NOVA SCOTIA COURT OF APPEAL
Citation: *Arnold v. O'Regan Halifax Limited*, 2023 NSCA 37

Date: 20230524
Docket: CA 517370
Registry: Halifax

Between:

Steve Arnold

Appellant

v.

O'Regan Halifax Limited

Respondent

Judge:	The Honourable Justice Joel Fichaud
Appeal Heard:	April 11, 2023, in Halifax, Nova Scotia
Subject:	*Labour Standards Code* – wrongful dismissal – issue estoppel
Summary:	O'Regan Halifax Limited employed Mr. Arnold for 22 years. In April 2020, Mr. Arnold was a Sales Manager at O'Regan's Toyota dealership and was earning over $100,000 annually. On April 23, 2020, during the COVID-19 pandemic, O'Regan laid-off Mr. Arnold. Then O'Regan restructured its operation to eliminate Mr. Arnold's job, meaning Mr. Arnold's employment was terminated. O'Regan paid $50,000 severance to Mr. Arnold. Mr. Arnold filed a Complaint under ss. 71 and 72 of the *Labour Standards Code*, R.S.N.S. 1989, c. 246 as amended. The Director of Labour Standards dismissed Mr. Arnold's Complaint because: (1) O'Regan's restructuring was done in good faith, meaning Mr. Arnold was "laid off", according to the definition in the *Code;* (2) s. 71 does not apply to a "lay-off"; and (3) the $50,000 severance exceeded Mr. Arnold's entitlement (eight weeks' pay) under s. 72.

Mr. Arnold sued O'Regan for wrongful dismissal in the Supreme Court of Nova Scotia. On O'Regan's motion, a judge of the Supreme Court dismissed Mr. Arnold's claim because: (1) Mr. Arnold's Complaint under the *Code* precluded a lawsuit for wrongful dismissal; and (2) his lawsuit was an abuse of process as an attempt to re-litigate an issue that was decided or should have been decided by the Director.

Mr. Arnold appealed to the Court of Appeal.

Issues: Did Mr. Arnold's Complaint under the *Code* preclude a lawsuit for wrongful dismissal? Was his lawsuit an abuse of process by attempted re-litigation?

Result: The Court of Appeal allowed the appeal.

Issues that the Director decided were subject to issue estoppel and cannot be re-litigated. The Director's finding that O'Regan acted in good faith is issue estopped.

Section 6 of the *Code* preserves the employee's rights under any "law" that is "more favourable" than the *Code*. "Law" includes the common law. The issues of (1) whether Mr. Arnold was "dismissed", under the common law's definition, (2) whether there was "just cause" at common law, (3) the period of "reasonable notice" at common law, and (4) the quantum of damages for the period of reasonable notice, were not decided by the Director, are not issue estopped, and may be litigated in the lawsuit for wrongful dismissal.

O'Regan's severance payment to Mr. Arnold would reduce any damages award for wrongful dismissal.

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Respondent

Judges:	Bryson, Fichaud and Beaton, JJ.A.
Appeal Heard:	April 11, 2023, in Halifax, Nova Scotia
Held:	Appeal allowed without costs, per reasons for judgment of Fichaud J.A.; Bryson and Beaton JJ.A. concurring
Counsel:	Blair Mitchell for the Appellant Rebecca Saturley and Dante Manna for the Respondent

Reasons for judgment:

[1] O'Regan Halifax Limited ("O'Regan") operates a group of car dealerships in the Halifax area. Steve Arnold was a 22-year employee. In April 2020, he was a Sales Manager, earning over $100,000 annually. During the COVID-19 pandemic, O'Regan laid him off, then restructured its operation to eliminate Mr. Arnold's position and gave him $50,000 as severance.

[2] Mr. Arnold claimed termination benefits under ss. 71 and 72 of the *Labour Standards Code*, R.S.N.S. 1989, c. 246, as amended ("*Code*"). The Director of Labour Standards ("Director") dismissed his Complaint because: (1) Mr. Arnold was "laid off", as that term is defined in the *Code*, which meant O'Regan did not contravene s. 71, and (2) the $50,000 exceeded O'Regan's statutory obligation of eight weeks severance under s. 72.

[3] Mr. Arnold sued O'Regan for wrongful dismissal in the Supreme Court of Nova Scotia. On O'Regan's motion, a judge of the Supreme Court dismissed Mr. Arnold's lawsuit because: (1) having sought a remedy under the *Code*, he was precluded from suing for wrongful dismissal, and (2) his lawsuit was an abuse of process by attempted re-litigation.

[4] Mr. Arnold appeals.

[5] Section 6 of the *Code* says:

> … nothing in this Act affects the rights or benefits of an employee under any law, custom, contract or arrangement that are more favourable to him than his rights or benefits under this Act.

[6] The question is whether s. 6 preserves Mr. Arnold's lawsuit for wrongful dismissal at common law. The answer is yes, subject to issue estoppel.

The Background

[7] In March 1998, O'Regan hired Steve Arnold as a Sales Consultant. By 2001, Mr. Arnold had risen to Sales Manager. In early 2020, he was the Sales Manager at O'Regan's Toyota dealership.

[8] In spring 2020, O'Regan experienced a drop in sales during the COVID-19 pandemic. O'Regan responded by laying off some employees, including Mr. Arnold. His lay-off was on April 23, 2020. At that time, his base salary was

$70,000 per annum plus benefits and bonuses based on sales. According to O'Regan, from 2017 to 2019 his gross annual income before deductions ranged from $102,408.66 to $106,841,04.

[9] Initially, Mr. Arnold expected he would be re-hired as Sales Manager once the sales volume recovered. However, O'Regan decided to reconfigure its operation. The new structure focused more on used car sales which, in O'Regan's view, was not Mr. Arnold's forte.

[10] In June 2020, O'Regan informed Mr. Arnold that his former position no longer existed. At the same time, O'Regan offered Mr. Arnold two other positions: Sales Consultant at its Chevrolet dealership and Financial Services Manager at its BMW dealership. As Mr. Arnold considered those to be demotions with reduced compensation, he declined.

[11] In September 2020, O'Regan issued to Mr. Arnold a Record of Employment stating his employment had ended from a lay-off.

[12] In October 2020, O'Regan sent Mr. Arnold a "without prejudice" payment of $50,000 less statutory deductions.

Mr. Arnold's Proceeding Under the Labour Standards Code

[13] On October 23, 2020, Mr. Arnold, without counsel, filed a Complaint seeking termination benefits under ss. 71 and 72 of the *Code*. To the question on the Complaint form – "Seeking reinstatement?", Mr. Arnold ticked "no".

[14] Section 71 and the pertinent wording of s. 72 say:

> TERMINATION OF EMPLOYMENT
>
> **Dismissal or suspension without just cause**
>
> 71(1) Where the period of employment of an employee with an employer is ten years or more, the employer shall not **discharge or suspend** that employee without just cause unless that employee is a person within the meaning of person as used in clause (d), (e), (f), (g) (h) or (i) of subsection (3) of Section 72.
>
> (2) An employee who is **discharged or suspended** without just cause may make a complaint to the Director in accordance with Section 21.
>
> (3) An employee who has made a complaint under subsection (2) and who is not satisfied with the result may make a complaint to the Board in accordance with

Section 23 and such complaint shall be deemed to be a complaint within the meaning of subsection (1) of Section 23.

Termination of employment by employer

72(1) Subject to subsection (3) and Section 71, an employer shall not **discharge, suspend or lay off** an employee, unless the employee has been guilty of wilful misconduct or disobedience or neglect of duty that has not been condoned by the employer, without having given at least

(a) one week's notice in writing to the person if his period of employment is less than two years;

(b) two weeks' notice in writing to the person if his period of employment is two years or more but less than five years;

(c) four weeks' notice in writing to the person if his period of employment is five years or more but less than ten years; and

(d) **eight weeks' notice** in writing to the person if his period of employment is **ten years or more**.

