Date: 20080212

Dockets: A-112-07
A-113-07
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Citation: 2008 FCA 53

CORAM: **NADON J.A.**
SEXTON J.A.
PELLETIER J.A.

BETWEEN:

HER MAJESTY THE QUEEN

Appellant

and

ALLAN GARBER
GEOFFREY BELCHETZ
LINDA LECKIE MOREL

Respondents

Heard at Toronto, Ontario, on December 10, 2007.

Judgment delivered at Ottawa, Ontario, on February 12, 2008.

REASONS FOR JUDGMENT BY:	SEXTON J.A.
CONCURRED IN BY:	PELLETIER J.A.
CONCURRING REASONS BY:	NADON J.A.

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REASONS FOR JUDGMENT

SEXTON J.A.

INTRODUCTION

[1] These appeals, concerning the invocation of the abuse of process doctrine against individuals litigating a matter for the very first time, involve the sometimes conflicting interests of the finality and authority of judicial decisions and the right to be heard in a proceeding. Ultimately,

it is the integrity of the judicial process which should be the court's fundamental concern and these conflicting interests must be balanced to produce a result conducive to that end.

[2] This is an appeal from the judgment of Justice Bowie (the "Motions Judge") of the Tax Court of Canada in *Morel v. Canada* 2007 TCC 109, in which he determined that it would not be an abuse of process for the taxpayers in this particular tax appeal to assert facts that would, it was speculated, run contrary to a criminal conviction involving third parties.

[3] For the reasons that follow, I would dismiss these appeals.

FACTS

[4] Between November 28, 1984 and January 27, 1986, Overseas Credit Guarantee Corporation ("OCGC"), acting as General Partner, registered 79 partnerships with the Ontario Ministry of Consumer and Commercial Relations in the Province of Ontario as limited Partnerships. In its filings, OCGC represented the purpose of the partnerships to be the carrying on of charter operations of luxury yachts and cruiseships. From 1985 – 1987, OCGC, either directly or indirectly through enterprises, sold 36 limited partnerships to approximately 600 individual investors.

[5] Allan Garber, Geoffrey D. Belchetz, and Linda Leckie Morel (collectively, the "respondents" or "taxpayers") each entered into an arrangement with OCGC in which they acquired 1 unit in one of the limited partnerships.

[6] Each of the respondents made certain deductions from their income arising from their participation as one of the limited partners in their respective limited partnership. The deductions were disallowed by Notices of Reassessment. By Notices of Objection the respondents objected to the reassessments. The Minister confirmed the reassessments. The taxpayers each appealed by Notice of Appeal.

[7] Einar Bellfield, the President, controlling and sole shareholder of OCGC ("Bellfield"), was charged along with two associates of two counts of fraud contrary to section 380(1)(*a*) of the *Criminal Code* R.S.C. 1985, c. C-46, as am. (the "*Criminal Code*") and two counts of uttering forged documents contrary to section 368(1) of the *Criminal Code*. In December of 1999, following a trial comprised of a judge and jury, Bellfield and one of his associates Osvaldo Minchella ("Minchella") were convicted on the charges that, together with OCGC, Neptune Marine Resources S.A. and Starlight Charters S.A, they:

- unlawfully did, by deceit, falsehood or other fraudulent means, defraud the public of tax revenues owing to Her Majesty in right of Canada by making false claims to Revenue Canada in relation to approximately $110,000,000.00 in losses claimed on behalf of thirty-six limited Partnerships, including the limited partnerships in question managed by OCGC;
- unlawfully did, by deceit, falsehood or other fraudulent means, defraud investors in thirty-six limited Partnerships, including the limited partnerships in question managed by OCGC, of cash deposits paid, the value of promissory notes, and interest payments paid in respect of the said promissory notes to the said OCGC in respect of units purchased by investors in each of the said limited Partnerships;

- knowing that documents were forged, unlawfully did cause or attempt to cause Her Majesty in right of Canada to use, deal with, or act on said documents, namely, limited Partnership financial statements, invoices and other documents relating to thirty-six limited Partnerships, including the limited partnerships in question managed by the said OCGC as if they were genuine; and
- knowing that documents were forged, unlawfully did cause or attempt to cause investors in thirty-six limited Partnerships, including the limited partnerships in question to use, deal with, or act on said documents, namely, limited Partnership financial statements and other documentation, as if they were genuine.

[8] Justice Chaplik of the Ontario Superior Court of Justice made a number of findings of fact in her reasons for sentence (*R. v. Bjellebo* [2000] O.J. No. 478 (S.C.J.) (QL)). Those findings will be discussed later.

[9] The convictions and sentences were affirmed by the Ontario Court of Appeal (*R. v. Bjellebo* [2003] O.J. No. 3946 (C.A.) (QL)) and applications for leave to the Supreme Court of Canada were dismissed ([2003] S.C.C.A. No. 541 (Bellfield) and [2004] S.C.C.A. No. 69 (Minchella)).

[10] The respondents were not parties to the criminal proceedings, were not represented by counsel in the criminal proceedings and, although aware of the criminal proceedings, were not given formal notice.

[11] Pursuant to Rule 58(1)(*a*) of the *Tax Court of Canada Rules (General Procedure)*, the Motions Judge was asked to answer the following questions before trial:

1) Where convictions have been entered, does the doctrine of abuse of process prevent the Appellant from alleging that Einar Bellfield and Osvaldo Minchella together with OCGC, Neptune Marine Resources S.A. and Starlight Charters S.A. did not unlawfully, by deceit, falsehood or other fraudulent means, defraud the public of tax revenues owing to Her Majesty in right of Canada by making false claims to Revenue Canada in relation to approximately $100,000,000.00 in losses claimed on behalf of thirty six limited Partnerships, including the S/Y Close Encounters Limited Partnership, managed by the said OCGC?;

2) Where convictions have been entered, does the doctrine of abuse of process prevent the Appellant from alleging that Einar Bellfield, and Osvaldo Minchella together with OCGC, Neptune Marine Resources S.A. and Starlight Charters S.A. did not unlawfully, by deceit, falsehood or other fraudulent means, defraud investors, including Belchetz, in thirty-six limited Partnerships managed by the said OCGC, of cash deposits paid, the value of promissory notes, interest payments paid in respect of the said promissory notes to the said OCGC in respect of units purchased by the investors, including Belchetz, in each of the said limited Partnerships?;

3) Where convictions have been entered, does the doctrine of abuse of process prevent the Appellant from alleging that Einar Bellfield and Osvaldo Minchella together with OCGC, Neptune Marine Resources S.A. and Starlight Charters S.A. did not, knowing that documents were forged, unlawfully cause or attempt to cause Her Majesty n [sic] right of Canada to use, deal with, or act on said documents, namely limited Partnership financial statements, invoices and other documentation relating to thirty-six limited partnerships, including the S/Y Close Encounters Limited Partnership, managed by the said OCGC as if they were genuine?;

4) Where convictions have been entered, does the doctrine of abuse of process prevent the Appellant from alleging that Einar Bellfield and Osvaldo Minchella together with OCGC, Neptune Marine Resources S.A and Starlight Charters S.A. did not, knowing that documents were forged, unlawfully cause or attempt to cause investors including Belchetz, to use, deal with or act on said documents, namely limited Partnership financial statements, invoices and other documentation relating to thirty-six limited partnerships, including the S/Y Close Encounters Limited Partnership, managed by the said OCGC as if they were genuine?;

5) Does the doctrine of abuse of process prevent Belchetz from asserting in this appeal facts contrary to the findings of fact made by the trial judge in the prosecution of Bellfield and Minchella which findings form part of her Reasons for Sentence?;

6) If the answer to any of 1), 2), 3), 4) or 5) is yes, should the appeal be dismissed as an abuse of process?; and

7) If the answer to any of 1), 2), 3), 4) or 5) is yes but the answer to 6) is no, what is the appropriate remedy, if any, respecting the hearing of the appeal?

DECISION BELOW

[12] In the Court below, Bowie J. answered questions one through five in the negative, and thus did not need to answer questions six or seven.

