

THE ADMISSIBILITY OF CRIMINAL CONVICTIONS IN CIVIL TRIALS

1.0 The Underlying Principles

Trial court decisions, on matters of fact, are generally afforded judicial deference by appellate courts. Appellate courts will defer to the trial judge unless the trial judge was “clearly wrong on questions of fact or on mixed questions of fact and law”.¹ In jury cases, the test for appellate review is even higher. Appellate courts do not decide whether a jury made the correct assessment, rather they only consider if the assessment is “beyond the scope of anything that could be accepted as reasonable”.² Appellate courts carry heavily the burden of rejecting a lower court’s decision on issues of fact³ because it is recognized that trial judges have advantages when determining facts; drawing inferences from facts; and assessing the credibility of witnesses. Additionally, our system of justice recognizes that re-litigating facts which have been determined by another court, risks inconsistent results and is a waste of resources, both of which offend the administration of justice.

Issues arise however when civil courts deal with matters that have previously proceeded through the criminal system. How should civil courts treat the decisions made by criminal courts in cases involving similar facts? The parties are not the same in the criminal case and the civil case; the issues, even when similar, always have different consequences; criminal courts and civil courts employ varying standards of proof (a judgment of a civil court need only be based on proof to a balance of probabilities while a judgment of a criminal court requires proof beyond a reasonable doubt); and the procedures followed regarding the use and admission of evidence and the review of decisions are different in the criminal and civil forums.

The common law rule about the admissibility of criminal convictions in subsequent civil actions was originally established by a 1943 decision of the English Court of Appeal in *Hollington v. F. Hewthorn & Co.*⁴ The rule in *Hollington* held that a criminal conviction could not be admitted into evidence in a subsequent civil proceeding as proof of the facts of the conviction.

In Canada, the treatment afforded to criminal convictions in civil cases has evolved since *Hollington*. Despite the differences between the criminal and civil

¹ *Housen v. Nikolaisen*, [2002] 2 SCR 235 at para. 22

² *Veczorek v. Piersma* (1987), 58 O.R. (2d) 583 at p. 589 (Ont. C.A.)

³ The deference given to the trial judge’s or the jury’s fact-finding does not extend to errors in interpretation of law. Appellate courts analyze questions of law for correctness and an appellate court is free to replace the opinion of the trial judge with its own (*Housen v. Nikolaisen*, supra. At para.8).

⁴ [1943] 1 K.B. 587 (Eng. C.A.)

forums, courts have increasingly recognized that the final decision of a competent, expert, criminal court should be an important, and in some cases a decisive factor in subsequent civil proceedings. Previous criminal convictions are generally admissible in subsequent civil proceedings and are considered prima facie proof of the material facts underlying the conviction. However, the prima facie weight afforded to criminal convictions is still subject to a right to rebuttal.

In most jurisdictions within the United States, a criminal conviction is not only admissible in a subsequent civil proceeding (based on the same wrong) – it is determinative of the facts on which the criminal decision was based. Hence, the findings of fact in the criminal case are not subject to challenge in the civil action.

The within review of Canadian cases considered since *Hollington*, reveals that there is no strict adherence to a particular rule or doctrine instructing how a party to a civil action may use a prior conviction, once admitted. Rather the nature and the circumstances of each case are considered and the courts are flexible regarding the weight that they afford to prior convictions.

It is the conclusion of this review that prior criminal convictions are correctly admissible in subsequent civil proceedings as prima facie evidence of the material facts upon which the convictions were made; but, the presumption is and should be rebuttable. An individual convicted of a criminal charge should be afforded the opportunity to rebut the presumption with available evidence, but must first overcome the presumption against him. Additionally, persons who did not participate in the criminal matter, but have a legitimate interest in the civil outcome, should be afforded the benefit of the presumption. This use of prior criminal convictions in subsequent civil trials balances the competing interests of certainty and fairness, and supports the administration of justice as a whole.

1.1 The “Rule” in *Hollington v. Hewthorn*

Instruction about the treatment of criminal convictions in subsequent civil actions was provided by the English Court of Appeal in the case of *Hollington v. F. Hewthorn & Co.*⁵. The decision evolved into a “rule” governing the admissibility of criminal convictions in civil trials. The “rule”, which was perhaps followed in its breach more than its application, has been the cause of much debate in subsequent case law in England; in other common law jurisdictions including Canada; and by legal scholars.

The *Hollington* rule provided that evidence of an earlier criminal conviction was not admissible in a subsequent civil action as proof that the person convicted was guilty of the conduct constituting the offence. A prior criminal conviction could not be tendered in a civil action as evidence of the material facts upon which the conviction was based. Further, a finding of fact made by a criminal

⁵ Ibid.

court was not admissible in evidence, let alone conclusive proof of the fact. Prior judicial findings in a criminal matter were not admissible as evidence, absent proof of the factual basis for those findings in the civil forum.

At the trial level, Hollington⁶ involved a defendant driver of a vehicle involved in a collision with the plaintiff's car. The plaintiff's car was driven by the plaintiff's son. The only witnesses of the collision were the two drivers. The defendant driver was convicted of careless driving, contrary to the Road Traffic Act, 1930⁷. A certificate of conviction was issued against the defendant driver by a magistrate's court. The plaintiff then commenced a civil action for the damage done to his vehicle in the collision. In his defence of the civil matter, the defendant denied any negligence arising out of the collision and pled that the driver was contributorily negligent for having caused the collision.

The operator of the plaintiff's vehicle died prior to trial. Hence the plaintiff could not call any witness about the circumstances of the collision and was unable to provide any direct evidence of the defendant's negligence. Therefore, at trial, the plaintiff sought to introduce the certificate of the defendant's careless driving conviction as evidence, not only of the conviction itself, but of the material facts upon which the conviction was based.

At the trial level, Hilbery J. ruled that the evidence of a conviction of the defendant driver of careless driving, at the time and place of the subject collision, was inadmissible because it was "Res Inter Alios Act"⁸ (a doctrine which holds that a matter between others is not our business). Hilbery J. also ruled against the admissibility of a statement made to the investigating police by the driver of the plaintiff's vehicle (now deceased).

Despite ruling that the prior conviction was inadmissible and that a statement made to police by the now deceased driver of the plaintiff's vehicle was not admissible, Hilbery J. found that the plaintiff had established a prima facie case of negligence against the defendant and gave judgment in the plaintiff's favour. The defence appealed the decision.

