CITATION: Ontario (Community Safety and Correctional Services) v. De Lottinville, 2015 ONSC 3085
DIVISIONAL COURT FILE NO.: 534/13
DATE: 20150527

ONTARIO

SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

H. Sachs, Harvison Young, and Gray JJ.

BETWEEN:	
Div. Ct. File No.: 534/13	*Jinan Kuburski & Hera Evans*, for the Applicants, Ontario Provincial Police and Phil Nowiski
HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO AS REPRESENTED BY THE MINISTRY OF COMMUNITY SAFETY AND CORRECTIONAL SERVICES (ONTARIO PROVINCIAL POLICE) and PHIL NOWISKI	*Bruce Best, Kathy Laird & Toby Young*, for Dean De Lottinville, Respondent
	Margaret Leighton & Brian Blumenthal, for the Human Rights Tribunal of Ontario, Respondent
Applicants	
– and –	*Cathy Pike & Sunil Gurmukh*, for the Ontario Human Rights Commission, Intervener
DEAN De LOTTINVILLE	
	Miriam Saksznajder, for the Office of the Independent Police Review Director, Intervener
Respondent	
(Application under s. 2(1) of the *Judicial Review Procedure Act*, R.S.O. 1990, c.J.1, as amended)	*Avvy Go & Karin Baqui*, for the Coalition of Legal Clinics, Intervener
Div. Court File No.: 242/14	*Julie K. Parla & Alexandre Blanchard*, for the Applicant, Dr. Ron Kodama
B E T W E E N:	
DR. RON KODAMA	*Toby Young & Grace Vaccarelli*, for the Respondent, K.M.
Applicant	
- and –	*Margaret Leighton & Brian Blumenthal*, for Social Justice Tribunals of Ontario, Respondent
K.M.	
	Cathy Pike & Sunil Gurmukh, for the Ontario Human Rights Commission, Intervener
Respondent	
	Marshall Swadron, Mercedes Perez, Ryan Peck & Amy Wah, for the Mental Health Legal Committee and HIV & AIDS Legal Clinic, Intervener
	Avvy Go, Karin Baqui & Roger Love, for the Coalition of Legal Clinics, Intervener
	Miriam Saksznajder, for the Office of the Independent Police Review Director, Intervener
	HEARD at Toronto: April 20, 21 and 22, 2015

THE COURT:

Overview

[1] These applications, which were heard together, deal with the issue of when human rights complainants should be foreclosed from pursuing their complaints at the Human Rights Tribunal (the "Tribunal") if the facts giving rise to those complaints were the subject of a prior complaint to an administrative body charged with regulating the behaviour of the people against whom the complaints are brought. In the first application, the complaint is against a police officer. In the second, it is against a doctor.

[2] Finality, judicial economy, and consistency are important ingredients of a fair legal system. So is the need to ensure that justice is done in a particular case. At the heart of these applications is an attempt to balance these factors in light of two Supreme Court of Canada decisions: *British Columbia (Workers' Compensation Board) v. Figliola*, 2011 SCC 52, [2011] 3 S.C.R. 422 ("*Figliola*"), and *Penner v. Niagara (Regional Police Services Board)*, 2013 SCC 19, [2013] 2 S.C.R. 125 ("*Penner*").

[3] The Respondent, Mr. De Lottinville, brought an application before the Tribunal alleging racial discrimination by the police. The facts underlying the application had earlier formed the basis of a broader complaint that he had made under the *Police Services Act*, R.S.O. 1990, c. P.15, as amended (the "*PSA*"). The Ontario Provincial Police ("OPP") investigated his complaint and concluded that his allegations of police misconduct were not substantiated. This conclusion was reviewed by the Ontario Civilian Police Commission ("OCPC"), which confirmed the OPP's finding. As a result, no disciplinary hearing was held. Given the findings of that investigation, the OPP and the officer in question (Phil Nowiski) requested that the Tribunal dismiss Mr. De Lottinville's application pursuant to s. 45.1 of the *Human Rights Code*, R.S.O. 1990, c. H.19, as amended (the "*Code*").

[4] Section 45.1 of the *Code* gives the Tribunal the authority to dismiss all or part of an application where the substance of the application has been appropriately dealt with in another proceeding. The Tribunal heard the Applicants' application together with two other applications to dismiss where the complainants had previously made complaints under the *PSA*. A three-person Tribunal was established and, in an Interim Decision, dated July 25, 2013, the Tribunal declined to exercise its discretion to dismiss Mr. De Lottinville's human rights application, finding that it would be unfair to do so.

[5] The Respondent, K. M., brought an application before the Tribunal alleging that he had been discriminated against by the Respondent, Dr. Ron Kodama. Prior to his human rights application, K. M. had complained about Dr. Kodama's conduct to the College of Physicians and Surgeons of Ontario (the "College"). This complaint went to the College's Inquiries, Complaints and Reports Committee (the "ICRC") who did not refer the matter on for a hearing, but did find it necessary to caution Dr. Kodama. Dr. Kodama brought an application under s 45.1 of the *Code* requesting that the human rights application against him be dismissed. On April 11, 2014, the Tribunal issued an Interim

Decision in which it denied Dr. Kodama's request to dismiss on a number of bases, including the fact that it would be unfair to exercise its discretion to dismiss under s. 45.1.

[6] The two applications before us are applications to judicially review the Interim Decisions in question. For the reasons that follow, we would dismiss both applications. On the issue that both applications have in common, we find that the Tribunal reasonably exercised its discretion based on the fairness considerations outlined by the Supreme Court of Canada in *Penner*. In doing so, we find that this is one of those exceptional cases where it was not appropriate to dismiss the applications on the basis of prematurity. Unlike most decisions under s. 45.1, all parties, including the Tribunal, have treated this case as a test case representing an important development in the Tribunal's jurisprudence under s. 45.1.

Factual Background

The *De Lottinville* Application

[7] On May 1, 2009, Mr. De Lottinville filed a complaint under Part V of the *PSA* alleging racial discrimination by OPP officers. In his complaint, he alleged that on the evening of April 25, 2009, while in the washroom at a bar in Elliott Lake, he was kicked in the leg by an OPP officer and was told to leave town. Two days later, several OPP officers responded to a call from a hotel owner in Elliott Lake requesting their assistance in getting Mr. De Lottinville to leave the hotel. Mr. De Lottinville asserted that the officers intimidated him and that one of the officers used a racial slur towards him while he was being escorted from the hotel.