[13] The Motions Judge began by considering the leading cases on abuse of process and issue estoppel, including *Hunter v. Chief Constable of the West Midlands Police* [1982] A.C. 529 (H.L.) ("*Hunter*"), *Danyluk v. Ainsworth Technologies Inc.* [2001] 2 S.C.R. 460 ("*Danyluk*"), and *Toronto (City) v. Canadian Union of Public Employees (C.U.P.E.) local 79* [2003] 3 S.C.R. 77 ("*CUPE*"). After considering these cases, he relied significantly on the following passage written by Justice Arbour in *CUPE* at paragraph 52:

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

[14] Justice Bowie concluded, at paragraph 6 of his decision, that fairness dictated that it would not be an abuse of process for the taxpayers to be allowed to proceed with their appeals:

> In the present case, there is no suggestion before me that the trial of Bellfield and Minchella was in any way tainted. The appellants were not called to give evidence, nor did they have the opportunity to do so had they so wished, but they may do so on their tax appeals before this Court. Most importantly, however, considerations of fairness dictate that the appellants should not be bound in this litigation by the convictions of Bellfield and Minchella. The appellants do not seek to relitigate anything. The validity of the assessments against them has never been litigated, except in these appeals. They did not litigate the guilt or innocence of Bellfield and Minchella, nor could they have done so. They are quite different parties from the accused persons, and their purpose is not to impeach the convictions but simply to be heard in their own income tax appeals. In my view, it would not be fair in this context to deny the appellants the opportunity to be heard as to the issue whether the partnerships in question in these appeals qualify as sources of income for the purpose of section 3 of the *Income Tax Act*, although that is the result that the respondent contends would flow from affirmative answers to the first five questions. [footnote omitted] It is noteworthy in this connection that in those cases where the doctrine of abuse of process has been applied to prevent relitigation, it is invariably the party that lost the first litigation that seeks to gain through the relitigation.

The Motions Judge also found that his conclusion was supported by the right to a hearing under paragraphs 1(*a*) and 2(*e*) of the *Canadian Bill of Rights*, R.S.C. 1985 (Appendix III).

[15] Her Majesty the Queen (the "appellant") has appealed against the three respondents. The three respondents' cases were consolidated by order of Sharlow J.A., with the lead file to be *Queen v. Allan Garber* (A-112-07).

ISSUES

[16] There are two issues in these appeals, namely:

- Did the Motions Judge err in answering the first four questions in the negative?

- Did the Motions Judge err in the exercise of his discretion in deciding that there was no abuse of process to make allegations contrary to the findings of fact during sentencing by Justice Chapnik?

STANDARD OF REVIEW

[17] The determination as to whether the relitigation of issues and material facts constitutes an abuse of process is a discretionary matter (*CUPE* at paragraph 35). When the lower court judge has made a discretionary decision, it will usually be afforded deference by the appellate court. However, the latter will be entitled to substitute the lower court judge's discretion for its own if the appellate court clearly determines that the lower court judge has given insufficient weight to relevant factors or has made an error of law (*Elders Grain Co. v. Ralph Misener (The)*, [2005] 3 F.C. 367 (C.A.) at paragraph 13).

ANALYSIS

The Underlying Context of these Appeals

[18] It is helpful to begin by elucidating the ultimate issues to be resolved between the parties. As stated earlier, the taxpayers hope to deduct expenditures they undertook in the partnerships commenced by OCGC. In order to be deductible, the expenses have to be incurred for the purposes of earning income from a business pursuant to paragraph 18(1)(*a*) of the *Income Tax Act* R.S.C. 1985, c. 1 (5th Supp.) (the "*Act*").

[19] In *Hammill v. The Queen*, 2005 FCA 252, 257 D.L.R. (4th) 1 (leave to appeal to the S.C.C. refused [2005] S.C.C.A. No. 451) ("*Hammill*") the taxpayer wished to deduct expenses paid to an admittedly fraudulent selling agent for the purpose of selling precious gems the taxpayer had accumulated. Despite paying numerous fees to the selling agent, no sales ever ultimately transpired. In that case the Tax Court Judge made a finding of fact that the taxpayer had been the victim of substantial fraud from beginning to end, and that the whole transaction in question was a fraud from its inception. As a result, this Court, per Noel J.A., concluded at paragraphs 27-8:

> This finding by the Tax Court Judge that the appellant was the victim of a fraud from beginning to end, if supported by the evidence, is incompatible with the existence of a business under the Act. […]
>
> A fraudulent scheme from beginning to end or a sting operation, if that be the case, cannot give rise to a source of income from the victim's point of view and hence cannot be considered as a business under any definition.

It should be emphasized that, as opposed to this case, in *Hamill* there had been a clear finding of fact by the Tax Court Judge that there was a fraudulent scheme in place. Given that the finding was made by the Tax Court Judge, and not in another proceeding in which the taxpayers were not present, no issues of fairness arose. No such finding has yet been made in the case of the respondents.

[20] Ultimately the case between the parties will centre on whether or not the investments of the taxpayers into the partnerships can be classified as expenses for the purposes of earning income from a business. Put simply, were they legitimate business expenses? This in turn will demand an examination of whether the partnerships were legitimate businesses, an issue that was to some

extent explored in the criminal proceedings against Bellfield and Minchella. However, as will be explained below, the jury never made an explicit finding on whether there was a legitimate business.

Did the Motions Judge err in answering the first four questions in the negative?

What do the first four questions mean?

[21] There was much argument between the parties regarding what would be the implications of answering any of the first four questions in the affirmative. The reason for such confusion lies in the broadness of the questions. The questions do not simply ask whether it would be an abuse of process for the taxpayers to contest the convictions of Bellfield and Minchella. Rather, to use question one as an example, it asks whether it would be an abuse of process for the taxpayers to "allege that [Bellfield and Minchella] did not unlawfully, by deceit, falsehood, or other fraudulent means, defraud the public of tax revenues owing to Her Majesty in right of Canada by making false claims to Revenue Canada in relation to approximately $100,000,000.00 in losses…". The appellant argues that the questions do not speak simply to challenging the criminal convictions of Bellfield and Minchella but also challenging the fundamental issues and material facts underlying those convictions. I would agree with this characterization. But this simply begs another question: what were the material facts underlying the convictions?

[22] First and foremost, Bellfield and Minchella were convicted by a jury. As the respondents argue in their Memorandum of Fact and Law, "In rendering its verdict, the jury did not express any reasons for judgment, nor did the jury ever inform the court as to which findings of fact it had believed the Crown had proved beyond a reasonable doubt." In addition, the record does not

indicate whether the jury was posed any questions by Justice Chaplik. However, through analysis of the criminal charges, it is possible to discern what was necessary for the jury to find in order to convict Bellfield and Minchella.

[23] Discerning what it was necessary for the jury to find in order to convict the accused is easiest with respect to questions three and four, which refer to the charges of uttering forged documents. The respondent rightfully points out in their Memorandum of Fact and Law that "the Crown was only obliged to have proved beyond a reasonable doubt that the accused uttered **one** or more forged documents in order for the jury to find the accused guilty of the two uttering charges" (emphasis in original). Indeed, Justice Chapnik represented as such in her charge to the jury.

[24] Thus, it is only evident that, with respect to the charges of uttering forged documents, the jury concluded that Bellfield and Minchella uttered at least one false document. However, from the conviction I am unable to discern how many documents were false, nor which documents were false.

[25] The analysis is much more complicated when one looks at the convictions of fraud which are the subject of questions one and two. The criminal offence of fraud was described in Justice Chapnik's charge to the jury as an intentional deception resulting in deprivation or the risk of deprivation or prejudice to another, or a false representation of a fact that is intended to deceive another person, and causes that person deprivation or a risk of deprivation. Based on this definition by Justice Chapnik, it is logical to conclude that the jury found that there was both an intentional

deception, and that there was a deprivation or a risk of deprivation or prejudice to the Crown and to the investors. However, that is the extent to which one can discern a definite conclusion by the jury with respect to the fraud convictions. It is impossible to know what constituted the deception necessary for a conviction of fraud. It is important to note that the Crown alleged six different acts of deceit as outlined in Justice Chapnik's charge to the jury:

> According to the Crown, the overall false representation as to the validity of the limited partnerships is the product of many component acts of deception and misrepresentation. The key ones were as follows:
>
> > 1. That many boats existed or were being built when they were not;
> >
> > 2. That Neptune had millions of dollars when, in fact, it did not;
> >
> > 3. That the soft costs for services were paid to Starlight in the amount of approximately $60 million, when they were not;
> >
> > 4. That the documents created to show the legitimacy of the scheme were valid when, in fact, they were false documents;
> >
> > 5. That Mr. Bellfield did not control Neptune and Starlight when he did, in fact, control these companies;
> >
> > 6. That the investor tax losses were valid when they were not.

[26] While the Crown maintained in the criminal proceedings that the false representation constituted many acts of deception, Justice Chapnik made it clear throughout her charge to the jury that only one act of deceit had to occur in order to convict Bellfield and Minchella:

> The Crown need only prove that the accused told one material lie that put the economic interests of the investors and/or the government at risk. [Emphasis in original.]
>
> […]

> Ask yourselves this question in respect of count 1 and count 2: Did Mr. Bellfield and/or Mr. Minchella knowingly tell one or more falsehoods that they knew could put the economic interest of the investors and/or the public at risk of deprivation? [Emphasis added.]
>
> […]
>
> I will go back over that because you only need one. Did Mr. Bellfield and/or Mr. Minchella knowingly tell one falsehood that they knew could put the economic interest of the investors and/or the public at risk of deprivation? [Emphasis added.]
>
> […]
>
> If, on the totality of the evidence, you are satisfied beyond a reasonable doubt that one or both accused knowingly committed one material or significant act of deception by words or actions which put the investors and/or CCRA at risk of deprivation, then you will find that accused guilty of the fraud offences. [Emphasis added.]

