





[1] This is an Application filed June 26, 2009 under section 53(5) of Part VI of the *Human Rights Code* R.S.O. 1990, c. H.19, as amended (the "Code").

[2] The purpose of this Decision is to address the preliminary issue raised by the respondents that this Application should be dismissed as being outside the jurisdiction of the Tribunal.

[3] The applicant alleges that the Kawartha-Haliburton Children's Aid Society (the "CAS") and the personal respondents discriminated against her on the grounds of ancestry, colour, creed, disability, ethnic origin, family status, place of origin, and race in the provision of services.

[4] The personal respondent, Hugh Nicholson is the local director of the CAS. The personal respondents Jennifer Hill and Jennifer Smith were, at the material time, employed by the CAS as Child Protection Case Managers.

[5] The applicant first contacted the CAS with concerns about her great-nephew in 2002. In 2006, she became aware of court ordered affidavits prepared by Ms. Hill and Ms. Smith in respect of a custody dispute concerning that child. She alleges the information in these affidavits is offensive and discriminatory. The applicant complained to Mr. Nicholson. He responded in a letter which she claims is also discriminatory. She further alleges that CAS's determination not to investigate her concerns raised in 2002 was discriminatory.

#### DECISION

[6] The Tribunal does not have the general power to inquire into claims of unfairness or wrongdoing outside the areas or grounds prescribed in the *Code*. See *Cooper v. Pinkofskys*, 2008 HRTO 390 (CanLII). The Tribunal's jurisdiction is limited to dealing with disputes that properly fall under the *Code*. The applicant alleges that she experienced discrimination in the provision of goods and services contrary to s. 1 of the *Code*, which provides:

Every person has a right to equal treatment with respect to services,

goods and facilities, without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, marital status, family status or disability.

[7] The various contexts in which the Tribunal has found the area of “services” to be engaged suggest the necessity for some sort of service relationship, as opposed to mere interaction, between the parties. See *Cooper, supra*.

[8] Neither the applicant nor the respondents were a party to the family law dispute. In complying with a judicial order, Ms. Hill and Ms. Smith were not engaged in the provision of a service to the applicant.

[9] Further, the applicant was not at any time material to her Application in receipt of service from any of the respondents. The child who had been a client of the CAS may have received services from CAS through Ms. Hill or Ms. Smith. Under those circumstances, however, any services that the CAS would have provided, would be to and for this child and his parents or guardians, not to or for the applicant. CAS was not providing a service to the applicant. See *Swezey v. Ontario (Attorney General)*, 2009 HRTO 1296 (CanLII).

[10] Because the respondents were not providing a service to the applicant there is no *Code* protected relationship between the parties on which the Application can be founded. In the circumstances, the Tribunal is without jurisdiction to proceed with this Application and the Application is dismissed.

Dated at Toronto, this 26<sup>th</sup> day of October, 2009.

“Signed by”

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Judith Hinchman  
Member



# HUMAN RIGHTS TRIBUNAL OF ONTARIO

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**BETWEEN:**

**Vannak Troeung**

**Applicant**

**-and-**

**St. Michael's Hospital**

**Respondent**

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## DECISION

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**Adjudicator:** Alan G. Smith  
**Date:** August 12, 2011  
**File Number:** 2010-09280-I  
**Citation:** 2011 HRTO 1509  
**Indexed as:** **Troeung v. St. Michael's Hospital**

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## BACKGROUND

## WRITTEN SUBMISSIONS

[1] The applicant filed an Application under s. 34 of the *Human Rights Code*, R.S.O. Vannak Troeung, Applicant ) Self-represented (the "Code"), on June 2010, alleging that the respondent employer discriminated against him because of his sexual orientation.

[2] In section 7(c) of the Application ("What was the date of the last event?"), the applicant's representative wrote "May 11, 2010". The Application indicates that the respondent terminated the applicant's employment on that date. In section 7(d) of the Application ("If you are applying more than one year from the last event, please explain why"), the applicant's wrote:

...I am afraid that if I file an application with the Human Rights Tribunal, and the Tribunal notify my professional college... my regulatory body would interpret my errors as negligence, without taking into consideration the underlying cause of such errors, then take away my licence to practice ending my career as a Lab Technologist-Histotechnologist - a career for which I enjoy, and worked so hard to obtain...

[3] On July 12, 2011, the Tribunal Registrar sent a Notice of Intent to Dismiss to the applicant which noted that the Application appeared to be outside of the Tribunal's jurisdiction (power to decide) because it was filed more than one year after the last alleged incident of discrimination. The Tribunal invited the applicant to provide written submissions to explain the delay in filing.

[4] On July 26, 2011, the applicant sent the Tribunal further submissions on the timeliness issue. In essence, he repeated the explanation provided in the Application.

## DECISION

[5] The Tribunal does not have the general power to inquire into claims of unfairness or wrongdoing outside the parameters prescribed in the Code. The Tribunal's jurisdiction is limited to dealing with disputes that properly fall under the Code. See *Fulton-Bell v. Kawartha-Haliburton Children's Aid Society*, 2009 HRTO 1769.

## BACKGROUND of the Code provides:

[1] The applicant filed an Application under s. 34 of the *Human Rights Code*, R.S.O. 1990, c. H.19, as amended (the “Code”), on June 29, 2011, which alleged that the respondent employer discriminated against him because of his sexual orientation.

[2] In section 7(c) of the Application (“What was the date of the last event?”), the applicant’s representative wrote “May 11, 2010”. The Application indicates that the respondent terminated the applicant’s employment on that date. In section 7(d) of the Application (“If you are applying more than one year from the last event, please explain why:”), the applicant’s wrote:

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[4] On July 26, 2011, the applicant sent the Tribunal further submissions on the timeliness issue. In essence, he repeated the explanation provided in the Application.

## DECISION

[5] The Tribunal does not have the general power to inquire into claims of unfairness or wrongdoing outside the parameters prescribed in the *Code*. The Tribunal’s jurisdiction is limited to dealing with disputes that properly fall under the *Code*. See *Fulton-Bell v. Kawartha-Haliburton Children’s Aid Society*, 2009 HRTO 1769.

[6] Section 34 of the *Code* provides:

(1) If a person believes that any of his or her rights under Part I have been infringed, the person may apply to the Tribunal for an order under section 45.2,

(a) within one year after the incident to which the application relates; or

(b) if there was a series of incidents, within one year after the last incident in the series.

(2) A person may apply under subsection (1) after the expiry of the time limit under that subsection if the Tribunal is satisfied that the delay was incurred in good faith and no substantial prejudice will result to any person affected by the delay.

[7] The Tribunal has set a fairly high onus on applicants to provide a reasonable explanation for the delay. See, for example, *Klein v. Toronto Zionist Council*, 2009 HRTO 241. The mandatory one-year limitation period is consistent with the *Code*'s objective that human rights claims should be dealt with fairly and expeditiously.

[8] In order to satisfy the Tribunal that the delay was incurred in good faith, the applicant must provide a reasonable explanation as to why he or she did not pursue his or her rights under the *Code* in a timely manner. See *Corrigan v. Peterborough Victoria Northumberland and Clarington Catholic District School Board*, 2008 HRTO 424, and *Cartier v. Northeast Mental Health Centre*, 2009 HRTO 1670. Good faith is more than just the absence of bad faith. To succeed under s. 34(2) the applicant has to show he acted with all due diligence. See *Reid v. Ontario March of Dimes*, 2009 HRTO 2207 and *McGhie v. Bell Canada*, 2011 HRTO 1197.

[9] It appears that the applicant's argument is that he delayed filing an Application because he was fearful of the repercussions that step might have on his professional designation. However, he fails to explain what difference the passage of time made in that regard. In other words, what difference would it have made if he had filed the Application on, for example, May 10, 2011, instead of waiting another seven weeks to June 29, 2011?



[10] Given the absence of evidence that the delay was incurred in good faith, I find that the Application does not satisfy the requirements of section 34 of the *Code*. Therefore the Tribunal is without jurisdiction to proceed with the Application.

[11] The Tribunal has held that, if it has not been shown that the delay was incurred in good faith, it is not necessary for the Tribunal to make the further determination as to whether any party will be substantially prejudiced by the delay. See *Esanu v. Georgetown Non-Contact Hockey League*, 2009 HRTO 579 and *McGhie* above.

