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Penner's Paradox Continued: The Standard of Proof in Administrative Proceedings*

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Following the Supreme Court of Canada's 2008 decision in C. (R.) v. McDougall, there appeared to be peace in the land when it came to the standard of proof in non-criminal proceedings. That peace has been called into question by the Court's recent 2013 decision in Penner v. Niagara Regional Police Services Board. The Penner case has indirectly reignited a settled debate about whether an intermediate standard of proof applies in professional discipline proceedings. This paper explores the procedural history and policy considerations underpinning the Penner case, considers to what extent Penner has reversed or created an exception to McDougall, and suggests that caution should be exercised before relying on Penner as a signal that the Supreme Court has intentionally departed from the standard of proof for non-criminal proceedings established in McDougall.

À la suite de l'arrêt de la Cour suprême du Canada en 2008 dans C. (R.) c. McDougall, la paix semblait régner à l'égard de la norme de preuve dans les procédures non pénales. Cette paix a été remise en question par le récent arrêt de la Cour en 2013 dans Penner c. Niagara (Commission régionale de services policiers). L'arrêt Penner a indirectement relancé un débat réglé à savoir si une norme de preuve intermédiaire s'applique dans les procédures en matière de droit disciplinaire et professionnel. Dans cet article, l'auteur explore l'historique des procédures et les considérations de principe qui sous-tendent l'arrêt Penner, estime dans quelle mesure cet arrêt a inversé ou créé une exception à l'affaire McDougall, et suggère que la prudence s'impose avant de s'appuyer sur l'arrêt Penner comme signe que la Cour suprême a volontairement dérogé à la norme de preuve pour les procédures non pénales établie dans l'arrêt McDougall.

1. INTRODUCTION

This paper continues a discussion[1] concerning the standard of proof in administrative discipline matters commenced pursuant to the *Police Services Act* and sub-

* An earlier version of this paper was presented at the Canadian Institute's 13th annual conference on Advanced Administrative Law and Practice on October 30, 2013, Ottawa.

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1 The summary of the facts and procedural history in this paper have been taken from Brian Gover and Edward Marrocco's paper "Penner's Paradox: Standard of Proof in

sequent to the 2013 majority decision of the Supreme Court of Canada in *Penner v. Niagara Regional Police Services Board*.[2] The authors have previously commented on the suggestion that *Penner* represents a tacit departure from earlier, unanimously decided, Supreme Court jurisprudence on the standard of proof applicable in administrative proceedings. More specifically, that what began as an ideal case to ensure fairness to aggrieved parties, and the corresponding need to protect respondents from infinitely re-litigating the same issues, has indirectly reignited the settled debate about whether an intermediate standard of proof applies in disciplinary proceedings. The purpose of this paper is to expand the scope of the *Penner* discussion to focus on administrative proceedings even beyond the police discipline context. It will be suggested that until the Supreme Court has the opportunity to clarify and re-confirm or depart from the *McDougall* approach, administrative tribunal adjudicators should exercise caution when invited to accept *Penner* as a departure from *McDougall*.

2. THE FACTS OF THE CASE[3]

On January 28, 2003, Wayne Penner ("Penner") was in Niagara Region Provincial Offences Court (traffic court) where his wife was on trial in relation to a vehicle infraction issued by P.C. Nathan Parker. Mrs. Penner had been charged under the *Provincial Offences Act* for operating a motor vehicle without displaying two licence plates.

During Mrs. Penner's trial, Mr. Penner, who was on probation at the time, repeatedly disrupted the proceedings by making a chirping noise during P.C. Parker's testimony. Mr. Penner's disruption was significant enough to cause presiding Justice of the Peace Tisi to address him in the gallery directly from the Bench.

After completing his testimony and returning to the gallery, P.C. Parker made a comment to Penner which resulted in a further outburst and the beginning of a confrontation between the two men. Unfortunately for Mr. Penner, traffic court was well populated with police officers that day and his latter outburst resulted in him being forcibly removed from the courtroom and arrested by P.C. Parker and another Niagara Region officer in attendance on an unrelated matter, P.C. Koscinski.[4] Justice of the Peace Tisi had "fled" the courtroom during the melee between the arresting officers and Penner and had therefore not directed that Penner be arrested.[5] This would become a material fact later on in the case.

