Federal Court  Cour fédérale

Date: 20140211

Docket: T-229-13

Citation: 2014 FC 139

Ottawa, Ontario, February 11, 2014

PRESENT: The Honourable Madam Justice Bédard

BETWEEN:

NORM MURRAY

Applicant

and

CANADIAN HUMAN RIGHTS COMMISSION
THE ATTORNEY GENERAL OF CANADA

Respondents

REASONS FOR JUDGMENT AND JUDGMENT

[1] The applicant, Mr. Norm Murray, is a Black African Canadian who has been working at the Immigration and Refugee Board [IRB] since 1989. He holds the position of Case Officer [CO] at the group and level of PM-01. On April 22, 2004, he filed a complaint with the Canadian Human Rights Commission [Commission] under sections 7, 10, 12 and 14 of the *Canadian Human Rights Act*, RSC, 1985, c H-6 [CHRA].

[2] The Commission forwarded the complaint to the Canadian Human Rights Tribunal [Tribunal] for an inquiry. In a decision dated January 4, 2013, Tribunal member Edward P. Lustig dismissed Mr. Murray's complaint. Dealing with a motion to dismiss the complaint filed by the IRB, the Tribunal found that the subject matter of Mr. Murray's complaint had previously been adjudicated by the Public Service Staffing Tribunal [PSST] and applying the doctrines of issue estoppel and abuse of process, the Tribunal found that adjudicating the complaint would amount to an abuse of its process.

[3] The applicant filed an application for a judicial review challenging that decision under section 18.1 of the *Federal Courts Act*, RSC 1985, c F-7. For the following reasons, the application is allowed.

I. Context

[4] Mr. Murray filed his human rights complaint on April 24, 2004. At that time, he was working in an acting position as a Refugee Protection Officer [RPO] at the group and level of PM-04. The complaint was initially brought pursuant to sections 7 and 14 of the CHRA, but was subsequently amended to also include sections 10 and 12 of the CHRA.

[5] The core of the applicant's complaint related to an incident that occurred in April, 2003 during which racist comments were allegedly made. The complaint also included allegations of systemic discrimination, poisoned work environment, barriers to advancement of visible minority employees and their clustering in lower level positions, and harassment. Following a long history,

which will be discussed in my analysis, the Commission requested that the Tribunal institute an inquiry into Mr. Murray's complaint.

[6] In 2007, Mr. Murray also filed two complaints before the PSST (dated March 21, 2007 and April 4, 2007) pursuant to paragraph 77(1)(*b*) of the *Public Service Employment Act*, SC 2003, c 22, ss 12, 13 [PSEA]. These complaints related to allegations of abuse of authority in choosing between an advertised and a non-advertised internal appointment process and were consolidated at the IRB's request. In his complaints, Mr. Murray alleged that the IRB's decision to use a non-advertised appointment process to staff new Tribunal Officers [TO] PM-05 positions (appointment process 07-IRB-INA-03-13392) in 2007, discriminated against him on the basis of his race. Mr. Murray argued that the IRB's decision to favour a non-advertised process was tainted by systemic discrimination and, therefore, constituted an abuse of authority under the PSEA.

[7] In a decision dated December 21, 2009 (*Murray v Canada (Immigration and Refugee Board)*, 2009 PSST 33, 2009 LNCPSST 33 [*Murray v Canada*]), the PSST dismissed Mr. Murray's complaints on the grounds that he had not established a *prima facie* case of discrimination.

II. The decision under review

[8] Member Lustig was seized with three different motions for orders of production of certain documents from the applicant and from the Commission, as well as a motion from the IRB for an order dismissing the applicant's complaint before the Tribunal.

[9] In his decision, Member Lustig summarized the different proceedings initiated by the applicant, including a group grievance filed under the *Public Service Labour Relations Act*, SC 2003, c 22, s 2 that had yet to be heard, and the complaints filed before the PSST.

[10] The Tribunal identified the issues raised by the IRB's motion to dismiss, as follows:

> A. On what basis can the Tribunal dismiss a complaint prior to conducting a full hearing on the merits?
>
> B. Does paragraph 40.1(2)(*b*) of the *Act* limit the Tribunal's ability to consider the complaint?
>
> C. Does subsection 54.1(2) of the *Act* limit the Tribunal's ability to consider the complaint?
>
> D. Is there reason to dismiss the complaint on the principles of issue estoppel or abuse of process?
>
> E. In the alternative, if the complaint is not dismissed for any reason above, is there reason to limit the scope of the inquiry?

[11] First, the Tribunal concluded that it had jurisdiction to deal with the motion in advance of a full hearing on the merits. With respect to the second and third issues, the Tribunal concluded that neither paragraph 40.1(2)(*b*) nor subsection 54.1(2) of the CHRA limited the Tribunal's ability to consider the applicant's complaint. These three findings are not at issue in this application.

[12] The Tribunal then went on to deal with the fourth issue, namely whether there were reason to dismiss the applicant's complaint based on the principles of issue estoppel or abuse of process. The Tribunal indicated that it based its assessment on the principles outlined by the Supreme Court of Canada in *British Columbia (Workers' Compensation Board) v Figliola*, 2011 SCC 52, [2011] 3

SCR 422 [*Figliola*] and by the Federal Court of Appeal in *Canada (Human Rights Commission) v Canadian Transportation Agency*, 2011 FCA 332, [2011] FCJ No 1685 [*Morten*].

[13] Relying on *Figliola*, the Tribunal indicated that the object of the doctrines of issue estoppel, abuse of process, and collateral attack was to prevent unfairness by precluding an abuse of the decision-making process, and cited the principles underlying these doctrines as outlined by the Supreme Court. The Tribunal also cited the three-prong test applicable to trigger the application of issue estoppel, and canvassed the questions it was tasked to answer as follows:

> 66. Based on these principles, a tribunal determining a request that it not hear a proceeding, because the subject matter of the proceeding has previously been the subject of adjudication by another tribunal, should ask the following questions:
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> - whether there was concurrent jurisdiction to decide human rights issues;
> - whether the previously decided legal issue was essentially the same as what is being complained of to the Tribunal; and,
> - whether there was an opportunity for the complainants or their privies to know the case to be met and have the chance to meet it, regardless of how closely the previous process procedurally mirrored the one the Tribunal prefers or uses itself.
>
> (see *Figliola* at para 37)
>
> According to a majority of the Supreme Court: "At the end of the day, it is really a question of whether it makes sense to expend public and private resources on the relitigation of what is essentially the same dispute" (*Figliola* at para 37).

[14] The Tribunal focussed its analysis on the proceedings before the PSST. Responding to the first question and having regard to sections 77 and 80 of the PSEA, Member Lustig concluded that the PSST had concurrent jurisdiction to decide human rights issues.

[15] With respect to the second question, Member Lustig found that the PSST had essentially decided the same legal issue (systemic race barriers within the IRB) as the one that was at issue in Mr. Murray's human rights complaint. His reasoning can be found in the following excerpt from his decision:

> 75. While the adverse effects of the alleged systemic discrimination may be different before the Tribunal than they were before the PSST, including the number of people affected, the underlying issue remains the same: whether the IRB has engaged in a discriminatory practice against Mr. Murray as a result of alleged systemic practices based on race. The PSST has already concluded that the Complainant has insufficient evidence to establish that there exists systemic race based barriers within the IRB. As outlined above, the fact that the PSST was examining whether there was discrimination in relation to a single appointment process did not change the nature of this finding. The PSST first determined that there was insufficient evidence to establish the existence of systemic barriers, before moving on to whether that evidence established discrimination in the particular circumstances of section 77 of the *PSEA*. In the current complaint, the Complainant again puts in issue the existence of systemic race based barriers within the IRB, and that those barriers have resulted in discrimination against him. As the PSST has previously decided that the Complainant has insufficient evidence to establish the existence of systemic race based barriers within the IRB, I find the PSST has decided essentially the same legal issue as what is currently being complained of to the Tribunal.
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> […]
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> 78. In applying the doctrines of issue estoppel/abuse of process, and the principles outlined in *Figliola*, I find that the subject matter of the current proceeding has previously been the subject of adjudication by the PSST. Therefore, as adjudicating the present

> complaint would amount to an abuse of the Tribunal's process, it should be dismissed.
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> [emphasis in original]

[16] Member Lustig also found that the applicant had an opportunity to know the case he had to meet before the PSST and had a chance to meet it. In conclusion, Member Lustig determined that the conditions for applying the doctrines of issue estoppel/abuse of process were triggered and that it would constitute an abuse of the Tribunal's process to deal with Mr. Murray's complaint.