#### ORDER

[12] The Application is dismissed.

Dated at Toronto this 12<sup>th</sup> day of August, 2011.

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"signed by"  
Alan G. Smith  
Member

Toronto (City) v. C.U.P.E., Local 79, [2003] 3 S.C.R. 77, 2003 SCC 63

**Canadian Union of Public Employees, Local 79**

*Appellant*

v.

**City of Toronto and Douglas C. Stanley**

*Respondents*

and

**Attorney General of Ontario**

*Intervener*

**Indexed as: Toronto (City) v. C.U.P.E., Local 79**

**Neutral citation: 2003 SCC 63.**

File No.: 28840.

2003: February 13; 2003: November 6.

Present: McLachlin C.J. and Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour, LeBel and Deschamps JJ.

on appeal from the court of appeal for ontario

*Labour law — Arbitration — Dismissal without just cause — Evidence — Recreation instructor dismissed after being convicted of sexual assault — Conviction upheld on appeal — Arbitrator ruling that instructor had been dismissed without just*

*Per* McLachlin C.J. and Gonthier, Iacobucci, Major, Bastarache, Binnie and Arbour JJ.: When asked to decide whether a criminal conviction, *prima facie* admissible in a proceeding under s. 22.1 of the Ontario *Evidence Act*, ought to be rebutted or taken as conclusive, courts will turn to the doctrine of abuse of process to ascertain whether relitigation would be detrimental to the adjudicative process. The doctrine engages the inherent power of the court to prevent the misuse of its procedure, in a way that would bring the administration of justice into disrepute. It has been applied to preclude relitigation in circumstances where the strict requirements of issue estoppel are not met, but where allowing litigation to proceed would nonetheless violate such principles as judicial economy, consistency, finality and the integrity of the administration of justice. The motive of the party who seeks to relitigate, and the capacity in which he or she does so, cannot be decisive factors in the application of the bar against relitigation. What is improper is to attempt to impeach a judicial finding by the impermissible route of relitigation in a different forum. A proper focus on the process, rather than on the interests of a party, will reveal why relitigation should not be permitted. From the system's point of view, relitigation carries serious detrimental effects and should be avoided unless the circumstances dictate that relitigation is necessary to enhance the credibility and the effectiveness of the adjudicative process as a whole. Casting doubt over the validity of a criminal conviction is a very serious matter. Collateral attacks and relitigation are not appropriate methods of redress since they inordinately tax the adjudicative process while doing nothing to ensure a more trustworthy result. The common law doctrines of issue estoppel, collateral attack and abuse of process adequately capture the concerns that arise when finality in litigation must be balanced against fairness to a particular litigant. There is no need to endorse a self-standing and independent "principle of finality" as either a separate doctrine or as an independent test to preclude relitigation.

arbitrator's determination in this case that O's criminal conviction could indeed be relitigated during the grievance proceeding was incorrect. As a matter of law, the arbitrator was required to give full effect to O's conviction. His failure to do so was sufficient to render his ultimate decision that O had been dismissed without just cause — a decision squarely within the arbitrator's area of specialized expertise and thus reviewable on a deferential standard — patently unreasonable, according to the jurisprudence of the Court.

*By Arthur* Because of growing concerns with the ways in which the standards of review currently available within the pragmatic and functional approach are conceived of and applied, the administrative law aspects of this case require further discussion. The patent unreasonableness standard does not currently provide sufficiently clear parameters for reviewing courts to apply in assessing the decisions of administrative adjudicators. Certain fundamental legal questions — for instance constitutional and human rights questions and those involving civil liberties, as well as other questions that are of central importance to the legal system as a whole, such as the issue of relitigation — typically fall to be decided on the correctness standard. Not all questions of law, however, must be reviewed under a standard of correctness. Resolving general legal questions may be an important component of the work of some administrative adjudicators. In many instances, the appropriate standard of review in respect of the application of general common or civil law rules by specialized adjudicators should not be one of correctness, but rather of reasonableness. If the general question of law is closely connected to the adjudicator's core area of expertise, the decision will typically be entitled to deference.

621; *Wilson v. The Queen*, [1983] 2 S.C.R. 364; *A v. Superior*, [1996] 2 S.C.R. 723; *R. v. Consolidated*. In reviewing a decision under the existing standard of patent unreasonableness, the court's role is not to identify the correct result. To pass a review

correctness and a revised unified standard of reasonableness? Should we attempt to more clearly define the nature and scope of each standard or rethink their relationship and application? This is perhaps some of the work which lies ahead for courts, building on the developments of recent years as well as on the legal tradition which created the framework of the present law of judicial review.

**Cases Cited**

By Arbour J.

**Referred to:** *Ontario v. O.P.S.E.U.*, [2003] 3 S.C.R. 149, 2003 SCC 64; *Dr. Q v. College of Physicians and Surgeons of British Columbia*, [2003] 1 S.C.R. 226, 2003 SCC 19; *Law Society of New Brunswick v. Ryan*, [2003] 1 S.C.R. 247, 2003 SCC 20; *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982; *Toronto (City) Board of Education v. O.S.S.T.F., District 15*, [1997] 1 S.C.R. 487; *Parry Sound (District) Social Services Administration Board v. O.P.S.E.U., Local 324*, [2003] 2 S.C.R. 157, 2003 SCC 42; *Demeter v. British Pacific Life Insurance Co.* (1983), 150 D.L.R. (3d) 249, aff'd (1984), 48 O.R. (2d) 266; *Hunter v. Chief Constable of the West Midlands Police*, [1982] A.C. 529, aff'g *McIlkenny v. Chief Constable of the West Midlands*, [1980] 1 Q.B. 283; *Re Del Core and Ontario College of Pharmacists* (1985), 51 O.R. (2d) 1; *Danyluk v. Ainsworth Technologies Inc.*, [2001] 2 S.C.R. 460, 2001 SCC 44; *Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979); *R. v. Regan*, [2002] 1 S.C.R. 297, 2002 SCC 12; *Lemay v. The King*, [1952] 1 S.C.R. 232; *R. v. Banks*, [1916] 2 K.B. 621; *Wilson v. The Queen*, [1983] 2 S.C.R. 594; *R. v. Sarson*, [1996] 2 S.C.R. 223; *R. v. Consolidated Maybrun Mines Ltd.*, [1998] 1 S.C.R. 706; *R. v. Power*, [1994] 1 S.C.R. 601; *R. v. Conway*, [1989] 1 S.C.R. 1659; *R. v. Scott*, [1990] 3 S.C.R. 979; *Blencoe v.*

*British Columbia (Human Rights Commission)*, [2000] 2 S.C.R. 307, 2000 SCC 44; *R. v. O'Connor*, [1995] 4 S.C.R. 411; *United States of America v. Shulman*, [2001] 1 S.C.R. 616, 2001 SCC 21; *Canam Enterprises Inc. v. Coles* (2000), 51 O.R. (3d) 481, rev'd [2002] 3 S.C.R. 307, 2002 SCC 63; *Franco v. White* (2001), 53 O.R. (3d) 391; *Bomac Construction Ltd. v. Stevenson*, [1986] 5 W.W.R. 21; *Bjarnarson v. Government of Manitoba* (1987), 38 D.L.R. (4th) 32, aff'd (1987), 21 C.P.C. (2d) 302; *R. v. McIlkenny* (1991), 93 Cr. App. R. 287; *United States v. Burns*, [2001] 1 S.C.R. 283, 2001 SCC 7; *R. v. Bromley* (2001), 151 C.C.C. (3d) 480; *Q. v. Minto Management Ltd.* (1984), 46 O.R. (2d) 756; *Nigro v. Agnew-Surpass Shoe Stores Ltd.* (1977), 18 O.R. (2d) 215, aff'd (1978), 18 O.R. (2d) 714; *Germescheid v. Valois* (1989), 68 O.R. (2d) 670; *Simpson v. Geswein* (1995), 25 C.C.L.T. (2d) 49; *Roenisch v. Roenisch* (1991), 85 D.L.R. (4th) 540; *Saskatoon Credit Union, Ltd. v. Central Park Enterprises Ltd.* (1988), 47 D.L.R. (4th) 431; *Canadian Tire Corp. v. Summers* (1995), 23 O.R. (3d) 106.