Thus, it is unclear which of the six alleged acts were found to be acts of deceit for the purposes of convicting Bellfield and Minchella of fraud.

[27] It is also impossible to discern the extent of the risk of deprivation to the investors and the Crown. While the charges refer to Minchella and Bellfield "making false claims to Revenue Canada in relation to approximately $110,000,000.00 in losses claimed" it was not necessary for the jury to find that the fraud perpetrated related to that full amount. Indeed, the amounts alleged in a count in an indictment "are not essential elements of the offences charged" (*R. v. Alexander Street Lofts Development Corp.* (2007) 86 O.R. (3d) 710 (C.A.) at 714).

[28] It is also impossible to discern the quality of the deprivation; that is, whether the investors and the Crown actually lost money, were simply prejudiced, or whether there was simply a risk of deprivation. As put in her charge to the jury, Chapnik J. explained:

> The word "deprivation" has a special meaning in criminal law; it means to place the economic interests of another person at risk. Therefore, the victim does not actually have to lose any money, et cetera, as long as there was a risk to his or her economic interests.
>
> […]
>
> [An] example might be as follows – a seller of oil shares induces the purchaser to buy them at market value by falsely representing that the company has recently struck new oil. The victim suffers no economic loss since the shares are worth what he paid for them, but the seller obtained the purchaser's money and induced him to buy something which lacked the quality it was purported to have. Thus, the element of deprivation is satisfied on proof of detriment, prejudice or risk of prejudice to the economic interests of the victim. It is not essential that there be actual economic loss as the outcome of the fraud.

[29] In appealing the conviction and the sentence, Bellfield and Minchella alleged that they had a legitimate business. This was rejected by the Ontario Court of Appeal in *R. v. Bjellebo* [2003] O.J. No. 3946 (QL) at paragraph 12:

> In his oral presentation, Bellfield tried to persuade us that the scheme that gave rise to these charges was a legitimate business arrangement. I am satisfied that Bellfield's position in that regard was fully and fairly put to the jury. The jury did not accept his explanation and he has failed to persuade us that there is any basis for us to interfere with the jury's verdict.

However, this conclusion does not necessarily preclude the taxpayers from alleging that the partnerships had legitimate business expenses. Neither the Ontario Court of Appeal nor the jury could have been directing themselves to the taxpayers' argument. Indeed, in her reasons for sentence Chapnik J. did find that two of the ships actually ended up being built through investor funds (*R. v. Bjellebo* [2002] O.J. No. 478 (S.C.J.) (QL) at paragraph 34). Without commenting on the merits of the taxpayers' case, there might arguably have been some sort of business.

[30] From the foregoing analysis, it is clear that the jury's convictions leave numerous questions to be answered. It is impossible to know the extent to which the taxpayers would be arguing facts inconsistent with the criminal convictions, even if the entire case of the taxpayers was before the Court. This is due to the broad nature of the criminal acts of fraud and uttering forged documents, as well as the fact that Bellfield and Minchella were convicted by a jury.

[31] The appellant will argue, and indeed, has argued before Bowie J., that answering any of the first four questions in the affirmative will preclude the taxpayers from making any allegation that their expenses were legitimate business expenses. There is a possibility that the taxpayers may allege facts that would run contrary to the convictions of Bellfield and Minchella, but it is impossible to conclude that it would be an inevitability.

[32] The difficulties in discerning the implications of answering questions one through four in the affirmative point to the vagueness of the questions and the difficulties in answering them in the abstract. It is difficult to answer them because of the problem in ascertaining what is a fundamental issue or material fact underlying the convictions of Bellfield and Minchella. Such difficulties, as will be explained below, constitute a factor militating against invoking the abuse of process doctrine in this instance.

The Doctrine of Abuse of Process by Relitigation

[33] The law with respect to the abuse of process by relitigation was recently clarified by the Supreme Court of Canada in the companion cases of *CUPE*, *supra*, and *Ontario v. Ontario Public*

Service Employees Union (O.P.S.E.U.) 2003 SCC 64 , [2003] 3 S.C.R. 149 ("*OPSEU*"). Both of these cases concerned individuals who were convicted of sexual assault upon persons under their care, and who were then fired from their employment on the basis of the convictions. Both of the defendants wished to contest their dismissal by alleging that they did not commit the assaults, running contrary to the criminal convictions.

[34] In *CUPE*, Justice Arbour elucidated the principles underlying the doctrine of abuse of process by relitigation. Admittedly, the case of *CUPE* did not concern individuals who were strangers to the original proceedings. Thus, the reasoning of Justice Arbour did not contemplate a situation such as the one before this Court; this is clear in numerous statements in that case. Nevertheless, the principles ascertainable from the thorough reasons in *CUPE* can, in my opinion, still be applied to the context at bar. It should be pointed out that at paragraph 19 of the decision, Justice Arbour stated *in obiter*, "There are circumstances in which evidence will be admissible to rebut the presumption that the person convicted committed the crime, in particular where the conviction in issue is that of a non-party." Contrary to the concurring reasons of Justice Nadon, *infra*, I do not think that paragraph 19 of the *CUPE* decision necessarily precludes the application of the abuse of process doctrine to non-parties.

[35] The doctrine of abuse of process is a flexible one whose origins are derived from the inherent jurisdiction of the court to control its own process and ensure the integrity of the justice system. Justice Arbour explained at paragraphs 37-8:

> In the context that interests us here, the doctrine of abuse of process engages "the inherent power of the court to prevent the misuse of its procedure, in a way that would . . . bring the

administration of justice into disrepute" (*Canam Enterprises Inc. v. Coles* (2000), 51 O.R. (3d) 481 (C.A.), at para. 55, *per* Goudge J.A., dissenting (approved [2002] 3 S.C.R. 307, 2002 SCC 63)). Goudge J.A. expanded on that concept in the following terms at paras. 55-56:

> The doctrine of abuse of process engages the inherent power of the court to prevent the misuse of its procedure, in a way that would be manifestly unfair to a party to the litigation before it or would in some other way bring the administration of justice into disrepute. It is a flexible doctrine unencumbered by the specific requirements of concepts such as issue estoppel. See *House of Spring Gardens Ltd. v. Waite*, [1990] 3 W.L.R. 347 at p. 358, [1990] 2 All E.R. 990 (C.A.).
>
> One circumstance in which abuse of process has been applied is where the litigation before the court is found to be in essence an attempt to relitigate a claim which the court has already determined. [Emphasis added.]

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

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

> The two policy grounds, namely, that there be an end to litigation and that no one should be twice vexed by the same cause, have been cited as policies in the application of abuse of process by relitigation. Other policy grounds have also been cited, namely, to preserve the courts' and the litigants' resources, to uphold the integrity of the legal

> system in order to avoid inconsistent results, and to protect the principle of finality so crucial to the proper administration of justice.

[36] While the policy grounds supporting abuse of process by relitigation and issue estoppel can be similar, Justice Arbour has emphasized that the main focus of the abuse of process doctrine is to preserve the integrity of the legal system in order to avoid inconsistent results. In *CUPE* she stated, at paragraph 43, that "In all of its applications, the primary focus of the doctrine of abuse of process is the integrity of the adjudicative functions of courts." She later added at paragraph 44:

> The adjudicative process, and the importance of preserving its integrity, were well described by Doherty J.A. He said, at para. 74:
>
> > The adjudicative process in its various manifestations strives to do justice. By the adjudicative process, I mean the various courts and tribunals to which individuals must resort to settle legal disputes. Where the same issues arise in various forums, the quality of justice delivered by the adjudicative process is measured not by reference to the isolated result in each forum, but by the end result produced by the various processes that address the issue. By justice, I refer to procedural fairness, the achieving of the correct result in individual cases and the broader perception that the process as a whole achieves results which are consistent, fair and accurate.

[37] In this sense, Justice Arbour has explained that this focus in the abuse of process doctrine can be distinguished from issue estoppel, which is more concerned with the principle that no one should be twice vexed by the same cause. She stated at paragraph 12 of *OPSEU*, *supra*:

> Although both doctrines promote the better administration of justice, issue estoppel is a more appropriate doctrine to use when the focus is primarily on the interests of litigants. Abuse of process, on the other hand, transcends the interests of litigants and focuses on the integrity of the entire system.

[38] Indeed, when Justice Arbour applied the doctrine of abuse of process to the facts on appeal, it is clear that she was mostly concerned with maintaining the integrity of the judicial system, especially with respect to the prospect of conflicting decisions bringing the administration of justice into disrepute. She stated at paragraph 57:

> As a result of the conflicting decisions, the City of Toronto would find itself in the inevitable position of having a convicted sex offender reinstated to an employment position where he would work with the very vulnerable young people he was convicted of assaulting. An educated and reasonable public would presumably have to assess the likely correctness of one or the other of the adjudicative findings regarding the guilt of the convicted grievor. The authority and finality of judicial decisions are designed precisely to eliminate the need for such an exercise. [Emphasis added.]