[8] The complaint was investigated by the OPP Professional Standards Bureau ("PSB"). The PSB investigator interviewed Mr. De Lottinville, the subject officer (Phil Nowiski), and various witnesses, and prepared a report concluding that both sets of allegations were unsubstantiated. The OPP Commissioner's delegate reviewed the report, agreed with the investigator's conclusion and decided to take no further action.

[9] In December 2009, Mr. De Lottinville sought a statutory review of the OPP's decision by the OCPC. He also submitted a human rights application to the Tribunal. The human rights application was deferred pending the OCPC review of Mr. De Lottinville's *PSA* complaint.

[10] In December 2010, the OCPC issued a decision letter stating that the review panel confirmed the OPP's finding that Mr. De Lottinville's complaints were unsubstantiated and confirming the OPP's decision to take no further action.

[11] In June 2011, the De Lottinville applicants filed their request for dismissal of Mr. De Lottinville's human rights complaint pursuant to s. 45.1 of the *Code*. The Tribunal decided that it would convene a joint hearing in five applications in which the respondent police forces had brought requests to dismiss under s. 45.1.

[12] During a case management conference call held by a Tribunal adjudicator on November 2, 2011, the parties were advised that the focus of the hearing would be the application of

the Supreme Court of Canada's decision in *Figliola* and "the broader policy issues relevant to the interpretation of s. 45.1 of the *Code* in the context of proceedings under Part V of the *PSA*". The joint hearing proceeded on May 14 and 15, 2012.

[13] In November 2012, the Tribunal advised the parties that remained part of the joint hearing on s. 45.1 that it had decided to await the Supreme Court of Canada's decision in *Penner* before issuing its decision. The *Penner* decision was released on April 5, 2013, and the Tribunal then directed the parties to provide written submissions on the decision and its impact. The parties provided those written submissions and the Tribunal released its Interim Decision in the remaining three joined cases: *De Lottinville*, *Claybourn*, and *Ferguson*.

The *Kodama* Application

[14] The Respondent, K. M., is a female to male transgendered person. In March and April of 2010, he underwent a series of gender reassignment and reparative surgeries and procedures in Belgium. On May 5, 2010, K. M. went to see the applicant, Dr. Kodama, an urologist, seeking treatment for various acute conditions and for continuing management of urological complications arising from his surgeries. During the course of that appointment, Dr. Kodama made numerous remarks to K. M. that are alleged to be discriminatory.

[15] K. M. filed a complaint under the *Regulated Health Professions Act*, 1991, S.O. 1991, c. 18 ("*RHPA*"), with the College. The ICRC investigates complaints brought by the public to the College and it has the authority to refer complaints to the College Discipline Committee. Following an investigation, the ICRC released its decision regarding K. M.'s complaint. At p. 4 of that decision, the ICRC stated:

> There is no independent information before the Committee from which we could conclude that Dr. Kodama intentionally treated [K. M.] in a discriminatory manner. Rather, it would seem that Dr. Kodama may have found himself overwhelmed by [K. M.'s] clinical situation and allowed this to negatively affect his interaction with him.

[16] The ICRC did not refer K. M.'s complaint to the Discipline Committee, but did find at p. 4

> ...that it is appropriate to caution Dr. Kodama regarding the quality of his communications with [K. M.]. He failed to display the level of sensitivity required by the situation. In addition, he was less than clear or effective in communicating his intentions and recommendations to the patient.

[17] K. M. decided not to seek a review of the ICRC's Decision by the Health Professionals Appeal and Review Board ("HPARB"). However, he subsequently commenced a human rights application pursuant to the *Code* in which he alleged that Dr. Kodama

discriminated against him in the provision of medical services on the grounds of disability and gender identity.

[18] Dr. Kodama requested that the Tribunal dismiss K. M.'s application pursuant to s. 45.1 of the *Code*.

The *Figliola* Decision

[19] In *Figliola*, three workers suffering from chronic pain sought compensation from the British Columbia Worker's Compensation Board. Pursuant to a Board policy, their award was fixed at an amount equal to 2.5% of their total disability. The workers appealed the fixing of their award, arguing among other things that the Board's policy was discriminatory within the meaning of the British Columbia *Human Rights Code*, R.S.B.C. 1996, c. 210 (the "*BC Code*"). A Review Officer of the Review Division of the Worker's Compensation Appeal Tribunal found that the Board's policy did not contravene the *BC Code* and was not discriminatory.

[20] The complainants then filed complaints with the British Columbia Human Rights Tribunal making the same arguments about the discriminatory nature of the Board's chronic pain policy that they had made before the Review Division. The Workers' Compensation Board brought a motion asking the B.C. Tribunal to dismiss the complaints under s. 27(1)(a) of the *BC Code*, which provides that the B.C. Tribunal may dismiss all or part of a complaint if the substance of the complaint has been appropriately dealt with in another proceeding. The B.C. Tribunal refused to exercise its discretion to dismiss the complaints, and the B.C. Tribunal's decision in this regard was the subject of a judicial review application that proceeded through the B.C. courts to the Supreme Court of Canada.

[21] The Supreme Court concluded that the B.C. Tribunal's decision not to exercise its discretion to dismiss the complaints was patently unreasonable. However, the Court was split on the remedy that should be imposed. Abella J., writing for a majority of five, found that there was no need to refer the matter back to the B.C. Tribunal for reconsideration; the Court could dismiss the complaints. Cromwell J., writing for a minority of four, would have referred the matter back to the B.C. Tribunal for reconsideration. He also disagreed with some other aspects of Abella J.'s reasons.

[22] In *Figliola*, Abella J. confirmed that s. 27(1) of the *BC Code* is a statutory reflection of the collective principles underlying the doctrines of issue estoppel, collateral attack and abuse of process. All of these doctrines exist to prevent unfairness and, according to Abella J., they have the following common underlying principles:

(a) The finality of decisions is in the interest of the public and the parties.

(b) Relitigating issues that have already been decided in another forum undermines confidence in the administration of justice by allowing unnecessarily duplicative proceedings and creating the risk of inconsistent results.

(c) The appropriate way to challenge the validity or correctness of a decision is through an appeal or a judicial review application. These mechanisms should not be circumvented by allowing parties to challenge a decision of one tribunal in another forum.

(d) Unnecessary litigation leads to unnecessary expenditure.

[23] Section 27(1) of the *BC Code* embraces these principles and requires the B.C. Tribunal to ask itself three questions: (1) Did the other tribunal have concurrent jurisdiction to decide human rights issues? (2) If it did, was the previously decided legal issue essentially the same as the issue that is the subject of the complaint before the B.C. Tribunal? (3) If it was, was there an opportunity for the complainant in the previous proceeding to know the case she had to meet and to have the chance to meet it? As noted, at para. 37, in *Figliola*:

> All of these questions go to determining whether the substance of a complaint has been 'appropriately dealt with'. At the end of the day, it is really a question of whether it makes sense to expend public and private resources on the relitigation of what is essentially the same dispute.