III. Issues

[17] This application raises the issue of whether the Tribunal's decision to dismiss Mr. Murray's complaint on the basis of the doctrines of issue estoppel and/or abuse of process was reasonable.

IV. Standard of review

[18] The parties are in agreement that the Tribunal's decision involved the exercise of discretion and should be examined under the reasonableness standard of review. I agree that reasonableness is the appropriate standard of review.

[19] However, the applicant and the Attorney General diverge as to the scope of possible acceptable outcomes available to the Tribunal. The applicant contends that because the Tribunal's decision involved the application of common law finality doctrines to human rights matters, the range of possible outcomes should be narrow given that it involves a great legal content. He relies on several authorities among which *Catalyst Paper Corp v North Cowichan (District)*, 2012 SCC 2 at paras 17-18 and 23, [2012] 1 SCR 5; *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC

12 at para 59, [2009] 1 SCR 339 [*Khosa*]; *Canada (Human Rights Commission) v Canada (Attorney General)*, 2011 SCC 53, [2011] 3 SCR 471 [*Mowat*], *First Nations Child and Family Caring Society of Canada v Canada (Attorney General)*, 2013 FCA 75 at paras 14-15, [2013] FCJ No 249; and *Canada (Attorney General) v Abraham*, 2012 FCA 266 at paras 42-48, [2012] FCJ No 1324 [*Abraham*].

[20] The Attorney General, on the contrary, argues that the Tribunal should be allowed a broader range of acceptable outcomes because it is the master of its own procedure and because the issue raised in the motion to dismiss was discretionary and involved the possibility of an abuse of its own process. The issue fell directly within the Tribunal's authority and expertise and involved a factual and policy assessment with little legal content. The Attorney General relies on *Khosa*, *Abraham* and *Canada (Canadian Human Rights Commission) v Canada Post Corp*, 2004 FC 81 at paras 13-14, [2004] FCJ No 439, aff'd 2004 FCA 363, [2004] FCJ No 1792.

[21] In my view, it is not necessary to identify the range of possible outcomes that were open to the Tribunal as I am of the view that the Tribunal's decision is not one that "falls within the range of possible, acceptable outcomes which are defensible in respect of the facts and the law" (*Dunsmuir v New Brunswick*, 2008 SCC9, at para 47, [2008] 1 SCR 190), whatever the scope of reasonableness that is applied.

V. Positions of the parties

A. *The applicant*

[22] The applicant argues that the circumstances of this case do not satisfy the three-part test established in *Figliola* and that the Tribunal erred in concluding that the issue before the PSST was essentially the same as the one raised in his human rights complaint.

[23] First, Mr. Murray argues that the entirety of his human rights complaint was forwarded to the Tribunal for inquiry, and that it contains issues, namely allegations of harassment and discrimination against him personally, that did not overlap in any way with the PSST complaints. Mr. Murray insists that the scope of the Tribunal's jurisdiction is determined by the request for an inquiry that the Commission addresses to the Tribunal. In this case, the letter sent by the Commission to the Tribunal's Chairperson did not restrict the scope of the inquiry it requested. As a result, the entirety of the complaint was referred to the Tribunal and not only the issue of systemic discrimination. The applicant relies on *Basudde v Canada (Health Canada)*, 2005 CHRT 21 at para 4, [2005] CHRD No 18; *Côté v Canada (Royal Canadian Mounted Police)*, 2003 CHRT 32 at paras 12-13, [2003] CHRD No 39; and *Gover and the Canada Border Services Agency*, 2013 CHRT 14 at paras 38 and 45, [2013] CHRD No 14.

[24] Second, the applicant argues that even if the Tribunal was only seized with the portions of his complaint that were sent back for re-investigation by Justice Hansen's Order (which Order was issued on consent after the applicant sought a judicial review of the Commission's decision to dismiss the applicant's human rights complaint), the Tribunal erred in concluding that the PSST had

adjudicated essentially the same issues as those raised in his human rights complaint. The applicant contends that the PSST's jurisdiction was limited to the narrow issue of whether there was an abuse of authority based on discrimination in the particular appointment process chosen to fill the new TO PM-05 positions (whether the choice of a non-advertised appointment process was tainted with discrimination), whereas the human rights complaint raised much broader issues of systemic discrimination. The applicant insists that the PSST did not address and, had no authority to address broader issues of discrimination that fell outside the specific appointment process at issue. The applicant relies on *Alexander v Canada (Attorney General)*, 2011 FC 1278 at paras 68-71, [2011] FCJ No 1560; and *Brown v The Commissioner of Correctional Service Canada*, 2012 PSST 0017 at para 23, 2012 LNCPSST 17. Furthermore, the issues raised in each complaint occurred in different timeframes (2003-2004 for the human rights complaint and 2006-2007 for the PSST complaints) and, on that basis only, the complaints could not have been found to encompass essentially the same issues. In addition, the applicant contends that the scope of the human rights complaint was still at issue as the parties had yet to exchange particulars. The applicant also asserts that there are significant differences in the remedies that the PSST and the Tribunal can order.

[25] In addition to arguing that the issues before the PSST and the Tribunal were different, the applicant argues that the Tribunal erred in not conducting a fairness analysis as dictated by the Supreme Court of Canada in *Danyluk v Ainsworth Technologies Inc*, 2001 SCC 44, [2001] 2 SCR 460 [*Danyluk*] and in *Penner v Niagara (Regional Police Services Board)*, 2013 SCC 19, [2013] SCJ No 19 [*Penner*].

B. *The Commission*

[26] The Commission supports the arguments presented by the applicant and maintains that the issues before the PSST and the Tribunal were significantly different. The issues before the PSST were limited in both time and scope, whereas the issues before the Tribunal involved broad allegations of discrimination and harassment.

[27] However, the Commission insists that the central focus in this application should be placed on the Tribunal's failure to exercise its discretion to determine whether the application of the doctrine of issue estoppel was appropriate in the particular circumstances of Mr. Murray's complaint, and whether its application would result in unfairness or injustice as instructed by the Supreme Court of Canada in *Danyluk* and *Penner*.

[28] The Commission argues that in *Penner*, the Supreme Court clearly indicated that the doctrine of issue estoppel should not be applied mechanically, and that each case requires an exercise of discretion even where the three pre-conditions for applying the doctrine are met. In the Commission's view, the Tribunal did not address the present issues in light of these principles and dismissed Mr. Murray's human rights complaint without analyzing whether it would be fair to use the result of the PSST's decision to preclude Mr. Murray's entire human rights complaint.

[29] The Commission contends that nothing in the PSEA could suggest that the PSST's decision would be conclusive of Mr. Murray's entire human rights complaint. The Commission insists that the PSEA regime is not intended to foreclose access to the Tribunal, and the Tribunal failed to

consider Mr. Murray's expectation about the impact of his PSST complaint on his human rights complaint.