By LeBel J.

**Referred to:** *Chamberlain v. Surrey School District No. 36*, [2002] 4 S.C.R. 710, 2002 SCC 86; *Ontario v. O.P.S.E.U.*, [2003] 3 S.C.R. 149, 2003 SCC 64; *C.U.P.E. v. Ontario (Minister of Labour)*, [2003] 1 S.C.R. 539, 2003 SCC 29; *Dr. Q v. College of Physicians and Surgeons of British Columbia*, [2003] 1 S.C.R. 226, 2003 SCC 19; *Miller v. Workers' Compensation Commission (Nfld.)* (1997), 154 Nfld. & P.E.I.R. 52; *Toronto (City) Board of Education v. O.S.S.T.F., District 15*, [1997] 1 S.C.R. 487; *Canada (Attorney General) v. Public Service Alliance of Canada*, [1993] 1 S.C.R. 941; *Ivanhoe inc. v. UFCW, Local 500*, [2001] 2 S.C.R. 565, 2001 SCC 47; *Canadian Broadcasting Corp. v. Canada (Labour Relations Board)*, [1995] 1 S.C.R. 157; *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982; *Canada*

(*Director of Investigation and Research*) v. *Southam Inc.*, [1997] 1 S.C.R. 748; *Pezim v. British Columbia (Superintendent of Brokers)*, [1994] 2 S.C.R. 557; *National Corn Growers Assn. v. Canada (Import Tribunal)*, [1990] 2 S.C.R. 1324; *Canada (Attorney General) v. Mossop*, [1993] 1 S.C.R. 554; *Pasiechnyk v. Saskatchewan (Workers' Compensation Board)*, [1997] 2 S.C.R. 890; *Macdonell v. Quebec (Commission d'accès à l'information)*, [2002] 3 S.C.R. 661, 2002 SCC 71; *Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corp.*, [1979] 2 S.C.R. 227; *Law Society of New Brunswick v. Ryan*, [2003] 1 S.C.R. 247, 2003 SCC 20; *Service Employees' International Union, Local No. 333 v. Nipawin District Staff Nurses Association*, [1975] 1 S.C.R. 382; *Anisminic Ltd. v. Foreign Compensation Commission*, [1969] 2 A.C. 147; *Metropolitan Life Insurance Co. v. International Union of Operating Engineers, Local 796*, [1970] S.C.R. 425; *CAIMAW v. Paccar of Canada Ltd.*, [1989] 2 S.C.R. 983; *Canadian Union of Public Employees, Local 301 v. Montreal (City)*, [1997] 1 S.C.R. 793; *Domtar Inc. v. Quebec (Commission d'appel en matière de lésions professionnelles)*, [1993] 2 S.C.R. 756; *Canada Safeway Ltd. v. RWDSU, Local 454*, [1998] 1 S.C.R. 1079; *Lester (W.W.) (1978) Ltd. v. United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry, Local 740*, [1990] 3 S.C.R. 644; *Hao v. Canada (Minister of Citizenship and Immigration)* (2000), 184 F.T.R. 246; *United Brotherhood of Carpenters and Joiners of America, Local 579 v. Bradco Construction Ltd.*, [1993] 2 S.C.R. 316; *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817; *Reference re Resolution to Amend the Constitution*, [1981] 1 S.C.R. 753; *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217.

Toronto (City) v. C.U.P.E., Local 79, [2003] 3 S.C.R. 77, 2003 SCC 63

**Canadian Union of Public Employees, Local 79**

*Appellant*

v.

**City of Toronto and Douglas C. Stanley**

*Respondents*

and

**Attorney General of Ontario**

*Intervener*

**Indexed as: Toronto (City) v. C.U.P.E., Local 79**

**Neutral citation: 2003 SCC 63.**

File No.: 28840.

2003: February 13; 2003: November 6.

Present: McLachlin C.J. and Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour, LeBel and Deschamps JJ.

on appeal from the court of appeal for ontario

*Labour law — Arbitration — Dismissal without just cause — Evidence — Recreation instructor dismissed after being convicted of sexual assault — Conviction upheld on appeal — Arbitrator ruling that instructor had been dismissed without just*



*cause — Whether union entitled to relitigate issue decided against employee in criminal proceedings — Evidence Act, R.S.O. 1990, c. E.23, s. 22.1 — Labour Relations Act, S.O. 1995, c. 1, Sch. A, s. 48.*

*Judicial review — Standard of review — Labour arbitration — Recreation instructor dismissed after being convicted of sexual assault — Arbitrator ruling that instructor had been dismissed without just cause — Whether arbitrator entitled to revisit conviction — Whether correctness is appropriate standard of review — Evidence Act, R.S.O. 1990, c. E.23, s. 22.1 — Labour Relations Act, S.O. 1995, c. 1, Sch. A, s. 48.*

O worked as a recreation instructor for the respondent City. He was charged with sexually assaulting a boy under his supervision. He pleaded not guilty. At trial before a judge alone, he testified and was cross-examined. The trial judge found that the complainant was credible and that O was not. He entered a conviction, which was affirmed on appeal. The City fired O a few days after his conviction. O grieved the dismissal. At the arbitration hearing, the City submitted the complainant's testimony from the criminal trial and the notes of O's supervisor, who had spoken to the complainant at the time. The complainant was not called to testify. O testified, claiming that he had never sexually assaulted the boy. The arbitrator ruled that the criminal conviction was admissible evidence, but that it was not conclusive as to whether O had sexually assaulted the boy. No fresh evidence was introduced. The arbitrator held that the presumption raised by the criminal conviction had been rebutted, and that O had been dismissed without just cause. The Divisional Court quashed the arbitrator's ruling. The Court of Appeal upheld that decision.

*Held:* The appeal should be dismissed.

*Per McLachlin C.J. and Gonthier, Iacobucci, Major, Bastarache, Binnie and Arbour JJ.:* When asked to decide whether a criminal conviction, *prima facie* admissible in a proceeding under s. 22.1 of the Ontario *Evidence Act*, ought to be rebutted or taken as conclusive, courts will turn to the doctrine of abuse of process to ascertain whether relitigation would be detrimental to the adjudicative process. The doctrine engages the inherent power of the court to prevent the misuse of its procedure, in a way that would bring the administration of justice into disrepute. It has been applied to preclude relitigation in circumstances where the strict requirements of issue estoppel are not met, but where allowing litigation to proceed would nonetheless violate such principles as judicial economy, consistency, finality and the integrity of the administration of justice. The motive of the party who seeks to relitigate, and the capacity in which he or she does so, cannot be decisive factors in the application of the bar against relitigation. What is improper is to attempt to impeach a judicial finding by the impermissible route of relitigation in a different forum. A proper focus on the process, rather than on the interests of a party, will reveal why relitigation should not be permitted. From the system's point of view, relitigation carries serious detrimental effects and should be avoided unless the circumstances dictate that relitigation is necessary to enhance the credibility and the effectiveness of the adjudicative process as a whole. Casting doubt over the validity of a criminal conviction is a very serious matter. Collateral attacks and relitigation are not appropriate methods of redress since they inordinately tax the adjudicative process while doing nothing to ensure a more trustworthy result. The common law doctrines of issue estoppel, collateral attack and abuse of process adequately capture the concerns that arise when finality in litigation must be balanced against fairness to a particular litigant. There is no need to endorse a self-standing and independent "principle of finality" as either a separate doctrine or as an independent test to preclude relitigation.

The appellant union was not entitled, either at common law or under statute, to relitigate the issue decided against the grievor in the criminal proceedings. The facts in this appeal point to the blatant abuse of process that results when relitigation of this sort is permitted. O was convicted in a criminal court and he exhausted all his avenues of appeal. In law, his conviction must stand, with all its consequent legal effects. There is nothing in this case that militates against the application of the doctrine of abuse of process to bar the relitigation of O's criminal conviction. The arbitrator was required as a matter of law to give full effect to the conviction. As a result of that error of law, the arbitrator reached a patently unreasonable conclusion. Properly understood in the light of correct legal principles, the evidence before the arbitrator could only lead him to conclude that the respondent City had established just cause for O's dismissal.

