do not hand over your grandchild we will take her by force,
>
> I said, your not taking her anywhere this Is her home now get out of my house, The rushed in and pushed me to the couch and said i was under arrest, in front of my kids and my 5 yr old grandaughter, she was crying saying stop hurting my nanna, i fought with them as they had thier knee in my back n the women pulling me down and gripping my arm kicking my guitar smashing upside my tv knocking off my glasses
>
> and yes i insisted it was my grandaughters birthday, the next day and they were trying to take her away from her home, they had no warrent and no reason to do what they did,

[5] On October 20, 2014, the office of the PCC issued a "Notification of Admissibility of Complaint" pursuant to section 83(2) of the *Police Act*, R.S.B.C.

1996, c. 367 [“the *Act*”]. Section 82 of the *Act* provides that on receiving a complaint the Commissioner is to determine if the complaint is “admissible” or “inadmissible”. An admissible complaint is one that is made within a year, is not frivolous or vexatious and if substantiated would constitute misconduct by a member of a Police Department designated by the *Act*.

[6] The conduct to be investigated was described in the Notification of Admissibility of Complaint as follows:

- Abuse of Authority, pursuant to section 77(3)(a) of the *Police Act* in relation to [the complainant’s] allegation the officers entered and searched her home unlawfully.
- Abuse of Authority, pursuant to section 77(3)(a)(ii)(A) of the *Police Act* in relation to [the complainant’s] allegation she was physically pushed to the couch.
- Damage to Property of Others, pursuant to section 77(3)(e)(i) of the *Police Act* in relation to [the complainant’s] allegation her guitar, T.V., and glasses were damaged by the officers.
- Abuse of Authority, pursuant to section 77(3)(a)(i) of the *Police Act* in relation [the complainant’s] allegation she was arrested without good and sufficient cause.

[7] On November 7, 2014, the complainant was charged in a two count Information that on August 22, 2014 she “did assault [the petitioner] a peace officer engaged in the execution of [his] duties” and that she “did wilfully resist or obstruct or resist [the petitioner] in the execution of [his duty]”.

[8] Section 90(1) of the *Act* required the Chief Constable of the Abbotsford Police Department to appoint a member of that department, of at least the rank of the petitioner, as an investigating officer. Sergeant Ellie Wright was appointed and on April 15, 2015, Sergeant Wright submitted her Final Investigation Report to the Chief Constable of the Abbotsford Police Department who was the “Discipline Authority" as defined in s. 76 of the *Act*.

[9] The complaint of “abuse of authority” Sergeant Wright was to investigate, is defined in section 77(3)(a) of the *Act* to mean:

> (3) Subject to subsection (4), any of the conduct described in the following paragraphs constitutes a disciplinary breach of public trust, when committed by a member:
>
> (a) "abuse of authority", which is oppressive conduct towards a member of the public, including, without limitation,
>
> (i) intentionally or recklessly making an arrest without good and sufficient cause,
>
> (ii) in the performance, or purported performance, of duties, intentionally or recklessly
>
> (A) using unnecessary force on any person, or
>
> (B) detaining or searching any person without good and sufficient cause, or
>
> (iii) when on duty, or off duty but in uniform, using profane, abusive or insulting language to any person including, without limitation, language that tends to demean or show disrespect to the person on the basis of that person's race, colour, ancestry, place of origin, political belief, religion, marital status, family status, physical or mental disability, sex, sexual orientation, age or economic and social status;

[10] In her Final Investigation Report Sergeant Wright was required to provide an account of the investigative steps taken; a complete summary of the relevant evidence; a list of witnesses interviewed; a list of relevant records and her "assessment of the evidence and analysis of the facts". In her Report Sergeant Wright concluded that the complaints were not substantiated.