[30] The Commission insists that while both the Tribunal and the PSST have concurrent jurisdiction regarding human rights matters, the scope and purpose of their respective jurisdiction is different. Further, the CHRA provides broader remedial powers to prevent and eliminate discrimination. The PSST also has remedial powers but they are limited, and do not include the broad remedies available to the Tribunal under the CHRA. In addition, the PSST has no jurisdiction to deal with human rights issues that are not related to a specific staffing process.

C. *The Attorney General*

[31] The Attorney General submits that Member Lustig exercised his discretion appropriately and that his decision is reasonable and falls within the range of acceptable outcomes.

[32] The Attorney General argues that it was reasonable, in the circumstances of this case, for the Tribunal to determine that the allegations of systemic discrimination covered by the human rights complaint before it were essentially the same as those raised in the PSST complaints, and that it would be an abuse of the Tribunal's process to inquire into Mr. Murray's human rights complaint. The Attorney General submits that the Tribunal's decision accords with the principles outlined in *Figliola* and in *Morten*.

[33] First, the Attorney General submits that the applicant is wrong in his assertion that the entirety of his human rights complaint was referred to the Tribunal. The Attorney General argues

that over a period of 8 years, and as a result of the decisions made by the Commission and the Order of Justice Hansen, the scope of Mr. Murray's human rights complaint was narrowed and limited to specific allegations of systemic discrimination, namely those relating to employment barriers and the clustering of visible minority employees in lower level positions. The Attorney General referred the Court to *Kowalski v Ryder Integrated Logistics*, 2009 CHRT 22 at para 10, [2009] CHRD No 22.

[34] Second, the Attorney General rebuts the applicant's argument that the scope of the human rights complaint had yet to be determined because the parties had not yet exchanged particulars and that Member Lustig's decision was pre-mature. The Attorney General takes the position that the applicant had the opportunity to provide details of his complaint but choose not to do so.

[35] Third, the Attorney General contends that it is clear from the Tribunal's decision that Member Lustig understood the parameters that he had to apply, namely the principles outlined in *Figliola*, as well as the scope of both Mr. Murray's human rights complaint and his PSST complaints.

[36] The Attorney General insists that although the PSST was seized with complaints that related to a specific staffing process, Mr. Murray himself raised allegations of systemic discrimination which were wide ranging and broad enough to encompass the same allegations of systemic discrimination that form the core of his human rights complaint. In short, Mr. Murray framed his PSST complaints in such a manner that his allegations of systemic discrimination were central to his complaints. The allegations that the IRB's abuse of authority in the choice of a non-advertised

process was the result of systemic discrimination required the PSST to first determine whether there was systemic discrimination at the IRB, and second, to link the systemic discrimination to Mr. Murray's circumstances. For the Attorney General, this issue of systemic discrimination in the human rights complaint is therefore essentially the same in both proceedings, namely that IRB's practices create barriers for employment opportunities which, in turn, create a clustering of visible minority employees in lower level positions.

[37] The Attorney General also contends that Mr. Murray adduced evidence before the PSST to substantiate his allegations of systemic discrimination and clustering of visible minority employees in lower level jobs. That evidence was broad ranging and covered a period of more than a decade, which included the timeframe involved in Mr. Murray's human rights complaint. On that specific issue, the Attorney General referred the Court to paragraphs 87 and 91 to 98 of the PSST's decision.

[38] The Attorney General also relies on the following excerpt from Dr. Agocs' report which was filed before the PSST:

> [m]y analysis of systemic racial discrimination surrounding Mr. Murray's complaint makes reference to three diagnostic elements: numerical representations, employment policies and practices (or employment systems), and organizational culture [cite omitted]. The issues raised in Mr. Murray's complaint mainly concern employment systems. This analysis begins with a discussion of Mr. Murray's complaint regarding the specific process used to staff the Tribunal Officer positions. <u>This staffing process is then situated within the larger organizational context of the IRB, Toronto Region, where a pattern of clustering of visible minorities at low levels in the hierarchy, specifically at the PM01 level, has been documented for at least a decade</u>. […]
>
> [emphasis in original]
>
> (para 55 of the Attorney General's Memorandum of Fact and Law)

[39] In addition, the Attorney General contends that the Tribunal dealt with the issue of the differences in the timeframe covered by each complaint and made a reasonable finding in determining that because Mr. Murray filed his human rights complaint first, he knew the barriers that were allegedly causing systemic discrimination, and he had the opportunity to have those allegations addressed by the PSST.

[40] The Attorney General also submits that the Tribunal could not have applied the principles enunciated in *Penner*, as it was issued after the Tribunal rendered its decision. However, the Attorney General maintains that the *Penner* decision would not have impacted the Tribunal's decision. The Attorney General insists that in *Penner*, the Supreme Court did not overturn the principles outlined in *Figliola*. Rather, the Court expanded on how a tribunal should exercise its discretion and conduct a proper fairness analysis when applying the doctrine of issue estoppel. The Attorney General insists that the Tribunal made a reasonable policy finding when it determined that "it does not make sense to expend public and private resources on the re-litigation of what is essentially the same allegation." (para 77 of the Tribunal's decision).

[41] The Attorney General further insists that in *Penner*, the Court asserted that injustice could occur from using the result of one proceeding to preclude another proceeding "where there is a significant difference between the purposes, processes or stakes involved in the two proceedings." (para 42). In the Attorney General's view, the differences between the processes were more significant in the proceedings involved in *Penner* than they are between the PSST and the Tribunal proceedings in the case at bar. In short, for the Attorney General, the distinctions between

proceedings in this case are not so significant as to bring into question the fairness of Member Lustig's exercise of discretion.

[42] The Attorney General finally insists that in *Penner*, the Court squarely focussed on the doctrine of estoppel whereas in this case both doctrines of issue estoppel and abuse of process are at play.

VI. Analysis

[43] Member Lustig concluded that because the PSST dealt with essentially the same issues as those raised in Mr. Murray's human rights complaint, it would constitute an abuse of the Tribunal's process to also deal with it.

[44] I find it useful to summarize the guiding principles to the application of the doctrines of issue estoppel and abuse of process before assessing how the Tribunal applied them to Mr. Murray's complaint.

[45] In *Danyluk*, the Supreme Court outlined the principles of finality underlying the doctrine of issue estoppel and reiterated the three pre-conditions for its operation:

> 18**.** The law rightly seeks a finality to litigation. To advance that objective, it requires litigants to put their best foot forward to establish the truth of their allegations when first called upon to do so. A litigant, to use the vernacular, is only entitled to one bite at the cherry. […] A person should only be vexed once in the same cause. Duplicative litigation, potential inconsistent results, undue costs, and inconclusive proceedings are to be avoided.
>
> […]

> 25. The preconditions to the operation of issue estoppel were set out by Dickson J. in *Angle*, supra, at p. 254:
>
> (1) that the same question has been decided;
>
> (2) that the judicial decision which is said to create the estoppel was final; and,
>
> (3) that the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised or their privies.