In the course of arrest and detention, Penner sustained physical injuries including a black eye, bruised knee, scrapes and sore elbows, wrists and ribs. Penner was ultimately charged with causing a disturbance, breach of probation and resisting

Police Discipline Cases" which was presented at the Canadian Institute's Law of Policing Conference, September 24, 2013, Toronto.

2 2013 SCC 19, 2013 CarswellOnt 3743, 2013 CarswellOnt 3744 (S.C.C.).

3 *Supra*, note 1.

4 Penner was arrested for causing a disturbance pursuant to s. 175 of the *Criminal Code*, R.S.C. 1985, c. C-46.

5 See Ontario Civilian Commission on Police Services ("OCCPS") Decision #05-01.

arrest. However, all charges were withdrawn by the Crown about five months after the incident.

3. THE DISCIPLINARY COMPLAINT

Shortly after his arrest, Penner filed a complaint under the *Police Services Act*[6] (the "PSA") against P.C.s Parker and Koscinski and the Chief of Police (the "Complaint"). In the Complaint, Penner alleged, *inter alia*, that his arrest was unlawful; that the officers used unnecessary force in the course of his arrest; that he was denied prompt medical assistance while in custody; and that the Niagara Police failed to cooperate in the investigation of his allegations against Constables Parker and Koscinski.

In 2004, a disciplinary hearing was convened pursuant to the Complaint and presided over by retired Superintendant Robert J. Fitches. Penner exercised his right to assert party status under the PSA and, acting as his own legal counsel, participated in that hearing as a party. It appeared that Penner's advocacy was remarkably ineffective. The Hearing Officer ultimately stated that the evidence of both Penner and his wife was found by the Tribunal to be untrue, overstated and lacking in both forthrightness and candour.[7] The Hearing Officer also concluded that both Penner and the prosecution had failed to provide evidence sufficient to show "in any clear and cogent way" that Penner's arrest was unlawful. Equally, relying upon a video of the incident at the courthouse, the Hearing Officer concluded that there was "no clear, convincing or cogent evidence whatsoever" of the use of unnecessary force. The Hearing Officer was persuaded that P.C.s Koscinski and Parker used an appropriate amount of force to gain control over Penner.[8] On the basis of the foregoing findings, Supt. Fitches held that no misconduct had been established.

In April 2005, Penner successfully appealed the Hearing Officer's decision to what was then the Ontario Civilian Commission on Police Services (now the Ontario Civilian Police Commission) (hereinafter collectively the "Commission") arguing that, because Justice of the Peace Tisi had left the courtroom and not directed that Penner be arrested, there was a legal conflict at work between the Justice's authority and the officers'. The Hearing Officer had expressly declined to deal with this issue, deeming it unnecessary in light of the Tribunal's evidentiary findings, described above. The Commission was persuaded that the Hearing Officer should have addressed this issue in arriving at his conclusion rather than simply relying on his rejection of Penner's evidence. The Commission revoked the Hearing Officer's decision and substituted its own finding of misconduct against both officers.[9]

The officers appealed the Commission's decision to the Divisional Court which found that the Commission had erred in law when it held that the Hearing Officer ought to have determined whether the officers had the legal authority to

6 R.S.O. 1990, c .P.15.

7 Decision of Supt. Robert J. Fitches, dated June 28, 2004; Summary of the Hearing Officer's findings reproduced in *Parker*, *infra*, note 12, at paras. 9–15 and 26.

8 Taken from the Supreme Court of Canada's summary of the Complaint hearing, located in paras. 12–14 of *Penner supra*, note 2.

9 OCCPS Decision #05-01, *supra*, note 5.

arrest Mr. Penner in the courtroom. Though Carnwath J. expressed some concern about the Hearing Officer's reasoning on the burden of proof, the Divisional Court was satisfied that the correct conclusion had been reached and restored the Hearing Officer's findings.[10] Penner did not appeal the Complaint further.

4. THE CIVIL ACTION

In July of 2003, approximately one month after the criminal charges against him were dropped, Penner had filed a civil claim in the Ontario Superior Court of Justice seeking damages for alleged mistreatment he suffered during his arrest in January. The civil action was evidently dormant throughout the hearing and appeal of the Complaint.