[11] Section 98(9) of the *Act* provides that the Discipline Authority alone, or the Police Complaint Commissioner in consultation with the Discipline Authority, may reject a Final Investigation Report and direct further investigative steps be taken. On April 27, 2015, the Final Investigation Report was rejected with the Commissioner expressing the opinion that "the best evidence relating to this matter can be examined through the upcoming trial of [the complainant] on July 21, 2015". In his "Direction For Further Investigative Steps" the Commissioner commented:

> The criminal prosecution in this matter will likely have a significant impact on the *Police Act* process from an evidentiary standpoint. There exists a real potential that the criminal proceedings will likely examine the same issues involved in the *Police Act* investigation. Therefore, the Professional standards investigator will be able to have access to the evidence tendered in the court process. This avenue of investigation will have the benefit of evidence in the

> form of admissions, and testimony under oath under the scrutiny of cross-examination. The court process will be able to shed light on evidence in terms of reliability and credibility.
>
> In *Toronto (City) v. C.U.P.E., Local 79, 2003 SCC 63* the court stated:
>
> > [44] The adjudicative process, and the importance of preserving its integrity, were well described by Doherty J.A. He said, at para. 74:
> >
> > > The adjudicative process in its various manifestations strives to do justice. By the adjudicative process, I mean the various courts and tribunals to which individuals must resort to settle legal disputes. Where the same issues arise in various forums, the quality of justice delivered by the adjudicative process is measured not by reference to the isolated result in each forum, but by the end result produced by the various processes that address the issue. By justice, I refer to procedural fairness, the achieving of the correct result in individual cases and the broader perception that the process as a whole achieves results which are consistent, fair and accurate.
>
> …
>
> In terms of the additional investigative steps required in this matter, pursuant to section 98(9) of the *Police Act*, I direct that the Abbotsford Police Department thoroughly investigate evidence and conclusions arising from the trial of [the complainant], which may include, but is not limited to:
>
> i. Gathering evidence presented at the trial of [the complainant] related to the *Police Act* allegations, including transcripts, the judgment of the trier of fact, and the reasons provided, if any; and
>
> ii. Considering evidentiary findings at the trial of [the complainant] that may be relevant or binding in relation to the *Police Act* process.
>
> In accordance with section 98(10) of the Act, the investigating officer must promptly comply with the direction for further investigative steps and resubmit a final investigation report to the Discipline Authority and the Police Complaint Commissioner within five business days of carrying out those steps. In consultation with the Discipline Authority, tire Final Investigation Report will be resubmitted on August 21, 2015. Pursuant to section 98(11), the Discipline Authority must ensure that every direction for further investigation is carried out.

[12] On July 21, 2015, Rounthwaite P.C.J. heard the trial of the charges against the complainant. Evidence was given by the petitioner and the three constables who had been present at the incident on August 22, 2014 at the home of the complainant, who did not testify. She was acquitted on both counts.

[13] Provincial Court Judge Rounthwaite's findings of fact include the following:

> [3] Police attended at the accused['s] residence, in order to arrest her son for assaulting his girlfriend some 17 hours earlier, and to apprehend the couple's child and deliver her to her mother, the victim girlfriend. When informed that the son was not home, the police decided to proceed with apprehending the child. I am satisfied on the evidence of both Sgt. Scott and Cst. Siemens that the decision to apprehend was made in advance of the police arrival at the residence, and was without an evidence-based assessment of the health and safety of the child and based only on the girlfriend's expressed safety concerns about the grandparents. Sgt. Scott believed he had the discretion and the authority to enter the residence to take the child, and to use as much force as necessary.
>
> …
>
> [6] Police action pursuant to s. 27 [of the *Child, Family and Community Service* Act, R.S.B.C. 1996, c. 46] requires reasonable grounds to believe a child is in immediate danger. This is to be contrasted with court ordered judicially-authorized police involvement of s. 17 and 19 of the *CFCSA*, with the lesser test of being in need of protection.
>
> …
>
> [9] … I am satisfied the police did indeed step into the residence before any physical response from the accused. … It was at that point that the accused was arrested for assault P.C. and obstruct, yet there was no common- law or statutory justification for the officer's entry into the residence without consent, which clearly was absent in this case.
>
> …
>
> [12] … The evidence at the entryway is that the accused grabbed the officer's arm and tried unsuccessfully to push him out of the way while trying to close the door. Given the unlawful entry by the police, in my view such action was justified and cannot be characterized as an assault. If not, I would have found it to be *de minimus*.
>
> [13] In their subsequent efforts to arrest and handcuff [the complainant], which I find to be unlawful, she ended up on the couch with her hands under her body, clearly resisting being handcuffed. Officer Scott says she was on her back and deliberately turned and kicked him twice. Two others, however, say she was face-down on the sofa, struggling and kicking, while having her arms pulled out and handcuffed behind her back.
>
> [14] The conflict in the evidence raises a reasonable doubt as to whether the accused intentionally kicked Officer Scott. She cannot be found guilty of the lesser included offence, and I acquit her of Count 1 as well as Count 2.