[46] The Court also stated that issue estoppel must be assessed under a two-step analysis. The first step requires the court or the tribunal to determine whether the three pre-conditions are met. If the conditions are met, the decision-maker must then, as a second tier, determine as a matter of discretion whether the doctrine should be applied in the specific circumstances of the case:

> 33. The rules governing issue estoppel should not be mechanically applied. The underlying purpose is to balance the public interest in the finality of litigation with the public interest in ensuring that justice is done on the facts of a particular case. (There are corresponding private interests.) The first step is to determine whether the moving party (in this case the respondent) has established the preconditions to the operation of issue estoppel set out by Dickson J. in *Angle, supra*. If successful, the court must still determine whether, as a matter of discretion, issue estoppel *ought* to be applied: *British Columbia (Minister of Forests) v. Bugbusters Pest Management Inc.* (1998), 50 B.C.L.R. (3d) 1 (C.A.), at para. 32; *Schweneke v. Ontario* (2000), 47 O.R. (3d) 97 (C.A.), at paras. 38-39; *Braithwaite v. Nova Scotia Public Service Long Term Disability Plan Trust Fund* (1999), 176 N.S.R. (2d) 173 (C.A.), at para. 56. [emphasis in original]
>
> […]
>
> 63. In *Bugbusters, supra*, Finch J.A. (now C.J.B.C.) observed, at para. 32:
>
> > It must always be remembered that although the three requirements for issue estoppel must be satisfied before it can apply, the fact that they may be satisfied does not automatically give rise to its application. Issue estoppel is an equitable

> doctrine, and as can be seen from the cases, is closely related to abuse of process. The doctrine of issue estoppel is designed as an implement of justice, and a protection against injustice. It inevitably calls upon the exercise of a judicial discretion to achieve fairness according to the circumstances of each case.
>
> [...]
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> 66. In my view it was an error of principle not to address the factors for and against the exercise of the discretion which the court clearly possessed. This is not a situation where this Court is being asked by an appellant to substitute its opinion for that of the motions judge or the Court of Appeal. The appellant is entitled at some stage to appropriate consideration of the discretionary factors and to date this has not happened.

[47] In *Figliola*, the Supreme Court reiterated the underlying principles of the finality doctrines and insisted on the need for judicial finality:

> 34. At their heart, the foregoing doctrines [issue estoppel, collateral attack and abuse of process] exist to prevent unfairness by preventing "abuse of the decision-making process" (*Danyluk*, at para. 20; see also *Garland*, at para. 72, and *Toronto (City)*, at para. 37). Their common underlying principles can be summarized as follows:
>
> - It is in the interests of the public and the parties that the finality of a decision can be relied on (*Danyluk*, at para. 18; *Boucher*, at para. 35).
>
> - Respect for the finality of a judicial or administrative decision increases fairness and the integrity of the courts, administrative tribunals and the administration of justice; on the other hand, relitigation of issues that have been previously decided in an appropriate forum may undermine confidence in this fairness and integrity by creating inconsistent results and unnecessarily duplicative proceedings (*Toronto (City)*, at paras. 38 and 51).
>
> - The method of challenging the validity or correctness of a judicial or administrative decision should be through the appeal or judicial review mechanisms that are intended by the legislature (*Boucher*, at para. 35; *Danyluk*, at para. 74).

- Parties should not circumvent the appropriate review mechanism by using other forums to challenge a judicial or administrative decision (*TeleZone*, at para. 61; *Boucher*, at para. 35; *Garland*, at para. 72).

- Avoiding unnecessary relitigation avoids an unnecessary expenditure of resources (*Toronto (City)*, at paras. 37 and 51).

[48] The doctrine of abuse of process, and its interaction with the general doctrine of *res judicata*, was extensively discussed by Justice Arbour in *Toronto (City) v Canadian Union of Public Employees (CUPE), Local 79*, 2003 SCC 63, [2003] 3 SCR 77 [*Toronto*]:

> 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)).
>
> […]
>
> 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. […]

[49] Justice Arbour went on to state at para 2, that the discretion aspect that applies to prevent the issue estoppel from creating an unfair or unjust situation, should equally apply to the doctrine of abuse of process.

[50] While the Supreme Court did not expand on the fairness analysis in *Figliola*, in *Penner* it elaborated on the discretionary application of issue estoppel and the need for flexibility:

> 8. […] The flexible approach to issue estoppel provides the court with the discretion to refuse to apply issue estoppel if it will work an injustice, even where the preconditions for its application have been met. However, in our respectful view, the Court of Appeal erred in its analysis of the significant differences between the purpose and scope of the two proceedings, and failed to consider the reasonable expectations of the parties about the impact of the proceedings on their broader legal rights. […]
>
> […]
>
> 39. Broadly speaking, the factors identified in the jurisprudence illustrate that unfairness may arise in two main ways which overlap and are not mutually exclusive. First, the unfairness of applying issue estoppel may arise from the unfairness of the prior proceedings. Second, even where the prior proceedings were conducted fairly and properly having regard to their purposes, it may nonetheless be unfair to use the results of that process to preclude the subsequent claim.
>
> […]
>
> 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.
>
> [emphasis in original]

[51] Keeping all of these principles in mind, I am of the view that the Tribunal's decision is not one that falls within acceptable outcomes for two reasons. First, it was unreasonable for the Tribunal to conclude that the PSST had decided essentially the same issues as those raised in Mr. Murray's human rights complaint. Second, if the Tribunal's finding that the pre-conditions for applying the doctrine of issue estoppel were met, or that the applicability of the doctrine of abuse of process could be triggered, it erred by not asking itself whether it would be fair to apply the doctrines in the specific circumstances of this case and prevent Mr. Murray from having his human rights complaint investigated by the Tribunal.

[52] The Tribunal found that both proceedings involved essentially the same issues because in both complaints, the underlying issues related to whether the IRB had engaged in a discriminatory practice against Mr. Murray as a result of systemic discriminatory practices. The Tribunal found that since the PSST had already concluded, as a first tier of its analysis, that the applicant had adduced insufficient evidence to conclude that there existed race based barriers within the IRB, it had dealt with essentially the same issue as that which was at the core of the applicant's human rights complaint. The Tribunal further concluded that it would not make sense to expend resources to re-litigate the issue that had already been dealt with by the PSST:

> 77. Therefore, in the course of adjudicating his *PSEA* complaint, the Complainant had a full and ample opportunity to present his case regarding systemic discrimination at the IRB. Now before the

> Tribunal, it does not make sense to expend public and private resources on the re-litigation of what is essentially the same allegation. The Tribunal's role is not to "..."judicially review" another tribunal's decision, or to reconsider a legitimately decided issue in order to explore whether it might yield a different outcome" (*Figliola* at para. 38). As the Complainant is currently doing, the proper way to challenge the PSST's decision is through an application for judicial review.

[53] The first step in assessing the reasonableness of the Tribunal's finding that both complaints raised essentially the same issues, is to determine the scope and the subject matter involved in both complaints.

A. *The human rights complaint*

[54] The parties disagree on the scope of the allegations that were referred to the Tribunal for inquiry. The applicant and the Commission contend that the Tribunal was seized with the entirety of Mr. Murray's human rights complaint whereas the Attorney General argues that the Tribunal was only seized with the specific allegations of clustering of visible minority employees in lower level positions and their under-representation in permanent positions. In my view, the history of Mr. Murray's human rights complaint can only lead to one conclusion: the Tribunal was seized with the specific allegations of systemic discrimination referred to in Justice Hansen's Order for the specific period of March 2003 to March 2004. It is useful to summarize the history of Mr. Murray's complaint.