In October 2009, in reliance on the Divisional Court's overturning of the Commission's decision and its restoration of the Hearing Officer's findings in the Complaint, the police defendants in Penner's civil action brought a Rule 21 motion to strike the allegations in the claim on the basis that Supt. Fitches' findings estopped Penner from re-litigating those same issues.[11]

The motion was successful.

In granting the relief sought by the defendants, Fedak J. applied the test for issue estoppel in accordance with the Supreme Court's 2001 decision in *Danyluk v. Ainsworth Technologies Inc.*[12]

Broadly speaking, the test in *Danyluk* is comprised of two parts. The first part requires: (1) that the decision being relied upon for estoppel was judicial (fulfilling the requirement of procedural fairness); (2) that the decision was final; and (3) that the same parties are engaged in all of the proceedings in issue.

The second part of the *Danyluk* test provides a judicial discretion not to apply issue estoppel in matters where to do so would work an injustice (the "discretionary analysis").

Penner appealed his loss on the Rule 21 motion to the Ontario Court of Appeal arguing, for reasons which will be described below, that the motion judge should have applied the discretionary analysis in his favour and precluded the application of issue estoppel in this case.

10 See *Parker v. Niagara Regional Police Service*, 2008 CarswellOnt 119, [2008] O.J. No. 122 (Ont. Div. Ct.) at paras. 34-35, additional reasons 2008 CarswellOnt 1495 (Ont. Div. Ct.); see also 2010 ONCA 616, 2010 CarswellOnt 7164 (Ont. C.A.) at para. 17, reversed 2013 CarswellOnt 3743, 2013 CarswellOnt 3744 (S.C.C.) per Laskin J.A.

11 2009 CarswellOnt 9420 (Ont. S.C.J.); affirmed 2010 CarswellOnt 7164 (Ont. C.A.); reversed 2013 CarswellOnt 3743, 2013 CarswellOnt 3744 (S.C.C.) as cited by the Supreme Court in *Penner, supra*, note 2.

12 2001 CarswellOnt 2434, 2001 CarswellOnt 2435, [2001] 2 S.C.R. 460 (S.C.C.); See also discussion in *Penner, supra*, note 2, at paras. 19–21.

5. DECISION OF THE ONTARIO COURT OF APPEAL

In its 2010 decision, the Ontario Court of Appeal agreed with Justice Fedak and dismissed Penner's appeal.[13] In endorsing the motion judge's approach to the discretionary analysis, Laskin J.A., on behalf of the Court, acknowledged that although it should not be the case that a PSA complaint precludes a complainant's ability to pursue a civil action, had Penner been successful with the Complaint at the Tribunal level, he would have had the benefit of the Hearing Officer's findings to aid in his civil action.[14] On the basis of this and other factors including: Penner's opportunity to participate in the hearing of the Complaint; the right of appeal contained in the PSA which Penner had the benefit of exercising; and the fact that the hearing of the Complaint had all the hallmarks of a civil trial, the Court of Appeal held that Fedak J. was correct in concluding that there was no injustice in this matter requiring a remedy under the discretionary analysis.

6. ARGUING INTERMEDIATE STANDARDS OF PROOF

In support of his position before the Court of Appeal on the proper application of the discretionary analysis, Penner argued that the PSA imposes a higher standard of proof in police disciplinary matters than is otherwise applicable in typical civil proceedings.

To put this argument in perspective, the PSA states, at s. 84(1), that:

> 84. (1) If at the conclusion of a hearing under subsection 66 (3), 68 (5) or 76 (9) held by the chief of police, misconduct as defined in section 80 or unsatisfactory work performance is proved *on clear and convincing evidence*, the chief of police shall take any action described in section 85. 2007, c. 5, s. 10.
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> (Emphasis Added)

In both PSA cases and the broader administrative law context, this argument is not novel. Even in professions where the governing legislation does not articulate a requirement of proof on "clear and convincing evidence", Ontario professional regulators have previously grappled with the argument that the seriousness of misconduct allegations in professional discipline cases in combination with the severity of the consequences for respondents demands that such matters must be proven on "clear, convincing and cogent" evidence with specific regard to the gravity of the consequences of any finding by the tribunal.[15] Jurisprudence focusing on the severity of the allegations and their related consequences has often been put forward in support of the proposition that proof on clear, convincing and cogent evidence is an

13 *Penner v. Niagara Regional Police Services Board*, 2010 CarswellOnt 7164, [2010] O.J. No. 4046 (Ont. C.A.); reversed 2013 CarswellOnt 3743, 2013 CarswellOnt 3744 (S.C.C.).