[14] Provincial Court Judge Rounthwaite made no findings about damage to the complainant's property on August 22, 2014.

[15] Pursuant to the Commissioner's direction for Further Investigative Steps, Staff Sergeant Dhillon of the Abbotsford Police Department reviewed the trial evidence as

well as the reasons for judgment of Rounthwaite P.C.J. and concluded that the petitioner had acted in good faith under the mistaken view that the provisions of the *Child Family and Community Services Act*, R.S.B.C. 1996, c. 46 provided legal authority in the circumstances to enter the complainant's home to arrest her and thus "the essential elements of abuse of authority were not met". Staff Sergeant Dhillon observed that Rounthwaite P.C.J. made no findings regarding damage to the complainant's property. The outcome of Staff Sergeant Dhillon's review of Sergeant Wright's Report was that the complaint was "not substantiated".

[16] On February 23, 2016, the Abbotsford Chief Constable, as the Discipline Authority, sent a 17 page Notice of Decision to the complainant and to the Commissioner. The notice describes the entering of the petitioner and the other police officers into the complainant's home thus:

> 9. there is conflicting evidence as to the timing of [the complainant] assaulting A/Sgt. Scott in relation to him entering the threshold of the premises. As A/Sgt. Scott and Cst. Baring were attempting to calm the situation and rationally explain why [the daughter] was to be returned to her mother, [the complainant] continued to act irrationally and aggressively. What is clear is that Cst. Baring did have her foot blocking the doorway thereby preventing [the complainant] from closing the door. Cst. Behm stated in his court testimony that it appeared that A/Sgt. Scott was partway in the residence when [the complainant] grabbed his hand or wrist in an attempt to hold him back. A/Sgt. Scott asserts that he was on the front steps and not in the threshold of the doorway.

[17] If the Commissioner considered there was a reasonable basis to believe that the Notice of Decision of the Discipline Authority was incorrect then pursuant to s. 117 of the *Act*:

> (4) The police complaint commissioner must request the Associate Chief Justice of the Supreme Court to
>
> > (a) consult with retired judges of the Provincial Court, the Supreme Court and the Court of Appeal, and
> >
> > (b) recommend one or more retired judges for the purposes of this section.
>
> …
>
> (9) If, on review of the investigating officer's reports and the evidence and records referenced in them, the retired judge appointed considers that the conduct of the member or former member appears to constitute misconduct,

> the retired judge becomes the discipline authority in respect of the matter and must convene a discipline proceeding, unless section 120 (16) [which provides for a pre-hearing conference] applies.

[18] On March 22, 2016, the Commissioner gave notice of the appointment of the Honourable Ian H. Pitfield, a retired judge of the Supreme Court of British Columbia, to conduct the review.

[19] In the Notice of Appointment the Commissioner expressed "the view" that:

> … the Discipline Authority's decision did not properly consider the application of the Doctrine of Abuse of Process as described in *Toronto (City) v. C.U.P.E., Local 79, 2003 SCC 63*, which prevents the re-litigation of issues decided upon by the court.
>
> Furthermore, I am of the view that the Discipline Authority's application of the Doctrine of Good Faith in this matter was incorrect, as he did not assess the reasonableness of Acting Sergeant Scott's beliefs as they relate to his scope of his authority. In particular, good faith cannot be claimed on the basis of an officer's unreasonable error or ignorance as to the scope their authority (*R. v. Buhay, [2003] 1 S.C.R. 631, (SCC*).

[20] The Commissioner accepted that the decision, that the complaint of damage to property was not substantiated, was final.