[24] In *Figliola,* the Supreme Court found that the complainants were essentially trying to relitigate their complaint in another forum.

[25] The Court also held that the B.C. Tribunal erred in asking itself whether the Review Division's process met the necessary procedural requirements. This, as Abella J. put it, "is a classic judicial review question and not one within the mandate of a concurrent decision-maker" (para. 49).

[26] Additionally, the Supreme Court found that the B.C. Tribunal inappropriately criticized the Review Officer's interpretation of his human rights mandate. Again, according to Abella J., these are the kinds of questions that are "properly the subject of judicial review, not grounds for a collateral attack by a human rights tribunal under the guise of s. 27(1)(f)" (para. 50).

[27] Finally, the Supreme Court stated that the B.C. Tribunal erred and was overly technical in its approach to the doctrine of issue estoppel when it found that the Review Officer's decision was not final, that the parties were not the same, and that the Review Officer lacked the necessary expertise to interpret and apply the *BC Code*.

The *Penner* Decision

[28] In *Penner*, Mr. Penner was arrested for disruptive behaviour in an Ontario courtroom. He filed a complaint against two police officers under the *PSA*, which was dismissed after a hearing. He also started a civil action against the officers based on the same incident, in which he claimed damages. The two officers applied to have the civil action dismissed based on the doctrine of issue estoppel.

[29] Again, the case went to the Supreme Court of Canada. In a four to three decision, Cromwell and Karakatsanis JJ., writing for the majority, refused to dismiss the civil action, finding that it would be unfair to apply the doctrine of issue estoppel in the circumstances of the case before them. Abella J., writing for the minority, disagreed. Applying the doctrine of issue estoppel, she would have dismissed the appeal.

[30] The first issue that the majority addressed in *Penner* was whether there should be a rule of public policy excluding police disciplinary hearings from the application of the doctrine of issue estoppel. According to Mr. Penner and a number of the interveners who appeared before the court, such a rule was necessary to ensure police accountability through judicial oversight. The court was not persuaded that it was necessary to adopt such a rule.

[31] In *Penner*, the majority accepted that all of the preconditions of issue estoppel had been met. However, it determined that even if this was the case, "the court retains discretion to not apply issue estoppel when its application would work an injustice" (para. 29). As put by the majority, at paras. 30-31:

> The principle underpinning this discretion is that '[a] judicial doctrine developed to serve the ends of justice should not be applied mechanically to work an injustice': (citations omitted).
>
> Issue estoppel, with its residual discretion, applies to administrative tribunal decisions. The legal framework governing the exercise of this discretion is set out in *Danyluk*. In our view, this framework has not been overtaken by this Court's subsequent jurisprudence.

[32] In considering whether to exercise their residual discretion, the court must ask itself whether to do so would cause unfairness. The court noted, at para. 39, that further

> ...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.

[33] In *Penner*, the majority accepted that the disciplinary hearing had been a fair one and that Mr. Penner had had a meaningful opportunity to participate in that hearing. However, they found that it would be unfair to allow the results of that process to act as a bar to Mr. Penner's civil claim. In coming to this conclusion, they looked at the nature and scope of the earlier proceedings and considered the parties' reasonable expectations in relation to those proceedings.

[34] First, they examined the text of the *PSA* and noted that there was nothing in the language of that legislation to suggest that the legislature intended that the filing of a complaint would foreclose the possibility of civil proceedings. In fact, they noted that the legislation contained statutory privilege provisions providing for the inadmissibility of documents generated during the complaints process and the confidentiality of information gathered during that process. The Supreme Court noted that that "[t]hese provisions specifically contemplate parallel proceedings in relation to the same subject matter" (para. 50).

[35] Second, the majority found that the purpose of a police disciplinary proceeding is different from that of a civil action. The former is focused on whether to impose employment-related sanctions on the officer, and the latter seeks to provide compensation for the wrong that the complainant may have suffered at the hands of the officer.

[36] Third, the majority noted that Mr. Penner had no financial stake in the outcome of the disciplinary proceeding and that proving misconduct in the police disciplinary context requires that that misconduct be established on "clear and convincing evidence", a higher standard of proof than would apply in the civil action. These factors both supported the conclusion that "the parties could not reasonably have contemplated that the acquittal of the officers at the disciplinary hearing would be determinative of the outcome of Mr. Penner's civil action" (para. 60).

[37] Fourth, the majority considered "the risk of adding to the complexity and length of administrative proceedings by attaching undue weight to their results through applying issue estoppel" (para. 62). If Mr. Penner thought that his possibility of a civil action for damages would be precluded by an acquittal in the disciplinary proceeding, he might well have seen it as necessary to retain counsel and to mount a full-scale case, which would, in turn, put the officers in the position of having to undergo a longer process driven by two prosecutors – one focused on proving misconduct and the other focused on proving the civil action.

[38] As part of their considerations on this issue, the majority also noted a further risk, namely, that complainants who have been subject to police misconduct would refrain from laying a complaint under the *PSA* because of their fear that doing so could prejudice their ability to pursue an action for damages. This would be contrary to the public interest in ensuring that the police, as enforcers and upholders of the rule of law, are held accountable for their actions.

[39] Fifth, the court looked at the role that the Chief of Police had played in the *PSA* process that was used in Mr. Penner's case. After Mr. Penner submitted his complaint, it was the Chief who investigated the complaint and determined whether a hearing was required. The Chief also appointed the investigator, the prosecutor, and the hearing officer. While the court did not find that these procedures were objectionable for the purposes of the disciplinary hearing itself, it did find that they affected the fairness of applying the doctrine of issue estoppel. As put by the court: "[a]pplying issue estoppel against the complainant here had the effect of permitting the Chief of Police to become the judge of his own case, with the result that his designate's decision had the effect of exonerating the Chief and his police service from civil liability" (para. 66).