…

(3) Subsections (1) and (2) do not apply to

…

(d) a person who is discharged or laid off for any reason beyond the control of the employer including complete or partial destruction of plant, destruction or breakdown of machinery or equipment, unavailability of supplies and materials, cancellation, suspension or inability to obtain orders for the products of the employer, fire, explosion, accident, labour disputes, weather conditions and actions of any governmental authority, if the employer has exercised due diligence to foresee and avoid the cause of discharge or lay-off;

(e) a person who has been offered reasonable other employment by his employer;

…

(4) **Notwithstanding subsections (1),** (2) and (3), but subject to Section 71, the **employment of a person may be terminated** forthwith **where the employer** gives to the person notice in writing to that effect and **pays him** an amount equal to all pay to which he would have been entitled for work that would have been performed by him at the regular rate in a normal, non-overtime work week **for the period of notice prescribed under subsection (1)** or (2), as the case may be.

[bolding added]

[15] Section 72(1), with stipulated severance, applies to a discharge, suspension or "lay off". However, section 71, with broader remedies, applies only to a

discharge or suspension. Sections 2(c) and 2(r), respectively, define "discharge" as "a termination of employment by an employer **other than a lay-off** or suspension" and "suspension" as a "temporary interruption of employment, **other than a lay-off** at the direction of an employer" [bolding added]. Simply put, a "lay-off" does not offend s. 71.

[16] Section 2(i) defines "lay-off":

> 2 (i) "lay-off" means temporary or indefinite termination of employment because of lack of work and includes a temporary, indefinite or **permanent termination of employment because of the elimination of a position**, and "laid off" has a corresponding meaning. [bolding added]

[17] This Court has interpreted s. 2(i) to require that the "elimination of a position" be in "good faith": *Decker v. Ben's Ltd.*,1995 NSCA 103, 142 N.S.R. (2d) 371, at paras. 12, 31, 37, per Hallett J.A. for the Court; *Halifax Developments Ltd. v. Sutton* 1995 NSCA 117, 142 N.S.R. (2d) 264, at paras. 14 and 20, per Freeman J.A., for the Court.

[18] Under the *Code*, Mr. Arnold's bottom line was:

- If he suffered a "permanent termination of employment because of the elimination of [his] position" in good faith, O'Regan did not contravene s. 71.
- If O'Regan did not contravene s. 71, Mr. Arnold's maximum entitlement would be the statutory severance stipulated by s. 72, *i.e.* eight weeks pay under ss. 72(1)(d) and 72(4). This is less than the $50,000 severance he had already received from O'Regan.

[19] In section 71(3), "Board" refers to the Labour Board. Until 2010, an employee's recourse from the Director was to the Labour Standards Tribunal. In 2010, the *Code* was amended to substitute the Labour Board for the Tribunal (S.N.S. 2010, c. 37, ss. 84-116).

[20] Mr. Arnold's Complaint went to the Director to be processed under s. 21. That procedure is:

- Sub-sections 21(1), (2) and (3) say the Director investigates, attempts to achieve a settlement and, if there is no settlement, determines whether there has been a contravention of the *Code*.

- Section 21(3) says "where the Director concludes that any person has contravened a provision of this Act", the Director may order the "contravening person" to "do any act or thing that in the opinion of the Director constitutes full compliance with this Act" including compensation and reinstatement.

- Section 21(5) permits an appeal to the Labour Board by the "person against whom the Director has made an order". Section 26(2)(b) says, if "the Board decides that a party has contravened a provision of this Act", the Board "may order the contravening party to … rectify an injury caused to the person injured or to make compensation therefor".

- Under s. 21(7), if the Director determines there was no contravention, the Director "shall so inform the complainant and advise him of his right to make a complaint to the Board and that he may wish the advice of counsel". "Board" refers to the Labour Board. Under ss. 23-26 and s. 71(3), the Labour Board hears the complaint afresh, determines whether there has been a contravention of the *Code* and, if so, orders a remedy.

[21] In response to Mr. Arnold's Complaint, O'Regan's counsel filed evidence and submissions with the Director.

[22] On November 10, 2021, the Director issued a Decision (File # 63474). Further to s. 21(7), the Decision found there was "no violation of the *Labour Standards Code* and regulations". The material passages said:

> **Findings**
>
> **Termination – Pay in Lieu of Notice**
>
> When discharging or suspending an employee with ten years or more of service an employer must comply with both sections 71 and 72 of the Labour Standards Code. Pursuant to section 71 an employer must have "just cause" to discharge or suspend an employee where the period of employment is ten years or more.
>
> **Unlike section 72, which is discussed below, section 71 of the Code does not apply to lay-offs**, only discharges and suspensions. Section 2(i) of the *Code* defines lay-offs as follows:

> *"lay-off" means temporary or indefinite termination of employment because of lack of work and includes a temporary, indefinite or permanent termination of employment because of the elimination of a position….*

I must determine whether the Complainant's position of Sales Manager was genuinely eliminated, in which case section 71 would not apply to the present matter. When questioning whether a position has truly been eliminated, the relevant consideration is the good faith of the employer. The employer must demonstrate that the intention to restructure a business was genuine and not aimed at a particular employee, but rather, the employee's position.

…

I accept the evidence of the Respondent and find that the Sales Manager position and Used Car Sales Manager position are two different positions. Although part of the Complainant's duties in the approximately five weeks prior to his April 23, 2020 lay-off included running the Respondent's used car department, the Complainant's own evidence is that he had assumed a variety of duties. I find that the Complainant was not in the position of Used Car Sales Manager at the time of his April 23, 2020 lay-off.

I find that the Complainant's Sales Manager position was eliminated in good faith by the Respondent. The elimination of the position was not directed at the Complainant, but at the position of Sales Manager. …

Since I have found that the Complainant's position was eliminated in good faith when he was laid off on April 23, 2020, I further find that the Complainant is not entitled to any remedy under section 71 of the Labour Standards Code.

Section 72(1)(d) of the Labour Standards Code says an employer must give an employee with the Complainant's period of employment 8 weeks' written notice of termination, or pay in lieu of notice, unless the employee is guilty of wilful misconduct or disobedience or neglect of duty, in which case notice is not required.

The Respondent is not claiming the Complainant was guilty of wilful misconduct or disobedience or neglect of duty. There are exceptions to the rule of notice. Section 72(3)(d) states that notice is not payable to a person when the cause of the discharge or lay-off is beyond the control of the employer as long as the employer has exercised due diligence to foresee and avoid the cause of discharge or lay-off. Another exception is found other [*sic*] section 72(3)(e), which is that notice is not payable if the employee has been offered reasonable other employment by their employer.

The Respondent claims that both exceptions apply in this case. The Respondent says that the lay-off was caused by the unforeseeable disruption to its business that resulted from the COVID-19 pandemic and also that the Complainant was offered reasonable other employment.

> I find that I need not determine whether the exceptions to notice under section 72(3) apply in this case. **Since I have found that the Complainant is not entitled to a remedy under Section 71 the Complainant's greatest potential entitlement under the Labour Standards Code is 8 weeks' pay in lieu of notice under section 72.**
>
> In October 2020 the respondent provided to the Complainant a "without prejudice" lump-sum payment of $50,000 in recognition of his service. **Since the Complainant received a greater benefit than received 8 weeks' pay in lieu [*sic*] notice, which is all that is required under section 72, I find that he is not entitled to any additional remedy as a result of his termination. I find no violation of either sections 71 or 72 of the Labour Standards Code.**
>
> [bolding added]

[23] On November 18, 2021, Mr. Arnold filed a Notice of Appeal to the Labour Board under ss. 23 and 71(3) of the *Code*.

[24] On December 10, 2021, the Board's vice-chair, Frank DeMont, held a Case Management Conference. Attending were a member of the Dalhousie Pro Bono Labour Standards Appeal Project Team, who now represented Mr. Arnold, and counsel for O'Regan. Mr. DeMont's letter of December 16, 2021, summarized the meeting and noted that Mr. Arnold would amend his reasons for the Complaint.

[25] By mid-January 2022, Mr. Arnold had retained his current counsel. On January 19, 2022, Mr. Arnold's counsel wrote to the Board, giving notice that Mr. Arnold discontinued his appeal to the Board.

Mr. Arnold's Wrongful Dismissal Lawsuit

[26] On February 7, 2022, Mr. Arnold filed a Notice of Application in the Supreme Court of Nova Scotia against O'Regan Properties Limited. The Notice claimed "damages for wrongful dismissal including pay in lieu of notice, inclusive of moral damages for breach of the Respondent's duty of good faith performance to the Applicant".

[27] With O'Regan's consent, Mr. Arnold later amended his Notice of Application to substitute "O'Regan Halifax Limited" for "O'Regan Properties Limited" as the Respondent.