Issue estoppel has no application in this case since the requirement of mutuality of parties has not been met. With respect to the collateral attack doctrine, the appellant does not seek to overturn the sexual abuse conviction itself, but rather contest, for the purposes of a different claim with different legal consequences, whether the conviction was correct.

*Per LeBel and Deschamps JJ.:* As found by the majority, this case is appropriately decided on the basis of the doctrine of abuse of process, rather than the narrower and more technical doctrines of either collateral attack or issue estoppel. There was also agreement that the appropriate standard of review for the question of whether a criminal conviction may be relitigated in a grievance proceeding is correctness. This is a question of law involving the interpretation of the arbitrator's constituent statute, an external statute, and a complex body of common law rules and conflicting jurisprudence dealing with relitigation, an issue at the heart of the administration of justice. The

arbitrator's determination in this case that O's criminal conviction could indeed be relitigated during the grievance proceeding was incorrect. As a matter of law, the arbitrator was required to give full effect to O's conviction. His failure to do so was sufficient to render his ultimate decision that O had been dismissed without just cause — a decision squarely within the arbitrator's area of specialized expertise and thus reviewable on a deferential standard — patently unreasonable, according to the jurisprudence of the Court.

Because of growing concerns with the ways in which the standards of review currently available within the pragmatic and functional approach are conceived of and applied, the administrative law aspects of this case require further discussion. The patent unreasonableness standard does not currently provide sufficiently clear parameters for reviewing courts to apply in assessing the decisions of administrative adjudicators. Certain fundamental legal questions — for instance constitutional and human rights questions and those involving civil liberties, as well as other questions that are of central importance to the legal system as a whole, such as the issue of relitigation — typically fall to be decided on the correctness standard. Not all questions of law, however, must be reviewed under a standard of correctness. Resolving general legal questions may be an important component of the work of some administrative adjudicators. In many instances, the appropriate standard of review in respect of the application of general common or civil law rules by specialized adjudicators should not be one of correctness, but rather of reasonableness. If the general question of law is closely connected to the adjudicator's core area of expertise, the decision will typically be entitled to deference.

In reviewing a decision under the existing standard of patent unreasonableness, the court's role is not to identify the correct result. To pass a review

for patent unreasonableness, a decision must be one that can be rationally supported. It would be wrong for a reviewing court to intervene in decisions that are incorrect, rather than limiting its intervention to those decisions that lack a rational foundation. If this occurs, the line between correctness on the one hand, and patent unreasonableness, on the other, becomes blurred. The boundaries between patent unreasonableness and reasonableness *simpliciter* are even less clear and approaches to sustain a workable distinction between them raise their own problems. In the end, the essential question remains the same under both standards: was the decision of the adjudicator taken in accordance with reason? In summary, the current framework exhibits several drawbacks. These include the conceptual and practical difficulties that flow from the overlap between patent unreasonableness and reasonableness *simpliciter*, and the difficulty caused at times by the interplay between patent unreasonableness and correctness.

The role of a court in determining the standard of review is to be faithful to the intent of the legislature that empowered the administrative adjudicator to make the decision, as well as to the animating principle that, in a society governed by the rule of law, power is not to be exercised arbitrarily or capriciously. Judicial review on substantive grounds ensures that the decisions of administrative adjudicators are capable of rational justification; review on procedural grounds ensures that they are fair.

Administrative law has developed considerably over the last 25 years. This evolution, which reflects a strong sense of deference to administrative decision makers and an acknowledgment of the importance of their role, has given rise to some problems or concerns. It remains to be seen, in an appropriate case, what should be the solution to these difficulties. Should courts move to a two standard system of judicial review,

correctness and a revised unified standard of reasonableness? Should we attempt to more clearly define the nature and scope of each standard or rethink their relationship and application? This is perhaps some of the work which lies ahead for courts, building on the developments of recent years as well as on the legal tradition which created the framework of the present law of judicial review.

**Cases Cited**

By Arbour J.

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*Douglas J. Wray and Harold F. Caley*, for the appellant.

*Jason Hanson, Mahmud Jamal and Kari M. Abrams*, for the respondent the City of Toronto.

No one appeared for the respondent Douglas C. Stanley.

*Sean Kearney, Mary Gersht and Meredith Brown*, for the intervener.

The judgment of McLachlin C.J. and Gonthier, Iacobucci, Major, Bastarache, Binnie and Arbour JJ. was delivered by

ARBOUR J. —

## I. Introduction

1 Can a person convicted of sexual assault, and dismissed from his  
employment as a result, be reinstated by a labour arbitrator who concludes, on the  
evidence before him, that the sexual assault did not take place? This is essentially the  
issue raised in this appeal.

2 Like the Court of Appeal for Ontario and the Divisional Court, I have come  
to the conclusion that the arbitrator may not revisit the criminal conviction. Although  
my reasons differ somewhat from those of the courts below, I would dismiss the appeal.

## II. Facts

3 Glenn Oliver worked as a recreation instructor for the respondent City of  
Toronto. He was charged with sexually assaulting a boy under his supervision. He  
pleaded not guilty. At trial before a judge alone, he testified and was cross-examined.  
He called several defence witnesses, including character witnesses. The trial judge  
found that the complainant was credible and that Oliver was not. He entered a  
conviction, which was later affirmed on appeal. He sentenced Oliver to 15 months in  
jail, followed by one year of probation.

4 The respondent City of Toronto fired Oliver a few days after his conviction,  
and Oliver grieved his dismissal. At the hearing, the City of Toronto submitted the boy's  
testimony from the criminal trial and the notes of Oliver's supervisor, who had spoken  
to the boy at the time. The City did not call the boy to testify. Oliver again testified on  
his own behalf and claimed that he had never sexually assaulted the boy.

5           The arbitrator ruled that the criminal conviction was admissible as *prima facie* but not conclusive evidence that Oliver had sexually assaulted the boy. No evidence of fraud nor any fresh evidence unavailable at trial was introduced in the arbitration. The arbitrator held that the presumption raised by the criminal conviction had been rebutted, and that Oliver had been dismissed without just cause.

III. Procedural History

A. *Superior Court of Justice (Divisional Court)* (2000), 187 D.L.R. (4th) 323

6           At Divisional Court the application for judicial review was granted and the decision of the arbitrator was quashed. The Divisional Court heard this case and *Ontario v. O.P.S.E.U.* at the same time. (*Ontario v. O.P.S.E.U.*, [2003] 3 S.C.R. 149, 2003 SCC 64, is being released concurrently by this Court.) O’Driscoll J. found that while s. 22.1 of the *Evidence Act*, R.S.O. 1990, c. E.23, applied to all the arbitrations, relitigation of the cases was barred by the doctrines of collateral attack, issue estoppel and abuse of process. The court noted that criminal convictions are valid judgments that cannot be collaterally attacked at a later arbitration (paras. 74-79). With respect to issue estoppel, under which an issue decided against a party is protected from collateral attack barring decisive new evidence or a showing of fraud, the court found that relitigation was also prevented, rejecting the appellant’s argument that there had been no privity because the union, and not the grievor, had filed the grievance. The court also held that the doctrine of abuse of process, which denies a collateral attack upon a final decision of another court where the party had “a full opportunity of contesting the decision”, applied (paras. 81 and 90). Finally, O’Driscoll J. found that whether the standard of review was correctness or patent unreasonableness in each case, the standard for judicial review had been met (para. 86).

B. *Court of Appeal for Ontario* (2001), 55 O.R. (3d) 541

7           Doherty J.A. for the court held that because the crux of the issue was whether the Canadian Union of Public Employees (CUPE or the union) was permitted to relitigate the issue decided in the criminal trial, and because this analysis “turned on [the arbitrator’s] understanding of the common law rules and principles governing the relitigation of issues finally decided in a previous judicial proceeding”, the appropriate standard of review was correctness (paras. 22 and 38).

8           Doherty J.A. concluded that issue estoppel did not apply. Even if the union was the employee’s privy, the respondent City of Toronto had played no role in the criminal proceeding and had no relationship to the Crown. He also found that describing the appellant union’s attempt to relitigate the employee’s culpability as a collateral attack on the order of the court did not assist in determining whether relitigation could be permitted. Commenting that the phrase “abuse of process” was perhaps best limited to describe those cases where the plaintiff has instigated litigation for some improper purpose, Doherty J.A. went on to consider what he called “the finality principle” in considerable depth.