On appeal, the plaintiff sought to uphold the judgment of Hilbery J., but also contended that the evidence tendered by him at trial was wrongly excluded. The plaintiff argued that if the appellate court should find that there was no evidence to support the judgment, there should be a new trial where the previously rejected evidence tendered by the plaintiff (the criminal conviction) could be admitted. The plaintiff, represented by Mr. Denning (as he then was), argued that the Court of Appeal ought to consider whether it was a legitimate inference that the defendant was negligent and if so, the matter would end. Alternatively,

⁶ [1942] KB 27

⁷ Road Traffic Act, 1930, c.43, as amended

⁸ Hollington, supra at p. 29

the plaintiff argued that the court should determine whether a conviction of the defendant of careless driving was admissible at common law.

Mr. Denning argued that he was entitled to put the conviction in evidence, not as conclusive, but as *prima facie* evidence that the defendant was driving negligently. Mr. Denning admitted that he must prove by oral evidence, if it is not admitted, that the defendant is the person who was convicted. He admitted that he would have to causally link the defendant's negligence with the accident. He admitted that the conviction would not be an estoppel, because it was open to the defendant to demonstrate that he ought not to have been convicted or that his negligence was not the cause of the accident. However, Mr. Denning urged the appellate court to consider that the fact of the defendant's conviction was *prima facie* evidence that the defendant was guilty of negligence.

The Court of Appeal held that the prior criminal conviction was rightly rejected as evidence in the civil case. The Court of Appeal found that the inference of Hilbery J. was not justified and, based on the evidence before Hilbery J., could not support a finding of negligence against the defendant.

The Court of Appeal reasoned that the conviction was rightly rejected because a civil court would have to review all the evidence that was before the criminal court before it could give any weight to the prior conviction. The civil court would not know about the evidence that was before the criminal court, nor the arguments that were addressed, nor what influenced the court in arriving at its decision. Hence, how could such evidence be given any weight? Further, to link the defendant's negligence and the actual accident (an issue that would not have been a requirement in the criminal case) would require the civil court to call substantially the same evidence. Therefore, proof of the conviction was no more than proof that another court came to a conclusion that the defendant was guilty. The opinion of the criminal court that the defendant was negligent – was not relevant; it was merely the opinion of another judicial body. The Court of Appeal explained:

In many, perhaps in most cases, the correctness of the conviction would not be questioned, but where it is, its value can be assessed only by a retrial on the same evidence.

However convenient the other course may be, it is in our opinion, safer in the interests of justice that on the subsequent trial the court should come to a decision on the facts placed before it without regard to the result of other proceedings before another tribunal.⁹

The Court of Appeal also considered that the prevailing law had long established the rejection of prior criminal convictions into evidence and explained:

⁹ Hollington, *supra* at p. 602

Where it is clear that over a long period there has been a unanimous opinion, not only of most modern text-book writers, but among judges of first instance, that some particular class of evidence is admissible, the court should be slow to differ from it unless it can be clearly shown that the communis opinio, which we are satisfied has hitherto prevailed, is based on wrong premises”.¹⁰

The Court of Appeal also considered that if it agreed that a conviction ought to be admitted as prima facie evidence because the facts have been investigated and the results of the investigation have established facts, then it ought to be open to a defendant who has been acquitted to use the acquittal as proof that the criminal court was not satisfied of his or her guilt.

The use of a “quid pro quo” example, to demonstrate that the civil court can get no real guidance from the former criminal proceedings without retrying the criminal case is questionable in light of the different burden of proof in criminal and civil courts. An acquittal in a criminal court may still be a conviction on a lower civil standard. Nonetheless, the example was given and the decision made to refuse the admission of a criminal conviction.

Since its creation, the rule in *Hollington v. Hewthorn* has been influential in many jurisdictions, although widely criticized.

1.2 The Hollington Rule Applied in Canada

Arguably, the adoption of the Hollington rule in Canada was confirmed by a 1943 decision of the Supreme Court of Canada in *La Fonciere Compagnie d'Assurance de France v. Perras et al.*¹¹ In *La Fonciere*, the plaintiff claimed coverage for property damage under a policy of private insurance. The defendant insurer did not deny the policy but alleged that the automobile accident which caused the damage arose as a result of the plaintiff's commission of a criminal offence.

The plaintiff denied that the accident had resulted from a criminal offence (although he had been convicted of a criminal offence under the Criminal Code of Canada arising out of the same accident) and alleged that the accident was caused by ordinary negligence, which was covered under the policy.

The defendant insurer argued that the criminal conviction constituted res judicata of the fact that the plaintiff, while driving in a manner that caused the accident, had committed a criminal offence.

¹⁰ Ibid., p. 593

¹¹ [1943] S.C.R. 165

The court found that the judgment of the magistrate's court did not meet the requirements of *res judicata* as outlined in the Quebec Civil Code – one requirement of which was that the claim in the present action be about the same issue that was adjudicated in the criminal trial. Accordingly, the criminal conviction was not admitted.

La Fonciere appeared to uphold the Hollington rule. It has been argued in subsequent Canadian cases that *La Fonciere* stands for the proposition that evidence of a conviction, by certificate or otherwise, is not admissible in civil proceedings as proof of the commission of the offence.

However, on its facts, *La Fonciere* can only stand for the proposition that the decision of a criminal court cannot constitute res judicata before a civil court. The Supreme Court did not say that a prior criminal conviction is not admissible as evidence of the material facts on which the conviction is based; rather it found that – in the Quebec Civil Code – *res judicata* did not apply to make the criminal court finding binding in a subsequent civil case.

In *Secretary of State for Canada v. Quinn*¹², a B.C. county court judge held that he was bound by the decision in *La Fonciere* to deny the admissibility of a certificate of conviction; however, he was of the opinion that a conviction might be admissible where civil proceedings are brought to claim the fruits of a crime. Accordingly, the Hollington rule, although applied, was criticized in part.

In *English v. Richmond and Pulver*¹³, the Supreme Court of Canada dealt with the issue of a guilty plea in a prior criminal proceeding. A civil plaintiff had previously pled guilty to careless driving. The civil trial judge decided to admit in evidence the fact that the guilty plea had been made but then considered that the civil trial should continue. No conviction was tendered in evidence but the trial judge decided that the action should continue before him alone and the jury was discharged. The trial judge subsequently dismissed the plaintiff's action but disregarded the evidence of the plea of guilty in coming to his conclusion. The judgment was affirmed by the Court of Appeal. The appeal to the Supreme Court was dismissed. This case has been cited as support for the application of the Hollington rule in Canada. However, the case does not opine on the admissibility of a criminal conviction because no conviction was tendered in evidence.