[39] In terms of how to exercise one's discretion in applying the abuse of process doctrine, Justice Arbour provided a number of considerations in deciding when it would not be an abuse of process to relitigate a matter in *CUPE* at paragraphs 51-2:

> Rather than focus on the motive or status of the parties, the doctrine of abuse of process concentrates on the integrity of the adjudicative process. Three preliminary observations are useful in that respect. First, there can be no assumption that relitigation will yield a more accurate result than the original proceeding. Second, if the same result is reached in the subsequent proceeding, the relitigation will prove to have been a waste of judicial resources as well as an unnecessary expense for the parties and possibly an additional hardship for some witnesses. Finally, if the result in the subsequent proceeding is different from the conclusion reached in the first on the very same issue, the inconsistency, in and of itself, will undermine the credibility of the entire judicial process, thereby diminishing its authority, its credibility and its aim of finality.
>
> In contrast, proper review by way of appeal increases confidence in the ultimate result and affirms both the authority of the process as well as the finality of the result. It is therefore apparent that from the system's point of view, relitigation carries serious detrimental effects and should be avoided unless the circumstances dictate that relitigation is in fact necessary to enhance the credibility and the effectiveness of the adjudicative process as a whole. There may be instances where relitigation will enhance, rather than impeach, the integrity of the judicial system, for example: (1) when the first proceeding is tainted by fraud or dishonesty; (2) when fresh, new evidence, previously unavailable, conclusively impeaches the original results; or (3) when fairness dictates that the original result should not be binding in the new context. This was stated unequivocally by this Court in *Danyluk*, *supra*, at para. 80.

[40] It ought to be emphasized that Justice Arbour in *CUPE* explicitly makes reference to the comments of Justice Binnie in *Danyluk*, *supra*, to inform the considerations of "fairness" when deciding whether or not to invoke the abuse of process doctrine. Justice Binnie, writing for the Court with respect to issue estoppel, made it abundantly clear that considerations of fairness include the right to be heard. He stated, at paragraph 80:

> As a final and most important factor, the Court should stand back and, taking into account the entirety of the circumstances, consider whether application of issue estoppel in the particular case would work an injustice. Rosenberg J.A. concluded that the appellant had received neither notice of the respondent's allegation nor an opportunity to respond. He was thus confronted with the problem identified by Jackson J.A., dissenting, in *Iron v. Saskatchewan (Minister of the Environment & Public Safety)*, [1993] 6 W.W.R. 1 (Sask. C.A.), at p. 21: [Emphasis added.]
>
> > The doctrine of res judicata, being a means of doing justice between the parties in the context of the adversarial system, carries within its tenets the seeds of injustice, particularly in relation to issues of allowing parties to be heard. [Emphasis added.]
>
> Whatever the appellant's various procedural mistakes in this case, the stubborn fact remains that her claim to commissions worth $300,000 has simply never been properly considered and adjudicated.

[41] The final relevant factor to consider in analyzing the abuse of process doctrine for the purposes of these appeals is the gravity of casting doubt over the validity of a criminal conviction. Doing so has been deemed by the Supreme Court of Canada to be "a very serious matter" (*CUPE*, *supra*, at paragraph 54).

Application of the abuse of process doctrine to the facts

[42] First and foremost, the application of the abuse of process doctrine involves a balancing exercise. As explained by Justice Arbour in *CUPE* at paragraph 15:

> Properly understood and applied, the doctrines of *res judicata* and abuse of process govern the interplay between different judicial decision makers. These rules and principles call for a judicial balance between finality, fairness, efficiency and authority of judicial decisions. [Emphasis added.]

[43] Justice Bowie applied one of the instances Justice Arbour envisioned where it may not be appropriate for the abuse of process doctrine to be invoked, namely "when fairness dictates that the original result should not be binding in the new context" (*CUPE* at paragraph 52). He found that, given that the assessments had never been litigated, and given that the taxpayers did not litigate the guilt or innocence of Bellfield and Minchella, it would not be fair to deny the taxpayers the opportunity to be heard with respect to whether the partnerships qualified as sources of legitimate business income.

[44] The Motions Judge explicitly balanced the two relevant factors in these appeals – the right to be heard and the gravity of casting doubt on a criminal conviction – at paragraph 8 of his decision: "In my view, this is a case in which the *quasi* constitutional rights of the appellants to a fair hearing must take precedence over finality and the potential for conflicting results."

[45] The appellant argues that the Motions Judge erred by placing emphasis upon the interests of the taxpayers, instead of the judicial system. It is necessary to point out, however, that when it comes to the right to be heard, the interests of the taxpayers and the integrity of the judicial system are not mutually exclusive. That litigants have the opportunity to make their case in court for the first time is an interest that ought to be maintained in any judicial system. The right to be heard – the *audi alteram partem* rule – is a principle of natural justice. The right to be heard is also a quasi-constitutional right under federal law (paragraphs 1(*a*) and 2(*e*) of the *Canadian Bill of Rights*, R.S.C. 1985 (Appendix III). Indeed, I agree with Justice Bowie when he stated in his decision, at paragraph 7, "…the credibility of the system would not be enhanced by denying these appellants the right to call evidence in respect of the core issue in their appeals." Justice Bowie was correct to consider the right to be heard: *Danyluk*, *supra*, at paragraph 80. This is especially acute when the doctrine of abuse of process by relitigation is pleaded against a litigant not party to the original proceeding. In this circumstance the right to be heard is a factor strongly militating against invoking the doctrine.

[46] Of course, it is impossible to tell whether answering questions one through four in the affirmative will deny the taxpayers' ability to call evidence. However, to this same end, it will be difficult to know the extent to which the taxpayers' evidence or argument may go against facts allegedly found by the jury in the criminal convictions of Bellfield and Minchella. Ultimately, I am also not convinced that the appellant has demonstrated that the administration of justice would be placed into disrepute. While I fully recognize that to render a judicial decision which purports to upset the clear and crucial findings of a criminal conviction may seriously bring the administration

of justice into disrepute, it is unclear that that would occur in this instance. It is important to juxtapose the situation in this instance with the facts in *CUPE*, *supra* and *OPSEU*, *supra*. In those cases, the parties had been convicted of sexual assault, and in order to grieve their dismissals, their unions, on their behalf, had to argue that they did not commit those sexual assaults. Such facts would unambiguously bring into question the integrity of the justice system. As stated by Doherty J.A. in *Toronto (City) v. Canadian Union of Public Employees, Local 79* (2001), 55 O.R. (3d) 541, 205 D.L.R. (4th) 280 (C.A.) at paragraph 84 (and cited with approval by Justice Arbour in *CUPE* at paragraph 56):

> The reasonable observer would wonder how Oliver could be found guilty beyond a reasonable doubt in one proceeding and after the Court of Appeal had affirmed that finding, be found in a separate proceeding not to have committed the very same assault. That reasonable observer would also not understand how Oliver could be found to be properly convicted of sexually assaulting the complainant and deserving of 15 months in jail and yet also be found in a separate proceeding not to have committed that sexual assault and to be deserving of reinstatement in a job which would place young persons like the complainant under his charge.

[47] In the present case, it might be possible that a reasonable observer would not have trouble reconciling a decision rendered in the taxpayers' favour with the criminal convictions. This is the case for two reasons. Firstly, it must be recalled that this is a case involving jury convictions. As stated earlier, it is impossible to discern what precisely the jury concluded. Secondly, unlike the situation in *CUPE*, *supra*, and *OPSEU*, *supra*, the relationship between the convictions of Bellfield and Minchella and what the taxpayers need to prove to win their appeal is much more tangential. Bellfield and Minchella were convicted of fraud and uttering forged documents, whereas the taxpayers are claiming that they simply had legitimate business expenses. While there is some

overlap between the two proceedings in terms of the type of evidence presented, it is impossible to know whether the taxpayers' case will explicitly contradict the findings by the jury. To use the language of Doherty J.A., I cannot be certain that a reasonably educated person would have difficulty reconciling the conviction of Minchella and Bellfield with a successful taxpayer appeal by the respondents.

[48] Once again, the broadness of questions one through four needs to be emphasized. The Motions Judge was not asked, "Would it be an abuse of process for the taxpayers to say that Bellfield and Minchella were wrongfully convicted?" Rather, he was faced with a question as to whether the taxpayers could allege evidence and/or argument contrary to the fundamental issues and/or material facts underlying the criminal convictions. Based on this, Justice Bowie made no discernable error in declining to exercise his discretion in answering questions one through four in the negative.

Did the Motions Judge err in the exercise of his discretion in deciding that there was no abuse of process to make allegations contrary to the findings of fact during sentencing by Justice Chapnik?