9           Doherty J.A. dismissed the appeal on the basis of this principle. He held that the *res judicata* jurisprudence required a court to balance the importance of finality, which reduces uncertainty and inconsistency in results, and which serves to conserve the resources of both the parties and the judiciary, with the “search for justice in each individual case” (para. 94). Doherty J.A. held that the following approach should be

taken when weighing finality claims against an individual litigant's claim to access to justice (at para. 100):

- Does the *res judicata* doctrine apply?
- If the doctrine applies, can the party against whom it applies demonstrate that the justice of the individual case should trump finality concerns?
- If the doctrine does not apply, can the party seeking to preclude relitigation demonstrate that finality concerns should be given paramountcy over the claim that justice requires relitigation?

10 Ultimately, Doherty J.A. dismissed the appeal, concluding that “finality concerns must be given paramountcy over CUPE’s claim to an entitlement to relitigate Oliver’s culpability” (para. 102). He so concluded because there was no suggestion of fraud at the criminal trial, because the underlying charges were serious enough that the employee was likely to have litigated them to the fullest, and because there was no new evidence presented at arbitration (paras. 103-108).

#### IV. Relevant Statutory Provisions

11 *Evidence Act*, R.S.O. 1990, c. E.23

**22.1** (1) Proof that a person has been convicted or discharged anywhere in Canada of a crime is proof, in the absence of evidence to the contrary, that the crime was committed by the person, if,

- (a) no appeal of the conviction or discharge was taken and the time for an appeal has expired; or
- (b) an appeal of the conviction or discharge was taken but was dismissed or abandoned and no further appeal is available.

(2) Subsection (1) applies whether or not the convicted or discharged person is a party to the proceeding.

(3) For the purposes of subsection (1), a certificate containing the substance and effect only, omitting the formal part, of the charge and of the conviction or discharge, purporting to be signed by the officer having the custody of the records of the court at which the offender was convicted or discharged, or by the deputy of the officer, is, on proof of the identity of the person named as convicted or discharged person in the certificate, sufficient evidence of the conviction or discharge of that person, without proof of the signature or of the official character of the person appearing to have signed the certificate.

*Labour Relations Act, 1995*, S.O. 1995, c. 1, Sch. A

48. (1) Every collective agreement shall provide for the final and binding settlement by arbitration, without stoppage of work, of all differences between the parties arising from the interpretation, application, administration or alleged violation of the agreement, including any question as to whether a matter is arbitrable.

## V. Analysis

### A. *Standard of Review*

12 My colleague LeBel J. discusses at length our jurisprudence on  
standards of review. He reviews concerns and criticisms about the three standard system  
13 of judicial review. Given that these issues were not argued before us in this case, and  
without the benefit of a full adversarial debate, I would not wish to comment on the  
desirability of a departure from our recently affirmed framework for standards of review  
analysis. (See this Court's unanimous decisions of *Dr. Q v. College of Physicians and*  
*Surgeons of British Columbia*, [2003] 1 S.C.R. 226, 2003 SCC 19, and *Law Society of*  
*New Brunswick v. Ryan*, [2003] 1 S.C.R. 247, 2003 SCC 20.)



13 The Court of Appeal properly applied the functional and pragmatic approach as delineated in *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982 (see also *Dr. Q, supra*), to determine the extent to which the legislature intended that courts should review the tribunals' decisions.

14 Doherty J.A. was correct to acknowledge patent unreasonableness as the general standard of review of an arbitrator's decision as to whether just cause has been established in the discharge of an employee. However, and as he noted, the same standard of review does not necessarily apply to every ruling made by the arbitrator in the course of the arbitration. This follows the distinction drawn by Cory J. for the majority in *Toronto (City) Board of Education v. O.S.S.T.F., District 15*, [1997] 1 S.C.R. 487, where he said, at para. 39:

17 It has been held on several occasions that the expert skill and knowledge which an arbitration board exercises in interpreting a collective agreement does not usually extend to the interpretation of "outside" legislation. The findings of a board pertaining to the interpretation of a statute or the common law are generally reviewable on a correctness standard. . . . An exception to this rule may occur where the external statute is intimately connected with the mandate of the tribunal and is encountered frequently as a result. [Emphasis added.]

15 In this case, the reasonableness of the arbitrator's decision to reinstate the grievor is predicated on the correctness of his assumption that he was not bound by the criminal conviction. That assumption rested on his analysis of complex common law rules and of conflicting jurisprudence. The body of law dealing with the relitigation of issues finally decided in previous judicial proceedings is not only complex; it is also at the heart of the administration of justice. Properly understood and applied, the doctrines

of *res judicata* and abuse of process govern the interplay between different judicial decision makers. These rules and principles call for a judicial balance between finality, fairness, efficiency and authority of judicial decisions. The application of these rules, doctrines and principles is clearly outside the sphere of expertise of a labour arbitrator who may be called to have recourse to them. In such a case, he or she must correctly answer the question of law raised. An incorrect approach may be sufficient to lead to a patently unreasonable outcome. This was reiterated recently by Iacobucci J. in *Parry Sound (District) Social Services Administration Board v. O.P.S.E.U., Local 324*, [2003] 2 S.C.R. 157, 2003 SCC 42, at para. 21.

2003 SCC 63 (CanLII)

16 Therefore I agree with the Court of Appeal that the arbitrator had to decide correctly whether CUPE was entitled, either at common law or under a statute, to relitigate the issue decided against the grievor in the criminal proceedings.

B. *Section 22.1 of Ontario's Evidence Act*

17 Section 22.1 of the Ontario *Evidence Act* is of limited assistance to the  
20 disposition of this appeal. It provides that proof that a person has been convicted of a crime is proof, "in the absence of evidence to the contrary", that the crime was committed by that person.

18 As Doherty J.A. correctly pointed out, at para. 42, s. 22.1 contemplates that the validity of a conviction may be challenged in a subsequent proceeding, but the section says nothing about the circumstances in which such challenge is or is not permissible. That issue is determined by the application of such common law doctrines as *res judicata*, issue estoppel, collateral attack and abuse of process. Section 22.1 speaks

of the admissibility of the fact of the conviction as proof of the truth of its content, and speaks of its conclusive effect if unchallenged. As a rule of evidence, the section addresses in part the hearsay rule, by making the conviction — the finding of another court — admissible for the truth of its content, as an exception to the inadmissibility of hearsay (D. M. Paciocco and L. Stuesser, *The Law of Evidence* (3rd ed. 2002), at p. 120; *Phipson on Evidence* (14th ed. 1990), at paras. 33-94 and 33-95).

19                    Here, however, the admissibility of the conviction is not in issue. Section  
21 22.1 renders the proof of the conviction admissible. The question is whether it can be  
rebutted by “evidence to the contrary”. There are circumstances in which evidence will  
be admissible to rebut the presumption that the person convicted committed the crime,  
in particular where the conviction in issue is that of a non-party. There are also  
circumstances in which no such evidence may be tendered. If either issue estoppel or  
22 abuse of process bars the relitigation of the facts essential to the conviction, then no  
“evidence to the contrary” may be tendered to displace the effect of the conviction. In  
such a case, the conviction is conclusive that the person convicted committed the crime.

20                    This interpretation is consistent with the rule of interpretation that legislation  
is presumed not to depart from general principles of law without an express indication  
to that effect. This presumption was reviewed and applied by Iacobucci J. in *Parry  
Sound, supra*, at para 39. Section 22.1 reflected the law established in the leading  
Canadian case of *Demeter v. British Pacific Life Insurance Co.* (1983), 150 D.L.R. (3d)  
249 (Ont. H.C.), at p. 264, *aff’d* (1984), 48 O.R. (2d) 266 (C.A.), wherein after a  
thorough review of Canadian and English jurisprudence, Osler J. held that a criminal  
conviction is admissible in subsequent civil litigation as *prima facie* proof that the  
convicted individual committed the alleged act, “subject to rebuttal by the plaintiff on

the merits". However, the common law also recognized that the presumption of guilt established by a conviction is rebuttable only where the rebuttal does not constitute an abuse of the process of the court (*Demeter* (H.C.), *supra*, at p. 265; *Hunter v. Chief Constable of the West Midlands Police*, [1982] A.C. 529 (H.L.), at p. 541; see also *Re Del Core and Ontario College of Pharmacists* (1985), 51 O.R. (2d) 1 (C.A.), at p. 22, *per Blair J.A.*). Section 22.1 does not change this; the legislature has not explicitly displaced the common law doctrines and the rebuttal is consequently subject to them.