14 *Ibid.*, at paras. 42-43 per Laskin J.A.

15 See *Bernstein v. College of Physicians & Surgeons (Ontario)*, 1977 CarswellOnt 496, 15 O.R. (2d) 447 (Ont. Div. Ct.) [the Bernstein Test]; see also *College of Physicians & Surgeons (Ontario) v. Heath*, 1997 CarswellOnt 2869, [1997] O.J. No. 3394 (Ont. Div. Ct.).

intermediate standard of proof that is more onerous than proof on the balance of probabilities.

The issue of an intermediate standard of proof is, of course, contentious. Counsel opposed to the imposition of a more onerous standard of proof have regularly argued that the words "clear, convincing and cogent" do not articulate a higher standard of proof; rather they speak to the quality of the evidence that a decision maker should properly consider when making a finding on the balance of probabilities.[16]

In any event, on the basis of the express language in the PSA, Penner argued that police disciplinary matters are subject to an intermediate standard of proof, and therefore it was incorrect to apply issue estoppel in the circumstances. In other words, Penner contended that his defeat in the Tribunal would not automatically preclude any possibility of success in an ordinary civil trial where his claim needed to only be proven on the balance of probabilities.

This is where the *Penner* case took a curious turn.

In rejecting Penner's argument, the Court of Appeal distinguished Mr. Penner's matter from an earlier Ontario Superior Court case on police discipline: *Porter v. York Regional Police*.[17] The *Porter* case was, at one time, the leading decision on issue estoppel in PSA matters.

In *Porter*, the Hearing Officer had stated that the Tribunal's decision had been "determined by a high standard of proof and might have been different if it had been decided on the lower standard."[18] The Hearing Officer in *Porter* was referring to the intermediate standard of proof which Penner argued arose by way of language in the PSA cited above.

Obviously, Mr. Penner's case was a little different.

Laskin J.A. dispensed with Penner's argument by explaining that Penner's unmitigated defeat before the Hearing Officer (and the Hearing Officer's findings) left no risk that Penner would be successful on any standard of proof, let alone the balance of probabilities. Indeed, Laskin J.A. stated that standard of proof had become "immaterial" based on the Hearing Officer's assessment of the evidence in the hearing of the Complaint.[19]

The only problem with this decision is that the Court of Appeal was silent on the fact that *Porter* pre-dated the Supreme Court of Canada's 2008 decision in *C. (R.) v. McDougall*.[20]

The *McDougall* case involved allegations of historical sexual assault. In that matter, the Supreme Court was called upon to determine the standard of proof a judge should apply when evaluating serious allegations in the context of civil litigation. In a unanimous decision, Rothstein J. expressly addressed the issue of an intermediate standard of proof (between the balance of probabilities and proof beyond a reasonable doubt) in non-criminal matters where the severity of the allegations or seriousness of the consequences for responding parties warranted theoretically heightened scrutiny commensurate with the jeopardy facing the parties.

In short, the unanimous Supreme Court in *McDougall* found that there is no intermediate standard of proof:

> To suggest that depending upon the seriousness, the evidence in the civil case must be scrutinized with greater care implies that in less serious cases the evidence need not be scrutinized with such care. *I think it is inappropriate to say that there are legally recognized different levels of scrutiny of the evidence depending upon the seriousness of the case*. There is only one legal rule and that is that in all cases, evidence must be scrutinized with care by the trial judge.
>
> Similarly, *evidence must always be sufficiently clear, convincing and cogent to satisfy the balance of probabilities test*. But again, there is no objective standard to measure sufficiency. In serious cases, like the present, judges may be faced with evidence of events that are alleged to have occurred many years before, where there is little other evidence than that of the plaintiff and defendant. As difficult as the task may be, the judge must make a decision. *If a responsible judge finds for the plaintiff, it must be accepted that the evidence was sufficiently clear, convincing and cogent to that judge that the plaintiff satisfied the balance of probabilities test*.[21]
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> . . . . .
>
> In the result, I would reaffirm that *in civil cases there is only one standard of proof and that is proof on a balance of probabilities*. In all civil cases, the trial judge must scrutinize the relevant evidence with care to determine whether it is more likely than not that an alleged event occurred.[22]
>
> (Emphasis Added)