[49] I begin my analysis on this issue by noting that the Motions Judge did not engage in separate analysis for question five. In my opinion, this question warrants separate attention. Nevertheless, for the reasons that follow, Justice Bowie did not commit a discernable error in law or principle in exercising his discretion to come to the same result.

[50] As opposed to the convictions by jury, it is more likely that any argument made by the taxpayers would contradict by the findings of fact by Justice Chapnik in her reasons for sentence. Some of her findings (*R. v. Bjellebo* [2000] O.J. No. 478 (S.C.J.) (QL)) included:

> In terms of gravity, this was a substantial fraud of massive proportion and international in scope. It involved layers of deceit and subterfuge… [at paragraph 18]
>
> As the general partner for each limited partnership, OCGC undertook to loan funds to the investors for the purchase of the units in return for interest bearing promissory notes. In reality, there were no loans secured and no funds available to OCGC other than the cash deposits and interest payments of the investors. [at paragraph 19]
>
> The principals had no honest intention to spend investor monies for a legitimate business purpose. [at paragraph 20]
>
> The magnitude of the fraudulent scheme was, by all accounts, enormous. [at paragraph 21]

[51] As in questions one through four, the two factors to balance are the right to be heard and the finality and authority of judicial decisions. My analysis with respect to the taxpayers' right to be heard and its crucial impact on the abuse of process doctrine remains the same here as it was for questions one through four.

[52] Where my analysis differs from the first four questions is with respect to the finality and authority of judicial decisions. There are two concerns here not applicable to the first four questions, but they ultimately cancel each other out. On the one hand, the reasonably educated person may have great difficulty reconciling the conclusions of Justice Chapnik with a successful appeal by the taxpayers. On the other hand, however, it is not as serious to contradict a finding of fact in the reasons given for sentencing as it would be to contradict a criminal conviction. I would note here that no authority has been brought to my attention where the reasons for sentence in one case have

been used to invoke the doctrine of abuse of process in a different case. Indeed, the appellant was unable to show any instance where the findings of fact in a reasons for sentence have been used as evidence in a subsequent proceeding.

[53] Thus, the Motions Judge made no error of law or principle in exercising his discretion to answer question five in the negative. Any possibility of the administration of justice being brought into disrepute was heavily outweighed by the right of the respondents to be heard.

[54] Since these appeals were heard, counsel for the appellant has brought this Court's attention to the decision of *Polgrain, as Executor on Behalf of the Estate of Polgrain v. The Toronto East General Hospital et al.* (2007) 87 O.R. (3d) 55 (S.C.J.) ("*Polgrain*"). In that case, the estate of Mrs. Polgrain had sued a hospital for a number of sexual assaults alleged to have taken place. In an earlier criminal proceeding relating to the same incidents, not only was the nurse in question acquitted, but the trial judge in his reasons for acquittal also found that no assaults took place at all. The hospital's motion to dismiss the action on the grounds of abuse of process was allowed. In my opinion, the reasons in *Polgrain* are not wholly apposite to the facts in these appeals for two reasons. Firstly, just as in *CUPE* and *OPSEU*, the questions in the criminal and the civil proceedings were identical, which cannot be said in these appeals. Secondly, despite a thorough review of Justice Arbour's reasons in *CUPE*, absent in the analysis in *Polgrain* was a consideration of the factors when relitigation would enhance the integrity of the justice system, especially where fairness dictates that the original result should not be binding in the new context: *CUPE* at paragraph 52. It appears from the reasons that counsel for the hospital never raised this argument in their

submissions, which explains its absence in *Polgrain*. While the assistance of counsel in drawing the Court's attention to this case is appreciated, it does not detract from my conclusion that the Motions Judge did not err in declining to invoke the abuse of process doctrine.

ADDITIONAL REMARKS

[55] I have read a draft of the concurring reasons of Justice Nadon, who concludes that the abuse of process can never apply against a litigant who was not a party to the original proceeding, nor a privy to a party to those proceedings. For the reasons that follow, I do not agree that it would be appropriate to apply this bright line test so as to limit the abuse of process doctrine in such a way. Leaving the difficulty in defining a privy aside, the problem with this bright line test is that it is not possible to foresee all potential fact situations. It would be unwise for this Court to lay down such a rule, only to have to revoke or revise it because of an unforeseen situation. The balancing test as outlined by Justice Arbour is sufficiently flexible to accommodate changing situations by keeping the focus of the analysis on the integrity of the judicial system.

[56] I would like to provide an illustrative example to demonstrate why it is unwise to completely exclude the abuse of process doctrine against non-parties. Insurance policies on houses often provide that the insurer will not cover any damages arising out of an act intended by any covered person to intentionally cause property damage. Suppose that the covered persons in such a case are a husband and a wife who own a house in joint tenancy, and are the named persons under the policy. Now imagine that the house is deliberately burned down by the husband, and he is, in turn, convicted of arson. The wife wishes to collect on the policy, but, according to the terms of the

policy, she must contest that the husband did not intentionally burn down the house. Should the abuse of process doctrine preclude the wife from arguing that her husband did not deliberately burn down the house?

[57] It is not my intention to go so far as to answer this particular question. Rather, I would like to simply consider what the preferable approach in such a case would be. Would it be better to apply the bright line approach and without more find that because the wife was not a party in the criminal trial that she can therefore proceed with the litigation, or would it be better to balance the wife's right to be heard against the gravity of casting doubt on her husband's criminal conviction?

[58] The difference between the two approaches is that the test I propose relies explicitly on *CUPE, supra,* and has the end goal of the integrity of the justice system in mind. In my view this is preferable to the technical bright line approach which does not take into account the sometimes competing factors of the right to be heard and the authority of judicial decisions, and in the end focuses on the integrity of the judicial system.

[59] As a final note, the doctrine abuse of process retains its broad scope in order for courts to ensure that the court's process is not abused to the point of bringing the administration of justice into disrepute. For instance, the doctrine can be invoked by way of an unreasonable delay causing serious prejudice: see *Blencoe v. British Columbia (Human Rights Commission),* 2000 SCC 24. In the criminal context, it can be invoked to disentitle the Crown to carry on with the prosecution of a charge where the accused has been treated unfairly or oppressively (see *R. v. Conway,* [1989] 1

S.C.R. 1659 at 1667). It remains a possibility, in my opinion, that a litigant not party to an original proceeding could act contrary to the interests of justice by contesting the findings of that proceeding. It would not be inappropriate, therefore, for the abuse of process doctrine to be considered in factual situations like the case at bar.

[60] In addition, I fail to see why we should close the door to the remedy in this instance, especially where it is unnecessary to do so to resolve these appeals. As was stated by Lord Diplock in *Hunter*, *supra*, at page 536:

> My Lords, this is a case about abuse of process of the High Court. It concerns the inherent power which any court of justice must possess to prevent misuse of its procedure in a way which, although not inconsistent with the literal application of its procedural rules, would nevertheless be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute among right-thinking people. The circumstances in which abuse of process can arise are very varied; those which give rise to the instant appeal must surely be unique. It would, in my view, be most unwise if this House were to use this occasion to say anything that might be taken as limiting to fixed categories the kinds of circumstances in which the court has a duty (I disavow the word discretion) to exercise this salutary power. [Emphasis added.]

Those words remain as true today as they were over twenty-five years ago. Now is not the time to decide that there can never be an instance where it might be an abuse of the court's process for a litigant to challenge the holding of another court where they were not a party to the original proceeding.

[61] The appropriate resolution, in my opinion, is to rely on the principles articulated by Justice Arbour in *CUPE*, *supra*. That ensures that the integrity of the justice system is maintained.

CONCLUSION

[62] Justice Bowie made no discernable error of law or principle in answering questions one through five in the negative. Given the disposition of those questions, it is not necessary to answer questions six or seven.

[63] These appeals will be dismissed with costs. A copy of this decision will be placed in each file, and file A-112-07 will retain the original.

"J. Edgar Sexton"
J.A.

"I agree
J.D. Denis Pelletier J.A."

NADON J.A. (CONCURRING)

[64] Although I agree with Sexton J.A. that the appeals must fail, I come to that conclusion for different reasons. More particularly, I take a different view with respect to the applicability of the doctrine of abuse of process.

[65] I need not repeat the facts, which have been carefully reviewed by my colleague in his Reasons.

[66] The proposition put forward by the appellant in the appeals is a startling one. As I understand it, the appellant says that notwithstanding that the respondents were not parties to the criminal proceedings which led to the convictions of Einer Bellfield and Osvaldo Minchella for fraud, contrary to paragraph 380(1)(a) of the *Criminal Code*, R.S.C. 1985, c. C-46, and hence that they did not litigate any of the issues raised in those proceedings, the doctrine of abuse of process prevents them from litigating before the Tax Court the said convictions and the material facts underlying them.