[55] As indicated earlier, the core of Mr. Murray's complaint related to an incident that occurred in April 2003 during which racist comments were allegedly made. However, his complaint also

included allegations of systemic discrimination, racism and harassment. The relevant paragraphs of the complaint read as follows:

> 2. I believe that management at the IRB, has discriminated against me, has imposed adverse differential treatment against me, has incited others to discriminate against me, has created and supported a poisoned work environment that makes it difficult to do my job, to attaint career improvement, and has adversely affected my health because of my race. As well, I believe that management at the IRB, has systematically pursued a practices [*sic*] that has effectively deprived me of employment opportunities because of my race.
>
> […]
>
> 18. As a union representative and a member of the Employment Equity Committee I have often been critical of the IRB on its practices concerning employment equity, race relations and discrimination. The reason being that the IRB has been officially recognized as having the largest percentage of visible minority employees in the Federal Public Service (the IRB has used this favourable status when it benefits the organization), yet visible minority employees do not favour well in the IRB as they continue to be clustered at the lowest classification levels. In addition acts of systemic racism, harassment and discriminatory practices, which adversely affects [*sic*] visible minorities, are prevalent throughout the IRB. This has been revealed in public accessible documents the most recent being the Public Service Survey. Management know these problems exist and have not taken the necessary steps to resolve them. I however, had never until then, been faced with this overt form of racism and harassment and wondered if years of neglect by management to address serious issues of racism, discrimination and harassment was the contributing factor.
>
> […]
>
> 56. I believe that management has encouraged and supported racism, harassment and discrimination at the IRB. I believe that because of the actions of management, racism, harassment and discriminatory practices have taken roots and have grown radically over this 12-month period. Management's actions over this period have caused the workplace to be polarized along racial lines, and have poisoned the workplace to the extent where I cannot work effectively. I am presently off on sick leave, because of the level of stress and poison in the workplace as a result of accumulative racist behaviour of management at the IRB over the 12-month period. As well: my

> ability to do my job has suffered: my ability to pursue promotional opportunities has suffered: my personal working relationship with my colleagues has suffered and my personal live outside the IRB has suffered tremendously.

[56] In a decision dated April 13, 2005, the Commission decided it would not immediately deal with Mr. Murray's complaint because an internal investigation relating to the allegation of harassment was being conducted by the IRB. However, once the internal investigation was finalized, the IRB determined that the applicant's harassment complaint was not founded. On July 4, 2005, Mr. Murray's union asked the Commission to revive its investigation into his complaint as he was not satisfied with the IRB's internal investigation conclusions.

[57] On March 30, 2007, Mr. Andrew Sunstrum, an investigator mandated by the Commission, recommended that the Commission deal with the portion of the applicant's complaint that was not addressed in the internal investigation. Mr. Sunstrum's report contains the following recommendation:

> Analysis:
>
> […]
>
> 16. While the respondent's investigation attempted to address the complainant's allegations of systemic discrimination, there are a number of allegations in the complaint form that were not addressed in the respondent's investigation report. They include in particular, the complainant's allegations in paragraph #2; that the respondent incited others to discriminate against him, and that the respondent deprived the complainant and other visible minorities permanent employment advancements because of his race.
>
> Recommendation of Internal Redress

> It is recommended, pursuant to subsection 41(1)(d) of the *Canadian Human Rights Act*, that the Commission not deal with the complainant's allegations of harassment.
>
> Further, it is recommended, pursuant to subsection 41(1) of the *Canadian Human Rights Act*, that the Commission deal with the portion of the complaint that was not dealt with through the respondent's internal investigation.

[58] This recommendation was endorsed by the Commission in a decision dated August 10, 2007. In a letter to the IRB dated September 19, 2007, the Commission specified that it "would only be dealing with the allegations that Immigration and Refugee Board incited others to discriminate against Mr. Murray, and deprived him and other visible minorities permanent employment advancements because of his race."

[59] Ms. Linda Foy was mandated by the Commission to proceed with the investigation. Following her investigation, Ms. Foy recommended that the Commission dismiss the applicant's complaint and made the following recommendation:

> 90. It is recommended, pursuant to paragraph 44(3)(b) of the *Canadian Human Rights Act*, that the Commission dismiss the complaint because, based on the evidence gathered at investigation,
>
> - the respondent has not failed to provide the complainant with an harassment-free workplace, and
>
> - the respondent does not pursue a policy, rule, practice or standard which deprives the complainant and other visible minorities of permanent employment advancements due to their race and color (Black).

[60] This recommendation was endorsed by the Commission which dismissed Mr. Murray's complaint in a decision dated October 20, 2008.

[61] The applicant brought an application for a judicial review of that decision before this Court. In a consent Order dated August 18, 2009, Justice Hansen allowed the application in part, setting aside a portion of the Commission's decision and referred specific allegations of the complaint back for further consideration. The Order reads as follows:

> **UPON** motion made by the Respondent in writing and without personal appearance, pursuant to Rule 369 of the *Federal Courts Rules*, SOR\98-106 for an order:
>
> 1. Allowing the application for judicial review in part;
>
> 2. Setting aside the decision dated October 20, 2008 by the Canadian Human Rights Commission ("Commission"), in so far as it relates to the allegations of systemic discrimination, more precisely the allegations of clustering of visible minorities as described in paragraphs 57 to 63 and 67 to 73 of the Investigation Report dated June 9, 2008 written by Linda Foy on the following basis:
>
>   a) the investigation into the allegations of clustering of visible minorities in lower status positions ands underrepresentation of visible minorities in permanent positions at the Immigration and Refugee Board ("IRB") Toronto Regional Office during the period of 13 months preceding the filing of the complaint with the Commission was not thorough and thus constituted a breach of procedural fairness.
>
> 3. Referring the matter back to the Commission for supplemental investigation conducted by a new investigator in the above allegations; and
>
> 4. There will be no costs.
>
> **AND UPON** reading the Consent of the parties and the Written Representations of the Respondent;
>
> **THE COURT ORDERS THAT:**
>
> 1. The Application for judicial review is allowed in part;

2. The Commission's decision of October 20, 2008 is quashed in so far as it relates to the allegations of systemic discrimination as described in paragraph 3 below and as it relates to paragraph 57 to 63 and 67 to 73 of the Investigation Report dated June 9, 2008 written by Linda Foy.

3. The matter if systemic discrimination is remitted back to the Commission for a supplemental investigation by a new investigator, examining the situation of visible minorities at the IRB Toronto Regional Office during the period of 12 months preceding the filing of the Complaint with specific reference to:

    a. Clustering of visible minorities in lower status positions;

    b. Underrepresentation of visible minorities in permanent positions.

4. All of which is without costs.

[62] Paragraphs 57 to 63 of Ms. Foy's investigation report relate to the applicant's allegations that the IRB only provided visible minorities with acting positions. Paragraphs 67 to 73 of that report relate to the allegation that visible minority employees have been clustered in lower level positions.

[63] An investigation was conducted by Mr. Dean Steacy following the Order issued by Justice Hansen and he prepared a report dated March 14, 2011. It appears from his report that his investigation was limited to the two specific allegations mentioned in Justice Hansen's Order, namely the clustering of visible minority employees in lower level positions and the under-representation of visible minorities in permanent positions. As specified by Justice Hansen, the investigation was also clearly focussed on the 12-month period that preceded the filing of the applicant's complaint.

[64] Following his investigation, Mr. Steacy found that there was evidence indicating that, during the period of March 2003 to March 2004, visible minority employees appeared to have been clustered at lower level positions and acting positions. He recommended that the Commission request that the Tribunal institute an inquiry into the complaint. His recommendation reads as follows:

> 40. It is recommended, pursuant to paragraph 44(3)(a) of the *Canadian Human Rights Act*, that the Commission request that the Chairperson of the Canadian Human Rights Tribunal institute an inquiry into the complaint because:
>
> - The evidence gathered indicates that from March 1, 2003 to March 17, 2004, visible minorities within the IRB's Toronto regional office, appear to be clustered in lower level positions in the PM, AS, and CR categories.
>
> - The evidence gathered shows that visible minorities within the IRB's Toronto regional office, when provided acting opportunities, were provided the acting opportunities mainly within the lower categories.
>
> - The evidence gathered also shows that within the IRB Toronto regional office, that a barrier may exist that prohibits PM-01s from advancing within the IRB.
>
> - The evidence gathered shows that within the IRB's Toronto regional office, visible minorities appear to be under-represented within the higher levels such as the PM-05 and PM-06 levels.