Canadian courts essentially circumvented the rule in Hollington until the decision in *Demeter v. British Pacific Life Insurance Company*¹⁴, when Osler, J. held that *Hollington v. Hewthorn* was not binding upon a trial court in Ontario; was wrongly decided by the English Court of Appeal; and quite frankly was never authority for the proposition that a prior conviction is never admissible in a subsequent civil proceeding.

¹² [1943] 4 D.L.R. 70

¹³ [1956] S.C.R. 383

¹⁴ (1983), 150 D.L.R. (3d) 249

1.3 Statutory Framework in Canada that Codified the Common Law

Today, in Canada, there remains little question that criminal convictions are admissible in subsequent civil proceedings. All provinces and territories (save Quebec) have amended their legislation to codify the admissibility of criminal convictions in civil matters.¹⁵ The admissibility has also been codified federally.¹⁶ In Ontario, the Evidence Act¹⁷, section 22.1, reads:

22.1(1) Proof that a person has been convicted or discharged anywhere in Canada is proof, in the absence of evidence to the contrary, that the crime has been committed by the person, if,

(a) no appeal of the conviction or discharge was taken and the time for an appeal has expired; or

(b) an appeal of the conviction or discharge was taken but was dismissed or abandoned and no further appeal is available.

(2) Subsection (1) applies whether or not the convicted or discharged person is a party to the proceeding.

None of the provincial, territory or federal evidence Acts specify the weight that a prior criminal conviction is afforded in a subsequent civil proceeding. Nor do the respective evidence Acts specify the evidentiary effect of the conviction where the convicted party seeks to challenge the facts underlying the criminal offence in the subsequent civil proceeding. If the defendant concedes that the conviction is admissible against her in the civil action but submits that the conviction is only “some” evidence and that her denial of the allegations against her give rise to a genuine issue for trial – how is the weight of the conviction determined?

2.0 Ongoing Issues Relating to Admissibility

Despite statutory admissibility of prior criminal convictions, issues continue to arise about the weight criminal convictions should be afforded in subsequent civil actions. Are convictions only ever prima facie evidence of facts, always subject to rebuttal? Or are they conclusive evidence of facts that cannot be challenged in a subsequent civil action? If they are only prima facie evidence, what weight are

¹⁵ British Columbia Evidence Act, R.S.B.C. 1996, c. 124, s.15; Alberta Evidence Act, R.S.A. 2000, c. A-18, s.24; Saskatchewan Evidence Act, R.S.S. 1978, c.S-16, s.18; Manitoba Evidence Act, R.S.M. 1987, c.E 150, s.22; New Brunswick Evidence Act, R.S.N.B. 1973, c. E-11, s.20; Prince Edward Island Evidence Act, R.S.P.E.I. 1988, c.E-11, s.18; Nova Scotia Evidence Act R.S.N.S. 1989, c.154, s.58; Newfoundland Evidence Act, R.S.N. 1990, c.E-16, s.13; North West Territories Evidence Act, R.S.W.N.W.T. 1988, c. E-8, s.29; Yukon Evidence Act, R.S.Y. 2002, c.78, s.27, Ontario Evidence Act, R.S.O. 1990, c.E.23, s.22

¹⁶ Canada Evidence Act, R.S.C. 1985, c.C-5, s.12

¹⁷ Evidence Act, R.S.O. 1990, c.E.22, ss.22.1, as amended by S.O. 1995, c.6, s.6

they afforded? If they are not subject to any rebuttal, what factors give the conviction such protection from challenge and does this enhance the administration of justice in Canada?

2.1 Criminal Convictions as Prima Facie Evidence

Prima facie evidence is evidence which, unless disproved or rebutted, would be sufficient to establish a fact or raise a presumption.¹⁸ Prima facie evidence need not be conclusive or irrefutable.

Criminal convictions are consistently admissible as prima facie proof of the material facts underlying the conviction where the prior criminal conviction is sought to be used by the injured party in the civil action, to establish the fault of the party convicted. Once admitted as prima facie proof, the civil proceeding may then commence to test the evidence and create a ruling about the weight the evidence should be afforded.

In *Re Del Core and Ontario College of Pharmacists*¹⁹, a prior criminal conviction was admissible against a pharmacist as prima facie evidence of wrongdoing in a disciplinary hearing before the College of Pharmacists. Holden J.A. and Blair J.A. explicitly rejected the proposition that the conviction amounted to conclusive proof of the facts underlying the criminal conviction. According to Blair J.A., it was important to maintain some flexibility in the law regarding the use or weight afforded to prior criminal convictions in civil cases. To jump from a rule positively excluding evidence of prior criminal convictions (Hollington) to a rule allowing prior criminal convictions to be conclusive proof of material facts underlying the conviction, would be “highly undesirable”. Blair J.A. explained:

Since the evidence of prior convictions affords only prima facie proof of guilt it follows that its effect may be countered in a variety of ways. For example, the conviction may be challenged or its effect mitigated by explanation of the circumstances surrounding the conviction. It is both unnecessary and imprudent to attempt any exhaustive enumeration.

The law of Ontario is only now emerging from the long shadow cast over it by the decision in *Hollington v. Hewthorn* that excluded evidence of convictions.

It would be highly undesirable to replace [the] arbitrary rule [in *Hollington v. Hewthorn*] by prescribing equally rigid rules to replace it.²⁰

¹⁸ Bryan A. Garner, editor, *Black's Law Dictionary*, 9th ed. (West Group, 2009)

¹⁹ (1985), 51 O.R. (2d) 1 (Ont. C.A.)

²⁰ *Ibid.*, p. 22

Therefore, the weight of a prior criminal conviction will depend on the circumstances of each case. The rationale for this “anti-rule” was discussed by the Court of Appeal of New Zealand in *Jorgensen v. New Media (Auckland) Ltd.*²¹ and has been adopted by a number of Canadian authorities. The New Zealand Court of Appeal held that the rule in *Hollington v. Hewthorn* did not extend to New Zealand and that a certificate of conviction was conclusive evidence of that conviction. North P. explained:

[P]roof of ... conviction ... while not conclusive of ... guilt, is evidence admissible in proof of the fact of guilt. Whether such evidence discharges the evidentiary burden of proof at any stage of the trial will be for the Court to decide on the evidence tendered.²²

Evidence of prior convictions is admissible in civil matters – where it is relevant. The conviction is admitted as prima facie evidence of the material facts upon which the conviction was based. However, the courts have recognized that there are circumstances where prior convictions should be afforded greater weight.