Post-*McDougall*, it was understood that all evidence sufficient to satisfy a decision maker on the balance of probabilities will be, *de facto*, "sufficiently clear, convincing and cogent". The words "clear, convincing and cogent" do not alter or heighten the test under an assessment made on the balance of probabilities. Consequently, where matters or allegations are particularly severe or serious, it will be the responsibility of the decision maker to take that severity into account when assessing the quality of the evidence.

7. APPLYING MCDOUGALL

Professional discipline cases in Ontario can be distinguished by way of their regulating legislation.

Unsurprisingly, in the context of police discipline cases, some Ontario judges had expressed concern about *McDougall*, even prior to *Penner*, arguing that *Mc-*

16 See for example *Law Society of Upper Canada v. Neinstein*, 2007 CarswellOnt 1560 (Ont. Div. Ct.) at paras. 54–57, additional reasons 2008 CarswellOnt 5672 (Ont. Div. Ct.); reversed 2010 CarswellOnt 1459 (Ont. C.A.).

17 2001 CarswellOnt 2030, [2001] O.J. No. 5970 (Ont. S.C.J.).

18 This excerpt from *Porter* is taken from the Court of Appeal decision, *ibid.*, at para. 50 per Laskin J.A.

19 *Penner*, *supra*, note 13, at para. 51 per Laskin J.A.

20 2008 CarswellBC 2041, 2008 CarswellBC 2042, (sub nom. *F.H. v. McDougall)* [2008] 3 S.C.R. 41 (S.C.C.).

21 *Ibid.*, at paras. 45-46.

22 *Ibid.*, at para. 49.

Dougall did not adequately address the statutory standard of proof applicable to PSA hearings.

For example, in *McCormick v. Greater Sudbury Police Service*,[23] Hill J., speaking *obiter* on behalf of the majority of the Divisional Court, suggested that administrative (disciplinary) proceedings, which are mandated by statute to require proof on clear and convincing evidence, may somehow be distinguishable from the "civil" matters that the Supreme Court was considering in *McDougall*[24] (the "Statutory Argument").

The dissenting member of the panel in *McCormick*, Madam Justice Wilson, dissented from Justice Hill on these issues.[25]

It is noteworthy however that in *McDougall*, the Supreme Court does acknowledge and address the standard of proof applicable to all Ontario disciplinary proceedings:

> In Ontario Professional Discipline cases, the balance of probabilities requires that proof be "clear and convincing and based upon cogent evidence".[26]

Rothstein J. then proceeds to make the following finding:

> Like the House of Lords, I think it is time to say, once and for all in Canada, that *there is only one civil standard of proof at common law and that is proof on a balance of probabilities*. Of course, context is all important and a judge should not be unmindful, where appropriate, of inherent probabilities or improbabilities or the seriousness of the allegations or consequences. However, *these considerations do not change the standard of proof.* I am of the respectful opinion that *the alternatives* I have listed above *should be rejected* for the reasons that follow.[27]
>
> (Emphasis Added)

Unequivocally, it should be clear that there is no intermediate standard of proof applicable to Ontario disciplinary proceedings under the PSA or any other legislation or jurisprudence post-*McDougall*.

The Statutory Argument to the contrary was also recently rejected by a hearing officer in *TPS v. Izzett*.[28]

23 2010 ONSC 270, 2010 CarswellOnt 1871 (Ont. Div. Ct.).

24 *Ibid.*, at paras. 99-100 per Hill J.

25 *Ibid.*, at para. 179 per Wilson J.

26 *McDougall*, *supra*, note 20, at para. 31.

27 *Ibid.*, at para. 40.

28 In *TPS v. Izzett*, the the Honourable Keith Hoilett, a retired Superior Court judge, presided over a high profile disciplinary hearing (pre-*Penner*) involving very serious allegations, including sexual harassment and deceit, against a (now former) Staff Inspector of the Toronto Police Service. In finding that misconduct had been proven on many the counts with no "doubt", the Hearing Officer went on to confirm that the *McDougall* case set out the standard of proof applicable with crystal clarity. Cases like *McCormick* were rejected.