21 The question therefore is whether any doctrine precludes in this case the relitigation of the facts upon which the conviction rests.

*C. The Common Law Doctrines*

22 Much consideration was given in the decisions below to the three related common law doctrines of issue estoppel, abuse of process and collateral attack. Each of these doctrines was considered as a possible means of preventing the union from relitigating the criminal conviction of the grievor before the arbitrator. Although both the Divisional Court and the Court of Appeal concluded that the union could not relitigate the guilt of the grievor as reflected in his criminal conviction, they took different views of the applicability of the different doctrines advanced in support of that conclusion. While the Divisional Court concluded that relitigation was barred by the collateral attack rule, issue estoppel and abuse of process, the Court of Appeal was of the view that none of these doctrines as they presently stand applied to bar the rebuttal. Rather, it relied on a self-standing "finality principle". I think it is useful to disentangle these various rules and doctrines before turning to the applicable one here. I stress at the outset that these common law doctrines are interrelated and in many cases more than one

doctrine may support a particular outcome. Even though both issue estoppel and collateral attacks may properly be viewed as particular applications of a broader doctrine of abuse of process, the three are not always entirely interchangeable.

(1) Issue Estoppel

Issue estoppel is a branch of *res judicata* (the other branch being cause of action estoppel), which precludes the relitigation of issues previously decided in court in another proceeding. For issue estoppel to be successfully invoked, three preconditions must be met: (1) the issue must be the same as the one decided in the prior decision; (2) the prior judicial decision must have been final; and (3) the parties to both proceedings must be the same, or their privies (*Danyluk v. Ainsworth Technologies Inc.*, [2001] 2 S.C.R. 460, 2001 SCC 44, at para. 25, *per* Binnie J.). The final requirement, known as “mutuality”, has been largely abandoned in the United States and has been the subject of much academic and judicial debate there as well as in the United Kingdom and, to some extent, in this country. (See G. D. Watson, “Duplicative Litigation: Issue Estoppel, Abuse of Process and the Death of Mutuality” (1990), 69 *Can. Bar Rev.* 623, at pp. 648-51.) In light of the different conclusions reached by the courts below on the applicability of issue estoppel, I think it is useful to examine that debate more closely.

The first two requirements of issue estoppel are met in this case. The final requirement of mutuality of parties has not been met. In the original criminal case, the *lis* was between Her Majesty the Queen in right of Canada and Glenn Oliver. In the arbitration, the parties were CUPE and the City of Toronto, Oliver’s employer. It is unnecessary to decide whether Oliver and CUPE should reasonably be viewed as privies for the purpose of the application of the mutuality requirement since it is clear that the

Crown, acting as prosecutor in the criminal case, is not privy with the City of Toronto, nor would it be with a provincial, rather than a municipal, employer (as in the *Ontario v. O.P.S.E.U.* case, released concurrently).

25           There has been much academic criticism of the mutuality requirement of the doctrine of issue estoppel. In his article, Professor Watson, *supra*, argues that explicitly abolishing the mutuality requirement, as has been done in the United States, would both reduce confusion in the law and remove the possibility that a strict application of issue estoppel may work an injustice. The arguments made by him and others (see also D. J. Lange, *The Doctrine of Res Judicata in Canada* (2000)), urging Canadian courts to abandon the mutuality requirement have been helpful in articulating a principled approach to the bar against relitigation. In my view, however, appropriate guidance is available in our law without the modification to the mutuality requirement that this case would necessitate.

26           In his very useful review of the abandonment of the mutuality requirement in the United States, Professor Watson, at p. 631, points out that mutuality was first relaxed when issue estoppel was used defensively:

The defensive use of non-mutual issue estoppel is straight forward. If P, having litigated an issue with D1 and lost, subsequently sues D2 raising the same issue, D2 can rely defensively on the issue estoppel arising from the former action, unless the first action did not provide a full and fair opportunity to litigate or other factors make it unfair or unwise to permit preclusion. The rationale is that P should not be allowed to relitigate an issue already lost by simply changing defendants . . . .

27           Professor Watson then exposes the additional difficulties that arise if the mutuality requirement is removed when issue estoppel is raised offensively, as was done

by the United States Supreme Court in *Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979). He describes the offensive use of non mutual issue estoppel as follows (at p. 631):

The power of this offensive non-mutual issue estoppel doctrine is illustrated by single event disaster cases, such as an airline crash. Assume P1 sues Airline for negligence in the operation of the aircraft and in that action Airline is found to have been negligent. Offensive non-mutual issue estoppel permits P2 through P20, etc., now to sue Airline and successfully plead issue estoppel on the question of the airline's negligence. The rationale is that if Airline fully and fairly litigated the issue of its negligence in action #1 it has had its day in court; it has had due process and it should not be permitted to re-litigate the negligence issue. However, the court in *Parklane* realized that in order to ensure fairness in the operation of offensive non-mutual issue estoppel the doctrine has to be subject to qualifications.

28 Properly understood, our case could be viewed as falling under this second category — what would be described in U.S. law as “non-mutual offensive preclusion”. Although technically speaking the City of Toronto is not the “plaintiff” in the arbitration proceedings, the City wishes to take advantage of the conviction obtained by the Crown against Oliver in a different, prior proceeding to which the City was not a party. It wishes to preclude Oliver from relitigating an issue that he fought and lost in the criminal forum. U.S. law acknowledges the peculiar difficulties with offensive use of non-mutual estoppel. Professor Watson explains, at pp. 632-33:

First, the court acknowledged that the effects of non-mutuality differ depending on whether issue estoppel is used offensively or defensively. While defensive preclusion helps to reduce litigation offensive preclusion, by contrast, encourages potential plaintiffs not to join in the first action. “Since a plaintiff will be able to rely on a previous judgment against a defendant but will not be bound by that judgment if the defendant wins, the plaintiff has every incentive to adopt a ‘wait and see’ attitude, in the hope that the first action by another plaintiff will result in a favorable judgment”. Thus, without some limit, non-mutual offensive preclusion would increase rather than decrease the total amount of litigation. To meet this problem the

*Parklane* court held that preclusion should be denied in action #2 “where a plaintiff could easily have joined in the earlier action”.

Second, the court recognized that in some circumstances to permit non-mutual preclusion “would be unfair to the defendant” and the court referred to specific situations of unfairness: (a) the defendant may have had little incentive to defend vigorously the first action, that is, if she was sued for small or nominal damages, particularly if future suits were not foreseeable; (b) offensive preclusion may be unfair if the judgment relied upon as a basis for estoppel is itself inconsistent with one or more previous judgments in favour of the defendant; or (c) the second action affords to the defendant procedural opportunities unavailable in the first action that could readily result in a different outcome, that is, where the defendant in the first action was forced to defend in an inconvenient forum and was unable to call witnesses, or where in the first action much more limited discovery was available to the defendant than in the second action.

In the final analysis the court declared that the general rule should be that in cases where a plaintiff could easily have joined in the earlier action or where, either for the reasons discussed or for other reasons, the application of offensive estoppel would be unfair to the defendant, a trial judge should not allow the use of offensive collateral estoppel.