[28] On February 24, 2022, O'Regan filed a Notice of Motion to dismiss Mr. Arnold's claim on the bases that the Supreme Court lacked jurisdiction and the claim was an abuse of process.

The Motions Judge's Decision

[29] Justice Darlene Jamieson heard O'Regan's motion on July 19, 2022 and issued a written Decision on August 2, 2022 (2022 NSSC 221). The judge allowed O'Regan's motion and dismissed Mr. Arnold's claim for wrongful dismissal. The Decision gave two reasons:

> **Conclusion**
>
> [84] When Mr. Arnold was terminated without just cause by O'Regan's, he had two options. He could either pursue his rights under the unjust dismissal provisions of the *Labour Standards Code* or file a wrongful dismissal claim in court. Once Mr. Arnold decided to initiate a complaint under the *Code*, he was obliged to exhaust that remedy. Mr. Arnold's claims fell within the intended ambit of the *Code* and effective redress was available under it. As a result, the court must defer to the mechanism selected by Mr. Arnold under the *Code* to pursue his claims.
>
> [85] In the alternative, Mr. Arnold's Application in Court is an attempt to re-litigate matters which have already been decided, or should have been decided, by the Director of Labour Standards. It would be an abuse of process to permit Mr. Arnold to pursue the same claims in a different forum after receiving a decision with which he disagrees.
>
> [86] The Application is dismissed with costs to the Respondent. …

[30] On August 26, 2022, Mr. Arnold appealed to the Court of Appeal.

Issues

[31] The appeal involves the interplay of three questions:

> 1. Are any of Mr. Arnold's pleadings in the lawsuit subject to issue estoppel?
>
> 2. Did his Complaint under the *Code* preclude a lawsuit for wrongful dismissal?
>
> 3. Is his lawsuit an abuse of process by attempted re-litigation?

[32] The first point would allow Mr. Arnold's wrongful dismissal lawsuit to proceed after eliminating any estopped issue. The second or third points, *i.e.* the bases for the motions judge's Decision, would bar the lawsuit.

[33] Central to the analysis of all three points is s. 6 of the *Code*:

> **Effect of Act**
>
> 6 This Act applies notwithstanding any other law or any custom, contract or arrangement, whether made before, on or after the first day of February, 1973, but **nothing in this Act affects the rights or benefits of an employee under any law**, custom, contract or arrangement **that are more favourable to him than his rights or benefits under this Act**. [bolding added]

Standard of Review

[34] The Court of Appeal applies correctness to issues of law and palpable and overriding error to issues of fact or mixed fact and law with no extractable legal issue.

[35] A discretionary ruling, whether interlocutory or final, is reviewed for error in legal principle or whether it would cause a patent injustice. As it is presumed a court should not exercise its discretion to cause a patent injustice, this is a subset of legal error. *Innocente v. Canada (Attorney General)*, 2012 NSCA 36, paras. 16-29; *Tapics v. Dalhousie University*, 2015 NSCA 72, para. 38; *Nova Scotia (Attorney General) v. Nova Scotia Teachers Union*, 2020 NSCA 17, paras. 45-46.

Issue Estoppel – the Deagle Decision

[36] *Deagle v. Shean Co-Operative Ltd*, (1996), 156 N.S.R. (2d) 219 (C.A.) is the leading authority in Nova Scotia on whether and how a lawsuit for wrongful dismissal may proceed in court after a ruling by the Director of Labour Standards on the employee's claim for termination benefits under the *Labour Standards Code*.

[37] Mr. Deagle was a thirteen-year employee. His employer dismissed him without notice or pay in lieu of notice. Mr. Deagle filed a claim with the Director of Labour Standards. Further to s. 72 of the *Code*, the Director and, after an appeal, the Labour Standards Tribunal ordered the employer to pay Mr. Deagle eight weeks' pay in lieu of notice. Eight weeks was then, as it remains today for Mr. Arnold, the statutory severance payable under s. 72(1)(d) to an employee with ten or more years service.

[38] Several months later, Mr. Deagle sued the employer for wrongful dismissal in the Supreme Court of Nova Scotia. His lawsuit claimed pay in lieu of reasonable notice, lost benefits, aggravated and punitive damages and damages for mental distress. The employer moved to dismiss Mr. Deagle's lawsuit on the basis that the matter had already been litigated before the Director and Tribunal. Supreme Court Justice Haliburton dismissed the employer's motion. The employer appealed to the Court of Appeal.

[39] This Court held the matter was governed by the principles of issue estoppel. This meant the lawsuit could proceed after eliminating any estopped issue that had been decided by the Director or Tribunal.

[40] Justice Flinn began by citing the requirements for issue estoppel *i.e.*: (1) the "same question has been decided"; (2) "the judicial decision which is said to create the estoppel was final"; and (3) "the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised or their privies" (para. 11).

[41] The second and third requirements were not in issue, as they are not in issue in Mr. Arnold's case.

[42] Justice Flinn focused on the first requirement – *i.e.* whether the "same question has been decided". To assess that matter, he examined the Tribunal's Decision. The Tribunal's Order to pay eight weeks' salary was prescribed by s. 72(1)(d) of the *Code*. It did not involve an assessment by the Tribunal of the period of reasonable notice in a common law lawsuit for wrongful dismissal.

[43] Justice Flinn said:

> [12] It is only the first of the three requirements which is in issue in this appeal. The question then is: In considering what the respondent's damages are, in his action for wrongful dismissal, **has that question already been answered** in the proceedings before the Labour Standards Tribunal?
>
> [13] **The answer is, clearly, no.**
>
> [14] The only question which the Labour Standards Tribunal was required to deal with in this matter was to determine if the respondent employee "has been guilty of wilful misconduct or disobedience or neglect of duty that has not been condoned by the employer" as those words are used in s. 72(1) of the Act. The Tribunal answered that question in the negative.
>
> …

> [16] The Tribunal decided, in accordance with s. 26(1)(a), that the employer contravened s. 72(1) of the *Act*. Pursuant to the provisions of s. 26(2)(a) of the *Act*, the Tribunal ordered the appellant comply with the provisions of s. 72 of the *Act* by paying to the respondent eight weeks' salary in lieu of notice, because the respondent had been in the employ of the appellant for ten years or more.
>
> [bolding added]

[44] In *Deagle*, the employer submitted that an employee's complaint under the *Code* precludes a lawsuit for wrongful dismissal in the courts, regardless of what issues had been determined by the Director. Justice Flinn rejected the submission because it contradicted s. 6 of the *Code*:

> [20] The purpose of s. 72 of the *Code* is to require an employer to meet certain minimum standards when dismissing an employee who has not "been guilty of wilful misconduct or disobedience or neglect of duty that has not been condoned by the employer". **These are minimum requirements, and vary with the length of service of the employee.** Most employers voluntarily comply with the provisions of s. 72. In such cases, and **because of s. 6 of the *Code*, the employer could not be heard to say that the employee has no further claim for damages for wrongful dismissal in the appropriate case. There is no reason why there should be any difference where the employer is forced to comply following a complaint made against him by the employee. If there was such a difference, employers would be encouraged not to comply with s. 72 of the *Code*** if they thought a hearing before the Labour Standards Tribunal would fully resolve the dismissed employee's claim. **That is not the purpose of s. 72 of the *Code*.**
>
> [21] **There is, therefore, no issue estoppel with respect to the respondent's claim for damages for wrongful dismissal**, and Justice Haliburton was correct in so deciding. Justice Haliburton quite properly deducted, from the damages which he awarded to the respondent, the eight weeks' pay ($3968.00) which was the subject of the order of the Labour Standards Tribunal.
>
> [bolding added]

[45] For the elements of issue estoppel, Justice Flinn (para. 11) cited *Rasanen v. Rosemount Instruments Ltd.*, (1994) 17 O.R. (3d) 267 (C.A.), at pp. 277-78, where Abella J.A. (as she then was) said:

> At its simplest, issue estoppel is intended to preclude re-litigation of issues that have been determined in a prior proceeding.
>
> …
>
> … Lord Guest summarized the requirements of issue estoppel as follows in *Carl-Zeizz-Siftung v. Rayner & Keeler Ltd. (No. 2)*, [1967] 1 A.C. 853 (H.L.) at p. 935:

> … (1) that the same question has been decided; (2) that the judicial decision which is said to create the estoppel was final; and, (3) that the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised or their privies.

