

**SUPREME COURT OF CANADA**

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| **Citation:** British Columbia (Workers’ Compensation Board) *v.* Figliola, 2011 SCC 52, [2011] 3 S.C.R. 422 | **Date:** 20111027  **Docket:** 33648 |

**Between:**

**Workers’ Compensation Board of British Columbia**

Appellant

and

**Guiseppe Figliola, Kimberley Sallis, Barry Dearden and**

**British Columbia Human Rights Tribunal**

Respondents

- and -

**Attorney General of British Columbia, Coalition of BC Businesses,**

**Canadian Human Rights Commission, Alberta Human Rights Commission**

**and Vancouver Area Human Rights Coalition Society**

Interveners

**Coram:** McLachlin C.J. and Binnie, LeBel, Deschamps, Fish, Abella, Charron, Rothstein and Cromwell JJ.

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| **Reasons for Judgment:**  (paras. 1 to 55)  **Reasons Concurring in Result:**  (paras. 56 to 99) | Abella J. (LeBel, Deschamps, Charron and Rothstein JJ. concurring)  Cromwell J. (McLachlin C.J. and Binnie and Fish JJ. concurring) |

British Columbia (Workers’ Compensation Board) *v.* Figliola, 2011 SCC 52, [2011] 3 S.C.R. 422

Workers’ Compensation Board of British Columbia *Appellant*

v.

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2011 SCC 52

File No.: 33648.

2011:  March 16; 2011:  October 27.

Present: McLachlin C.J. and Binnie, LeBel, Deschamps, Fish, Abella, Charron, Rothstein and Cromwell JJ.

on appeal from the court of appeal for british columbia

*Administrative law — Judicial review — Standard of review — Patent unreasonableness — Injured workers receiving compensation pursuant to British Columbia’s Workers’ Compensation Board chronic pain policy — Workers filing appeal with Board’s Review Division claiming policy breached s. 8 of British Columbia Human Rights Code — Board rejecting that policy breached Human Rights Code — Workers subsequently filing complaints with Human Rights Tribunal repeating same arguments — Human Rights Tribunal deciding that this was appropriate question for Tribunal to determine — What is the scope of Tribunal’s discretion to determine whether the substance of a complaint has been “appropriately dealt with” when two bodies share jurisdiction over human rights — Whether exercise of discretion by Tribunal was patently unreasonable — Human Rights Code, R.S.B.C. 1996, c. 210, ss. 8, 27(1) — Administrative Tribunals Act, S.B.C. 2004, c. 45, s. 59.*

The complainant workers suffered from chronic pain and sought compensation from British Columbia’s Workers’ Compensation Board. Pursuant to the Board’s chronic pain policy, they received a fixed compensation award. They appealed to the Board’s Review Division, arguing that a policy which set a fixed award for chronic pain was patently unreasonable, unconstitutional and discriminatory on the grounds of disability under s. 8 of the British Columbia *Human Rights Code* (“*Code*”). The Review Officer accepted that he had jurisdiction over the *Human Rights Code* complaint and concluded that the Board’s chronic pain policy was not contrary to s. 8 of the *Code* and therefore not discriminatory*.*

The complainants appealed this decision to the Workers’ Compensation Appeal Tribunal (“WCAT”). Before the appeal was heard, the legislation was amended removing WCAT’s authority to apply the *Code*. Based on the amendments, the complainants’ appeal of the Review Officer’s human rights conclusions could not be heard by WCAT, but judicial review remained available. Instead of applying for judicial review, the complainants filed new complaints with the Human Rights Tribunal, repeating the same s. 8 arguments about the Board’s chronic pain policy that they had made before the Review Division.

The Workers’ Compensation Board brought a motion asking the Tribunal to dismiss the new complaints, arguing that under s. 27(1)(a) of the *Code*,the Tribunal had no jurisdiction, and that under s. 27(1)(f) of the *Code*,the complaints had already been “appropriately dealt with” by the Review Division. The Tribunal rejected both arguments and found that the issue raised was an appropriate question for the Tribunal to consider and that the parties to the complaints should receive the benefit of a full Tribunal hearing. On judicial review, the Tribunal’s decision was set aside. The Court of Appeal, however, concluded that the Tribunal’s decision was not patently unreasonable and restored its decision.

*Held*: The appeal should be allowed, the Tribunal’s decision set aside and the complaints dismissed.