29

It is clear from the above that American non-mutual issue estoppel is not a mechanical, self-applying rule as evidenced by the discretionary elements which may militate against granting the estoppel. What emerges from the American experience with the abandonment of mutuality is a twofold concern: (1) the application of the estoppel must be sufficiently principled and predictable to promote efficiency; and (2) it must contain sufficient flexibility to prevent unfairness. In my view, this is what the doctrine of abuse of process offers, particularly, as here, where the issue involves a conviction in a criminal court for a serious crime. In a case such as this one, the true concerns are not primarily related to mutuality. The true concerns, well reflected in the reasons of the Court of Appeal, are with the integrity and the coherence of the administration of justice. This will often be the case when the estoppel originates from a finding made in a criminal case where many of the traditional concerns related to mutuality lose their significance.



reverse or relax the long-standing application of the mutuality requirement in this case

30 and I would. For example, there is little relevance to the concern about the “wait and see”  
plaintiff, the “free rider” who will deliberately avoid the risk of joining the original  
litigation, but will later come forward to reap the benefits of the victory obtained by the  
party who should have been his co-plaintiff. No such concern can ever arise when the  
original action is in a criminal prosecution. Victims cannot, even if they wanted to, “join  
in” the prosecution so as to have their civil claim against the accused disposed of in a  
31 single trial. Nor can employers “join in” the criminal prosecution to have their employee  
dismissed for cause.

cases in the wrong forum. As stated in *Wilson v. The Queen*, [1983]  
2 S.C.R. 594, at p. 599, the rule against collateral attack

31 On the other hand, even though no one can join the prosecution, the  
prosecutor as a party represents the public interest. He or she represents a collective  
interest in the just and correct outcome of the case. The prosecutor is said to be a  
minister of justice who has nothing to win or lose from the outcome of the case but who  
must ensure that a just and true verdict is rendered. (See Law Society of Upper Canada,  
*Rules of Professional Conduct* (2000), Commentary Rule 4.01(3), at p. 61; *R. v. Regan*,  
[2002] 1 S.C.R. 297, 2002 SCC 12; *Lemay v. The King*, [1952] 1 S.C.R. 232, at pp. 256-  
57, per Cartwright J.; and *R. v. Banks*, [1916] 2 K.B. 621 (C.C.A.), at p. 623.) The  
mutuality requirement of the doctrine of issue estoppel, which insists that only the  
Crown and its privies be precluded from relitigating the guilt of the accused, is hardly  
reflective of the true role of the prosecutor.

collateral attack on a conviction under  
a law later declared unconstitutional must fall under the rule against collateral attack

32 because the As the present case illustrates, the primary concerns here are about the  
integrity of the criminal process and the increased authority of a criminal verdict, rather  
than some of the more traditional issue estoppel concerns that focus on the interests of  
the parties, such as costs and multiple “vexation”. For these reasons, I see no need to

reverse or relax the long-standing application of the mutuality requirement in this case and I would conclude that issue estoppel has no application. I now turn to the question of whether the decision of the arbitrator amounted to a collateral attack on the verdict of the criminal court.

(2) Collateral Attack

33           The rule against collateral attack bars actions to overturn convictions when those actions take place in the wrong forum. As stated in *Wilson v. The Queen*, [1983] 2 S.C.R. 594, at p. 599, the rule against collateral attack

has long been a fundamental rule that a court order, made by a court having jurisdiction to make it, stands and is binding and conclusive unless it is set aside on appeal or lawfully quashed. It is also well settled in the authorities that such an order may not be attacked collaterally — and a collateral attack may be described as an attack made in proceedings other than those whose specific object is the reversal, variation, or nullification of the order or judgment.

Thus, in *Wilson, supra*, the Court held that an inferior court judge was without jurisdiction to pass on the validity of a wiretap authorized by a superior court. Other cases that form the basis for this rule similarly involve attempts to overturn decisions in other fora, and not simply to relitigate their facts. In *R. v. Sarson*, [1996] 2 S.C.R. 223, at para. 35, this Court held that a prisoner's *habeas corpus* attack on a conviction under a law later declared unconstitutional must fail under the rule against collateral attack because the prisoner was no longer "in the system" and because he was "in custody pursuant to the judgment of a court of competent jurisdiction". Similarly, in *R. v. Consolidated Maybrun Mines Ltd.*, [1998] 1 S.C.R. 706, this Court held that a mine owner who had chosen to ignore an administrative appeals process for a pollution fine

was barred from contesting the validity of that fine in court because the legislation directed appeals to an appellate administrative body, not to the courts. Binnie J. described the rule against collateral attack in *Danyluk, supra*, at para. 20, as follows: “that a judicial order pronounced by a court of competent jurisdiction should not be brought into question in subsequent proceedings except those provided by law for the express purpose of attacking it” (emphasis added).

34 Each of these cases concerns the appropriate forum for collateral attacks upon the judgment itself. However, in the case at bar, the union does not seek to overturn the sexual abuse conviction itself, but simply contest, for the purposes of a different claim with different legal consequences, whether the conviction was correct. It is an implicit attack on the correctness of the factual basis of the decision, not a contest about whether that decision has legal force, as clearly it does. Prohibited “collateral attacks” are abuses of the court’s process. However, in light of the focus of the collateral attack rule on attacking the order itself and its legal effect, I believe that the better approach here is to go directly to the doctrine of abuse of process.

37 (3) Abuse of Process

35 Judges have an inherent and residual discretion to prevent an abuse of the court’s process. This concept of abuse of process was described at common law as proceedings “unfair to the point that they are contrary to the interest of justice” (*R. v. Power*, [1994] 1 S.C.R. 601, at p. 616), and as “oppressive treatment” (*R. v. Conway*, [1989] 1 S.C.R. 1659, at p. 1667). McLachlin J. (as she then was) expressed it this way in *R. v. Scott*, [1990] 3 S.C.R. 979, at p. 1007:

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

36 The doctrine of abuse of process is used in a variety of legal contexts. The unfair or oppressive treatment of an accused may disentitle the Crown to carry on with the prosecution of a charge: *Conway, supra*, at p. 1667. In *Blencoe v. British Columbia (Human Rights Commission)*, [2000] 2 S.C.R. 307, 2000 SCC 44, this Court held that unreasonable delay causing serious prejudice could amount to an abuse of process. When the *Canadian Charter of Rights and Freedoms* applies, the common law doctrine of abuse of process is subsumed into the principles of the *Charter* such that there is often overlap between abuse of process and constitutional remedies (*R. v. O'Connor*, [1995] 4 S.C.R. 411). The doctrine nonetheless continues to have application as a non-*Charter* remedy: *United States of America v. Shulman*, [2001] 1 S.C.R. 616, 2001 SCC 21, at para. 33.

37 In the context that interests us here, the doctrine of abuse of process engages "the inherent power of the court to prevent the misuse of its procedure, in a way that would . . . bring the administration of justice into disrepute" (*Canam Enterprises Inc. v. Coles* (2000), 51 O.R. (3d) 481 (C.A.), at para. 55, *per* Goudge J.A., dissenting (approved [2002] 3 S.C.R. 307, 2002 SCC 63)). Goudge J.A. expanded on that concept in the following terms at paras. 55-56:

The doctrine of abuse of process engages the inherent power of the court to prevent the misuse of its procedure, in a way that would be manifestly unfair to a party to the litigation before it or would in some other way bring the administration of justice into disrepute. It is a flexible doctrine

unencumbered by the specific requirements of concepts such as issue estoppel. See *House of Spring Gardens Ltd. v. Waite*, [1990] 3 W.L.R. 347 at p. 358, [1990] 2 All E.R. 990 (C.A.).

One circumstance in which abuse of process has been applied is where the litigation before the court is found to be in essence an attempt to relitigate a claim which the court has already determined. [Emphasis added.]

As Goudge J.A.'s comments indicate, Canadian courts have applied the doctrine of abuse of process to preclude relitigation in circumstances where the strict requirements of issue estoppel (typically the privity/mutuality requirements) are not met, but where allowing the litigation to proceed would nonetheless violate such principles as judicial economy, consistency, finality and the integrity of the administration of justice. (See, for example, *Franco v. White* (2001), 53 O.R. (3d) 391 (C.A.); *Bomac Construction Ltd. v. Stevenson*, [1986] 5 W.W.R. 21 (Sask. C.A.); and *Bjarnarson v. Government of Manitoba* (1987), 38 D.L.R. (4th) 32 (Man. Q.B.), aff'd (1987), 21 C.P.C. (2d) 302 (Man. C.A.)) This has resulted in some criticism, on the ground that the doctrine of abuse of process by relitigation is in effect non-mutual issue estoppel by another name without the important qualifications recognized by the American courts as part and parcel of the general doctrine of non-mutual issue estoppel (*Watson, supra*, at pp. 624-25).