In 1999, the Quebec Court of Appeal in *Ali et 124558 Canada Inc. v. Cie d'Assurance Guardian et Cie d'Assurance Royale*²³, considered whether a criminal judgment has factual authority and is admissible as evidence, and if so, what weight that evidence should be given.

In the Ali case, Mr. Ali and his son operated a restaurant under the name “Bon B.B.Q.” The restaurant was destroyed by fire. Police investigation determined that the fire was intentionally set. Criminal charges were brought against the two men for having set fire to the business and then attempting to defraud their insurers, Guardian and Royal.

At trial, the men were found guilty of arson and insurance fraud. The guilty verdicts were upheld by the Court of Appeal²⁴. Leave to appeal was denied by the Supreme Court²⁵.

The Alis subsequently initiated property damage and business loss claims under their private policies of insurance. The claims were denied and the Alis initiated a civil case against Guardian Insurance and Royal Insurance. The trial judge, Justice Jean-Guy Riopel, held that he was not bound by the criminal judgment and found the evidence given by the Alis to be at least partially credible and allowed the action, in part.²⁶ The defendants appealed.

²¹ [1969] N.Z.L.R. 961

²² *Ibid.*, p. 980

²³ 1999 CanLII 13177 (QC C.A.)

²⁴ J.E. 89-470

²⁵ No. 21356, May 19, 1989

²⁶ [1993] R.R.A. 187

Justice Thibault authored the decision of the 3-judge panel of the Quebec Court of Appeal. Justice Thibault held that the criminal judgment was admissible in evidence in the civil matter and explained:

Faced, as in the present case, with a reasoned criminal judgment establishing that the Alis intentionally set fire to their building to collect the insurance, it seems difficult to me, in the absence of new evidence, that the judge in the civil proceeding should completely ignore this fact and reassess the evidence, which is otherwise strictly identical, and reach a solution that is clearly contradictory. That is, I find it difficult to see how a judge in a civil proceeding, before whom a mere preponderance of evidence is required to prove fraud, can conclude that two persons found guilty of arson following a trial in which their guilt must be proven beyond a reasonable doubt, should be able to “retry” the case, so to speak, based on the identical evidence, with the result that two contradictory decisions are reached. The Alis are criminals who intentionally started the fire because they wanted to defraud their insurance company, but, in the end, they didn’t start the fire intentionally for purposes of the payment of the insurance; that is the result we get!

...

The criminal judgment is a legal fact that none can ignore, that is relevant, and whose probative value must be considered. The judge in the civil proceeding is therefore free, depending on the circumstances, and without attributing the authority of *res judicata* in law or in fact to the criminal conviction, to draw the appropriate conclusions and presumptions of fact from this conviction.²⁷

The decision of Justice Thibault confirms the admissibility of criminal convictions in the evidence of a civil trial; does not give prior criminal convictions the conclusive authority of *res judicata*; and establishes that, in the absence of new evidence to the contrary, the trial judge should “draw the appropriate conclusion” when determining the weight afforded to the *prima facie* evidence.

2.2 The Abuse of Process Doctrine

In some circumstances, prior criminal convictions are not only admissible in subsequent civil actions, the material facts upon which the conviction was based are not subject to challenge.

²⁷ J.E. 99-1153 at p.17

Under the doctrine of abuse of process, prior criminal convictions are admitted in subsequent civil actions as conclusive proof of material facts. The facts upon which the conviction was based are not rebuttable because to allow the facts to be challenged would adversely affect the administration of justice.

All levels of Canadian courts have found that the right to challenge a conviction in a subsequent civil action is not absolute. A convicted person cannot attempt to prove that the conviction was wrong in circumstances where it would constitute an abuse of process to do so.

The abuse of process doctrine applies to prevent the re-litigation of a previously decided issue – when it is in the interests of “justice” to do so. The protection afforded by the abuse of process doctrine is not focused on the litigants (although one side will benefit from its application) but rather on the administration of justice as a whole.

The abuse of process doctrine originated in a decision of the House of Lords in *Hunter v. Chief Constable of West Midlands Police et al.*²⁸ The case stands for the proposition that where there has been a final decision made by a criminal court against the plaintiff, it is an abuse of process for the plaintiff in a civil action to challenge the facts upon which that conviction was based.

In *Hunter*, the plaintiffs had been convicted of murder. An important issue in the criminal trial was whether or not their confessions to police following the crime were voluntary and whether the confessions should therefore be admitted during the criminal trial. There was a lengthy voir dire about the admissibility of the confessions. The confessions were ultimately admitted at the criminal trial and the accused were convicted.

The convicted criminals then commenced a civil action against the police for assault. The allegations in the civil action were based on the same defence they had advanced in the criminal trial, namely the voluntariness and therefore admissibility of their confessions. The court found that to permit the plaintiffs a further opportunity to challenge the decision of the criminal court through the civil case was an abuse of process. According to Lord Diplock:

The abuse of process which the instant case exemplifies is the initiation of proceedings in a court of justice for the purpose of mounting a collateral attack upon a final decision against the intending plaintiff, which has been made by another court of competent jurisdiction in previous proceedings in which the intending plaintiff had a full opportunity of contesting the decision in the court in which it was made.²⁹

²⁸ [1982] A.C. 529 (U.K. H.L.)

²⁹ *Ibid.*, p. 541

In Canada, the abuse of process doctrine was adopted and applied in *Demeter v. British Pacific Life Insurance Company*³⁰ to prevent a previously convicted plaintiff from re-litigating an issue previously determined by the criminal court.

The *Demeter* case involved three civil actions against insurance companies for payment of the proceeds of life insurance policies. The policies insured the life of the deceased, Christine Demeter. The claims were advanced by the plaintiff, Peter Demeter, the surviving husband of Christine Demeter – despite his conviction of the murder of his wife.

The insurance defendants pled that Mr. Demeter should be estopped in the civil action from raising again the issue of his criminal responsibility for the death of his wife, or in the alternative, that it was an abuse of process for him to raise the issue of his criminal responsibility again in another court. The defendants argued that there was no fraud or collusion in connection with obtaining his conviction and there was no new evidence establishing his innocence that came to the attention of the plaintiff (since his conviction) that could not have been reasonably determined by the plaintiff prior to his conviction. Further, Peter Demeter's criminal conviction was confirmed by the Court of Appeal; an appeal to the Supreme Court of Canada on a point of law was dismissed; and an application to the Minister of Justice on grounds that new evidence was available, was rejected.

Counsel for Peter Demeter argued that the principle established in *Hollington v. Hewthorn* applied in Ontario and answered the defence on all issues.