[40] The majority concluded its decision by stating, at paras. 69-71:

> Issue estoppel is about balancing judicial economy and finality and other considerations of fairness to the parties. It is a flexible doctrine that permits the court to respond to the equities of a particular case. We see no reason to part from that approach and create a rule of public policy to preclude the application of issue estoppel in the context of public complaints against the police.
>
> Given the legislative scheme and the widely divergent purposes and financial stakes in the two proceedings, the parties could not have reasonably contemplated that the acquittal of the officers at the disciplinary hearing would determine the outcome of Mr. Penner's civil action. These are important considerations and the Court of Appeal did not take them into account in assessing the weight of the other factors, such as Mr. Penner's status as a party and procedural protections afforded by the administrative process. Further, the application of issue estoppel had the effect of using the decision of the Chief of Police's designate to exonerate the Chief in the civil claim.
>
> Applying issue estoppel against Mr. Penner to preclude his civil claim for damages in the circumstances of this case was fundamentally unfair.

The Tribunal's Decision in the *De Lottinville* Application

[41] The Tribunal's approach in this decision focused on "reconciling the principles expressed by the majority in the *Figliola* decision with the approach taken by the majority in *Penner*" (*De Lottinville* Tribunal Decision, para. 65).

[42] In the Tribunal's view, the considerations that drove the majority in *Penner* did not arise in *Figliola* because, in the latter case, the issue before the WCB Review Officer was exactly the same issue raised before the B.C. Human Rights Tribunal. As noted by the Tribunal at para. 78, the remedies sought by the parties were also the same:

> In these circumstances, the majority in *Figliola* was of the view that the parties reasonably would regard the issue as having been conclusively determined, such that their reasonable expectation would be that there would not be a re-litigation of essentially the same issue, between the same parties, in another forum.

[43] The Tribunal considered whether the *Penner* decision had any application to its own interpretation, as an administrative tribunal, of its discretion under s. 45.1 of the *Code*. The argument was that *Penner* was concerned with the application of the common law doctrine of issue estoppel to bar a civil court action, and not with the application of an administrative tribunal's statutory discretion to dismiss a complaint because another

administrative tribunal had already dealt with the matter. In the latter situation, according to this argument, *Figliola* is the applicable decision and it leaves no room for the exercise of discretion on the bases set out in *Penner*.

[44] The Tribunal rejected this argument. First, it found that *Figliola* did not preclude an application of the *Penner* factors. Second, it found that it would make no sense for a person to "have the issue of whether he or she was allowed to proceed with a civil action alleging the violation of a *Code* right determined on the basis of the principles enunciated in *Penner*, while the same person would have an application to this Tribunal based on the same allegation dismissed under s. 45.1 of the *Code* without consideration of the principles enunciated in *Penner*" (para. 70). To construe s. 45.1 in this way would be to drive people to the courts to seek compensation for a violation of their *Code* rights, rather than to the Tribunal. This would be antithetical to one of the *Code*'s fundamental purposes – providing "an accessible forum for the resolution of human rights disputes" (para. 70).

[45] The Tribunal also found that interpreting s. 45.1 without regard to the principles set out in *Penner* would run contrary to the direction in *Figliola* that the role of a tribunal in applying a statutory provision like s. 45.1 is to have regard to the principles underlying the common law doctrines of issue estoppel, collateral attack, or abuse of process. As well, it would amount to a finding that the Legislature intended s. 45.1 to be interpreted in a way that could constitute "a serious affront to basic principles of fairness" (para. 68).

[46] The Tribunal found that the principles articulated by the majority in *Penner* caused it to exercise its discretion not to dismiss Mr. De Lottinville's human rights complaint. It found the same thing with respect to the other two complaints before it.

[47] In doing so, the Tribunal recognized that its decision represented a departure from its own established case law. However, it found that its own jurisprudence had to be "guided by the courts and in particular by pronouncements of the Supreme Court of Canada that bear directly upon the issues that come before us" (para. 85).

[48] The majority of the Tribunal noted that its existing case law had established a two-part test for its considerations under s. 45.1: (1)Was the other process a "proceeding" within the meaning of s. 45.1? (2) Did the other proceeding appropriately deal with the substance of the application? The majority found it unnecessary to deal with the first question and found that the factors to be considered under the second question encompassed the principles articulated in *Penner*.

[49] One member of the Tribunal issued concurring reasons. In those reasons, she agreed with her colleagues on the impact of *Penner* with respect to the interpretation of s. 45.1. However, she found that the matters had not been dealt with in another proceeding, both because all that transpired before the *PSA* was an investigation (not an adjudication after a hearing) and because none of the people who dealt with the *PSA* complaints addressed or resolved "as a matter of law, the question that is before this tribunal: whether the respondents breached the *Code* in the course of their duties as police officers, in the ways alleged in the Applications before us" (para. 97). In other words, unlike her colleagues,

the third member of the Tribunal did deal with the first question and answered the second question by looking beyond the principles of unfairness dictated by *Penner*.

The Tribunal Decision in the *Kodama* Application

[50] In *Kodama*, which was heard after *De Lottinville*, the Tribunal (which this time consisted of one member) agreed with the Tribunal in *De Lottinville* "that the fairness of using the results of another proceeding to bar a human rights Application is a principle that ought to be considered in applying s. 45.1 of the *Code*" (*Kodama* Tribunal Decision, para. 52). On this basis, the Tribunal would have refused to exercise its discretion under s. 45.1 to dismiss the proceeding.

[51] As in *Penner*, the complainant, K. M., had no financial stake in the College proceedings and no possibility of obtaining any redress at all for the alleged breach of his *Code* rights. Furthermore, as in *Penner,* the *RHPA* contains provisions that specifically contemplate parallel civil proceedings. On this basis, neither party could have reasonably contemplated that by complaining to the College about Dr. Kodama's behaviour towards him, K. M. would be barred from bringing a human rights complaint against Dr. Kodama based on the same behaviour.

[52] The *Kodama* Tribunal also refused Dr. Kodama's s. 45.1 request to dismiss on two additional bases. First, it found that s. 36(3) of the *RHPA* prevented the respondent physician from relying on the ICRC's Decision in support of his request. Section 36(3) of the *RHPA* states:

> No record of a proceeding under this Act, a health profession Act or the *Drug and Pharmacies Regulation Act*, no report, document or thing prepared for or statement given at such a proceeding and **no order or decision made in such a proceeding is admissible in a civil proceeding other than a proceeding under this Act,** a health profession Act or the *Drug and Pharmacies Act* or a proceeding relating to an order under section 11.1 or 11.2 of the *Ontario Drug Benefit Act*.
>
> [Emphasis added.]

[53] The Tribunal found that in *M.F. v. Sutherland* (2000), 188 D.L.R. (4th), 98 A.C.W.S. (3d) 59, the Ontario Court of Appeal considered the application of s. 36(3) and concluded that it created an absolute bar to the admission of any documents prepared in the context of the College's proceedings. This bar was implemented by the Legislature with the purpose of encouraging complainants to report complaints of professional misconduct against members of the health profession. By virtue of s. 36(3), complainants could make these complaints knowing that nothing that was produced during the course of that proceeding – not even a decision – could be produced in any other proceeding they may choose to pursue.