38

It is true that the doctrine of abuse of process has been extended beyond the strict parameters of *res judicata* while borrowing much of its rationales and some of its constraints. It is said to be more of an adjunct doctrine, defined in reaction to the settled rules of issue estoppel and cause of action estoppel, than an independent one (*Lange, supra*, at p. 344). The policy grounds supporting abuse of process by relitigation are the same as the essential policy grounds supporting issue estoppel (*Lange, supra*, at pp. 347-48):

The two policy grounds, namely, that there be an end to litigation and that no one should be twice vexed by the same cause, have been cited as policies in the application of abuse of process by relitigation. Other policy grounds have also been cited, namely, to preserve the courts' and the litigants' resources, to uphold the integrity of the legal system in order to avoid inconsistent results, and to protect the principle of finality so crucial to the proper administration of justice.

39 The *locus classicus* for the modern doctrine of abuse of process and its relationship to *res judicata* is *Hunter, supra*, aff'g *McIlkenny v. Chief Constable of the West Midlands*, [1980] Q.B. 283 (C.A.). The case involved an action for damages for personal injuries brought by the six men convicted of bombing two pubs in Birmingham. They claimed that they had been beaten by the police during their interrogation. The plaintiffs had raised the same issue at their criminal trial, where it was found by both the judge and jury that the confessions were voluntary and that the police had not used violence. At the Court of Appeal, Lord Denning, M.R., endorsed non-mutual issue estoppel and held that the question of whether any beatings had taken place was estopped by the earlier determination, although it was raised here against a different opponent. He noted that in analogous cases, courts had sometimes refused to allow a party to raise an issue for a second time because it was an "abuse of the process of the court", but held that the proper characterization of the matter was through non-mutual issue estoppel.

40 On appeal to the House of Lords, Lord Denning's attempt to reform the law  
41 of issue estoppel was overruled, but the higher court reached the same result via the doctrine of abuse of process. Lord Diplock stated, at p. 541:

The abuse of process which the instant case exemplifies is the initiation of proceedings in a court of justice for the purpose of mounting a collateral attack upon a final decision against the intending plaintiff which has been

made by another court of competent jurisdiction in previous proceedings in which the intending plaintiff had a full opportunity of contesting the decision in the court by which it was made.

41 It is important to note that a public inquiry after the civil action of the six accused in *Hunter, supra*, resulted in the finding that the confessions of the Birmingham six had been extracted through police brutality (see *R. v. McIlkenny* (1991), 93 Cr. App. R. 287 (C.A.), at pp. 304 *et seq.*). In my view, this does not support a relaxation of the existing procedural mechanisms designed to ensure finality in criminal proceedings. The danger of wrongful convictions has been acknowledged by this Court and other courts (see *United States v. Burns*, [2001] 1 S.C.R. 283, 2001 SCC 7, at para. 1; and *R. v. Bromley* (2001), 151 C.C.C. (3d) 480 (Nfld. C.A.), at pp. 517-18). Although safeguards must be put in place for the protection of the innocent, and, more generally, to ensure the trustworthiness of court findings, continuous re-litigation is not a guarantee of factual accuracy.

42 The attraction of the doctrine of abuse of process is that it is unencumbered by the specific requirements of *res judicata* while offering the discretion to prevent relitigation, essentially for the purpose of preserving the integrity of the court's process. (See Doherty J.A.'s reasons, at para. 65; see also *Demeter* (H.C.), *supra*, at p. 264, and *Hunter, supra*, at p. 536.)

43 Critics of that approach have argued that when abuse of process is used as a proxy for issue estoppel, it obscures the true question while adding nothing but a vague sense of discretion. I disagree. At least in the context before us, namely, an attempt to relitigate a criminal conviction, I believe that abuse of process is a doctrine much more responsive to the real concerns at play. In all of its applications, the primary focus of the

doctrine of abuse of process is the integrity of the adjudicative functions of courts. Whether it serves to disentitle the Crown from proceeding because of undue delays (see *Blencoe, supra*), or whether it prevents a civil party from using the courts for an improper purpose (see *Hunter, supra*, and *Demeter, supra*), the focus is less on the interest of parties and more on the integrity of judicial decision making as a branch of the administration of justice. In a case such as the present one, it is that concern that compels a bar against relitigation, more than any sense of unfairness to a party being called twice to put its case forward, for example. When that is understood, the parameters of the doctrine become easier to define, and the exercise of discretion is better anchored in principle.

44 The adjudicative process, and the importance of preserving its integrity, were well described by Doherty J.A. He said, at para. 74:

47 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.

45 When asked to decide whether a criminal conviction, *prima facie* admissible in a proceeding under s. 22.1 of the Ontario *Evidence Act*, ought to be rebutted or taken as conclusive, courts will turn to the doctrine of abuse of process to ascertain whether relitigation would be detrimental to the adjudicative process as defined above. When the focus is thus properly on the integrity of the adjudicative process, the motive of the party



who seeks to relitigate, or whether he or she wishes to do so as a defendant rather than as a plaintiff, cannot be decisive factors in the application of the bar against relitigation.

46            Thus, in the case at bar, it matters little whether Oliver's motive for relitigation was primarily to secure re-employment, rather than to challenge his criminal conviction in an attempt to undermine its validity. Reliance on *Hunter, supra*, and on *Demeter (H.C.), supra*, for the purpose of enhancing the importance of motive is misplaced. It is true that in both cases the parties wishing to relitigate had made it clear that they were seeking to impeach their earlier convictions. But this is of little significance in the application of the doctrine of abuse of process. A desire to attack a judicial finding is not in itself an improper purpose. The law permits that objective to be pursued through various reviewing mechanisms such as appeals or judicial review. Indeed reviewability is an important aspect of finality. A decision is final and binding on the parties only when all available reviews have been exhausted or abandoned. What is improper is to attempt to impeach a judicial finding by the impermissible route of relitigation in a different forum. Therefore, motive is of little or no import.

47            There is also no reason to constrain the doctrine of abuse of process only to those cases where the plaintiff has initiated the relitigation. The designation of the parties to the second litigation may mask the reality of the situation. In the present case, for instance, aside from the technical mechanism of the grievance procedures, who should be viewed as the initiator of the employment litigation between the grievor, Oliver, and his union on the one hand, and the City of Toronto on the other? Technically, the union is the "plaintiff" in the arbitration procedure. But the City of Toronto used Oliver's criminal conviction as a basis for his dismissal. I cannot see what difference it makes, again from the point of view of the integrity of the adjudicative

process, whether Oliver is labelled a plaintiff or a defendant when it comes to relitigating his criminal conviction.

48 The appellant relies on *Re Del Core, supra*, to suggest that the abuse of process doctrine only applies to plaintiffs. *Re Del Core*, however, provided no majority opinion as to whether and when public policy would preclude relitigation of issues determined in a criminal proceeding. For one, Blair J.A. did not limit the circumstances in which relitigation would amount to an abuse of process to those cases in which a person convicted sought to relitigate the validity of his conviction in subsequent proceedings which he himself had instituted (at p. 22):

50 The right to challenge a conviction is subject to an important qualification. A convicted person cannot attempt to prove that the conviction was wrong in circumstances where it would constitute an abuse of process to do so. . . . Courts have rejected attempts to relitigate the very issues dealt with at a criminal trial where the civil proceedings were perceived to be a collateral attack on the criminal conviction. The ambit of this qualification remains to be determined . . . . [Emphasis added.]

49 While the authorities most often cited in support of a court's power to prevent relitigation of decided issues in circumstances where issue estoppel does not apply are cases where a convicted person commenced a civil proceeding for the purpose of attacking a finding made in a criminal proceeding against that person (namely *Demeter* (H.C.), *supra*, and *Hunter, supra*; see also *Q. v. Minto Management Ltd.* (1984), 46 O.R. (2d) 756 (H.C.), *Franco, supra*, at paras. 29-31), there is no reason in principle why these rules should be limited to such specific circumstances. Several cases have applied the doctrine of abuse of process to preclude defendants from relitigating issues decided against them in a prior proceeding. See for example *Nigro v. Agnew-Surpass Shoe Stores Ltd.* (1977), 18 O.R. (2d) 215 (H.C.), at p. 218, *aff'd* without reference to