8. THE PENNER SUPREME COURT DECISION

What complicates the otherwise crystal clear state of the law on standard of proof in administrative proceedings — post-*McDougall* — is the fact that the majority of the Supreme Court in *Penner* determined that the discretionary analysis should have been exercised in Penner's favour. More specifically, McLachlin C.J. and Fish, Cromwell and Karakatsanis JJ. were satisfied that the Court of Appeal's approach was incorrect and worked an injustice. The majority addressed the standard of proof as follows:

> . . ..It cannot necessarily be said that issue estoppel "works both ways" here. *As the Court of Appeal recognized, because the PSA requires that misconduct by a police officer be "proved on clear and convincing evidence" (s. 64(10)), it follows that such a conclusion might, depending upon the nature of the factual findings, properly preclude relitigation of the issue of liability in a civil action where the balance of probabilities — a lower standard of proof — would apply. However, this cannot be said in the case of an acquittal. The prosecutor's failure to prove the charges by "clear and convincing evidence" does not necessarily mean that those same allegations could not be established on a balance of probabilities. Given the different standards of proof*, there would have been no reason for a complainant to expect that issue estoppel would apply if the officers were acquitted. Indeed, in Porter, at para. 11, the court refused to apply issue estoppel following an acquittal in a police disciplinary hearing because the hearing officer's decision "was determined by a high standard of proof and might have been different if it had been decided based on the lower civil standard". Thus, 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.
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> By assuming that issue estoppel "works both ways", the Court of Appeal attached too little weight to the fact that Mr. Penner had no financial stake in the disciplinary hearing and wrongly concluded that he had more at stake than he could reasonably have thought at the time.[29]
>
> (Emphasis Added)

The Majority anchors much of its decision on Mr. Penner's expectations. That is, the Majority was satisfied that Penner could not have reasonably initiated a disciplinary complaint with the expectation that defeat before the Tribunal would also foreclose any chance of civil recovery in a subsequent or concurrent civil claim. This makes sense on many levels. Penner obviously cannot obtain damages from the Tribunal (because the Tribunal is only convened to address issues of alleged misconduct by police officers) and Penner certainly would not have initiated such a complaint if he knew that it would have caused him to give up his rights to argue a civil claim at another time.

However, there is a much simpler theme underlying the *Penner* case and it was one that was advanced in oral argument on the Supreme Court appeal by Penner's counsel. It was expressed to the Court that the Tribunal is a forum officiated by the Chief of Police (under the PSA). The Chief then designates the prosecutors and a Hearing Officer to adjudicate complaints. Prosecutors in these matters are

29 *Penner*, *supra*, note 2, at paras. 60-61.

typically Inspectors within the same police service and adjudicators are usually Superintendants. It follows that if the Court of Appeal's analysis was correct, the Chief of Police had the ability to not only adjudicate the complaints, but also effectively adjudicate the civil claim at the exact same time. Indeed, this is a powerful and persuasive point and one which certainly influenced the Court.

The dissenting judges (LeBel, Abella and Rothstein JJ.) took the same view of the issue as to standard of proof as did Laskin J.A in the Court of Appeal and effectively distinguished this case from one in which the Chief of Police was foreclosing a related civil claim. The standard of proof was entirely immaterial in this matter:

> Unlike *Porter*, however, the standard of proof was immaterial to the hearing officer's decision in this case. The hearing officer made unambiguous findings of fact against Mr. Penner. His findings are unequivocal: he found "*no . . . evidence whatsoever*" to support Mr. Penner's claims (A.R., at p. 114 (emphasis added)). On judicial review, the Divisional Court found that there was no error in these factual findings and that they were supported by "an ample evidentiary foundation" (para. 28). *The burden of proof is therefore irrelevant in this case* — there is simply no evidence to support Mr. Penner's claims on any standard.[30]
>
> (Emphasis Added)

As a result, it is now open to question whether the standard of proof in police discipline hearings in Ontario is that of the balance of probabilities as per *McDougall*, or whether the Supreme Court's decision in *Penner* has once again created an intermediate standard of proof that is a heightened standard above the single balance of probabilities.