[67] The appellant's position is clearly set out at paragraphs 31 to 35 of its Memorandum of Fact and Law:

> - The doctrine of abuse of process precludes a party from relitigating issues that have been fully determined in a proceeding, especially a criminal proceeding. By their appeals, the Taxpayers seek to maintain the losses they claim in respect of the "partnerships" despite the findings of the criminal court that the principals of OCGC had no honest intention to spend investor monies for a legitimate business purpose, that the partnership financial statements were false, and that the limited partners, including these Taxpayers, were defrauded as a result of their 'investment' in limited "partnerships". As a result of the Order of the Motions Judge, the Taxpayers are free to challenge the criminal convictions

of Bellfield and Minchella and the fundamental issues and material facts underlying those convictions, admittedly in support of the Taxpayers' claim for tax relief.

- The Motions Judge cited "considerations of fairness", including the fact that the Taxpayers were not parties to the prosecution of Bellfield and Minchella and that the validity of their assessments had never been litigated. The Motions Judge therefore concluded, in error, that the Taxpayers "did not seek to religitate anything".

- The Crown submits that the Motions Judge failed to appreciate the scope and purpose of the abuse of process doctrine, and consequently failed to properly apply it in answering the questions of law put before him in the circumstances described in the Agreed Statement of Fact.

- In particular, the Motions Judge erred when considering the abuse of process doctrine
  i. placing emphasis upon the interests of the Taxpayers, rather than the judicial system;
  ii. failing to consider whether the Taxpayers could provide "fresh new evidence, previously unavailable, that conclusively impeaches the original result";
  iii. concluding that the Taxpayers do "not seek to religitate anything", which by his order, allowing them to bring before a new court the identical issues of whether the "partnership" documents were genuine, whether the promoters ever intended to carry out a legitimate business, and whether they were defrauded, which issues were conclusively determined by the convictions and reasons for sentencing of Bellfield and Minchella.

- The integrity of the criminal justice system may be undermined unless the abuse of process doctrine is applied to prevent the Taxpayers from relitigating the material facts and issues already determined by the criminal courts.

[68] In making this proposition, the appellant relies, *inter alia*, on the Supreme Court of Canada's decision in *Toronto (City) v. CUPE Local 79*, [2003] 3 S.C.R. 77.

[69] The position asserted by the appellant found its way before the Tax Court by way of seven questions (reproduced at paragraph 11 of Sexton J.A.'s Reasons) put to the Judge for determination.

The Judge gave negative answers to questions 1 to 5 and, as a result, he made no determination with respect to questions 6 and 7.

[70] At paragraph 34 of its Memorandum of Fact and Law, the appellant criticizes the Judge for, *inter alia*, placing greater weight on the interests of the respondents rather than on the integrity of the judicial system. That criticism is followed by a statement, at paragraph 35 of the Memorandum, that the integrity of the criminal justice system will be undermined unless the respondents are prevented from litigating the issues and the material facts underlying those issues already determined by the criminal court.

[71] In concluding that in answering questions 1 to 5 in the negative, the Judge made no error of law or principle in the exercise of his discretion, Sexton J.A. conducts the balancing exercise required by the Supreme Court in *CUPE*, above, and in particular, at paragraph 15 thereof, where Arbour J. states:

> Properly understood and applied, the doctrines of *res judicata* and abuse of process govern the interplay between different judicial decision makers. These rules and principles call for a judicial balance between finality, fairness, efficiency and authority of judicial decisions.

[72] Sexton J.A. conducts separate balancing exercises with respect to questions 1 to 4 and with respect to question 5. At paragraphs 46 and 47 of his Reasons, he deals with questions 1 to 4 in the following terms:

> 46. Of course, it is impossible to tell whether answering questions one through four in the affirmative will deny the taxpayers' ability to call evidence. However, to this same end, it will be difficult to know the extent to which the taxpayers' evidence or argument may go against facts allegedly found by the jury in the criminal

convictions of Bellfield and Minchella. Ultimately, I am also not convinced that the appellant has demonstrated that the administration of justice would be placed into disrepute. While I fully recognize that to render a judicial decision which purports to upset the clear and crucial findings of a criminal conviction may seriously bring the administration of justice into disrepute, it is unclear that that would occur in this instance. It is important to juxtapose the situation in this instance with the facts in *CUPE, supra* and *OPSEU, supra*. In those cases, the parties had been convicted of sexual assault, and in order to grieve their dismissals, their unions, on their behalf, had to argue that they did not commit those sexual assaults. Such facts would unambiguously bring into question the integrity of the justice system. …

47. In the present case, it might be possible that a reasonable observer would not have trouble reconciling a decision rendered in the taxpayers' favour with the criminal convictions. This is the case for two reasons. Firstly, it must be recalled that this is a case involving jury convictions. As stated earlier, it is impossible to discern what precisely the jury concluded. Secondly, unlike the situation in *CUPE, supra*, and *OPSEU, supra*, the relationship between the convictions of Bellfield and Minchella and what the taxpayers need to prove to win their appeal is much more tangential. Bellfield and Minchella were convicted of fraud and uttering forged documents, whereas the taxpayers are claiming that they simply had legitimate business expenses. While there is some overlap between the two proceedings in terms of the type of evidence presented, it is impossible to know whether the taxpayers' case will explicitly contradict the findings by the jury. To use the language of Doherty J.A., I cannot be certain that a reasonably educated person would have difficulty reconciling the conviction of Minchella and Bellfield with a successful taxpayer appeal by the respondents.

[Emphasis added]

[73] With respect to question 5, he makes the following remarks at paragraphs 51 and 52:

[51] As in questions one through four, the two factors to balance are the right to be heard and the finality and authority of judicial decisions. My analysis with respect to the taxpayers' right to be heard and its crucial impact on the abuse of process doctrine remains the same here as it was for questions one through four.

[52] Where my analysis differs from the first four questions is with respect to the integrity of the judicial system. There are two concerns here not applicable to the first four questions, but they ultimately cancel each other out. On the one hand, the reasonably educated person may have great difficulty reconciling the conclusions of Chapnik J.with a successful appeal by the taxpayers. On the other hand, however, it is not as serious to contradict a finding of fact in the reasons given for sentencing as it would be to contradict a criminal conviction. I would note here that no authority has been brought to my attention

> where the reasons for sentence in one case have been used to invoke the doctrine of abuse of process in a different case. Indeed, the appellant was unable to show any instance where the findings of fact in a reasons for sentence have been used as evidence in a subsequent proceeding.
>
> [Emphasis added]

[74] Thus, because he is of the view that the doctrine of abuse of process can, in principle, find application herein, Sexton J.A conducts the balancing exercise which the Supreme Court sets out in *CUPE*, above. Contrary to that view, I am of the opinion that in the circumstances of this case, the doctrine of abuse of process is simply not "in play" and, thus, no balancing exercise is required. My reasons for this view are as follows.

[75] I begin with a discussion of the Supreme Court's decision in *CUPE*, above. There, the issue was whether a labour arbitrator could, in the context of a grievance, reconsider the guilt of a person convicted of sexual assault who, as a result, was dismissed from his employment. In concluding that the person's guilt could not be relitigated, the Supreme Court applied the doctrine of abuse of process because the employee, who had been found guilty of sexually assaulting a boy under his supervision, was attempting to adduce before the arbitrator evidence proving his innocence with respect to the charges for which he had been convicted and sentenced to 15 months in prison.

[76] It is in that particular context that the words of Arbour J., on which my colleague relies (see paragraphs 12, 15, 37, 38, 44, 51, 52 and 57 of Arbour J.'s Reasons in *CUPE*, above), must be understood and, in particular, when she says at paragraph 51 of her Reasons, that "[r]ather than

focus on the motive or status of the parties, the doctrine of abuse of process concentrates on the integrity of the adjudicative process".

[77] There can be no doubt that Arbour J. concluded as she did in *CUPE*, above, because the person found guilty following a criminal trial was attempting, albeit in the context of grievance proceedings, to again assert his innocence. In that light, her words at paragraph 54 are particularly apposite:

> [54] These considerations are particularly apposite when the attempt is to relitigate a criminal conviction. Casting doubt over a criminal conviction is a very serious matter. Inevitably in a case such as this one, the conclusion of the arbitrator has precisely that effect, whether this was intended or not. The administration of justice must equip itself with all legitimate means to prevent wrongful convictions and to address any real possibility of such an occurrence after the fact. Collateral attacks and relitigation, however, are not in my view appropriate methods of redress since they inordinately tax the adjudicative process while doing nothing to ensure a more trustworthy result.
>
> [Emphasis added]

[78] Arbour J.'s remarks do not, in any way, support the view that a criminal conviction cannot be challenged in subsequent proceedings, either civil or criminal, by a person who was not a party to the criminal proceedings, or privy to a party to those proceedings. Paragraphs 17 to 19 of her Reasons in *CUPE*, above, make this abundantly clear. In discussing the effects of section 22.1 of the *Ontario Evidence Act*, R.S.O. 1990, c. E.23, which provided that proof of a person's conviction for a crime was proof "in the absence of evidence to the contrary" that the crime was committed by the person, Arbour J. pointed out that although the section contemplated that the validity of a conviction could be challenged in other proceedings, it was silent as to the circumstances in which such a challenge could be made. She then made the following remarks at paragraph 19 of her Reasons:

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

[79] In the above passage, Arbour J. distinguishes between those circumstances in which it will be open to a party to rebut the presumption of guilt and those circumstances in which that avenue will be closed. With regard to the former, Arbour J. says in no uncertain terms that the conviction of a non-party [i.e. Bellfield and Minchella] can be challenged in subsequent proceedings. It is only in regard to the latter that Arbour J. opines that the doctrine of abuse of process may be applied to bar a party from challenging a criminal conviction.