[65] The Commission endorsed Mr. Steacy's recommendation. In a letter dated July 29, 2011, addressed to the President of the IRB, the Commission informed the IRB of its decision to request that the Chairperson of the Tribunal institute an inquiry into Mr. Murray's complaint. The letter specifically reiterated Mr. Steacy's recommendations.

[66] On the same date, the Commission wrote a letter to the Chairperson of the Tribunal. That letter did not contain the same specifications as the letter to the IRB. It only specified that the Commission, pursuant to paragraph 44(3)(*z*) of the CHRA, had decided to request that the Tribunal "institute an inquiry into the complaint as it is satisfied that, having regard to all the circumstances, an inquiry is warranted."

[67] I agree that, in principle, the letter that the Commission sends to the Tribunal defines the scope of "what" is being referred to the Tribunal for an inquiry. Furthermore, I agree that the letter sent to the Tribunal in this case did not specify that only portions of Mr. Murray's complaint were referred for inquiry. However, the Commission's letter cannot be disconnected from the long history of the complaint and the context into which the Tribunal was being seized of Mr. Murray's complaint. In the specific circumstances of this case, I find the authorities on which the applicant relied to be of little use.

[68] Over the years, and more specifically as a result of Justice Hansen's Order, which was rendered on consent by all parties, the scope of Mr. Murray's complaint was clearly narrowed to specific allegations of systemic discriminations in a specific timeframe. As a result, only specific portions of the complaint were re-investigated by the Commission and only the allegations covered by the supplemental investigation could be referred to the Tribunal. These allegations related to the clustering of visible minority employees in lower level positions and their under-representation in permanent higher level positions at the Toronto Regional Office of the IRB for the specific period of March 2003 to March 2004. It is important to keep in mind that Justice Hansen's Order allowed the application for judicial review in part and set aside the Commission's decision dated October 20,

2008, dismissing the applicant's complaint only insofar as it related to the specific allegations specified in the Order. Those allegations were specific in their nature and in their timeframes. The remainder of the Commission's decision dated April 20, 2008 to dismiss the applicant's complaint was not set aside or changed in any way by Justice Hansen's Order. Since the Commission was directed by the Court to conduct a supplemental investigation only into specific allegations, the Commission' subsequent request that the Tribunal institute an inquiry into Mr. Murray's complaint could not have extended to all the allegations that were contained in Mr. Murray's initial complaint.

B. *The PSST complaints*

[69] Let us now look at the scope of the PSST complaints. Mr. Murray filed two complaints before the PSST dated March 21, 2007 and April 4, 2007. These complaints were filed under paragraph 77(1)(*b*) of the PSEA which relates to allegations of abuse of authority in choosing between an advertised and a non-advertised internal appointment process. The two complaints were consolidated at the IRB's request. In his complaints, Mr. Murray alleged that the IRB's decision to use a non-advertised appointment process to staff new Tribunal Officers [TO] PM-05 positions (appointment process 07-IRB-INA-03-13392) in 2007, discriminated against him on the basis of his race. Section 80 of the CHRA clearly provides that the PSST has jurisdiction to interpret and apply the CHRA where a complaint raises human rights issues. Mr. Murray argued that the IRB's decision to favour a non-advertised process was tainted with systemic discrimination and, therefore, that decision constituted an abuse of authority under the PSEA.

[70] The IRB's decision to choose a non-advertised appointment process for that specific staffing process arose in the context of a reorganization where the IRB decided to integrate its support

operations. This reorganization resulted in the replacement of the Refugee Protection Officers [RPO] positions that were at the PM-04 group and level, by TO positions at the PM-05 group and level. The IRB chose to conduct a non-advertised appointment process because it wanted to staff those new positions among the incumbents of the RPO positions that were at the PM-04 group and level. The IRB asserted that it proceeded in this manner in the interest of fairness to the RPOs incumbents because it eliminated the need to declare them surplus and ensured their ongoing employment. Therefore, only the incumbents of RPO positions were eligible to participate in the staffing process. Mr. Murray was not eligible to participate in the appointment process because his position was one of CO at the PM-01 group and level and not a RPO. While Mr. Murray had acted in a RPO position (PM-04) for a period of 3 years, his acting appointment had ended due to lack of work at least 6 months before the reorganization was launched.

[71] The context of this reorganization and the reasons for the IRB's choice to go with a non-advertised appointment process is explained in great detail in the PSST's decision and need not be further expanded for the purpose of this application.

[72] In its decision dated December 21, 2009 (*Murray v Canada)*, the PSST framed Mr. Murray's allegations as follows:

> 1. […] He alleges that this non-advertised process constitutes systemic discrimination where job barriers result in clustering of visible minorities in CO positions at the PM-01 group and level. He asserts that this clustering at the IRB has been recognized in several employment systems review reports.

[73] Before the PSST, Mr. Murray essentially alleged that the decision to conduct a non-advertised appointment process was tainted by the systemic discriminatory practices that existed at the IRB, and that this decision directly affected him as a member of a visible minority group. Therefore, the IRB's decision constituted an abuse of authority.

[74] The PSST set out the following issues for determination:

> 6. The Tribunal must determine the following issues:
>
> (i) Does the complainant have a right to bring this complaint?
>
> (ii) Has the complainant established a prima facie case of discrimination in the choice of a non-advertised appointment process?
>
> (iii) If so, has the respondent provided a reasonable explanation for its choice of a non-advertised appointment process?

[75] The PSST outlined the principles that would guide its analysis. Further, it stated that the applicant had the burden of establishing that the alleged discrimination was at least one factor that influenced the IRB's decision to conduct a non-advertised appointment process. The PSST added that there was no direct evidence of discrimination in relation to the 2007 appointment process, but that Mr. Murray could nevertheless satisfy his burden by leading circumstantial evidence. It added that evidence of systemic discrimination was admissible as circumstantial evidence of direct individual discrimination.

[76] The PSST indicated that "[c]onsiderable evidence was provided at the hearing to establish that there has been, and continues to be, clustering of visible minorities at the lower level positions of the IRB, such as the PM-01 level." (para 88 of the decision). The PSST found that Mr. Murray

had established that there "has been clustering of visible minorities at the lower levels of the PM groups at the IRB" (para 90 of the decision), but that he had not adduced sufficient evidence to substantiate his allegation that there existed systemic discrimination at the IRB and, therefore, that this clustering was a result of systemic discriminatory practices. The PSST added that even if there had been sufficient evidence to establish systemic discriminatory barriers to the promotion of visible minority employees in the TO positions, Mr. Murray would nonetheless have had to demonstrate a link between that systemic discrimination and individual discrimination in his own situation, which he failed to do. The PSST's reasoning appears in the following excerpt of its decision:

> 103. The evidence must establish first that systemic barriers exist, and, secondly, that there is a link between the evidence of systemic barriers and evidence of individual discrimination against the complainant, based on his race. Both evidentiary steps are necessary. Without both, there is no *prima facie* case. In this case, not only is there insufficient evidence that there was systemic discrimination but, even if there was, there is insufficient evidence before the Tribunal that links the alleged systemic barriers to individual discrimination against the complainant.

[77] The PSST further concluded that it would have dismissed the complaints even if the applicant had established a *prima facie* case of discrimination, because the IRB had met its burden of establishing a reasonable non-discriminatory explanation for choosing a non-advertised appointment process.