[21] Section 117(7) of the *Act* provides that the retired judge, within ten business days of receiving the reports for review, was to notify the complainant, as well as the petitioner and the Commissioner of "the next applicable steps". Subsection 8 provides that:

> (8) Notification under subsection (7) must include
>
> (a) a description of the complaint, if any, and any conduct of concern,
>
> (b) a statement of a complainant's right to make submissions under section 113,
>
> (c) a list or description of each allegation of misconduct considered by the retired judge,
>
> (d) if subsection (9) applies, the retired judge's determination as to the following:
>
> (i) whether or not, in relation to each allegation of misconduct considered by the retired judge, the evidence referenced in the report appears sufficient to substantiate the allegation and require the taking of disciplinary or corrective measures;

> (ii) whether or not a prehearing conference will be offered to the member or former member under section 120;
>
> (iii) the range of disciplinary or corrective measures being considered by the retired judge in the case, and
>
> (e) if subsection (10) applies, a statement that includes the effect of subsection (11). [Inapplicable in this instance.]

[22] Section 117(9) of the *Act* so far as applicable reads:

> (9) If, on review of the investigating officer's reports and the evidence and records referenced in them, the retired judge appointed considers that the conduct of the member or former member appears to constitute misconduct, the retired judge becomes the discipline authority in respect of the matter and must convene a discipline proceeding …[Emphasis added.]

[23] In a Notice of Decision dated April 13, 2016, the retired judge wrote the following:

> [2] The Commissioner's concerns in relation to the determination are that the Disciplinary Authority disregarded the finding of the Provincial Court of British Columbia that A/S Scott acted without lawful authority when he and other officers entered [the complainant's] residence, and improperly concluded that A/S Scott had not abused his authority because he had acted in good faith. The Commissioner is of the view that disregard for the finding of the Provincial Court results in an abuse of process, and good faith cannot be relied upon as a defence to the officer's conduct because any belief in his mind that he had authority to act as he did was unreasonable in the circumstances.
>
> [3] In my view, the Commissioner's concerns are well founded. In the result, I conclude that the allegations may be substantiated. As a result, a disciplinary hearing should proceed in the absence of a satisfactory disposition at a pre-hearing conference.
>
> …
>
> [20] The investigator's findings and conclusions differ in material respects front those of the Provincial Court judge. In my opinion, the investigator and the Disciplinary Authority failed to appropriately construe the Provincial Court ruling and the findings of fact on which the acquittal was based, and failed to respect the directive of the Supreme Court of Canada in *Toronto (City) v. C.U.P.E., Local 79, supra*, to avoid inconsistent results flowing from different judicial or administrative proceedings.
>
> [21] In *C.U.P.E.*, the Court addressed the question of whether a person convicted of sexual assault, and dismissed from his employment as a result, could be reinstated by a labour arbitrator who concluded, on the evidence before him, that the sexual assault did not take place. The question can be revised to reflect present circumstances. Can a disciplinary authority in a *Police Act* proceeding determine that an officer acted appropriately in the

execution of his duty and therefore had not abused his authority when a court of law has found the contrary as fact when acquitting an accused who is not the officer whose conduct is in question?

…

[24] The obvious material difference between present circumstances and those that prevailed in *C.U.P.E.* is that the individual whose conduct is presently the subject of review is not the person convicted of an offence. Nonetheless, the *C.U.P.E.* decision and the Provincial Court judgment cannot and should not be ignored. [The complainant] was the accused and was acquitted. She is the person complaining of police conduct including that of A/S Scott. The trial judge found as fact that she did not have physical contact with or obstruct A/S Scott before the officer entered her residence, that A/S Scott had no lawful authority to enter the residence, and that A/S Scott did not have reasonable grounds to believe that the child was in immediate danger.

[25] Acceptance of the Disciplinary Authority's determination, derived from the investigator's findings, that an assault occurred outside the residence and that A/S Scott's belief that the child was in immediate danger was reasonable because of concern about [the complainant's] sobriety, facts that the Provincial Court found had not been proved, would bring the administration of justice and into disrepute and undermine the integrity of the police complaint process.