[80] She completes her remarks on this issue by saying, at paragraphs 45 and 46:

> 45 When asked to decide whether a criminal conviction, prima facie admissible in a proceeding under s. 22.1 of the *Ontario Evidence Act*, ought to be rebutted or taken as conclusive, courts will turn to the doctrine of abuse of process to ascertain whether relitigation would be detrimental to the adjudicative process as defined above. When the focus is thus properly on the integrity of the adjudicative process, the motive of the party who seeks to relitigate, or whether he or she wishes to do so as a defendant rather than as a plaintiff, cannot be decisive factors in the application of the bar against relitigation.
>
> 46. Thus, in the case at bar, it matters little whether Oliver's motive for relitigation was primarily to secure re-employment, rather than to challenge his criminal conviction in an attempt to undermine its validity. Reliance on *Hunter*, *supra*, and on *Demeter* (H.C.), *supra*, for the purpose of enhancing the importance of motive is misplaced. It is true that in both cases the parties wishing to relitigate had made it clear that they were seeking to impeach their earlier convictions. But this is of little significance in the application of the doctrine of abuse of process. A desire to attack a judicial finding is not in itself an improper purpose. The law permits that objective to be pursued through various reviewing mechanisms such as

> appeals or judicial review. Indeed reviewability is an important aspect of finality. A decision is final and binding on the parties only when all available reviews have been exhausted or abandoned. What is improper is to attempt to impeach a judicial finding by the impermissible route of relitigation in a different forum. Therefore, motive is of little or no import.
>
> [Emphasis added]

[81] The doctrine of abuse of process has also received considerable attention in England. In *Johnson (AP) v. Gore Wood and Co (A Firm)*, [2001] 2 W.L.R. 72, Lord Bingham of Cornhill, explained the doctrine of abuse of process in terms very similar to those used by the Supreme Court in *CUPE*, above:

> It may very well be, as has been convincingly argued (Watt, "The Danger and Deceit of the Rule in *Henderson v. Henderson*: A new approach to successive civil actions arising from the same factual matter", 19 Civil Justice Quarterly, July 200, page 287), that what is now taken to be the rule in *Henderson v. Henderson* has diverged from the ruling which Wigram V-C made, which was addressed to *res judicata*. But *Henderson v. Henderson* abuse of process, as now understood, although separate and distinct from cause of action estoppel and issue estoppel, has much in common with them. The underlying public interest is the same, that there should be finality in litigation and that a party should not be twice vexed in the same matter. This public interest is reinforced by the current emphasis on efficiency and economy in the conduct of litigation, in the interests of the parties and the public as a whole. The bringing of a claim or the raising of a defence in later proceedings may, without more, amount to abuse if the court is satisfied (the onus being on the party alleging abuse) that the claim or defence should have been raised in the earlier proceedings if it was to be raised at all. I would not accept that it is necessary, before abuse may be found, to identify any additional elements such as a collateral attack on a previous decision or some dishonesty, but where those elements are present the later proceedings will be much more obviously abusive, and there will rarely be a finding of abuse unless the later proceeding involves what the court regards as unjust treatment of a party. It is, however, wrong to hold that because a matter could have been raised in early proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive. That is to adopt too dogmatic an approach to what should in my opinion be a broad, merit-based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case, focusing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before. As one cannot comprehensively list all possible forms of abuse, so one cannot formulate any hard and fast rule to determine whether, on given facts, abuse is to be found or not. Thus while I would accept that lack of funds would not ordinarily excuse a failure to raise in earlier proceedings an issue which could and should have been raised then, I would not regard it as necessarily irrelevant,

> particularly if it appears that the lack of funds has been caused by the party against whom it is sought to claim. While the result may often be the same, it is in my view preferable to ask whether in all the circumstances a party's conduct is an abuse than to ask whether the conduct is an abuse and then, if it is, to ask whether the abuse is excused or justified by special circumstances. Properly applied, and whatever the legitimacy of its descent, the rule has in my view a valuable part to play in protecting the interests of justice.
>
> [Emphasis added]

[82] I note from Lord Bingham's remarks that the doctrine of abuse of process seeks to consider both public and private interests involved, while focussing attention on the crucial question of whether parties are abusing the court process by raising issues which they have or could have raised in earlier proceedings.

[83] Reference to one other English authority will be helpful. In *Hunter v. Chief Constable of West Midlands Police*, [1982] A.C. 529, the plaintiff Hunter and five others were convicted of murder by a judge and jury, following the bombing of two Birmingham public houses which resulted in the deaths of 21 people and injury to 161. The evidence against the accused consisted mainly of confessions made to the police, either in writing or orally (the latter being the case for Hunter). Thus, the admission of the confessions into evidence was crucial to the prosecution's case.

[84] The accused sought a ruling from the judge on a *voir dire* that their confessions had not been voluntary and thus, inadmissible into evidence. The accused argued that their confessions resulted from the infliction upon them of severe physical violence by the police and from threats against their families should they refuse to confess their guilt. More particularly, Hunter testified with

respect to the physical injuries which he argued had been inflicted upon him by the police to extract his confession.

[85] After a *voir dire* of eight days, the Trial Judge concluded that the confessions were admissible. He found that the evidence of the police officers who testified before him established beyond all reasonable doubt that neither physical violence nor threats had been used by the police to obtain confessions from the accused. To the contrary, the Judge found that each of the accused was guilty of "gross perjury".

[86] Following their criminal trial, the accused commenced civil proceedings against the police and the Home Office, claiming damages for injury caused by assault while they were in custody. The allegations of assault were, in effect, the same allegations as those that had been made before the Trial Judge during the criminal *voir dire* in support of their argument that their confessions had not been made voluntarily. In putting forth their case for damages, the accused relied, *inter alia*, on new medical forensic evidence which they said gave support to their submission that the police had used violence against them to obtain their confessions. The defendants moved to have the Statements of Claim struck. The Motions Judge dismissed that application, but on appeal to the Court of Appeal, the motion was allowed and, as a result, the Statements of Claim were struck. The matter found its way to the House of Lords, which dismissed the appeal.

[87] In the Court of Appeal, [1980] 1 Q.B. 283, all three Lord Justices gave Reasons for dismissing the appeal. Although Lord Denning M.R. was of the view that the case should be

decided on the basis of issue estoppel, both Goff L.J. and Sir George Baker were of the view that abuse of process was the proper ground upon which the action should be stopped. At pages 330 and 331, Goff L.J. said the following:

> … the court clearly has a discretionary power to stay an action on the ground that the plaintiff is seeking to raise again a question already judicially decided against him, where he has had a full opportunity of presenting his whole case, even although the parties are different so that there is technically no estoppel. In my judgment also this power can be exercised at an early stage on application to strike out, although its exercise then calls for great caution …
>
> [Emphasis added]

[88] At page 346, Sir George Baker opined as follows:

> … that in fairness and justice they ought to be estopped from repeating them once more against the chief constables, who seem to me to have at least a privity of interest with the police officers.

[89] He then went on to say, at page 347:

> … It is an abuse of process for a party to relitigate a question or issue which has already been decided against him even though the other party cannot satisfy the strict rules of res judicata or, here, the requirements of issue estoppel.
>
> [Emphasis added]

[90] In the House of Lords, Lord Diplock began his Reasons, at page 536, with the following words:

> My Lords, this is a case about abuse of the process of the High Court. It concerns the inherent power which any court of justice must possess to prevent misuse of its procedure in a way which, although not inconsistent with the literal application of its procedural rules, would nevertheless be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute among right-thinking people**.** The circumstances in which abuse of process can arise are very varied; those which give rise to the instant appeal must surely be unique. It would, in my view, be most unwise if

> this House were to use this occasion to say anything that might be taken as limiting the fixed categories the kinds of circumstances in which the court has a duty (I disavow the word discretion) to exercise this salutary power.
>
> [Emphasis added]

[91] Later on, at page 541, Lord Diplock added:

> The abuse of process which the instant case exemplifies is the initiation of proceedings in a court of justice for the purpose of mounting a collateral attack upon a final decision against the intending plaintiff which has been made by another court of competent jurisdiction in previous proceedings in which the intending plaintiff had a full opportunity of contesting the decision in the court by which it was made.
>
> [Emphasis added]

[92] It is clear from the Reasons of both the Court of Appeal and the House of Lords that the doctrine of abuse of process was found to apply because the plaintiff Hunter (and his co-accused) had had a full opportunity during the course of their criminal trial to adduce evidence with regard to the issue of whether or not their confessions had been made voluntarily. In these circumstances, the courts were of the view that to allow the civil action in damages to continue would constitute an abuse of the court's process.