Osler, J. held that *Hollington v. Hewthorn* is not authoritative, even in its own jurisdiction, on the question of whether or not the identical question already decided in a criminal court of competent jurisdiction can be raised in a subsequent civil action by a party against whom the question has been decided.³¹

The Ontario Court of Appeal upheld the decision of Osler J.³² and found that the appellant was seeking to re-litigate the very issue that was decided against him in his criminal trial. MacKinnon A.C.J.O. explained that allowing Mr. Demeter to do so would be an abuse of the process of the courts:

...the use of a civil action to initiate a collateral attack on a final decision of a criminal court of competent jurisdiction in an attempt to re-litigate an issue already tried is an abuse of the process of the court.³³

³⁰ (1983), 150 D.L.R. (3d) 249, [1983] O.J. No. 3148 (Ont. H.C.J.), affd. (1984), 13 D.L.R. (4th) 318, [1984] O.J. No. 3363 (Ont C.A.)

³¹ *Ibid.*, para. 27

³² [1984] O.J. No. 3363 (Ont. C.A.)

³³ *Ibid.*, p. 268

The court (in both *Hunter* and *Demeter*) focused on the motive of the plaintiff to challenge the criminal judgment (despite having exhausted all avenues of appeal), as the grounds to refuse any challenge of the prior criminal conviction. The “improper” motive of the plaintiff in advancing a civil case was important to the court’s consideration when applying the abuse of process doctrine.

The leading case in Canada on the application of the abuse of process doctrine to prevent re-litigation is a decision of the Supreme Court of Canada in *Toronto (City) v C.U.P.E., Local 79*³⁴. In *C.U.P.E.*, an employee of the City of Toronto was charged with the sexual assault of a young boy under his supervision in a recreation program. At the criminal trial, the employee denied committing the assault; however, he was convicted and the conviction was affirmed on appeal.

Following the conviction, the City of Toronto fired the employee from his job. The employee, through his union, filed a grievance, challenging his dismissal. At the hearing before a labour Arbitrator, the employee again denied committing the assault. The Arbitrator found that the employee had been improperly dismissed, without just cause. In effect, the Arbitrator found that the sexual abuse had not occurred, contrary to the finding of the criminal court.

An application for judicial review, requested by the City of Toronto, was granted. Following review, the decision of the Arbitrator was set aside. The finding on judicial review was upheld by the Superior Court³⁵ and by the Supreme Court of Canada. The appellate courts applied the doctrine of abuse of process and overruled the Arbitrator’s decision to re-litigate the issue.

The circumstances under which evidence of prior proceedings should be adduced was addressed in the *C.U.P.E.* decision by Doherty J.A.:

The arbitrator erred in law by limiting the scope of the power to prohibit re-litigation of issues previously decided in criminal proceedings to circumstances in which the convicted person initiates the subsequent proceeding for the purpose of challenging a finding made in the criminal proceeding.³⁶

In *C.U.P.E.*, the motivation of the employee was to challenge his dismissal, not to overturn his criminal conviction. Hence the intended use of the conviction was not a factor in applying the doctrine of abuse of process. Further, the court also admitted evidence of an employee’s criminal conviction in a grievance hearing for wrongful dismissal brought by a union on behalf of an employee – where clearly there was no mutuality of issues or parties.

³⁴ [2003] 3 S.C.R. 77

³⁵ (2001), 55 O.R. (3d) 541

³⁶ *Ibid.*, para 72

The rationale for preventing a party from re-litigating decided issues was described in C.U.P.E. by Madame Justice Arbour as follows:

First, there can be no assumption that re-litigation will lead to a more accurate result.

Second, if the same result is reached, the re-litigation has been a waste of judicial resources, an unnecessary expense for the parties and additional hardship for witnesses.

Third, if the result is different, the inconsistency will undermine the credibility of the entire judicial process thereby diminishing its authority, its credibility and its aim of finality.³⁷

The doctrine of abuse of process has been expanded to apply to not only criminal offences but also to provincial regulatory offences. In *Andreadis et al. v. Pinto et al.*³⁸, Justice D. Brown of the Ontario Superior Court of Justice held that the provincial evidence legislation which permits the admissibility of criminal convictions in civil matters also applies to permit the admissibility of offences under provincial regulatory legislation.

Justice Brown explained that, “the policy reasons supporting the facilitation of the proof of certain conduct through the mechanism of s. 22.1 [the section of the Ontario Evidence Act that dispenses with the need to prove, in a civil proceeding, the essential facts established by the finding of liability in a criminal proceeding] would apply equally to both federal and provincial offences.”³⁹

In *Andreadis*, the defendant owner of a motor vehicle had previously pled guilty to a charge of permitting a motor vehicle to be operated without insurance, contrary to s. 2(1)(b) of the provincial Compulsory Automobile Insurance Act⁴⁰. At a subsequent civil trial, the main issue to be determined was whether, at the time of the accident, the defendant owner had consented to the operation of the vehicle by her now ex-husband. Justice D. Brown held that the defendant should not be permitted to re-litigate the facts essential to her conviction – the fact that she had “permitted” her vehicle to be operated without insurance - because her guilty plea was voluntary and unequivocal. Justice D. Brown explained that to allow re-litigation would be an abuse of process.

³⁷ C.U.P.E., supra at para 37

³⁸ 98 O.R. (3d) 701

³⁹ Ibid., para 15

⁴⁰ R.S.O. 1990, c. C.25

2.2.1 Abuse of Process – Offensive vs. Defensive use

Canadian courts have tended to apply the abuse of process doctrine to preclude challenge of the material facts underlying a previous criminal conviction when a convicted criminal commences the civil action to challenge the conviction in a collateral court. However, when the victim of the crime attempts to use the prior criminal conviction against a defendant in a civil proceeding, the courts in Canada have historically permitted the defendant to challenge the facts upon which the conviction was based. Canadian courts have considered how the conviction is going to be used when deciding the weight it will be given in the civil forum. If the conviction is used offensively by the plaintiff to establish the defendant's liability, the conviction is treated as *prima facie* proof, subject to rebuttal. However, if the conviction is raised defensively to resist a claim by a convicted party, the courts have invoked the abuse of process doctrine to prevent re-litigation, in the interest of justice.