[46] Since *Deagle*, the Supreme Court of Canada has confirmed the requirement that, for issue estoppel, the "same issue" must have been "decided" in the earlier proceeding:

- In *Danyluk v. Ainsworth Technologies Inc.*, [2001] 2 S.C.R. 460. Justice Binnie for the Court stated a two-fold test:

  First: Has a question of fact, law or mixed fact and law been determined by a final judicial decision in a proceeding between the same parties or their privies? (*Danyluk*, paras. 24-25, 54-60). Justice Binnie made it clear that, to trigger issue estoppel, it is necessary that "the same question has been decided" (paras. 25, 54-55).

  Second: If the answer to the first question is Yes, should the court exercise its discretion to decline the application of issue estoppel? As issue estoppel is an "implement of justice", the discretion should be exercised to promote justice in the circumstances of each case (*Danyluk*, paras. 33, 62-67).

- In *Boucher v. Stelco Inc.*, [2005] 3 S.C.R. 279, para. 33, LeBel J. for the Court, reiterated *Danyluk*'s tests and said "the issue must be the same as the one decided in the prior decision".

- In *British Columbia (Workers' Compensation Board) v. Figliola*, [2011] 3 S.C.R. 422, at para. 27, Justice Abella for the majority confirmed *Danyluk*'s tests and said issue estoppel turns on "whether the same question has been decided" in the earlier proceeding.

- In *Penner v. Niagara (Regional Police Services Board)*, [2013] 2 S.C.R. 125, at paras. 29 and 31, Justices Cromwell and Karakatsanis, for the majority, reiterated *Danyluk*'s tests and said issue estoppel applies to "an issue that was finally decided in prior judicial proceedings" between the same parties or their privies.

[47] To summarize the legal principles:

- *Deagle* has not been overturned. It remains the leading precedent in Nova Scotia on whether and how an employee may sue in court for wrongful

dismissal after the employee has claimed termination benefits under the *Labour Standards Code*.

- As stated in *Deagle*, s. 6 of the *Code* does not preclude a lawsuit for wrongful dismissal after a Complaint to the Director. This is the plain meaning of s. 6.

- Section 6 is unamended and has the same meaning today as at the time of *Deagle*.

- As stated in *Deagle*, the extent to which Mr. Arnold is restricted in his wrongful dismissal lawsuit depends on issue estoppel. Issue estoppel precludes re-litigation of a "decided" issue while permitting the employee to litigate, for the first time, his undecided "rights or benefits … under any law [such as the common law of wrongful dismissal]… that are more favourable to him than his rights or benefits under this Act", as directed by s. 6.

- Under the Supreme Court of Canada's recent rulings, "whether the same question has been decided" in the earlier proceeding, *i.e.* the test applied by *Deagle*, remains a pre-condition for issue estoppel.

- Whether the "same question has been decided" requires an examination of the Director's Decision. Issues the Director has decided may not be re-litigated, subject to the court's residual discretion under *Danyluk*'s second test. Issues the Director has not decided are litigable in the wrongful dismissal lawsuit.

Application of Issue Estoppel

[48] In Mr. Arnold's case, the Director's Decision listed the following "Findings":

- **Good faith:** "[T]he Complainant's Sales Manager position was eliminated in good faith by the Respondent." So it was a "lay off", as defined by s. 2(i).

- **No breach of s. 71:** "Since I have found that the Complainant's position was eliminated in good faith when he was laid off on April 23, 2020, I further find that the Complainant is not entitled to any remedy under section 71 of the Labour Standards Code." That was because s. 71 does not apply to a "lay-off".

- **Statutory severance under s. 72:** "Since I have found that the Complainant is not entitled to a remedy under section 71, the Complainant's greatest potential entitlement under the Labour Standards Code is eight weeks pay in lieu of notice under section 72." The eight weeks was stipulated by ss. 72(1)(d) and 72(4).

- **Credit for payment from O'Regan:** "In October 2020 the Respondent provided to the Complainant a 'without prejudice' lump-sum of $50,000 in recognition of his service. Since the Complainant received a greater benefit than 8 weeks' pay in lieu of notice, which is all that is required under section 72, I find that he [*sic*] not entitled to any additional remedy as a result of his termination."

[49] Those findings are issue estopped. The second and third relate to specific wording of the *Code* that is irrelevant to a wrongful dismissal lawsuit. However, the first and fourth overlap with issues in the lawsuit as follows:

- **Good faith:** In the lawsuit, Mr. Arnold's Notice of Application in the Supreme Court claims elevated damages for O'Regan's "breach of the Respondent's duty of good faith performance".

  In this Court, Mr. Arnold's counsel submitted that, under *Danyluk*'s second test, the Court should exercise its discretion to allow his claim for breach of good faith to proceed. I respectfully disagree. The record discloses no facts to sustain an exercise of the judicial discretion.

  Mr. Arnold did not have counsel for his Complaint to the Director. That alone does not oust issue estoppel. The *Labour Standards Code* is intended to give the employee a speedy minimum recourse, using the Director's resources. The process is meant to be summary. The trade-off is the saved expense of legal counsel. The safety valves are the option of a *de novo* hearing in the Labour Board with counsel and the preservation of the employee's more favourable legal options by s. 6. In Mr. Arnold's case, the process before the Director involved no unfairness, as discussed in *Danyluk*, paras. 62-81, or in *Penner, supra*, paras. 40-48. There is no basis to exclude the application of issue estoppel.

  Mr. Arnold's allegation that O'Regan failed to act in good faith is issue estopped.

- **Credit for payment from O'Regan:** The Director's Decision found that O'Regan paid Mr. Arnold $50,000. This was before the applicable

statutory deductions. In *Deagle*, Justice Flinn said the payment of $3,968 to Mr. Deagle would reduce his damages award for wrongful dismissal. Similarly, the payment of $50,000 to Mr. Arnold would reduce any damages (*i.e.* the gross quantum before applicable deductions) to Mr. Arnold for wrongful dismissal.

[50] The following four points would arise in the wrongful dismissal lawsuit, and were not decided by the Director:

- **Dismissal:** Was Mr. Arnold "dismissed" under the common law of wrongful dismissal? The Director made no finding.

  The Director said Mr. Arnold was "laid off". That was because the Director applied the statutory definitions of "discharge" and "lay-off" in ss. 2(c) and 2(i), respectively, of the *Labour Standards Code*.

  Those provisions enact the Legislature's policy that the reinstatement remedy does not apply to the employer's good faith elimination of a job position. They govern a claim under the *Code*. They do not apply to a wrongful dismissal lawsuit at common law. The Director said nothing about whether Mr. Arnold was "dismissed" under the common law.

  At common law, unless there is a contractual provision to the contrary, a termination of employment for redundancy is a dismissal: David Harris, *Wrongful Dismissal* (Toronto: Thomson Reuters, 2022 – looseleaf), vol. 1, paras. 5-8, and cases cited; Peter Barnacle and Michael Lynk, originally Geoffrey England, Innis Christie and Roderick Wood, *Employment Law in Canada* (Toronto: LexisNexis, 2005 – looseleaf), vol. 1, para. 15.92 and cases cited.

- **Just cause:** Was there "just cause" for Mr. Arnold's dismissal? The Director made no finding.

  Section 72(1) of the *Labour Standards Code* says the statutory severance (*i.e.* eight weeks for Mr. Arnold) is not payable if "the employee has been guilty of wilful misconduct or disobedience or neglect of duty". The Director's only comment was:

  > The Respondent is not claiming the Complainant was guilty of wilful misconduct or disobedience or neglect of duty.

The Director found O'Regan acted in "good faith". That was because s. 71 does not apply to a "lay off", defined by s. 2(i) as the "elimination of a position", to which this Court has added the criterion of the employer's good faith (*Decker* and *Halifax Developments*, *supra*). "Good faith" is an interpretative adjunct of s. 2(i) of the *Labour Standards Code*. Section 2(i) does not apply to a wrongful dismissal lawsuit at common law.