[26] In my opinion, the investigator's conclusions, and therefore the Disciplinary Authority's determination, cannot be sustained because the investigator failed to appropriately interpret the substance of the reasons of the Provincial Court Judge resulting in the acquittal of [the complainant], and the determination failed to apply the principles enunciated by the Supreme Court of Canada in *C.U.P.E.*

[27] It follows, therefore, that the question of whether A/S Scott abused his authority must be determined according respect for the factual findings of the trial judge. Respect for those findings of fact would result in the conclusion that A/S Scott had abused his authority. Moreover, the investigator's interpretation of the phrase "abuse of authority", regardless of the facts, was overly restrictive. In addition, the investigator incorrectly concluded that A/S Scott should be found to have acted in good faith because he believed he had the right to enter [the complainant's] residence and therefore exonerated.

[29| Abuse of authority is a disciplinary breach of public trust. While "breach of public trust" is not defined in the *Police Act*, it should be construed to reflect the public expectation that police will act in a manner that is not offensive to the public, to the policing profession generally, or to the police force of which an officer is a member.

[30] Rather than being exhaustively defined. "abuse of authority" embraces ***any*** [the retired judge's emphasis] conduct that may be regarded as oppressive to a member of the public. That result flows from insertion of the words "including, without limitation" before the description of certain kinds of conduct with greater particularity. It is an error to conclude that only intentional or reckless conduct can constitute an abuse of authority.

> [31] The finding of the trial judge that A/S Scott was not acting in the execution of his duty when entering the residence and dealing with [the complainant] because of the absence of reasonable grounds to believe a child was in immediate danger support the view that the allegations of abuse of authority may be substantiated. The officer's conduct was a marked and serious departure from the standard reasonably to be expected of a police officer.
>
> [32] A/S Scott cannot say that he acted in good faith and should therefore be exonerated given the finding of the trial judge that he did not have reasonable grounds upon which to enter [the complainant's] residence. Good faith requires more than an honest belief. The belief must be reasonable and, given the trial judge's findings, A/S Scott's belief was not reasonable. Similarly, it is not a defence to say that the officer acted under a mistake of law. If the officer acted under a mistake of law, the mistake was not reasonable. The officer is presumed to know the law as it pertains to search, seizure, entry to a residence, arrest and apprehension of a child.

[24] On April 19, 2016 the Commissioner issued a Notice of Designation of New Discipline Authority pursuant to s. 135(1) of the *Act*, which permitted the appointment of a Discipline Authority other than the Deputy Chief Constable of the Abbotsford Police Department if that was considered to be in the public interest. Acting on that authority, the Chief Constable of New Westminster was appointed to conduct a pre-hearing conference if the petitioner agreed. He did not. Thereafter, the retired judge was authorized to conduct a discipline hearing.

[25] On May 30, 2016, the amended petition which is now before me was filed seeking the following:

> 1. An order in the nature of *certiorari,* quashing the orders and decisions of the respondent, the Police Complaint Commissioner of British Columbia ("PCC"), dated March 22, 2016 and April 19, 2016.
> 2. Interim and permanent orders in the nature of prohibition, prohibiting the respondent, the Honourable Ian H. Pitfield ("respondent Pitfield") from proceeding with a Discipline Hearing into the conduct of the petitioner.
> 3. <u>In the alternative, an order that the respondent Pitfield is disqualified from serving as Discipline Authority, on the basis that his reasons for decision on the s. 117 review amount to an over-extension of his statutory authority and establish a reasonable apprehension of bias.</u>
>
> [Underlining in original.]

[26] In his written submissions the petitioner submits that if the order of the Commissioner of March 22, 2016, appointing a retired judge is quashed the other applications become moot.

Analysis of the Application for Judicial Review

[27] There are two troubling aspects to the approach to his task taken by the retired judge.

[28] The first is his implicit interpretation of s. 117(9) of the *Act* that it permitted him at an early stage of his inquiries to reach conclusions about the petitioner's conduct.