VII. Application

[78] Having regard to both proceedings, I fail to see how the issues raised in both complaints can be found to be essentially the same. The fact that in both complaints Mr. Murray based his allegations on systemic discrimination, is insufficient to conclude that the PSST had already dealt

with the core of Mr. Murray's allegations in his human rights complaint. In the human rights complaint, Mr. Murray raised broad issues of systemic discrimination involving employment barriers for visible minority employees and clustering those employees in lower level positions at the Toronto Regional Office for the specific period of March 2003 to March 2004. When the Tribunal rendered its decision, the parties had yet to exchange particulars that would have delineated further these general allegations.

[79] The fact that the complaints brought before the PSST also involved general allegations of systemic discrimination, employment barriers and clustering of visible minority employees in lower level positions, is insufficient to conclude that the issues were essentially the same. It is not disputed that the PSST had the authority to apply the CHRA, and that an abuse of authority under section 77 of the PSEA could stem from discrimination; however, the PSST's jurisdiction and focus was to determine whether the specific decision made by the IRB in 2007 to staff the TO officers by using a non-advertised appointment process was tainted by discrimination. The PSST's jurisdiction was limited to a specific decision made three years after the timeframe involved in the human rights complaint.

[80] I acknowledge that the allegation that the IRB's decision to launch a non-advertised appointment process in 2007 was tainted with systemic discrimination, led the PSST to first assess whether there was systemic discriminatory practices within the IRB Toronto Regional Office. The evidence adduced in that regard was wide ranging and covered a broad period of time. However, in my view it did not specifically refer to or focus on the systemic discrimination that allegedly occurred in the 2003-2004 period.

[81] Evidence was led in relation to an Employment Systems Review [ESR] that the IRB conducted in 1997 to comply with the *Employment Equity Act*, SC 1995, c 44. That review aimed at identifying employment barriers affecting designated employment equity groups, and an audit by the Commission followed the review. In an interim report dated August 1999, the Commission found that the ESR was deficient in its assessment of employment barriers for some of the groups, including the visible minority group. The IRB mandated Hara Associates Inc. to follow up on the ESR and its report dated October 15, 2000, [Hara Report], was introduced into evidence. Ms. Carole Cyr, the Director General, Human Resources at the IRB, and the person responsible for employment equity, testified about the Hara Report. She indicated that one of the key issues of the Hara Report was to determine whether there was clustering of visible minority employees in the lower levels of the PM group. In that regard, she stated that "the Hara Report indicated that the promotion of visible minority candidates was more than representative, and that the clustering in the lower levels was due to the filling of senior positions from other departments." She also indicated that there are some areas in need of improvement. Ms. Cyr testified that in 2001, the Commission found that the IRB was in compliance with the requirements of the *Employment Equity Act*, and in that regard, a document entitled "Hara Report Recommendations and Subsequent Actions taken" was entered in evidence.

[82] The applicant testified about the clustering of visible minorities in the Case Officer positions. He stated that "the clustering of visible minorities is not intentional, however, only one employee in this group is not a visible minority, and most have been in this function since 1991." Two colleagues of the applicant also testified about their experience at the IRB.

[83] The applicant also adduced evidence of an expert witness, Dr. Carol Agocs. Dr. Agocs was called upon to testify on the issue of systemic discrimination. She prepared a report dated September 12, 2008, entitled "Analysis of Possible Impact of Systemic Racial Discrimination in the Case of Norm Murray, Immigration and Refugee Board." Dr. Agocs based her analysis on a variety of documents such as the Commission Employment Equity Compliance Review of June 2001, the IRB Corporate Integrated Human Resources Plan: A Multiyear Vision, 2008-2009 to 2010-2011 and documents that she found on the Treasury Board web site. Dr. Agocs reviewed the exclusion of the applicant for consideration in the appointment process to staff the TO positions. In that regard, she relied upon the applicant's allegations and a Job Opportunity Advertisement open to all employees of the Federal Public Service in 2008. In her testimony, she indicated that "she found a number of job barriers that, together, she believes constitute a pattern of systemic discrimination." (para 44 of the PSST decision). It appears from the PSST decision that Dr. Agocs did not have access to the list of the 36 employees who were appointed to the TO positions in the non-advertised appointment process (12 of which self-identified as members of minorities); nor did she have access to a document entitled "Visible minority representation from 2006-2008 within the Central region compared to National" which showed an increase in visible minority representation from 21.5% to 25% in the PM-04 level and from 0% to 25.58% at the PM-06 level between 2006 and 2008.

[84] In my mind, the evidence presented to the PSST was not specific enough to conclude that the PSST was dealing with the specific allegations involved in Mr. Murray's human rights complaint that related to the March 2003 to March 2004 period.

[85] Moreover, nothing in the PSST decision allows me to conclude that the PSST made findings in relation to the specific allegations about employment barriers and clustering of visible minorities at the IRB in 2003-2004. The PSST concluded that there was evidence to support the allegations that there had been a clustering of visible minority employees in lower level positions, but that there was insufficient evidence to support the allegation that the clustering was the result of systemic discrimination. The Tribunal did not specify the period covered by its findings, but given that the complaints related to a staffing process that occurred in 2007, I cannot infer from the PSST findings which were made in relation to the specific staffing process of 2007, and from the evidence led before the PSST, that it specifically found that there was no systemic discrimination at the IRB Toronto Regional Office during March 2003 to March 2004. This question was not the focus of the PSST's decision which related to a timeframe contemporary to the decision made in 2007.

[86] The Attorney General argues that the Tribunal appropriately dealt with the difference in timeframe covered by each complaint, by concluding that in the context of his PSST complaints, Mr. Murray knew what barriers where allegedly causing systemic discrimination and nothing prevented him from presenting evidence that related to the allegations covered by his human rights complaint. On that point, the Tribunal made the following finding:

> 76. […] While the focus of the evidence before the PSST was on whether the employment practices of the IRB created a "bad" cluster of visible minority employees at the lower ranks of the IRB - which is also one of the systemic barriers identified by the Complainant in the present complaint - there was nothing preventing the Complainant from adducing evidence regarding other alleged systemic barriers at the IRB, which may now form part of the present complaint. This is reinforced by the fact that the PSST complaint was filed and adjudicated after the filing of the present complaint. Any alleged systemic barriers at the IRB forming the basis of the present complaint were known to the Complainant prior to adjudicating the PSST complaint. These

> alleged systemic barriers, and any evidence thereof, could have, and should have, been brought forward before the PSST as part of the Complainant's circumstantial evidence of systemic discrimination in that case.
>
> [emphasis added]

[87] I find this reasoning to be flawed. It would not have been relevant for the applicant to adduce evidence before the PSST in relation to "other alleged barriers" at the IRB which may form part of the human rights complaint, but which were not relevant to the specific decision that the PSST was asked to determine. The practices that existed at the IRB in 2003-2004 were not the focus of the PSST complaints. The fact that systemic discrimination may or may not have existed in the period of 2003-2004 could have been, at best, one of several elements relevant to the determination of whether a decision made in 2007 was tainted by a context of systemic discrimination practices. Nothing leads me to believe that the practices that existed at the IRB in March 2003 to March 2004 had any bearing on the PSST's decision. At the very least, it was certainly not central to its finding that the evidence was insufficient to substantiate Mr. Murray's allegation of systemic discrimination.

[88] In *Danyluk*, the Supreme Court revisited the requirement to conclude that issues have been dealt with in previous proceedings. I find that the principles outlined by the Court directly apply to the case at bar:

> 24. Issue estoppel was more particularly defined by Middleton J.A. of the Ontario Court of Appeal in *McIntosh v. Parent*, [1924] 4 D.L.R. 420, at p. 422:
>
> > When a question is litigated, the judgment of the Court is a final determination as between the parties and their privies. Any right, question, or fact distinctly put in issue and directly

> determined by a Court of competent jurisdiction as a ground of recovery, or as an answer to a claim set up, cannot be re-tried in a subsequent suit between the same parties or their privies, though for a different cause of action. The right, question, or fact, once determined, must, as between them, be taken to be conclusively established so long as the judgment remains. [Emphasis added.]