The common law's approach to termination of employment has evolved from contractual principles of repudiation and fundamental breach. In a wrongful dismissal lawsuit, just cause involves "misconduct by the employee" that (1) "goes to the root of the employment contract", or (2) caused "a breakdown of the employment relationship" or (3) "undermined his essential obligations" to his employer: *McKinley v. B.C. Tel*, [2001] 2 S.C.R. 161, paras. 48 and 58, per Iacobucci J. for the Court; Harris, *supra*, vol. 1, para. 5.1 and authorities there cited; Barnacle and Lynk, *supra*, paras. 15.4 to 15.20. The employee's degree of misconduct must be proportionate to the severity of the sanction, *i.e.* to the ultimate penalty of summary dismissal: *McKinley*, *supra*, para. 53, followed in many later authorities.

An employer's decision to restructure its operations, even one made in good faith for sound business reasons, leading to a lay-off, is not employee misconduct. Unless there is a provision in the contract to the contrary, it is not just cause for dismissal at common law: Harris, *supra*, vol. 1, para. 5.8 and authorities cited; Barnacle and Lynk, *supra*, para. 15.92 and authorities cited.

In this Court, O'Regan's counsel acknowledged that O'Regan does not assert just cause for Mr. Arnold's dismissal.

- **Reasonable notice:** If Mr. Arnold was dismissed without just cause, what is the period of "reasonable notice" at common law? The Director made no finding.

The Director cited eight weeks' pay because s. 72(1)(d) stipulates that amount is owing to the terminated employee. This is a statutory minimum, as it was in *Deagle*. Section 72(1)(d) does not apply to a wrongful dismissal lawsuit at common law.

If an employer has "contravened" s. 71, the remedial provisions of the *Code* entitle the employee to reinstatement or damages for the period of

reasonable notice: ss. 21(3) and 26(2)(b) of the *Code* and *Abridean International Inc. v. Bidgood*, 2017 NSCA 65, paras. 51-56. However, Mr. Arnold's "lay-off", as defined by s. 2(i), meant O'Regan did not contravene s. 71. Hence the Director had no authority to award damages for the period of reasonable notice. The Director's Decision said nothing on the point.

- **Claimable compensation:** What items of Mr. Arnold's lost income or benefits would be recoverable for the period of reasonable notice? The Director made no finding. As Mr. Arnold's receipt of $50,000 exceeded any computation of the statutory severance (eight weeks' compensation) under s. 72(1)(d), it was unnecessary that the Director go further.

[51] These four points are not the "same question [that] has been decided" by the Director and are not issue estopped. Applying this Court's approach from *Deagle*, Mr. Arnold may litigate these points in his lawsuit for wrongful dismissal.

[52] My reasoning differs from that of the motions judge. I will explain why.

Preclusion of a Lawsuit by a Complaint under the Code

[53] Justice Jamieson's Decision said (para. 84) "[o]nce Mr. Arnold decided to initiate a complaint under the *Code*, he was obliged to exhaust that remedy" and "the court must defer to the mechanism selected by Mr. Arnold".

[54] There is a distinct line of authority that explains when a remedy under a statutory regime precludes a lawsuit in court. The dominant principle is: the court defers to the statutory process to the degree that *the legislation shows an intent* to confine the parties to the statutory process.

[55] In *St. Anne Nackawic Pulp & Paper Co. Ltd. v. Canadian Paper Workers Union, Local 219*, [1986] 1 S.C.R. 704, Justice Estey for the Court referred to the exclusive remedy of the grievance and arbitration procedure in New Brunswick's *Industrial Relations Act*. He said:

> 20 What is left is an attitude of judicial deference to the arbitration process. … It is based on the idea that if the courts are available to the parties as an alternative forum, **violence is done to a comprehensive statutory scheme designed to govern all aspects** of the relationship of the parties in a labour relations setting. … [bolding added]

[56] In *Weber v. Ontario Hydro*, [1995] 2 S.C.R. 929, Justice McLachlin (as she then was) for the majority said:

> 45 … Section 45(1) of the *Ontario Labour Relations Act*, like the provision under consideration in *St. Anne Nackawic*, refers to " all differences between the parties arising from the interpretation, application, administration or alleged violation of the agreement [Justice McLachlin's underlining]. The Ontario **statute makes arbitration the only available remedy** for such differences. … The **object of the provision – and what is thus excluded from the courts – is all proceedings** arising from the difference between the parties, however those proceedings may be framed. …
>
> 46 … To permit concurrent court actions whenever it can be said that the cause of action stands independently of the collective agreement **undermines this goal**, as this Court noted in *St. Anne Nackawic*. …
>
> [bolding added]

[57] In *Regina Police Association Inc. v. Regina (City) Board of Police Commissioners*, [2000] 1 S.C.R. 360, Justice Bastarache for the Court said:

> 26 … the rationale for adopting the exclusive jurisdiction model was to ensure that the legislative scheme in issue was not frustrated by the conferral of jurisdiction upon an adjudicative body that was **not intended by the legislature.**
>
> …
>
> 34 The underlying rationale for the approach to determining jurisdiction set out in *Weber*, *supra*, was based, in part, on the recognition that it would **do violence to a comprehensive statutory scheme**, **designed to govern all aspects of the relationship** between parties in a labour relations setting, to allow disputes to be heard in a forum other than that specified in the scheme [citing *St Anne* and *Weber*]. … In my view, the same rationale applies in the case at bar. Here, **the legislature has shown its intention to have all matters** relating to discipline governed by the *Police Act* and Regulations. …
>
> [bolding added]

[58] In *Vaughan v. Canada*, [2005] 1 S.C.R. 146, Justice Binnie for the majority said:

> 15 … the dispute here is over a benefit unilaterally conferred by the employer, in respect of which Parliament has vested the final decision with the Deputy Minister or his or her designate without recourse to independent adjudication. If such restraint is not mandatory (as it was in *Weber*), is restraint nevertheless **necessary to avoid undermining Parliament's intent as expressed in the labour relations statute?**

…

> 22 … **The task of the court is still to determine whether**, looking at the legislative scheme as a whole, **Parliament intended** workplace disputes to be decided by the courts or under the grievance procedure established by the PSSRA.
>
> …
>
> 38 Fifthly, I do not accept for reasons already expressed, the central assumption of the appellant's argument that comprehensive legislative schemes which do not provide for third-party adjudication are not, on that account, worthy of deference. It is a consideration, but in the case of the PSSRA**, it is outweighed by other more persuasive indications of clues to parliamentary intent.**
>
> [bolding added]

[59] In *Canada (Attorney General) v. TeleZone Inc.*, [2010] 3 S.C.R. 585, Justice Binnie for the Court said:

> D. *The Jurisdiction of the Provincial Superior Courts*
>
> [42] What is required, at this point of the discussion, is to remind ourselves of the rule that **any derogation from the jurisdiction of the provincial superior courts** (in favour of the Federal Court or otherwise) requires **clear and explicit statutory language**: "[The] ouster of jurisdiction from the provincial superior courts in favour of vesting exclusive jurisdiction in a statutory court … requires clear and explicit statutory wording to this effect": *Ordon Estate v. Grail*, [1998] 3 S.C.R. 437, at para. 46; see also *Pringle v. Fraser*, [1972] S.C.R. 821, at p. 826; *Canada (Human Rights Commission) v. Canadian Liberty Net*, [1998] 1 S.C.R. 626, at para. 38. [bolding added]

[60] In *Penner*, *supra*, (2013), Justices Cromwell and Karakatsanis for the majority said:

> [51] Here, as recognized by the Court of Appeal, **the legislation does not intend to foreclose parallel proceedings** when a member of the public files a complaint. This would shape the reasonable expectations of the parties and the nature and extent of their participation in the process.
>
> [52] **Nothing in the legislative text, therefore, could give rise to a reasonable expectation** that the disciplinary hearing would be conclusive of Mr. Penner's legal rights against the constables, the Chief of Police or the Police Services Board in his civil action.
>
> [bolding added]

[61] I will turn to the decisions of Nova Scotia's courts.