[54] The *Kodama*Tribunal also concluded that the ICRC decision did not deal with the substance of K. M.'s human rights complaint. The ICRC did not go so far as to find that Dr. Kodama did not make the discriminatory comments to K.M. At most, it concluded that Dr. Kodama did not **intentionally** discriminate against K. M. However, to establish discrimination under the *Code* it was not necessary for K. M. to prove that Dr. Kodama intentionally discriminated against him. The Tribunal also found that the ICRC never made any finding as to whether Dr. Kodama ever made the alleged discriminatory comments to K. M.

[55] In its decision, the *Kodama* Tribunal rejected the submission that K. M.'s application constituted an abuse of process under s. 23(1) of the *Statutory Powers Procedure Act*, R.S.O. 1990, c. S.22.

Issues Raised in the Judicial Review Proceedings

[56] The parties, including the interveners, raised a number of issues in regards to both applications, some of which we find it necessary to deal with and some of which we do not.

[57] As already noted, the Tribunal raised the issue of prematurity in its submissions regarding the *De Lottinville* application.

[58] Counsel for the Applicants in the *De Lottinville* application argued that the Tribunal made a number of errors in its s. 45.1 analysis. First and foremost, it failed to follow the direction in *Penner* that each case must be determined on its own facts. Instead, according to the *De Lottinville* applicants, the effect of the Tribunal decision is to establish a general rule that no s. 45.1 application for dismissal can succeed if the prior proceeding in question is a proceeding under the *PSA*. Further, the Tribunal decision will have a significant impact on the application of s. 45.1 when the prior proceeding was a proceeding before a professional body.

[59] Second, the *De Lottinville* applicants assert that the Tribunal failed to actually address the *Figliola* questions and failed to properly apply the decisions in *Figliola* and *Penner* to the case before it. According to these applicants, if the Tribunal had properly applied the two cases, it would have recognized that the lack of a remedy in the *PSA* proceeding did not determine the issue of finality. It was always open to the Tribunal, if a *PSA* complaint was sustained, to accept that determination and simply assume jurisdiction over the issue of remedy. In this way, finality, with its minimization of the risks of inconsistent findings, would be reinforced rather than undermined.

[60] The intervener clinics in the *De Lottinville* application also raised an issue with respect to the *Figliola* factors: both tribunals must have concurrent jurisdiction to determine the human rights question. According to these interveners, the Chief of Police and the IPRC did not have concurrent jurisdiction.

[61] Dr. Kodama argued that the Tribunal erred when it found that *Penner* applies to motions under s. 45.1 of the *Code*. According to Dr. Kodama, *Penner* is only applicable in the context of a civil court action, not in the context of a proceeding before an administrative

tribunal. When it comes to proceedings before administrative tribunals, *Figliola* is the applicable case law and, under *Figliola*, there are only three questions to be answered: (1) Did the other tribunal have concurrent jurisdiction to decide human rights issues? (2) If it did, was the previously decided legal issue essentially the same as the issue that is the subject of the complaint before the Tribunal? (3) If it was, was there an opportunity for the complainant in the previous proceeding to know the case she had to meet and to have the chance to meet it? In this case, according to Dr. Kodama, all of those questions must be answered in the affirmative. This obligated the Tribunal, in the interests of finality, to grant Dr. Kodama's s. 45.1 application to dismiss.

[62] Dr. Kodama also argued that the *Kodama* Tribunal erred in its analysis of s. 36(3) of the *RHPA*. Section 36(3) only operates to preclude the admissibility of College proceeding documents and decisions when it comes to a consideration of the merits of another proceeding, not when it comes to the determination of a "threshold issue" such as whether a *Code* application should be dismissed under s. 45.1.

[63] Finally, Dr. Kodama submitted that the *Kodama* Tribunal erred when it found that the substance of the human rights complaint had not been dealt with by the ICPC.

[64] Because of our findings on the other issues, we find it unnecessary to deal with the issues of concurrent jurisdiction, as raised by the intervener clinics, or the issue of whether s. 36(3) of the *RHPA* prohibited Dr. Kodama from referring to the ICPC decision in his application under s. 45.1 of the *Code*.

Prematurity

[65] We agree that applications for judicial review will only be heard in exceptional circumstances where the administrative proceedings are ongoing. In this case, we find that the Tribunal itself has chosen to treat in an exceptional way its determination of the central interim issue before it. First, it constituted a three-person tribunal. Second, it joined five applications that all raised the same issue. Even in raising the issue of prematurity before us, the Tribunal did not suggest that we dismiss the applications without giving our opinion as to the merits of the Tribunal's reasoning with respect to s. 45.1 and the application of the *Penner* principles. Rather, it proposed that we rule on the question at issue and then indicate that, in any event, we would have dismissed the application on the basis of prematurity.

[66] As already indicated, this application is a test case, the results of which constitute a significant shift in the Tribunal's jurisprudence on an important issue that it deals with on a regular basis. As such, we find that it is appropriate in these exceptional circumstances to exercise our discretion to hear the applications.

Standard of Review

[67] The applicants submit that the issues in these applications are issues concerning the application of common law doctrines such as abuse of process, collateral attack, and issue estoppel. These are all questions of law that are of central importance to the legal system and that are outside of the specialized expertise of the Tribunal. They also argue that the

questions are questions regarding "the jurisdictional lines between two or more competing specialized tribunals": *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, at para 61. Therefore, according to the applicants, the applicable standard of review is correctness.

[68] We disagree. In both decisions, the Tribunal was engaged in interpreting s. 45.1 of the *Code* (its home statute) and in answering the question of whether it should exercise the discretion that it has been given under that statute. Finally, answering this question involved considering both the facts and the law. All of these factors point to a reasonableness standard of review. Further, the Court of Appeal has confirmed that the standard of review for the Tribunal's decisions is reasonableness: *Shaw v. Phipps*, 2012 ONCA 155, 347 D.L.R. (4th) 616. Finally, the court, in *Figliola*, considered the issue before it in the context of a standard of review of patent unreasonableness.

[69] We appreciate that, in *College of Nurses v. Trozzi*, 2011 ONSC 4614, 286 O.A.C. 92, this court held that a decision of the Tribunal under s. 45.1 of the *Code* was subject to review on a standard of correctness. That standard of review was found to apply because that case involved the determination of boundaries between competing specialized tribunals (the Tribunal and the HPARB) and because it required the Tribunal to interpret the *RHPA* "and general legal principles and doctrines such as abuse of process, collateral attack, adjudicative immunity and deliberative secrecy in its analysis," issues that fell outside of the Human Rights' Tribunal's specialized expertise (para. 25).