In *Q. v. Minto Management Ltd.*⁴¹, the plaintiff sued her convicted rapist and the management company of the apartment building that employed him. In the civil case, the plaintiff requested an order preventing the defendants from introducing new liability evidence, not before the criminal court. The trial judge refused to give the conviction preclusive effect and afforded the conviction *prima facie* value. According to Steele, J.:

Where a convicted criminal, as a plaintiff, brings a civil action, it may be an abuse of process of the court. Where the victim brings the action against the convicted criminal, nothing stops the defendant from raising the defence that he did not do it. The conviction is not conclusive but is *prima facie* evidence that the defendant may rebut. He may or may not give evidence at trial and the plaintiff should not have to reprove the entire offence in the first instance. However, the plaintiff must reprove the extent of her injuries and prove her damages. She will be subject to cross-examination. To totally tie the hands of the defendants would be unfair.⁴²

However, the abuse of process doctrine has been applied to preclude re-litigation of an issue even when the motive of the plaintiff does not appear to be improper. In *Bomac Construction Ltd. v. Stevenson*⁴³, the plaintiff and the third party were passengers in an aircraft owned by the defendant corporation and flown by the defendant pilot. The aircraft crashed and both the plaintiff and the third party were injured. The third party obtained a judgment against the defendants after a three-day jury trial. The defendant pilot was found negligent; the defendant corporation was found vicariously liable; and the third party was found not to

⁴¹ (1984), 46 O.R. (2d) 756 (Ont. H.C.)

⁴² *Ibid.*, p. 760

⁴³ (1986), 48 Sask. R. 62 (Sask. C.A.)

have been contributorily negligent for having caused the crash. The Court of Appeal dismissed the appeal from these findings.

The plaintiff then commenced a separate action. The defendants issued a statement of defence and commenced third party proceedings against the co-passenger. The plaintiff applied for an order striking out the statement of defence as it raised issues already determined in the earlier action. The third party sought to strike the third party claim. The motion to strike the defence and the third party claim was granted by Sirois, J. The defendants appealed.

Justice Wakeling of the Saskatchewan Court of Appeal explained:

The principle of issue estoppel was strongly urged upon the court by the respondents as being a full answer to this appeal. The problem in the application of that doctrine is that it has only been applied in situations where the same issue is being raised by the original parties or their privies.

...

There is, however, concern based on public policy that the same issues should not be re-litigated so that the parties should not be exposed to the same risk twice and also that there be an end to the litigation process. The courts have not only viewed such matters under the established doctrines of “res judicata” and “issue estoppel”, but also under the broader heading of the concept of abuse of process.⁴⁴

When considering the historical application of the abuse of process doctrine to prevent re-litigation only when a convicted party commences a civil action, Justice Wakeling explained:

It is usual to consider that the concept of abuse of process is applicable only to a plaintiff’s claim to prevent the commencement of certain types of actions, but there is no apparent reason for its restriction to such circumstances when it is considered that the purpose is to prevent the raising of an issue which has already been squarely before the courts once before and decision rendered. There seems little justification for concluding that such an issue cannot be raised by a plaintiff but may be raised in defence by a defendant. If the concern is a valid one, it should not matter by what process the concern is raised.⁴⁵

⁴⁴Ibid., paras 13 and 15

⁴⁵Ibid., para 17

The use of the abuse of process doctrine has been expanding in Canada. It is being applied in cases regardless of whether the intended use of the conviction is for offensive or defensive purposes. It is also being used in cases to prevent re-litigation where, historically, the stricter requirements of the doctrine of issue estoppel had to be met.

2.3 Issue Estoppel

The doctrine of issue estoppel precludes the relitigation of issues decided in a prior proceeding. Issue estoppel has four requirements:

1. The issue must be the same as the one decided in the prior matter;
2. The issue must have been actually litigated and decided in the prior proceeding and its resolution was necessary to the result;
3. The prior judicial decision must have been final; and
4. The parties to both proceedings must be the same (mutuality).⁴⁶

The requirement for mutuality is likely the greatest reason why issue estoppel is rarely applied. As a result, there is debate about whether or not the mutuality requirement is appropriate.⁴⁷

A reason for requiring mutuality in order to apply issue estoppel is that a party in a civil action should only be bound by the decision in a prior criminal proceeding if he/she was a party in the criminal action and therefore had the right to challenge the charges. However, it is hard to explain why a party who has participated in both proceedings (criminal and civil) should not be bound by the criminal decision just because the other civil party did not participate in the criminal proceeding. The party who has participated in both proceedings has had the opportunity to challenge the charges; there is usually great incentive for an accused to vigorously oppose criminal charges; and the burden of proof is higher in criminal matters than in civil matters.

Professor Gary Watson authored a critique of the requirement for mutuality in "Duplicative Litigation: Issue Estoppel, Abuse of Process and the Death of Mutuality"⁴⁸. Professor Watson explains that while Canadian courts have continued to insist on the requirement for mutuality in order to enforce issue estoppel – in effect, they have applied the abuse of process doctrine to achieve precisely the result that non-mutual issue estoppel would have achieved.

⁴⁶ Sopinka, J. et al. *The Law of Evidence in Canada*, 1999 Butterworths Canada Ltd., June 1999 at paras. 19.78 – 19.94.

⁴⁷ see Michael Herman and Gerald Hayden, "Issue Estoppel: Mutuality of Parties Reconsidered" (1986), 64 Can. Bar Rev. 437 and Garry Watson, "Duplicative Litigation: Issue Estoppel, Abuse of Process and the Death of Mutuality" (1990), 69 Can. Bar Rev. 623

⁴⁸ (1990), 69 Can. Bar Rev. 623.

There is no requirement for mutuality to apply issue estoppel in most jurisdictions in the United States. The leading U.S. case supporting non-mutual issue estoppel is *Parklane Hosiery Co. v. Shore*⁴⁹. The *Parklane* decision confirmed an earlier decision of the United States Supreme Court in *Blonder-Tongue Laboratories Inc. v. University of Illinois Foundation* where the court explained:

In any lawsuit where a defendant, because of the mutuality principle, is forced to present a complete defense on the merits to a claim which the plaintiff has fully litigated and lost in a prior action, there is an arguable misallocation of resources. To the extent that the defendant in the second suit may not win by asserting, without contradiction, that the plaintiff had fully and fairly, but unsuccessfully litigated the same claim in the prior suit, the defendant's time and money are diverted from alternative uses – productive or otherwise – to re-litigation of a decided issue.⁵⁰

The abuse of process doctrine has increasingly been applied quite broadly in Canada – when neither the parties nor the issues are identical and regardless of whether the use of the conviction is offensive or defensive.