[29] In *Florkow v. British Columbia (Police Complaint Commissioner)*, 2013 BCCA 92 Newbury J.A. observed that part XI of the *Act*, where s. 117 is found, "is not a model of clarity". Section 117(9) fits that description, but in my opinion it is clear that it authorized the retired judge to do no more than express a view that the petitioner's conduct on April 22, 2016 "appears" to have been misconduct. To have gone beyond an expression of a preliminary review by giving extensive reasons using conclusory language, such as asserting that the petitioner's "conduct was a marked and serious departure from the standard reasonably expected of a police officer" is not consistent with the scheme and object of the *Act* and the intention of the legislature (see *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27 at para. 21.

[30] In my opinion the legislature did not intend the retired judge, whose ultimate role could include presiding over a disciplinary hearing involving the very person whose conduct he had already determined was improper, nevertheless could use language, before a hearing had taken place, that on any reasonable reading left no doubt in the mind of the petitioner that the retired judge had already made up his mind that the petitioner was guilty of the misconduct alleged.

[31] The other troubling feature of the retired judge's Notice of Decision of April 13, 2016, is the narrow interpretation he placed on *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63. The retired judge concluded that the disciplinary authority had

"failed to respect the directive of the Supreme Court of Canada to avoid inconsistent results flowing from different judicial or administrative proceedings".

[32] In my view *Toronto (City)* cannot be read to be applied so restrictively as the retired judge contemplated. Justice Arbour for the majority, in addressing the re-litigation issue wrote at para. 52

> … There may be instances where relitigation will enhance, rather than impeach, the integrity of the judicial system, for example: (1) when the first proceeding is tainted by fraud or dishonesty; (2) when fresh, new evidence, previously unavailable, conclusively impeaches the original results; or (3) when fairness dictates that the original result should not be binding in the new context. This was stated unequivocally by this Court in *Danyluk*, *supra*, at para. 80. [*Danyluk v. Ainsworth Technologies Inc.*, [2001] 2 S.C.R. 460].

[33] At para. 53 Arbour J. spoke of the "discretionary factors that apply to prevent the doctrine of issue estoppel from operating in an unjust and unfair way are equally available to prevent the doctrine of abuse of process from achieving a similar undesirable result". Justice Arbour gave a non-exhaustive list of examples of the "many circumstances in which the bar to relitigation, either through the doctrine of *res judicata*, or that of abuse of process, would create unfairness". One of which is that "fairness would dictate that the administration of justice would be better served by permitting the second proceeding to go forward than by insisting that finality should prevail".

[34] The retired judge ought not to have foreclosed the possibility that the petitioner could demonstrate on a discipline hearing that fairness would be better served by permitting him to address the question of abuse of authority without being confined only to what was before the Provincial Court Judge on the trial of the complainant.

[35] In *Penner v. Niagara (Regional Police Services Board)*, 2013 SCC 19 at paras. 42 to 45, Cromwell and Karakatsanis JJ. for the majority wrote:

> [42] The second way in which the operation of issue estoppel may be unfair is not so much concerned with the fairness of the prior proceedings but with the fairness of *using their results* to preclude the subsequent proceedings. Fairness, in this second sense, is a much more nuanced enquiry. On the one