[70] With great respect, we do not agree that determining whether the Tribunal should exercise its discretion under s. 45.1 of the *Code* involves determining the boundaries between two competing tribunals. The issue of whether to exercise this discretion only arises if it has been determined that both tribunals have concurrent jurisdiction over the human rights issue in question. Concurrent jurisdiction by definition is a jurisdiction that is shared by two tribunals rather than held exclusively by one.

[71] We also do not agree that because the interpretation and application of s. 45.1 may involve considering common law doctrines or looking at other legislation that the standard of review is necessarily correctness. In *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 S.C.R. 654, at para. 46, the Supreme Court of Canada held that the exceptional category of "central *importance to the legal system*" and "outside the *adjudicator's specialized area* of expertise" must be interpreted conjunctively. While it could be argued that the common law doctrines of finality are of central importance to the legal system, it cannot be argued that applying these doctrines in the context of s. 45.1 is outside of the Tribunal's expertise. It is a fundamental and routine part of the Tribunal's expert adjudicative functioning to make determinations with respect to the application of s. 45.1 in various contexts, including:

1. claims made to Employment Standards Officers and decisions of the Labour Relations Board;

2. decisions of labour arbitrators;

3. decisions of the Workplace Safety and Insurance Board and the Workplace Safety and Insurance Appeals Tribunal;

4. decisions involving professional disciplinary bodies; and

5. decisions of other tribunals such as the Social Benefits Tribunal and the Landlord and Tenant Board.

[72] For these reasons, we find that the applicable standard of review is reasonableness.

Did the Tribunal reasonably interpret s. 45.1 of the *Code* in light of *Figliola* and *Penner*?

[73] This question is fundamental to both Tribunal decisions, as the *Kodama* Tribunal adopted the *De Lottinville* Tribunal's reasoning on this issue.

[74] While the *De Lottinville* applicants did not go so far as to say that *Penner* had no application, this was the thrust of Dr. Kodama's submission. According to Dr. Kodama, if the substance of K. M.'s human rights complaint had been decided by the ICRC (and Dr. Kodama asserts that it had), then the Tribunal erred when it applied *Penner* and imported the concepts of fairness and discretion from the doctrine of issue estoppel into its analysis.

[75] Dr. Kodama argues that *Penner* addresses the doctrine of issue estoppel and the factors that a **court** is to consider when exercising its inherent jurisdiction to determine whether to allow reconsideration of an issue that has already been considered by an administrative tribunal. It has no application to the interpretation of a statutory provision such as s. 45.1 by an administrative tribunal.

[76] According to Dr. Kodama, it is *Figliola* that specifically addresses an express statutory provision that is equivalent to s. 45.1. *Figliola* makes it clear that the purpose of such a provision is to ensure the finality of tribunal decisions and to protect such decisions from being reviewed by other administrative bodies. In short, Dr. Kodama states that the *Figliola* analysis was not modified by *Penner* and, therefore, that *Penner* should have played no part in the Tribunal's interpretation of s. 45.1.

[77] As already noted, the *De Lottinville* Tribunal considered and rejected this argument. Our task is to have regard to the justification, transparency, and intelligibility of the Tribunal's process of decision-making on this point and to determine whether its interpretation falls within the range of possible, acceptable, and defensible outcomes (*Dunsmuir*, at para. 47).

[78] Implicit in Dr. Kodama's submission is the assertion that *Figliola* mandates an interpretation of s. 45.1 that has regard to some of the principles embodied in the common law doctrines of issue estoppel, but not others. The Tribunal gave three reasons for rejecting this submission, all of which are reasonable.

[79] First, it noted that the court, in *Figliola*, was clear in stating that the role of a human rights tribunal in applying and interpreting a statutory provision like s. 45.1 is to have

regard to the principles underlying the common law finality doctrines such as issue estoppel, collateral attack, and abuse of process. This is clear from para. 24 of *Figliola* where Abella J. states:

> While s. 27(1)(f) [the *BC Code* equivalent of s. 45.1] does not call for a strict application of the doctrines of issue estoppel, collateral attack, or abuse of process, **the principles underlying all of these doctrines are 'factors of primary importance that must be taken into account when exercising discretion under s. 27(1)(f) of the *Human Rights Code* to proceed, or to refrain from proceeding, with the hearing of a complaint'**...
>
> [Emphasis added.]

[80] Further, in discussing the common law finality doctrines and the principles that underlie them, Abella J. makes explicit reference to the fact that fairness forms an important part of the analysis. At paras. 64-65, she states:

> I turn next to *Toronto (City) v. C.U.P.E., Local 79.* It concerned the role of the abuse of process doctrine when an arbitrator reviewing an employee's dismissal decided to make his own assessment of the facts relating to the conduct giving rise to the criminal conviction and on which the dismissal was based. Front and centre in Arbour J.'s analysis (on behalf of a unanimous court on this point) was the importance of maintaining a 'judicial balance between finality, fairness, efficiency and authority of judicial decisions': para. 15. Referring to *Danyluk*, she acknowledged that there are many circumstances in which barring relitigation would create unfairness and held that '[t]he discretionary factors that apply to prevent the doctrine of issue estoppel from operating in an unjust or unfair way are equally available to prevent the doctrine of abuse of process from achieving a similar undesirable result': para. 53. **She thus emphasized the importance of maintaining a balance between fairness and finality and the need for a flexible discretion to ensure that this is done.**
>
> I conclude that the Court's jurisprudence recognizes that, **in the administrative law context, common law finality doctrines must be applied flexibly to maintain the necessary balance between finality and fairness.** This is done through the exercise of discretion, taking into account a wide variety of factors which are sensitive to the particular administrative law context in which the case arises and to the demands of substantial justice in the particular circumstances of each case. Finality and requiring parties to use the most appropriate mechanisms for review are of

> course important considerations. But they are ***not* the *only*, or even the most important considerations.**
>
> [Emphasis added.]

[81] The Tribunal then stated that *Penner* provides a further elaboration of the principles underlying the common law doctrine of issue estoppel. There can be no doubt that this is the thrust of the majority decision in *Penner*, which is to focus on the discretion that a court retains not to apply issue estoppel even if all the technical requirements for the doctrine are present when to do so would work an injustice and cause unfairness.