[62] In *Canada (Attorney General) v. Pleau*, 1999 NSCA 159, leave to appeal to the Supreme Court of Canada refused Sept. 28, 2000, [2000] S.C.C.A. No. 83, Justice Cromwell for the Court said:

> [19] … **Where the legislation** and the contract **show a strong preference** for a particular dispute resolution process, that preference should, generally, be respected by the courts. While it takes very clear language to oust the jurisdiction of the superior courts as a matter of law, courts properly decline to exercise their inherent jurisdiction where there are strong policy reasons for doing so.
>
> …
>
> [49] Taking these underpinnings of *Weber* into account, the relevant considerations may be addressed under three headings.
>
> [50] First, consideration must be given to the process for dispute resolution established by the legislation and collective agreement. Relevant to this consideration are, of course**, the provisions of the legislation** and the collective agreement, particularly **as regards the question of whether the process is expressly or implicitly regarded as an exclusive one**. Language consistent with exclusive jurisdiction, the presence or absence of privative clauses and the relationship between the dispute resolution process and the overall legislative scheme should be considered.
>
> [51] Second, the nature of the dispute and its relation to the rights and obligations created by the overall scheme of the legislation and the collective agreement should be considered. In essence, this involves a determination of how closely the dispute in question resembles the sorts of matters which are, in substance addressed by the legislation and collective agreement. **What is required is an assessment of** the "essential character" of the dispute, the extent to which it is, in substance, regulated by **the legislative** and contractual **scheme and the extent to which the court's assumption of jurisdiction would be consistent or inconsistent with that scheme.**
>
> [52] Third, the capacity of the scheme to afford effective redress must be considered. Simply put, the concern is that where there is a right, there ought to be a remedy.
>
> [Justice Cromwell's underlining. Bolding added]

[63] In *Adams v. Cusack*, 2006 NSCA 9, Justice Cromwell for the Court said:

> [17] … Even though the *PSSRA* scheme, unlike *Weber*, does not contain language clear enough to oust court jurisdiction, judicial deference is nonetheless appropriate **given the clear legislative intent** that employment disputes should generally be resolved within the legislative dispute resolution scheme: *Pleau*, para. 33; *Vaughan*, paras. 21 and 29-41. [bolding added]

[64] In *Gillan v. Mount Saint Vincent University*, 2008 NSCA 55, para. 14, Justice Oland for the Court quoted the test from *Pleau*, set out above, and concluded:

> [31] … In my view, these provisions, in combination with the [*Trade Union*] ***Act*'s requirement** that every collective agreement incorporate provisions to settle differences concerning its violation, **show a strong preference** for the dispute resolution process set out in the legislation and the contract. [bolding added]

[65] In *Roumeli Investments Ltd v. Gish*, 2018 NSCA 27, Justice Bourgeois for the Court, summarized the approach from *Weber* and *Pleau*:

> [30] In my view, the above general principles can be summarized as follows:
>
> - The NSSC has original jurisdiction to hear civil claims founded in negligence;
>
> - Prior to passing of residential tenancies legislation, the NSSC historically shared a concurrent jurisdiction with inferior tribunals to hear disputes arising between landlords and tenants;
>
> - As a matter of statutory interpretation, there is a presumption that the legislature does not intend to remove the jurisdiction of the NSSC to hear matters within its original jurisdiction;
>
> - **Statutory provisions which intend** to remove jurisdiction from the NSSC **must be explicit, clear and specific in that intention.** Inferences and implications arising from a single statutory provision, or several read in conjunction, are not sufficient; and
>
> - Where asked to decline to exercise its concurrent jurisdiction in favour of another tribunal, **courts should conduct a *Weber* analysis**.
>
> …
>
> Conclusion
>
> [47] I am satisfied that the NSSC has original jurisdiction to hear the claim advanced by the appellant and the *RTA* [*Residential Tenancies Act*] does not oust that jurisdiction. There is only one provision in the *RTA* that specifically addresses the "exclusive" authority of the Director. …
>
> [48] There is nothing in the above provision, or any others in the *RTA*, which speak to the jurisdiction of the NSSC. … In my view, **there is an absence of clear language specifically addressing the legislature's intention** to remove the NSSC's original jurisdiction to hear matters arising from residential tenancies.
>
> [bolding added]

[66] To the same effect: *Cherubini Metal Works Ltd. v. Nova Scotia (Attorney General)*, 2007 NSCA 37, paras. 16 and 42; *Symington v. Halifax (Regional Municipality)*, 2007 NSCA 90, paras. 54-70.

[67] According to these rulings, the issue turns on legislative intent. Does the *Labour Standards Code* display an intent that Mr. Arnold be confined to his statutory remedy and precluded from suing for wrongful dismissal?

[68] There are authoritative answers to that question. The *Code* provides a "minimum" remedy that, under s. 6, the employee may try to supplement by suing for wrongful dismissal.

[69] In *Sobeys Stores Ltd. v. Yeomans*, [1989] 1 S.C.R. 238, at pp. 279-82, Justice Wilson for the majority discussed Nova Scotia's *Labour Standards Code*:

> When the Nova Scotia legislature enacted the Code in 1972 it brought together a number of diverse statutes all dealing with **minimum employment standards**. …
>
> The Code represents a comprehensive scheme for the protection of non-unionised workers. It provides what I would classify as both substantive and procedural protections and benefits to such workers. By substantive protections I refer to the provisions dealing with minimum wages, equal pay, maternity leave, hours of work, child employment, statutory **minimum notice periods on termination**, and reinstatement. Most of these areas are standard fare in collective agreements and in designating certain **minimum standards** the legislature has recognized the historic imbalance in bargaining power between an employer and an individual employee and has sought to provide some counterbalance to that. **Under section 4 [now s. 6] the Code's standards give way to any rights or benefits that are more favourable to an employee.** …
>
> …
>
> Along with its substantive protections the Code provides workers with a number of procedural protections. … More importantly, **the Code provides a cheap and speedy mechanism** whereby complaints can be investigated and resolved. This is **at least as important** as the substantive protections offered. …
>
> …
>
> The social policy of **providing employee protections and enforcing them expeditiously** is reflected in the Code as a whole and in s. 67A [now s. 71] in particular. … Although the Tribunal does carry out a judicial function with regard to s. 67A and many other aspects of the Code, that function is necessarily incidental to **the broader social policy goals that the Code is designed to achieve**.
>
> [bolding added]

[70] In *Machtinger v. HOJ Industries Ltd.*, [1992] 1 S.C.R. 986, the Supreme Court of Canada considered the *Employment Standards Act*, R.S.O. 1980, c. 137, Ontario's equivalent to Nova Scotia's *Labour Standards Code*. Justice Iacobucci for the majority said (pp. 999-1000, 1003, 1005):

> The Act provides for mandatory **minimum** notice periods. …
>
> It is also clear from ss. 4 and 6 of the Act that **the minimum notice periods set out in the Act do not operate to displace the presumption at common law of reasonable notice**. **Section 6 of the Act states that the Act does not affect the right of an employee to seek a civil remedy** from his or her employer. Section 4(2) states that a "right, benefit, term or condition of employment under a contract" that provides a greater benefit to an employee than the standards set out in the Act shall prevail over the standards in the Act. **I have no difficulty in concluding that the common law presumption of reasonable notice is a "benefit", which, if the period of notice required by the common law is greater than that required by the Act, will, if otherwise applicable, prevail over the notice period set out in the Act.** ….
>
> …
>
> Accordingly, **an interpretation of the Act which encourages employers to comply with the minimum requirements of the Act, and so extends its protections to as many employees as possible, is to be favoured over one that does not.** In this regard, the fact that many individual employees may be unaware of their statutory and common law rights in the employment context is of fundamental importance. …
>
> …
>
> Finally, I would note that the Act sets out what the provincial legislature deems to be fair **minimum notice periods**. One of the purposes of the Act is to ensure that employees who are discharged are discharged fairly. … **it would indeed be perverse to allow the employer to avail itself of legislative provisions intended to protect employees, so as to deny employees their common law right to reasonable notice**.
>
> [bolding added]

[71] In *Re Rizzo and Rizzo Shoes Inc.*, [1998] 1 S.C.R. 27, Justice Iacobucci for the Court said:

> 36 Finally, with regard to the scheme of the legislation, since the *ESA* [*Employment Standards Act* of Ontario] is a mechanism for providing minimum benefits and standards to protect the interests of employees, **it can be characterized as benefits-conferring legislation**. As such, according to several decisions of this Court, it ought to be interpreted in a broad and generous manner.