*Per* LeBel, Deschamps, Abella, Charron and Rothstein JJ.: Section 27(1)(f) of the *Code* is the statutory reflection of the collective principles underlying the doctrines of issue estoppel, collateral attack and abuse of process — doctrines used by the common law as vehicles to transport and deliver to the litigation process principles of finality, the avoidance of multiplicity of proceedings, and protection for the integrity of the administration of justice, all in the name of fairness.

Read as a whole, s. 27(1)(f) does not codify these actual doctrines or their technical explications, it embraces their underlying principles. As a result, the Tribunal should be guided less by precise doctrinal catechisms and more by the goals of the fairness of finality in decision‑making and the avoidance of the relitigation of issues already decided by a decision‑maker with the authority to resolve them. Relying on these principles will lead the Tribunal to ask itself whether there was concurrent jurisdiction to decide the issues; whether the previously decided legal issue was essentially the same as what is being complained of to the Tribunal; and whether there was an opportunity for the complainants or their privies to know the case to be met and have the chance to meet it, regardless of how closely the previous process procedurally mirrored the one the Tribunal prefers or uses itself. All of these questions go to determining whether the substance of a complaint has been “appropriately dealt with” under s. 27(1)(f). The Tribunal’s strict adherence to the application of issue estoppel was an overly formalistic interpretation of s. 27(1)(f), particularly of the phrase “appropriately dealt with”, and had the effect of obstructing rather than implementing the goal of avoiding unnecessary relitigation.

Section 27(1)(f) does not represent a statutory invitation either to judicially review another tribunal’s decision, or to reconsider a legitimately decided issue in order to explore whether it might yield a different outcome. The section is oriented instead towards creating territorial respect among neighbouring tribunals, including respect for their right to have their own vertical lines of review protected from lateral adjudicative poaching. When an adjudicative body decides an issue within its jurisdiction, it and the parties who participated in the process are entitled to assume that, subject to appellate or judicial review, its decision will not only be final, it will be treated as such by other adjudicative bodies.

The discretion in s. 27(1)(f) was intended to be limited. This is based not only on the language of s. 27(1)(f) and the legislative history, but also on the character of the other six categories of complaints in s. 27(1), all of which refer to circumstances that make hearing the complaint presumptively unwarranted, such as complaints that are not within the Tribunal’s jurisdiction, allege acts or omissions that do not contravene the *Code*, have no reasonable prospect of success, would not be of any benefit to the complainant or further the purposes of the *Code*, or are made for improper motives or bad faith.

What the complainants in this case were trying to do is relitigate in a different forum. Rather than challenging the Review Officer’s decision through the available review route of judicial review, they started fresh proceedings before a different tribunal in search of a more favourable result. This strategy represented a “collateral appeal” to the Tribunal, the very trajectory that s. 27(1)(f) and the common lawdoctrines were designed to prevent. The Tribunal’s analysis made it complicit in this attempt to collaterally appeal the merits of the Board’s decision and decision‑making process. Its analysis represents a litany of factors having to do with whether it was comfortable with the process and merits of the Review Officer’s decision: it questioned whether the Review Division’s process met the necessary procedural requirements; it criticized the Review Officer for the way he interpreted his human rights mandate; it held that the decision of the Review Officer was not final; it concluded that the parties were not the same before the Workers’ Compensation Board as they were before the Tribunal; and it suggested that Review Officers lacked expertise in interpreting or applying the *Code*.

The standard of review designated under s. 59 of the *Administrative Tribunals Act* is patent unreasonableness. Because the Tribunal based its decision to proceed with these complaints and have them relitigated on predominantly irrelevant factors and ignored its true mandate under s. 27(1)(f), its decision is patently unreasonable.

*Per* McLachlin C.J. and Binnie, Fish and Cromwell JJ.: Both the common law and in particular s. 27(1)(f) of the *Code* are intended to achieve the necessary balance between finality and fairness through the exercise of discretion. It is this balance which is at the heart of both the common law finality doctrines and the legislative intent in enacting s. 27(1)(f). A narrow interpretation of the Tribunal’s discretion under s. 27(1)(f) does not reflect the clear legislative intent in enacting the provision. Rather, s. 27(1)(f) confers, in very broad language, a flexible discretion on the Human Rights Tribunal to enable it to achieve that balance in the multitude of contexts in which another tribunal may have dealt with a point of human rights law.