This statement was adopted by Laskin J. (later C.J.), dissenting in Angle, supra, at pp. 267-68. This description of the issues subject to estoppel ("[a]ny right, question or fact distinctly put in issue and directly determined") is more stringent than the formulation in some of the older cases for cause of action estoppel (e.g., "all matters which were, or might properly have been, brought into litigation", Farwell, supra, at p. 558). Dickson J. (later C.J.), speaking for the majority in Angle, supra, at p. 255, subscribed to the more stringent definition for the purpose of issue estoppel. "It will not suffice" he said, "if the question arose collaterally or incidentally in the earlier proceedings or is one which must be inferred by argument from the judgment." The question out of which the estoppel is said to arise must have been "fundamental to the decision arrived at" in the earlier proceeding. In other words, as discussed below, the estoppel extends to the material facts and the conclusions of law or of mixed fact and law ("the questions") that were necessarily (even if not explicitly) determined in the earlier proceedings.

[emphasis added]

[89] I find that the allegations of systemic discrimination at the IRB, for the period of 2003-2004, were not central to the issues raised in the PSST complaints relating to the choice on a non-advertised appointment process three years later in 2007. As stated earlier, the evidence led before the PSST was general and did not focus specifically on that period of 2003-2004.

[90] Moreover, the fact that Mr. Murray could have led additional evidence about the alleged discriminatory practices of the IRB for the period of March 2003 to March 2004 before the PSST is insufficient to conclude that the issues in both proceedings were essentially the same. The time-

frame covered by both sets of complaints was different and evidence concerning the IRB's practices in 2003-2004 could have been one among several elements, but certainly not the central element to determine whether there were discriminatory practices in place in 2007.

[91] I therefore conclude that it was unreasonable for the Tribunal to find Mr. Murray's complaints before both the PSST and the Tribunal raised essentially the same issues. The PSST determined that there was insufficient evidence to conclude that a staffing process in 2007 was tainted by systemic discriminatory practices. I fail to see how dealing with allegations of systemic discrimination, namely the clustering of visible minority employees at lower level positions and their under-representation in permanent positions during the specific period of March 2003 to March 2004, would constitute a re-litigation of Mr. Murray's allegations that a staffing process conducted in 2007 was tainted with systemic discrimination. Even if the existence or non-existence of systemic discrimination in March 2003 to March 2004 could have some relevance in determining whether there was a history and/or a continuity of discriminatory employment practices at the IRB, it was not central to a determination as to whether the 2007 decision to conduct a non-advertised appointment process was tainted by such practices. Moreover and as stated earlier, the evidence adduced and discussed was not specific enough to the period covered by Mr. Murray's human rights complaint.

[92] Even if I am wrong in determining that the Tribunal's finding that the issues in both proceedings were essentially the same is unreasonable, I am of the view that the Tribunal made a second error by failing to address the fairness issue to determine whether it was appropriate to apply

the doctrines of issue estoppel and/or abuse of process to the specific circumstances of Mr. Murray's complaint.

[93] The Tribunal could not have benefited from the *Penner* judgment as it was issued after the Tribunal rendered its decision. Nevertheless, the Tribunal should have exercised its discretion to determine whether it was appropriate and fair to apply the doctrines as directed in *Danyluk* and *Toronto*. In my view, *Figliola* did not overturn the principle of fairness enunciated in *Danyluk* and *Toronto*. The first paragraph of Justice Abella's reasons in *Figliola* is of relevance:

> Litigants hope to have their legal issues resolved as equitably and expeditiously as possible by an authoritative adjudicator. Subject only to rights of review or appeal, they expect, in the interests of fairness, to be able to rely on the outcome as final and binding. What they do not expect is to have those same issues relitigated by a different adjudicator in a different forum at the request of a losing party seeking a different result. On the other hand, it may sometimes be the case that justice demands fresh litigation.

[94] Furthermore, even if it did, the principles outlined in *Penner* now apply and the Tribunal failed to turn its mind to whether the application of issue estoppel or abuse of process would be unfair and unjust.

[95] The Attorney General argues that the Tribunal made a policy decision when it determined that "it does not make sense to expend public and private resources on the re-litigation of what is essentially the same allegation." (para 77 of the Tribunal's decision).

[96] First and as stated above, the Tribunal erred in concluding that dealing with Mr. Murray's human rights complaint would constitute a re-litigation of the allegations of his PSST complaint.

Second, in its policy finding, the Tribunal failed to address whether it would be fair to use the PSST's conclusion to preclude Mr. Murray's human rights complaint from being dealt with. A similar situation occurred in *Danyluk* where the Court concluded as follows:

> 66. In my view it was an error of principle not to address the factors for and against the exercise of the discretion which the court clearly possessed. This is not a situation where this Court is being asked by an appellant to substitute its opinion for that of the motions judge or the Court of Appeal. The appellant is entitled at some stage to appropriate consideration of the discretionary factors and to date this has not happened.

[97] The Attorney General argues that even if *Penner* had been issued before the Tribunal's decision, it would probably have not had an impact on its decision because the differences in the proceedings before the PSST and the Tribunal were not significant enough to trigger the fairness analysis. As stated earlier, I consider that the issues raised and the focus of each proceeding were significantly different even if some "facts" could be said to have some relevance to both complaints, namely the IRB's employment practices during the period of March 2003 to March 2004. Furthermore, given that the PSST's mandate related to a finding in respect of a staffing process that occurred in 2007, it bears the question as to whether it would be fair to use the PSST's decision to prevent Mr. Murray from having his human rights complaint dealt with because some evidence covering the period of 2003-2004 had already been adduced before the PSST. Clearly, Mr. Murray could not have expected that by filing a complaint challenging a staffing decision in 2007, it would put and end to a complaint filed in 2004 that related to general allegations of systemic discrimination in the form of employment barriers and clustering of visible minorities in lower level positions for the period of March 2003 to April 2004.

[98] In my view, the Tribunal mechanically applied the pre-conditions for estoppel and/or abuse of process and failed to proceed to the second step of the analysis. As stated in *Danyluk* at paragraph 62, many factors should be considered in the determination of if and when the Tribunal's discretion should apply. The Tribunal's considerations in this case were too narrow-minded; other factors and general considerations should have been assessed by the Tribunal to determine whether it was appropriate and fair to apply the doctrines of issue estoppel or abuse of process. I therefore conclude that the Tribunal's decision was unreasonable and should be overturned.

JUDGMENT

THIS COURT'S JUDGMENT is that

1. The application is allowed;

2. The Tribunal's decision is quashed and Mr. Murray's complaint is referred back to a different panel of the Tribunal; and

3. Costs in the amount of $3,500 are ordered against the Attorney General of Canada in favour of the applicant.

"Marie-Josee Bédard"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-229-13
STYLE OF CAUSE:	NORM MURRAY v CANADIAN HUMAN RIGHTS COMMISSION, THE ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	OTTAWA, ONTARIO
DATE OF HEARING:	DECEMBER 9, 2013
REASONS FOR JUDGMENT AND JUDGMENT:	BÉDARD J.
DATED:	FEBRUARY 11, 2014

APPEARANCES:

Mr. David Yazbeck	FOR THE APPLICANT
Mr. Giacomo Vigna	FOR THE RESPONDENT CANADIAN HUMAN RIGHTS COMMISSION
Ms. Liz Tinker	FOR THE RESPONDENT ATTORNEY GENERAL OF CANADA

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