> hand, a party is expected to raise all appropriate issues and is not permitted multiple opportunities to obtain a favourable judicial determination. Finality is important both to the parties and to the judicial system. However, even if the prior proceeding was conducted fairly and properly having regard to its purpose, injustice may arise from using the results to preclude the subsequent proceedings. This may occur, for example, where there is a significant difference between the purposes, processes or stakes involved in the two proceedings. We recognize that there will always be differences in purpose, process and stakes between administrative and court proceedings. In order to establish unfairness in the second sense we have described, such differences must be significant and assessed in light of this Court's recognition that finality is an objective that is also important in the administrative law context. As Doherty and Feldman JJ.A. wrote in *Schweneke v. Ontario* (2000), 47 O.R. (3d) 97 (C.A.), at para. 39, if courts routinely declined to apply issue estoppel because the procedural protections in the administrative proceedings do not match those available in the courts, issue estoppel would become the exception rather than the rule.
>
> [43] Two factors discussed in *Danyluk* — "the wording of the statute from which the power to issue the administrative order derives" (paras. 68-70) and "the purpose of the legislation" (paras. 71-73), including the degree of financial stakes involved — are highly relevant here to the fairness analysis in this second sense. They take into account the intention of the legislature in creating the administrative proceedings and they shape the reasonable expectations of the parties about the scope and effect of the proceedings and their impact on the parties' broader legal rights: *Minott*, at pp. 341-42.
>
> [44] For example, in *British Columbia (Minister of Forests) v. Bugbusters Pest Management Inc.* (1998), 50 B.C.L.R. (3d) 1 (C.A.), a defendant in a civil action relied on the decision of a Deputy Chief Forester to preclude the Crown's civil action for damages caused by a forest fire. The Court of Appeal upheld the chambers judge's decision to exercise discretion against applying issue estoppel. As the statute did not contemplate that the Deputy Chief Forester's decision about the cause of a fire would be a final resolution of that issue, it followed that it "was not within the reasonable expectation of either party at the time of those proceedings" that it would be: *Bugbusters*, at para. 30.
>
> [45] Thus, where the purposes of the two proceedings diverge significantly, applying issue estoppel may be unfair even though the prior proceeding was conducted with scrupulous fairness, having regard to the purposes of the legislative scheme that governs the prior proceeding. For example, where little is at stake for a litigant in the prior proceeding, there may be little incentive to participate in it with full vigour: *Toronto (City)*, at para. 53.
>
> [Emphasis added.]

[36] The petitioner does not seek to challenge in subsequent administrative proceedings the acquittal of the complainant. The question before Rounthwaite P.C.J. was whether the complainant was guilty beyond a reasonable doubt of

assaulting a police constable in the execution of his duty and of resisting arrest. The issue of the complainant's guilt or innocence is not the same as the issue of whether the petitioner was guilty of misconduct by abusing his authority. Provincial Court Judge Rounthwaite decided the petitioner did not have authority to enter the house of the complainant and arrest her, but made no decision that the petitioner had abused his authority within the meaning of s. 77(3) of the *Police Act*, which is reproduced at para. 7 of these reasons. “Abuse of authority” is defined for the purpose of the complaint against the petitioner as the intentional or reckless arrest of the complainant without good and sufficient cause. I do not read the phrase “without limitation”, as the retired judge apparently did, to mean that intention or recklessness can be ignored when considering the petitioner’s conduct. In my view, the section should be read to apply to conduct which has a serious blameworthy element and not simply a mistake of legal authority alone.

[37] In my opinion, the retired judge improperly conflated the issue of whether the petitioner was in the course of his lawful duties when he entered the complainant's home and arrested her, with the other issue of whether the petitioner was guilty of misconduct by abusing his authority as defined in the *Police Act*. That conflation is apparent from the retired judge's conclusion that:

> It follows, therefore, that the question of whether A/S Scott abused his authority must be determined according respect for the factual findings of the trial judge. Respect for those findings of fact would result in the conclusion that A/S Scott had abused his authority.

[38] I do not agree that Provincial Court Judge Rounthwaite’s reasons conclusively answer the question of whether the petitioner abused his authority as that phrase is defined in the *Act*.

[39] Section 117 of the *Police Act* is unfortunately worded in some respects. On one possible interpretation a retired judge appointed pursuant to the *Act* is directed to reach conclusions about the conduct of a member of a police force before a disciplinary hearing has been conducted by the retired judge in respect of that conduct. I do not accept the legislature intended such an approach to be taken. If

that was the appropriate interpretation it would inevitably raise a serious issue of an apprehension of bias when the retired judge made preliminary findings adverse to the petitioner and was then required to conduct a disciplinary hearing. I conclude that the retired Judge adopted an interpretation which has now led to that unfortunate outcome.

[40] I agree with the petitioner that the retired judge must be disqualified from serving as the disciplinary authority pursuant to the *Act*.

[41] I have not addressed the standard of review in these reasons. It is my opinion that whether the standard is correctness or reasonableness the retired judge must be disqualified. The apprehension of bias is so apparent that the petitioner cannot reasonably have any confidence he will receive a fair hearing.

"Affleck J."