> **Any doubt arising from difficulties of language should be resolved in favour of the claimant**. [citations omitted]. It seems to me that, by limiting its analysis to the plain meaning of ss. 40 and 40a of the *ESA*, the Court of Appeal adopted an overly restrictive approach that is inconsistent with the scheme of the Act.
>
> [bolding added]

[72] In *Morine v. L & J Parker Equipment Inc.*, 2001 NSCA 53, paras. 8-11, Justice Cromwell for the Court applied the principles stated in *Machtinger* and *Rizzo* to Nova Scotia's *Labour Standards Code*. Justice Cromwell continued:

> [29] Third, and most importantly, the *Code* is a benefit-conferring, remedial statute designed to protect the interests of dismissed employees. As the Supreme Court of Canada said in *Rizzo Shoes*, **any doubt** arising from difficulties of language **should be resolved in favor of the claimant**. … [bolding added]

[73] I have quoted *Deagle*, paras. 20-21 (above, para. 44).

[74] In *Fredericks v. 2753014 Canada Inc.*, 2008 NSSC 377, Justice Duncan (as he then was) referred to *Deagle*, then concluded:

> [49] Subsequent judicial statements such as those in *Vaughan* and *Adams* have not changed the underlying principle as Flinn J.A. saw it. To restate it in the current context, **a claim for wrongful dismissal does not attract effective redress under the *Labour Standards Code (Nova Scotia)*. It provides a statutory minimum. Section 6 of the *Code* preserves to the plaintiff the more favourable benefit of rights in the common law that a court may find, and which are not otherwise available.**
>
> …
>
> [54] The question is whether the decision in *Danyluk* has overturned or otherwise altered the reasoning in *Deagle*. In my view, *Danyluk* does not change the reasoning set out in *Deagle*, at least in so far as it relates to the claim for damages arising from the inadequacy of notice of dismissal. The pre-conditions to the granting of issue estoppel are:
>
> 1. That the same question has been decided in earlier proceedings;
>
> 2. That the earlier decision was final; and
>
> 3. That the parties to that decision or their privies are the same in both proceedings.
>
> [55] In this case, the defendant provided the plaintiff with two weeks' notice, as required by s. 72(1)(b) of the *Code*, for an employee of at least two years and not more than five years. **The Director of Labour Standards concluded only that the defendant had complied with the minimum statutory provision. This does**

> **not constitute a determination of the benefits that the plaintiff lost as a result of his dismissal.**
>
> [56] **The defendant has not established that the first of the pre-conditions to issue estoppel has been satisfied and so I dismiss this argument.**
>
> …
>
> [65] I have concluded that a period of five months notice is appropriate for Mr. Fredericks.
>
> [bolding added]

[75] I will assume, for a moment, that a Complaint under the *Code* precludes a wrongful dismissal action. What consequences would follow?

- Before doing anything, the just-terminated individual will have to choose between the mutually exclusive Complaint to the Director and a lawsuit for wrongful dismissal.

- The Complaint under the *Code* is pursued by the Director and avoids legal fees for the employee. The former employee, suddenly without income, might readily opt for the Complaint over the lawsuit, as did Mr. Arnold. As the authorities (*e.g. Sobeys*, *Deagle*) have noted, the *Code* aims to encourage that course.

- However, if the Director or Board ends up finding there was a "lay off", as defined by s. 2(i), the employee would recover nothing under s. 71, and only his statutory award under ss. 72(1) and (4). Then, as an added side effect, the employee would be precluded from suing at common law. What the authorities term a "minimum" statutory payment would be the one and only payment.

- At common law, an employee terminated for redundancy may recover damages for the period of reasonable notice (see above, para. 50 – "Just cause"). That judicial award often is substantially higher than the statutory minimum under s. 72(1) of the *Code*. The *Code*, enacted with the object of protecting employees, would deny this potentially higher award to which the employee would otherwise be entitled. This would upend the intent of s. 6. In *Machtinger*, p. 1005, Justice Iacobucci termed a similar outcome "perverse".

- An employer who is considering a prospective lay-off, after being advised by its legal counsel of the potentialities, would be motivated to pay no severance to its "laid off" employee and hope the employee opts for the

Complaint to the Director. That is because, if the employee does so, the employer would be freed from the potentially higher damages award for wrongful dismissal. This was the scenario Justice Flinn sought to avoid in *Deagle*, para. 20.

- The *Labour Standards Code* would gift the employer with a strategy to potentially reduce the employer's exposure by rewarding employers for not voluntarily complying with the minimum severance requirements of ss. 72(1) and (4). That would contradict Justice Iacobucci's direction in *Machtinger*, p. 1003: "an interpretation of the Act which encourages employers to comply with the minimum requirements of the Act, and so extends its protections to as many employees as possible, is to be favoured over one that does not".

- Before choosing an option, a prudent employee might hire legal counsel for advice on the prospects of success with (1) a Complaint to the Director or (2) a lawsuit for wrongful dismissal, and (3) the consequences if the Complaint to the Director failed – *i.e.* preclusion of a lawsuit for wrongful dismissal. Legal opinions on those topics could draw on many of the authorities I have discussed in these lengthy reasons and would be accompanied by an invoice for legal fees. This would frustrate the *Code*'s "important" objective, according to Justice Wilson in *Sobeys*, that the statutory process be "cheap and speedy".

[76] A lay-off for redundancy does not contravene the *Code* but may be a wrongful dismissal at common law. On this matter, the common law is more favourable to the employee than is the *Code*. Section 6 says "nothing in this Act affects the rights … of an employee under any law … that are more favourable than his rights under this Act". Hence the availability of a statutory remedy under the *Code* does not itself oust the right to sue at common law. In my respectful view, the statute could not be plainer nor the judicial directives clearer than the passages from *Machtinger*, *Sobeys*, *Deagle* and *Fredericks*.

[77] The *Labour Standards Code* provides a minimum, not an alternative remedy. The employee may seek more than the minimum in a subsequent lawsuit for wrongful dismissal, subject to: (1) issue estoppel, further to *Danyluk*'s tests, for matters already decided, including the finding of O'Regan's "good faith" in this case, and (2) reduction for severance the employee has already received from the employer, including payments under s. 72.

Justice Abella's Comments in the Wilson Decision

[78] Justice Jamieson's Decision (paras. 42-44) quoted Justice Abella's reasons, for the majority, in *Wilson v. Atomic Energy of Canada Ltd.*, [2016] 1 S.C.R. 770, which considered the provisions of the *Canada Labour Code*, R.S.C. 1985, c. L-2. Justice Abella said:

> [64] It is true that under s. 246, dismissed employees may choose to pursue their common law remedy of reasonable notice or pay in lieu in the civil courts instead of availing themselves of the dismissal provisions and remedies in the *Code*. But **if they choose to pursue their rights under the Unjust Dismissal provisions of the Code, only those provisions apply**. As Prof. Arthurs observed in his Report:
>
> > … the two types of proceedings differ most importantly in other respects.
> >
> > The first relates to remedies. If successful in a civil action, an employee is entitled to damages equivalent to whatever compensation he or she would have received if the employment contract had been allowed to run its natural course – that is, for whatever period of notice would have been "reasonable". If an employer has been unfair or high-handed in carrying out the discharge, the employee may be awarded additional damages. *By contrast, if successful before an Adjudicator under Part III, an employee is entitled both to reinstatement and to compensation, not only for the duration of the notice period, but for all losses attributable to the discharge. These are potentially more extensive and expensive remedies than those a court might award.* [Justice Abella's italics]
>
> [65] It is worth noting that the [Canada Labour] Code's scheme, which was enacted in 1978, was preceded by similar Unjust Dismissal protection in Nova Scotia in 1975, and followed by a similar scheme in Quebec in 1979. Unlike other provinces, **the Nova Scotia and Quebec schemes display significant structural similarities to the federal statute.** They apply only after an employee has completed a certain period of service and do not apply in cases of termination for economic reasons or layoffs. Like the federal scheme, the two provincial ones have been consistently applied as prohibiting dismissals without cause, and grant a wide range of remedies such as reinstatement and compensation.
>
> [bolding added]

[79] From those passages in *Wilson*, Justice Jamieson deduced:

> [45] Accordingly, since Mr. Arnold chose not to pursue his rights under the unjust dismissal provisions of the *Code*, this court should only adjudicate his claims if, in the court's assessment, the claims do not fall within the intended ambit of the workplace dispute resolution scheme set out in the *Code*, or, if they

> do, that the *Code* cannot provide him with effective redress. Otherwise, the court must defer to the mechanism selected by Mr. Arnold under the *Code* to pursue his claims.

[80] Effectively, the motions judge held that Justice Abella's statement about "structural similarities" overrules this Court's Decision in *Deagle* on the applicability of issue estoppel under Nova Scotia's *Labour Standards Code*. I respectfully disagree for three reasons.