3.0 Have the Courts Gone Too Far?

A basic tenant of the Canadian legal system is the right to contest charges against you and defend any claim advanced against you. If a defendant in a civil case is precluded from challenging the material facts of a prior criminal conviction – query if she is effectively precluded from advancing a defence and whether that equally offends the administration of justice.

The court has granted summary judgment in civil actions on the strength of the prior criminal conviction, even though that prior criminal conviction was only *prima facie* evidence. The prior criminal conviction was afforded such weight that it was akin to conclusive evidence of the facts.

In *Simpson v. Geswein*⁵¹, the defendant was convicted of assaulting the plaintiff with a weapon. The plaintiff brought a civil action for damages arising out of the assault and moved for summary judgment, relying on the certificate of conviction and a transcript of the criminal court's reasons. In opposition to the summary judgment motion, the defendant filed an affidavit denying the assault and alleging self-defence.

Ordinarily, the issues raised in the defendant's affidavit would warrant the trial of the issue and therefore would not meet the test for summary judgment.

⁴⁹ 439 U.S. 322 (U.S. N.Y. 1979)

⁵⁰ 402 U.S. 313 (U.S. Ill. 1971) at p.649

⁵¹ (2005), 38 C.P.C. (3d) 292 (Man Q.B.)

However, the Master hearing the summary judgment motion granted summary judgment to the plaintiff.

The appeal of the Master's judgment was dismissed by Krindle J. on the grounds that although the certificate of conviction was not conclusive, it was "strong prima facie proof" and the defendant failed to deliver any evidence to cast doubt on the facts.

In *K.F. v. White*⁵², the court reviewed summary judgments from various jurisdictions across Canada where prior criminal convictions of defendants were afforded very heavy – almost conclusive – weight in subsequent civil actions. What can be drawn from that review is that when the issue in the civil proceeding was the same as the issue in the criminal proceeding and importantly the defendant failed to adduce new evidence – the prima facie evidence of conviction is afforded conclusive weight.

While the granting of summary judgments in civil actions on the basis of prior criminal convictions may appear like strict issue estoppel or an overly broad and liberal application of the abuse of process doctrine – a review of the case law reveals that the courts do consider the circumstances when re-litigation may be required. Madame Justice Arbour explained in *C.U.P.E.* that re-litigation may be necessary, in some circumstances, to enhance the credibility and effectiveness of the system:

When the first proceeding is tainted by fraud or dishonesty.

When fresh, new evidence, previously unavailable, conclusively impeaches the original results; or

When fairness dictates that the original result should not be binding in the new context.⁵³

Therefore, the prima facie proof afforded to a prior criminal conviction is still subject to rebuttal – even in summary judgment matters. The material facts supporting the conviction can be countered by challenging the underlying facts that led to the conviction or by mitigating the effect of the conviction by explaining the circumstances surrounding the conviction.

If the prior proceeding was tainted by fraud or untruth, doubt can be cast on the veracity of the decision reached in that proceeding. Judicial bias, jury impropriety, and investigation errors can be used to counter the prima facie proof that a conviction holds.

⁵² [2001] O.J. No. 847, 53 O.R. (3d) 391 C.A.

⁵³ *C.U.P.E.*, supra at para 52

New evidence that was not available at the time of the prior criminal trial can be used in a subsequent civil action to challenge the underlying basis of the criminal conviction. The party seeking to introduce the new evidence must be able to prove however that the evidence was not reasonably available at the time of the prior criminal proceeding.

Fairness could dictate that a conviction based on a guilty plea be afforded less weight than a conviction where there was a full consideration of the issue on the merits. There may be alternate reasons to plea that have nothing to do with guilt – these include the cost of a criminal trial and the financial ability of the accused to respond; the convenience of a guilty plea as opposed to a trial, especially when a criminal conviction is not particularly important to the accused; and the avoidance of risk that a plea affords vs. the effect of a more serious criminal conviction, especially when a criminal conviction would be very important to the accused. Fairness would dictate that the administration of justice would be better served by permitting a full and robust hearing rather than insisting that finality should prevail.

Convictions reached after a full and complete hearing where the facts were fully presented, challenged and tested by the defence should be afforded greater weight than convictions reached following a hearing where the facts were not vigorously tested. Although, if the facts upon which the conviction was made went unchallenged (despite the accused having the means and opportunity to challenge the facts) – it is arguable that this conviction should have greater weight in the civil matter.

Therefore, the effect of a prior conviction is not decided by pre-determined, inflexible rules (like the rule in *Hollington*), rather judicial discretion is applied after considering the nature of the case, the circumstances of the criminal hearing and the importance of the administration of justice.

According to Mr. Justice R.P. Marceau of the Court of Queen's Bench of Alberta in *Trang v Alberta*:

In my view, a contextual and flexible approach regarding the treatment of prior proceedings at a civil hearing is most logical. Any doubts as to the legitimacy of the findings made at the earlier proceedings, for whatever reason, properly go to weight and not admissibility. Although a contextual and flexible approach creates some uncertainty, it is a fair price for achieving a balance between finality and fairness concerns.⁵⁴

An acquittal in a criminal proceeding is inadmissible in a subsequent civil trial as proof that the party did not commit the offence. This is so because the burden of proof applicable in a criminal case is higher than the balance of probabilities

⁵⁴ *Trang v. Alberta (Edmonton Remand Centre)*, 2002 ABQB 658 at para 53

standard that must be met in a civil case. Accordingly, while an accused may be acquitted in a criminal matter because the test of beyond a reasonable doubt was not met, he/she could still be found guilty in a civil matter on exactly the same evidence, where the burden of proof is lower. It is possible to establish, on a balance of probabilities, that which cannot be proven beyond a reasonable doubt.

However, in the trial decision of *Polgrain v. The Toronto East General Hospital*⁵⁵, this principle was watered down because, although it did not change the rule on the inadmissibility of an acquittal in a civil case, it did open the door to allowing findings of fact in support of the acquittal to be admitted in a subsequent civil proceeding.

In *Polgrain*, a nurse was criminally charged with the sexual assault of a severely disabled and totally dependant patient in the intensive care unit at the Toronto East General Hospital. The nurse was assigned to care for patients in the intensive care unit and two employees of the hospital believed that they witnessed Mrs. Polgrain being sexually assaulted by the nurse on two separate occasions.

Justice LaForme, who presided over the criminal trial, found not only that the Crown failed to prove its case beyond a reasonable doubt, but that the assaults did not even occur. Justice LaForme went further to find that the evidence presented regarding the actions of the nurse was consistent with proper nursing practice.

A civil action was subsequently commenced by the family of the patient (now-deceased). The civil case was premised on the sexual assaults having occurred.