[93] There is nothing in the Reasons of the House of Lords and of the Court of Appeal in *Hunter*, above, which can possibly support the proposition put forward in this appeal by the appellant, i.e. that the criminal conviction of a non-party and the facts material to that conviction cannot be challenged in subsequent proceedings. Had that proposition been contemplated by either the House of Lords or the Court of Appeal, it is doubtful, in my view, that the courts would have felt it necessary to rest their decisions on the fact that Hunter and his co-accused had already had full

opportunity, during the course of the criminal *voir dire*, of making their case that the police had physically assaulted them in order to obtain their confessions.

[94] Thus, in circumstances like the ones before us, the doctrine of abuse of process has simply no application because the respondents have never had occasion to litigate the issues which they now seek to litigate for the first time before the Tax Court. At paragraphs 52 of her Reasons in *CUPE*, above, Arbour J. discusses instances where relitigation will be allowed because it will enhance the integrity of the judicial system. Specifically, Arbour J. says the following:

> [52] In contrast, proper review by way of appeal increases confidence in the ultimate result and affirms both the authority of the process as well as the finality of the result. It is therefore apparent that from the system's point of view, relitigation carries serious detrimental effects and should be avoided unless the circumstances dictate that relitigation is in fact necessary to enhance the credibility and the effectiveness of the adjudicative process as a whole. There may be instances where relitigation will enhance, rather than impeach, the integrity of the judicial system, for example: (1) when the first proceeding is tainted by fraud or dishonesty; (2) when fresh, new evidence, previously unavailable, conclusively impeaches the original results; or (3) when fairness dictates that the original result should not be binding in the new context. This was stated unequivocally by this Court in *Danyluk, supra*, at para. 80.
>
> [Emphasis added]

[95] Again, Arbour J.'s words must be understood in their proper context. In giving examples of situations where relitigation would enhance, rather than impeach, the integrity of the judicial system, she necessarily had in mind situations where a party had litigated in previous proceedings the issue which it now intended to raise. It is significant that, in respect of her third example, Arbour J. referred to the Supreme Court's decision in *Danyluk v. Ainsworth Technologies Inc.*, [2001] 2 S.C. 460.

[96] In *Danyluk*, above, the issue was whether the appellant, who was dismissed from her position as an account executive with Ainsworth Technologies Inc., could proceed with an action against her employer to recover approximately $300,000 in unpaid commissions. Both the Ontario Court (General Division) and the Court of Appeal for Ontario concluded that she was estopped from pursuing the matter because of a prior attempt to claim the same commissions under the *Employment Standards Act*, R.S.C. 1990, c. E-14. The Supreme Court disagreed with the Ontario courts and allowed the appeal. At paragraphs 18 and 19 of his Reasons for a unanimous Court, Mr. Justice Binnie made the following remarks:

> 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. The appellant chose the ESA as her forum. She lost. An issue, once decided, should not generally be re-litigated to the benefit of the losing party and the harassment of the winner. 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.
>
> 19 Finality is thus a compelling consideration and judicial decisions should generally be conclusive of the issues decided unless and until reversed on appeal. However, estoppel is a doctrine of public policy that is designed to advance the interests of justice. Where as here, its application bars the courthouse door against the appellant's $300,000 claim because of an administrative decision taken in a manner which was manifestly improper and unfair (as found by the Court of Appeal itself), a re-examination of some basic principles is warranted.
>
> [Emphasis added]

[97] Binnie J. then went on to explain the origin of the various “techniques” used by the courts to prevent abuse of the court process. His remarks at paragraph 20 are relevant and they read as follows:

> 20 The law has developed a number of techniques to prevent abuse of the decision-making process. One of the oldest is the doctrine estoppel per rem judicatem with its roots in Roman law, the idea that a dispute once judged with finality is not subject to relitigation: *Farwell v. The Queen* (1894), 22 S.C.R. 553, at p. 558; *Angle v. Minister of National*

> *Revenue*, [1975] 2 S.C.R. 248, at pp. 267-68. The bar extends both to the cause of action thus adjudicated (variously referred to as claim or cause of action or action estoppel), as well as precluding relitigation of the constituent issues or material facts necessarily embraced therein (usually called issue estoppel): G. S. Holmested and G. D. Watson, *Ontario Civil Procedure* (loose-leaf), vol. 3 Supp., at 21 s. 17 et seq. Another aspect of the judicial policy favouring finality is the rule against collateral attack, i.e., that a judicial order pronounced by a court of competent jurisdiction should not be brought into question in subsequent proceedings except those provided by law for the express purpose of attacking it: *Wilson v. The Queen*, [1983] 2 S.C.R. 594; *R. v. Litchfield*, [1993] 4 S.C.R. 333; *R. v. Sarson*, [1996] 2 S.C.R. 223.

[98] It is clear from Binnie J.'s remarks that the ultimate purpose of the various "techniques", namely, issue estoppel, the rule against collateral attack and abuse of process, used by the courts to prevent abuse of the court process is to favour finality. As Binnie J. says at paragraph 18 above, "[d]uplicate litigation, potentially inconsistent results, undue costs, and inconclusive proceedings are to be avoided".

[99] In the result, because of its view that, to use the words of Arbour J. in *CUPE*, above (at paragraph 52), "fairness dictates that the original results should not be binding in the new context", the Supreme Court allowed the appellant to proceed with her action. At paragraph 80, Binnie J. explains why preventing the appellant from proceeding with her case would constitute an injustice:

> 80 As a final and most important factor, the Court should stand back and, taking into account the entirety of the circumstances, consider whether application of issue estoppel in the particular case would work an injustice. Rosenberg J.A. concluded that the appellant had received neither notice of the respondent's allegation nor an opportunity to respond. He was thus confronted with the problem identified by Jackson J.A., dissenting, in *Iron v. Saskatchewan (Minister of the Environment & Public Safety)*, [1993] 6 W.W.R. 1 (Sask. C.A.), at p. 21:
>
> > The doctrine of res judicata, being a means of doing justice between the parties in the context of the adversarial system, carries within its tenets the

> seeds of injustice, particularly in relation to issues of allowing parties to be heard.
>
> Whatever the appellant's various procedural mistakes in this case, the stubborn fact remains that her claim to commissions worth $300,000 has simply never been properly considered and adjudicated.
>
> [Emphasis added]

[100] Thus, in my respectful view, it is clear that those situations where relitigation will enhance, rather than discredit, the integrity of the judicial system can only arise where a party, as in *Danyluk*, above, is attempting to litigate an issue for a second time. That is obviously not the case in the present matter.

[101] Lastly, I wish to refer to *Apotex Inc. et al v. Les Laboratoires Servier et al*, 2007 FCA 350, where I had occasion to discuss the doctrine of abuse of process. At paragraph 20, I made the following comments which I believe find application in the present matter:

> [20] The doctrine of abuse of process seeks to prevent relitigation in situations where the strict requirements of issue estoppel are not met, but where permitting the litigation to proceed would be contrary to the integrity of the court's process and to the good administration of justice (see Doherty J.A.'s Reasons in *CUPE v. Toronto (City)* (2003), 55 O.R. (3d) 541 at para. 65). In that light, the words of Kerr L.J. at page 137 of his Reasons in *Bragg v. Oceanus Mutual Underwriting Association (Bermuda) Ltd.*, [1982] 2 Lloyd's Rep. 132, C.A., are entirely apposite:
>
> > To take the authorities first, it is clear that an attempt to religitate in another action issues which have been fully investigated and decided in a former action may constitute an abuse of process, quite apart from any question of res judicata or issue estoppel on the ground that the parties or their privies are the same. It would be wrong to attempt to categorize the situations in which such a conclusion would be appropriate. However, it is significant that in the cases to which we were referred, where this conclusion was reached, the attempted relitigation had no other purpose than what Lord Diplock described as:
> >
> > > … mounting a collateral attack upon a final decision … which has been made by another court of competent

> jurisdiction in previous proceedings in which … (the party concerned) had a full opportunity of contesting the decision of the court by which it was made.
>
> [Emphasis added]

[102] As the respondents are seeking to litigate the issues which have given rise to these appeals for the first time in the Tax Court, the doctrine of abuse of process is simply not “in play” and, as a result, no balancing exercise is required. There is no authority whatsoever to support the appellant’s submission that the doctrine of abuse of process can be used to prevent the respondents from litigating those issues.

[103] I would therefore dismiss the appeals with costs.

"M. Nadon"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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