[81] **First:** In Justice Abella's comment (para. 64) – "if they choose to pursue their rights under the Unjust Dismissal provisions of the Code, only those provisions apply" – "Code" refers to the *Canada Labour Code*. Nova Scotia's legislation was not in issue. Justice Abella did not comment on the status of claimants under Nova Scotia's *Labour Standards Code* or the legislative intent of Nova Scotia's s. 6. She did not mention *Deagle*, other Nova Scotia authorities that have applied *Deagle*, or the use of issue estoppel in those rulings.

[82] In my view, Justice Abella's reference to "structural similarities" did not incidentally overrule Nova Scotia's established line of authority.

[83] **Second:** In *Wilson*, restrictions on employee rights were not in issue. Rather, the question was whether the *employer*'s common law rights against the employee were restricted by the *Canada Labour Code*, (*i.e.* whether the employer retained the common law right to terminate an employee by paying severance pay). Justice Abella said – "no", citing the *prevalence of employee protections* under labour standards legislation. She stated the employer's proposition would "create an anomalous legal environment in which the protections given to employees by statute – reasons, reinstatement, equitable relief – can be superseded by the common law right of employers". Abella J. said the employer's submission:

> [67] … somersaults our understanding of the relationship between common law and statutes, especially in dealing with employment protections, by assuming the continuity of a **more restrictive common law** regime notwithstanding the legislative enactment of benefit-granting provisions to the contrary: [citing *Machtinger*, *supra*, page 1003 and *Rizzo*, *supra*, para. 36] [bolding added]

[84] Whether an employer may use a "more restrictive" common law regime, for which there is no statutory saving provision, is the inverse of the issue in Mr. Arnold's case. Here, the issue is whether s. 6 preserves for the employee a "more favourable" common law regime.

[85] **Third:** Justice Abella premised her comment on the employee having more extensive remedies under the *Canada Labour Code* than at common law. Her para. 64 italicized for emphasis Professor Arthur's passage that the *Canada Labour Code* provides "potentially more extensive" remedies than a court might award.

[86] In Nova Scotia, those more extensive remedies apply only when an employer has "contravened" s. 71: see ss. 21(3) for the Director and 26(2)(b) for the Labour Board (quoted above, para. 20). Only then can the Director or Labour Board order reinstatement or damages for the period of reasonable notice: *Abridean*, *supra*, paras. 51-56. In such a case, the ruling of the Director or Board would "decide" the issues of "dismissal", "just cause" and "reasonable notice" under s. 71. Such a decision would establish issue estoppel, subject to the Court's fairness discretion under *Danyluk*'s second test.

[87] However, a "lay-off", as defined by Nova Scotia's s. 2(i), does not "contravene" s. 71. A "laid-off" employee, such as Mr. Arnold, cannot access the "more extensive" remedies and is left with the statutory minimum under s. 72. That is because, after a termination for redundancy, ss. 71 and 2(i) of the *Code* are less favourable to the employee than is the common law of wrongful dismissal. Section 6 preserves the employee's right to sue for "more favourable" rights and benefits available under "any law", including the common law.

Abuse of Process by Re-litigation

[88] Justice Jamieson's Decision (para. 85) said Mr. Arnold's lawsuit was an abuse of process as an attempt to re-litigate.

[89] The leading authority on abuse of process by re-litigation is *Toronto (City) v. C.U.P.E., Local 79*, [2003] 3 S.C.R. 77. Justice Arbour for the majority said:

> 23 … For issue estoppel to be successfully invoked, three preconditions must be met: (1) **the issue must be the same as the one decided in the prior decision**; (2) the prior judicial decision must have been final; (3) the parties to both proceedings must be the same, or their privies [citing *Danyluk*]. …
>
> 24 The **first two requirements of issue estoppel are met in this case**. **The final requirement of mutuality of parties has not been met**. In the original criminal case, the *lis* was between Her Majesty the Queen in right of Canada and Glenn Oliver. In the arbitration, the parties were CUPE and the City of Toronto. …

25 There has been much academic criticism of the mutuality requirement of the doctrine of issue estoppel. …

…

35 Judges have an inherent and residual discretion to prevent an abuse of the court's process. This concept of abuse of process was described at common law as proceedings "unfair to the point that they are contrary to the interest of justice". …

37 In the context that interests us here, the doctrine of abuse of process engages "the inherent power of the court to prevent the misuse of the 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. <u>It is a flexible doctrine unencumbered by the specific requirements of concepts such as issue estoppel</u> [citation omitted]
>
> <u>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.</u>

[Justice Arbour's underlining]

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. …

…

46 … A decision is final and binding on the parties only when all the 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. …

49 While the authorities most often cited in support of a court's power to prevent **relitigation of decided issues** in circumstances where issue estoppel does not apply are cases where a convicted person commenced a civil proceeding for the purpose of attacking a finding made in a criminal proceeding against the person [citations omitted], there is no reason in principle why these rules should be limited to such specific circumstances.

…

> 56 I am of the view that the facts in this appeal point to the blatant abuse of process that results when **relitigation of this sort** is permitted. The grievor was convicted in a criminal court and he exhausted all his avenues of appeal. In law, his conviction must stand, with all its consequent legal effects. Yet as pointed out by Doherty J.A. (at para. 84):
>
> > Despite the arbitrator's insistence that he was not passing on the correctness of the decision made by Ferguson J., that is exactly what he did. One cannot read the arbitrator's reasons without coming to the conclusion that he was convinced that the criminal proceedings were badly flawed and that Oliver was wrongly convicted. …
>
> …
>
> 58 … In short, there is nothing in a case like the present one that militates against the application of the doctrine of abuse of process **to bar the relitigation** of the grievor's conviction. The arbitrator was required as a matter of law to give full effect to the conviction. …
>
> [bolding added]

[90] According to these passages, abuse of process bars the "re-litigation of decided issues". Justice Arbour's reasons discounted the requirement that the "same parties or their privies" be involved in both matters. Here, O'Regan and Mr. Arnold were parties to both proceedings and mutuality is not in issue.

[91] The motions judge said:

> [74] In sum, I find that Mr. Arnold's Application is, in effect, an attempt to relitigate issues that **have already been decided**, or **should have been decided**, by the Director under the *Code*.
>
> …
>
> [85] … Mr. Arnold's Application in Court is an attempt to relitigate matters which **have already been decided**, or **should have been decided**, by the Director of Labour Standards. …
>
> [bolding added]

[92] I respectfully disagree:

- Mr. Arnold's pleading that O'Regan did not act in good faith was already decided and is issue estopped, as provided in *Deagle*. It will not be re-litigated.

- The other issues – dismissal, just cause, reasonable notice and damages for the period of reasonable notice – were not decided (above, para. 50). This is not a case where the Director weighed in, Mr. Arnold disagrees and wants to re-litigate the merits. The Director did not address those issues.

- It is incorrect to say those matters "should have been decided by the Director of Labour Standards". As Mr. Arnold was "laid off", under the *Code*'s definition, O'Regan did not "contravene" s. 71. Further to s. 21(3), in the absence of a contravention the Director had no authority to rule on remedies such as damages for the period of reasonable notice. Further to s. 26(2)(b), the Labour Board would be similarly constrained.

[93] To litigate, for the first time, an issue that has not been decided and could not have been decided, when that claim is expressly preserved by statute, is not an abuse of process. In my respectful view, the motions judge erred in law.

Conclusion

[94] I would allow Mr. Arnold's appeal, overturn the motions' judge's dismissal of Mr. Arnold's Notice of Application and dismiss O'Regan's motion.

[95] Mr. Arnold's lawsuit for wrongful dismissal may proceed, subject to the application of issue estoppel. Mr. Arnold's allegation that O'Regan acted in bad faith is issue estopped. Neither his claim that he was dismissed without just cause nor his entitlement to damages for the period of reasonable notice is estopped. His potential damages would be reduced by O'Regan's payment in October 2020.

[96] I would overturn the Supreme Court's costs award against Mr. Arnold and order O'Regan to return any payment of that amount.

[97] Mr. Arnold's counsel focused substantially on the unsuccessful submission that Mr. Arnold should be permitted to sue for O'Regan's alleged bad faith. As there was mixed success, the parties should bear their own costs.

Fichaud J.A.

Concurred: Bryson J.A.

Beaton J.A.