The Hospital brought a motion to dismiss the civil case as an abuse of process – citing that the plaintiffs were attempting to re-litigate a determination already made by the court.

Lederer, J. granted the motion and refused to allow the issue of whether or not the assaults occurred to be re-litigated. Lederer J. recognized that ordinarily an acquittal in a criminal case is not a bar to a subsequent civil case founded on the same facts because of the different burdens or proof applicable in each forum. However, Lederer, J. opined that Justice LaForme made findings on a balance of probabilities in the criminal case and was satisfied that there was a full and complete hearing on the issue of the alleged assaults. Lederer J. explained:

It follows that it would be an abuse of process to allow the re-litigation of the determination made by LaForme J. that the assaults did not occur. The evidence he heard was complete, his analysis was comprehensive and his finding certain.⁵⁶

⁵⁵ 2007 Can LII 41437 (ON S.C.)

⁵⁶ *Ibid.*, p.10

The plaintiffs appealed the decision of Lederer J. to the Ontario Court of Appeal. The Court of Appeal found that the reasons of Justice LaForme were reasonably open to the interpretation that he was satisfied on a balance of probabilities that there was no sexual assault – even though the applicable test for Justice LaForme was reasonable doubt. However, the Court of Appeal held that the integrity of the judicial process was an important principle to consider and for that reason allowed the appeal and set aside the order dismissing the civil action.

Although the criminal trial was not tainted by fraud or dishonesty; no new evidence (not available at the time of the initial criminal hearing) became available; and the general principle of fairness did not require re-litigation (because it was not a case where the stakes in the original proceeding were too minor to generate a full and robust response) – the Court of Appeal found that policy considerations mandated that the civil action be permitted to proceed.

Rosenberg J.A. for the 3-judge panel explained in *Polgrain*⁵⁷, upon considering the reasons of the Supreme Court in *Toronto (City) v C.U.P.E. Local 79*:

The core principle which the abuse of process doctrine seeks to vindicate is to prevent the use of the court process in a way that would bring the administration of justice into disrepute. Re-litigation of a claim that a court has already determined may bring the administration of justice into disrepute by violating such principles as judicial economy, consistency, finality and the integrity of the administration of justice. As such, abuse of process focuses less on the interest of parties and more on the integrity of judicial decision making as a branch of the administration of justice.⁵⁸

Re-litigation in some circumstances may be necessary to uphold the integrity of the justice system (as outlined in *C.U.P.E.*) – however, the Court of Appeal found that none of those reasons directly applied to the circumstances in *Polgrain*. Instead, the Court of Appeal held that, when considering the aim to uphold the integrity of the judicial process, there are policy issues to consider. If there is no way to review the judicial finding – policy dictates that this is unfair. In *Polgrain*, the additional findings of LaForme J. that the assault did not occur and that the actions of the nurse were acceptable nursing practice were contained in the reasons. There is no avenue to appeal the reasons, only to appeal the verdict.

Rosenberg J explained:

In my view, the reasons of the trial judge in acquitting Mr. Cocchio are not judicial findings that attract the same re-litigation concerns as does the formal verdict. To dismiss this suit as an abuse of

⁵⁷ 2008 ONCA 427 (CanLII)

⁵⁸ *C.U.P.E.*, *supra*

process would attribute to the reasons of the trial judge a declaration of innocence, a verdict that was not legally open in the criminal proceedings.⁵⁹

Rosenberg J. explained that when applying the abuse of process doctrine, the court can be required to review the reasons for the conviction to determine the matters in issue and the essential findings; however, on an acquittal, the only essential finding is that the case was not proved beyond reasonable doubt. Hence, “to give full legal significance for abuse of process purposes to matters that were not essential to the decision would confuse the roles of the criminal and civil courts”⁶⁰.

Justice Rosenberg rightly upheld the administration of justice by reigning in the application of the abuse of process doctrine.

4.0 The Current Evolution of the Doctrine in Canada

Under Canadian law, a prior criminal conviction is not simply viewed as an opinion of a collateral court. A prior criminal conviction, provided the criminal proceeding was not tainted; and there was a consideration of the issue on the merits; and the issue decided is the same as the issue to be decided in the civil matter, is admissible in subsequent civil proceedings and ordinarily constitutes *prima facie* – but not conclusive – proof of the fact of guilt.

The decision of a criminal court should not constitute a conclusive presumption that cannot be rebutted in a civil court. A defendant in a civil case should not be precluded from raising the defence that he/she did not do it. It would discredit our legal system if civil defendants were not permitted to defend themselves, despite a prior criminal conviction.

A conviction should be admissible in a subsequent civil proceeding as evidence that the person convicted was guilty of the conduct constituting the offence. The conviction should not be conclusive – but the onus of proving that the conviction was wrong should be on the person so alleging.

The question of how much weight ought to be afforded to the conviction depends on the nature and circumstances of each case and is a decision that should be left to the discretion of the court. In the exercise of its discretion, the court should consider not only the positions of the parties but also the goal of enhancing the administration of justice generally.

The weight of the conviction can range from persuasive evidence of the criminal finding and of the facts supporting the finding – to conclusive evidence of the

⁵⁹ Polgrain, *supra* at para. 35

⁶⁰ *Ibid.*, para 36.

facts supporting the finding which cannot be rebutted because to do so would adversely affect the administration of justice. As explained by H.S. LaForme, J.A. in *Hanna v. Abbott*:

I am satisfied that the doctrine of abuse of process ought to generally be a flexible doctrine whose aim is to protect litigants from abusive, vexatious or frivolous proceedings or otherwise prevent a miscarriage of justice. Its application will depend on the circumstances, facts and context of a given case: *Novartis Pharmaceuticals Canada Inc. v. RhoxallPharma Inc.*, [2002] F.C.J. No. 1006 (Fed. T.D.)⁶¹

In most cases, the presumption afforded to the facts surrounding a prior criminal conviction will not be rebuttable because of the nature of the criminal trial with its higher burden of proof. Further, re-litigating the same issue in a different court is wasteful of resources and risks inconsistent results and therefore uncertainty.

The general trend in the law of evidence away from a rigid application of rules to a case by case consideration of facts and issues and to the principles upholding the judicial system as a whole, is reflected in the treatment afforded to prior convictions in subsequent civil actions in Canada. Bright line rules (like the rule in *Hollington*) ought not to impede access to justice and fair results. Our courts, quite rightly, have trended away from these bright line rules in an effort to “get it right”.

⁶¹ 82 O.R. (3d) 215 (Ont. C.A.) at para 31

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