In that regard, it would have been helpful if there had been at least one reference to *McDougall* in order to reconcile and settle the point as between the two cases. The fact is, for some unknown reason, *McDougall* is not canvassed in *Penner* at all.

In recent publications commenting on this case, leading commentators have suggested that "there appears to be no convincing rationale for the Court of have departed from the logic of *McDougall*".[31] Not only was there no convincing rationale, it is unclear to what extent, if any, the Court has departed from *McDougall*.

The further complication which *Penner* creates is that if the Court has indeed departed from *McDougall* and reinstated a higher standard of proof for police discipline proceedings, there are going to be other disciplinary proceedings — before other administrative tribunals — where it will be argued that the standard of proof should also be heightened.

While at the end of the day, it may be that the Supreme Court did not intend to take a definitive stance on the standard of proof question in *Penner*, its decision has nonetheless reopened a door which appeared to be firmly shut and will likely, and

30 *Penner*, *supra*, note 2, at para. 125.

31 See "*Penner* and the Discretionary Application of Issue Estoppel" The Twelve-Minute Civil Litigator 2013, Law Society of Upper Canada CPD Materials, written by Rob Centa and Nav Purewal.

ironically, result in the issue of the standard of proof being re-litigated before administrative tribunals.

9. CONCLUSION

Practically speaking, *Penner* is intended to advance the law of issue estoppel, not standard of proof. As Laskin J.A. pointed out at the Court of Appeal stage of the matter — standard of proof had become immaterial in that case subsequent to the Hearing Officer's utter rejection of Penner's evidence. In other words, *Penner* is intended to be the next step in cases like *Danyluk*, not the next step in *McDougall*.

The thrust of the majority's reasoning in *Penner* is on flexibility of the application of the discretionary analysis in matters involving issue estoppel and *res judicata*. That is, the Court focused on achieving a balance between fairness to plaintiffs while at the same time preventing infinite re-litigation of the same issues by responding parties.

When we consider the optics of a disciplinary forum in which the Chief of Police could have arguably insulated the police force from a civil claim by way of the disposition of a misconduct hearing, it becomes apparent why the Court may have gone in the direction that it did in its consideration of the discretionary analysis. However, *Penner* is still a case about issue estoppel, not standard of proof.

As above, there will inevitably be a surge of appeals arising out of PSA Tribunals wherein parties will attempt to invoke the majority decision in *Penner* on standard of proof. We have previously warned that these arguments — without further clarification from the Court — should be rejected or treated with severe caution (in PSA hearings) because the Court has not clearly overruled *McDougall* in *Penner*. We would again recommend caution if and when invited to accept *Penner* even outside of the police discipline context.

The Court's understandable concern with certain issues in *Penner* (such as the optics of the Chief of Police quelling civil recovery as above) is not likely to arise in the same way in other administrative disciplinary contexts. It may well be that this is how the Court ultimately resolves the incompatibility between *Penner* and *McDougall*.

In any event, *McDougall* remains a leading decision of the Supreme Court on the rejection of intermediate standards of proof in non-criminal matters. The Supreme Court does not overturn or depart from its own decisions unless it has compelling reasons to do so and no such compelling reasons were provided in the *Penner* decision.[32]

If the issue of standard of proof in *Penner* was indeed immaterial subsequent to the Complaint, it could be argued that the Court's dicta on standard of proof is possibly *obiter*. If the expectations of Mr. Penner and the divergent purposes of disciplinary and civil litigation are indeed the basis for this ruling, the law on standard of proof and the policy reasons articulated by Rothstein J. rejecting intermediate standards of proof in *McDougall* should be unchanged.

32 *R. v. Salituro*, 1991 CarswellOnt 1031, 1991 CarswellOnt 124, 1991] 3 S.C.R. 654 (S.C.C.) at para. 27.

While *Penner* ought not to be ignored, to depart from the unanimous approach of the Supreme Court in *McDougall* for the majority's tacit, and possibly *obiter*, dicta on standard of proof in *Penner*, would be akin to taking two jurisprudential steps backward. In our view, until the Supreme Court has the opportunity to clarify and re-confirm or depart from the *McDougall* approach, administrative tribunal adjudicators should exercise caution when invited to accept *Penner* as a departure from *McDougall*.