[82] Nowhere in either *Figliola* or *Penner* does the Supreme Court state that the principles underlying the doctrine of issue estoppel should be applied differently by an administrative tribunal exercising its statutory authority to apply the doctrine. In fact, as the above excerpts from *Figliola* demonstrate, the Court specifically takes the opposite approach. It may be that the Supreme Court disagreed about the result in *Penner*, but the reason for this disagreement is not because either the majority or the minority distinguished between the principles underlying the common law finality doctrines when they are applied in the administrative context as opposed to being applied by a court as part of its inherent jurisdiction. In fact, a major basis for Abella J.'s dissent in *Penner* is her view that the majority did not accept that *Figliola* answered the question they had to answer.

[83] The second reason that the *De Lottinville* Tribunal gave for its conclusion that it should consider the *Penner* principles is that to do otherwise could result in a s. 45.1 decision that constitutes a "serious affront to the basic principles of fairness" (para. 68). The *Code* is remedial legislation that should be construed broadly and purposively. The Tribunal reasonably decided that a purposive interpretation of s. 45.1 did not support dismissing an application if to do so would lead to unfairness.

[84] The third reason for the Tribunal's decision in this regard is one that is based on a reasoned and intelligible analysis of the results that would flow if it had concluded otherwise. Section 46.1 of the *Code* contemplates the possibility of a civil action for an infringement of a *Code* right. If the *Penner* principles only apply to a civil action, then someone who commences a civil action for damages for a *Code* infringement would have a better chance of not having that action dismissed than someone who files a complaint under the *Code*. This cannot have been the Legislature's intention when it introduced the amendments to the *Code* in 2006. As the concurring reasons in *De Lottinville* point out, these amendments were designed to promote direct access to the Tribunal for human rights violations and to ensure that such complaints are treated fairly. They were not designed to make the courts the forums of choice for human rights claims. This is clear from the wording of s. 46.1(2), which precludes a person from commencing a court action "based solely on an infringement of a right under Part 1 [of the *Code*]".

[85] The other effect could be to discourage people from laying complaints before disciplinary tribunals. If someone has been discriminated against by a police officer, a doctor, or another professional, why would they complain to the bodies charged with regulating that

professional's behaviour, where they have no possibility of getting a personal remedy, if such a complaint could bar their ability to seek a remedy from the Tribunal? Yet, it is clearly in the public interest that people be encouraged, rather than discouraged, to let regulatory bodies know when the members of those bodies have engaged in discriminatory conduct.

[86] In this regard, it is important to remember that the goal of professional disciplinary proceedings is different from that of a human rights tribunal. When professional regulatory tribunals exercise their mandatein a diligent and responsible way, public confidence is maintained and increased in the provision of the services being regulated, such as police services or medical services. Human rights tribunals have as their goal the provision of ready access to remedies, whether systemic or personal, designed to prevent discriminatory behaviour and to compensate the victims of such behaviour. By virtue of these differences, the focus of the proceedings in front of these tribunals is and should be different. If bringing a proceeding before one tribunal bars a proceeding before another, the goal of one may be undermined at the expense of the other. The victims of discrimination, who are often from marginalized communities, may be forced to choose which route to take when they often do not have access to the information necessary to make this choice a meaningful one.

[87] For all of these reasons, we find that the Tribunal reasonably applied the principles set out in *Penner* while exercising its discretion under s. 45.1 of the *Code* in both the *De Lottinville* and *Kodama* applications.

Did the *De Lottinville* Tribunal unreasonably fetter its discretion by adopting a general rule that *PSA* proceedings could not form a basis for an application under s. 45.1 of the *Code*?

[88] Nowhere in the *De Lottinville* decision does the Tribunal articulate a principle that *PSA* proceedings can never form the basis of an application under s. 45.1. What the Tribunal did was look at the three cases before it to decide that, in those cases, the prior *PSA* proceedings did not mean that the human rights complaints should be dismissed. In Mr. De Lottinville's case, the Tribunal gave extensive reasons, based on the facts of that case, for its decision. These reasons included the following:

(i) The statutory scheme under which Mr. De Lottinville's police complaint was made is the same as the scheme considered by the court in *Penner*.

(ii) This scheme clearly contemplates that there may be a civil proceeding beyond any disciplinary complaint. If such an eventuality was within the reasonable expectation of the parties, so was the possibility that a human rights complaint to the Tribunal could be made in addition to a police complaint. This was clearly Mr. De Lottinville's expectation: when he made his complaint under the *PSA*, he told the OPP that he intended to file a human rights complaint.

(iii) As in *Penner*, Mr. De Lottinville had no personal stake in, and could seek no personal remedy in, the *PSA* process.

(iv) The same policy considerations that the majority considered in *Penner* applied equally with respect to Mr. De Lottinville's human rights complaint. To find that the *PSA* complaint could bar a human rights complaint could discourage the public from making such complaints. This would be contrary to the public interest and could also have the unintended effect of distorting and prolonging the *PSA* process.

(v) The Tribunal does not only have the power to order personal financial compensation, but also can impose public interest remedies requiring the Chief to implement systemic changes in his department. In Mr. De Lottinville's case, as in *Penner*, it was the Chief of Police who appointed the investigator who investigated the complaint and who decided that the complaints should not proceed to a hearing. If the effect of the Chief's determination is to insulate him from any further requirement to take action or pay compensation, this would, for the reasons expressed by the majority in *Penner*, have the effect of allowing the Chief "to become the judge in his own case" (para. 84).

[89] These reasons demonstrate that the Tribunal's process of decision-making was based on the facts of the case before it and was justified, transparent, and intelligible. The conclusion reached also falls well within the range of possible, acceptable, and defensible outcomes.

Did the *De Lottinville* Tribunal unreasonably apply the factors in *Figliola* and *Penner*?

[90] The *De Lottinville* applicants made two submissions in support of their position that the *De Lottinville* Tribunal unreasonably applied the factors in *Figliola* and *Penner*. First, they argued that the Tribunal failed to specifically ask itself the three questions outlined in *Figliola*: (1) Didthe *PSA* have concurrent jurisdiction to determine the issue of whether Mr. De Lottinville was discriminated against? (2) Was the legal issue that the *PSA* was dealing with essentially the same as the issue before the Human Rights Tribunal? (3) Did Mr. De Lottinville know the case that he had to meet in the *PSA* proceedings, and did he have the chance to meet it?

[91] It is true that the Tribunal did not directly ask itself these questions. However, its review of the facts clearly indicates that it was aware that conduct that constitutes discrimination under the *Code* can form the basis for a complaint under the *PSA*. This fact would have been an important one to consider if the Tribunal had found it necessary to directly address the three questions in *Figliola.* However, the Tribunal essentially found that even if the *Figliola* questions were answered in the affirmative, the fairness principles articulated in *Penner* dictated that it exercise its discretion to not dismiss Mr. De Lottinville's application. We see no error in this approach. The Tribunal is not obliged to apply a formulaic approach to its consideration of the principles underlying the exercise of its discretion under s. 45.1.

[92] The second part of the *De Lottinville* applicants' submission on this point is that the *De Lottinville* Tribunal overemphasized the fact that Mr. De Lottinville could not get a remedy in the *PSA* proceedings. According to the applicants, the Tribunal failed to consider an option that would do less damage to the doctrine of finality: a finding in the *PSA* proceedings that discrimination occurred could be binding on the Tribunal, which would then only have to deal with the question of remedy.

[93] There are at least two problems with this submission. First, the Tribunal cannot be faulted for failing to consider an option that was never put to it. Second, and more fundamentally, the Tribunal can only grant a remedy under s. 45.2 of the *Code* if "**the Tribunal** determines that a party to the application has infringed a right under Part 1 of another party to the application". Thus, under the legislation, the Tribunal must have made the finding of discrimination if a remedy is to be awarded. This reading of the legislation is consistent with the reality that in order to fashion an appropriate remedy, it is necessary to hear the facts of the case.

Did the *Kodama* Tribunal unreasonably decide that the ICRC did not appropriately deal with the substance of K. M.'s human rights application?

[94] Section 45.1 does not give the Tribunal discretion to dismiss an application where the prior proceeding did not actually decide the human rights issue that is before the Tribunal. The statutory test, as interpreted in *Figliola*, requires the Tribunal to consider "whether the previously decided legal issue was essentially the same as what is being complained of to the Tribunal" (*Figliola*, para. 37). In the *Kodama* case, as is already noted, the Tribunal decided that this test had not been met. At its highest, the ICRC decision only found that Kr. Kodama did not **intentionally** discriminate against K. M.

[95] Dr. Kodama argues that the Tribunal's analysis of the ICRC decision was precisely the type of technical review of another tribunal's decision-making that the Supreme Court of Canada determined in *Figliola* was prohibited. According to Dr. Kodama, the ICRC considered the same facts and evidence as would be considered in a Tribunal hearing. In doing so, it found that "there is no independent information" from which it could "conclude that Dr. Kodama intentionally treated [K. M.] in a discriminatory manner" (ICRC Decision, p. 4). In essence, according to Dr. Kodama, the ICRC found that there was insufficient evidence that he had discriminated against K. M.

[96] We disagree with the submission that the difference between "intentional discrimination" and "discrimination" is a technical one. An important component of modern human rights legislation, including the *Code*, is that there is no requirement to prove intention.

[97] In our view, the *Kodama* Tribunal reasonably read the ICRC decision as making no determination as to whether Dr. Kodama made the discriminatory comments to K. M. that he is alleged to have made. On this point, the ICRC stated, at ICRC Decision, p. 4:

> The Committee is faced with divergent information regarding the interactions between the parties. We therefore cannot say with any

> certainty what transpired. However, it is clear that there was some degree of miscommunication.

[98] This excerpt from the ICRC's Decision makes it clear that the ICRC did not feel it necessary to make the findings that the Tribunal will have to make. As the *Kodama* Tribunal pointed out, it is perfectly possible that Dr. Kodama could have made the comments that he is alleged to have made because he was overwhelmed and frustrated by K. M.'s condition, and not because he intended to discriminate against K. M. Therefore, if the Tribunal were to find that, on a balance of probabilities, Dr. Kodama did make the discriminatory remarks to K. M., this finding would not be inconsistent with the finding of the ICRC.

[99] It must also be remembered that the ICRC did find that Dr. Kodama's conduct towards K. M. was problematic. Specifically, the ICRC found, at pp. 4-5

> ...that it is appropriate to caution Dr. Kodama regarding the quality of his communications with [K. M.]. He failed to display the level of sensitivity required by the situation. In addition, he was less than clear or effective in communicating his intentions and recommendations to the patient. A caution arises in circumstances in which the Committee is concerned about an aspect of the physician's practice, and believes the physician would benefit from some direction as to how to conduct himself or herself in the future. This disposition is a significant one in the eyes of the College and the profession.

[100] For these reasons, we find that the *Kodama* Tribunal did not unreasonably decide that the substance of K. M.'s human rights complaint had not been dealt with by the ICRC.

Conclusion

[101] For all of these reasons, both applications for judicial review are dismissed. The applicants in both proceedings take the position that because this case was a test case, there should be no order as to costs. According to the *De Lottinville* applicants, if there is an order as to costs, it should be nominal. The respondents, Mr. De Lottinville and K. M., are seeking their costs, each in the amount of $10,000.00. In our view, this request is consistent with what would describe as a "nominal" award for this three-day application. Both respondents were represented by the Human Rights Legal Support Centre, a centre that is partly-funded by the costs awards they receive. While this is not a reason to award costs, it is a reason to reject the submission that the respondents should receive no costs because they were represented by the Centre. Therefore, we are awarding Mr. De Lottinville and K. M. their costs fixed in the amount of $10,000.00 each. The *De Lottinville* applicants shall pay the order with respect to Mr. De Lottinville's costs and Dr. Kodama shall pay the order with respect to K.M.'s costs. No other respondent sought costs.

[102] We are grateful for the assistance that was provided by all counsel who participated in the hearing before us.

H. SACHS J.

HARVISON YOUNG J.

GRAY J.

Released: 20150527

CITATION: Ontario (Community Safety and Correctional Services) v. De Lottinville, 2015 ONSC 3085
DIVISIONAL COURT FILE NO.: 534/13
DATE: 20150527

ONTARIO

SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

H. Sachs, Harvison Young, and Gray JJ.

BETWEEN:

Div. Ct. File No.: 534/13

HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO AS REPRESENTED BY THE MINISTRY OF COMMUNITY SAFETY AND CORRECTIONAL SERVICES (ONTARIO PROVINCIAL POLICE) and PHIL NOWISKI

Applicants

– and –

DEAN De LOTTINVILLE

Respondent

(Application under s. 2(1) of the *Judicial Review Procedure Act*, R.S.O. 1990, c.J.1, as amended)

Div. Court File No.: 242/14

B E T W E E N:

DR. RON KODAMA

Applicant

- and –

K.M.

Respondent

REASONS FOR JUDGMENT

THE COURT

Released: 20150527