The grammatical and ordinary meaning of the words of s. 27(1)(f) support an expansive view of the discretion, not a narrow one. Nor can it be suggested that s. 27(1)(f) be read narrowly because of the character of the other six categories of discretion conferred by s. 27(1). The provision’s legislative history also confirms that it was the Legislature’s intent to confer a broad discretion to dismiss or not to dismiss where there had been an earlier proceeding. The intent was clearly to broaden, not to narrow, the range of factors which a tribunal could consider.

The Court’s jurisprudence recognizes that, in the administrative law context, common law finality doctrines must be applied flexibly to maintain the necessary balance between finality and fairness.  This is done through the exercise of discretion taking into account a wide variety of factors which are sensitive to the particular administrative law context in which the case arises and to the demands of substantial justice in the particular circumstances of each case. Finality and requiring parties to use the most appropriate mechanisms for review are of course important considerations. But they are not the only, or even the most important considerations. The need for this necessarily broader discretion in applying the finality doctrines in the administrative law setting is well illustrated by the intricate and changing procedural context in which the complainants found themselves in this case and underlines the wisdom of applying finality doctrines with considerable flexibility in the administrative law setting. The most important consideration is whether giving the earlier proceeding final and binding effect will work an injustice. If there is substantial injustice, or a serious risk of it, poor procedural choices by the complainant should generally not be fatal to an appropriate consideration of his or her complaint on its merits.

In this case, the Tribunal’s decision not to dismiss the complaint under s. 27(1)(f) was patently unreasonable*.* While the Tribunal was entitled to take into account the alleged procedural limitations of the proceedings before the Review Officer, it committed a reversible error by basing its decision on the alleged lack of independence of the Review Officer and by ignoring the potential availability of judicial review to remedy any procedural defects. More fundamentally, it failed to consider whether the substance of the complaint had been addressed and thereby failed to take this threshold statutory requirement into account. This requires looking at such factors as the issues raised in the earlier proceedings; whether those proceedings were fair; whether the complainant had been adequately represented; whether the applicable human rights principles had been canvassed; whether an appropriate remedy had been available and whether the complainant chose the forum for the earlier proceedings. This flexible and global assessment seems to be exactly the sort of approach called for by s. 27(1)(f). The Tribunal also failed to have regard to the fundamental fairness or otherwise of the earlier proceeding. All of this led the Tribunal to give no weight at all to the interests of finality and to largely focus instead on irrelevant considerations of whether the strict elements of issue estoppel were present.

The appeal should be allowed and the application of the Workers’ Compensation Board under s. 27(1)(f) should be remitted to the Tribunal for reconsideration.

**Cases Cited**

By Abella J.

**Referred to:** *Tranchemontagne v. Ontario (Director, Disability Support Program)*, 2006 SCC 14, [2006] 1 S.C.R. 513; *British Columbia (Ministry of Competition, Science & Enterprise) v. Matuszewski*, 2008 BCSC 915, 82 Admin. L.R. (4th) 308; *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44, [2001] 2 S.C.R. 460; *Workers’ Compensation Appeal Tribunal (B.C.) v. Hill*, 2011 BCCA 49, 299 B.C.A.C. 129; *Berezoutskaia v. Human Rights Tribunal (B.C.)*, 2006 BCCA 95, 223 B.C.A.C. 71; *Hines v. Canpar Industries Ltd.*,2006 BCSC 800, 55 B.C.L.R. (4th) 372; *Boucher v. Stelco Inc.*, 2005 SCC 64, [2005] 3 S.C.R. 279; *Rocois Construction Inc. v. Québec Ready Mix Inc.*, [1990] 2 S.C.R. 440; *Angle v. Minister of National Revenue*, [1975] 2 S.C.R. 248; *Canada (Attorney General) v. TeleZone Inc*., 2010 SCC 62, [2010] 3 S.C.R. 585; *Garland v. Consumers’ Gas Co*., 2004 SCC 25, [2004] 1 S.C.R. 629; *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63, [2003] 3 S.C.R. 77; *R. v. Mahalingan*, 2008 SCC 63, [2008] 3 S.C.R. 316; *Rasanen v. Rosemount Instruments Ltd.* (1994), 112 D.L.R. (4th) 683; *Nova Scotia (Workers’ Compensation Board) v. Martin*, 2003 SCC 54, [2003] 2 S.C.R. 504; *Council of Canadians with Disabilities v. VIA Rail Canada Inc.*, 2007 SCC 15, [2007] 1 S.C.R. 650.

By Cromwell J.

**Referred to:** *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44, [2001] 2 S.C.R. 460; *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63, [2003] 3 S.C.R. 77; *British Columbia (Minister of Forests) v. Bugbusters Pest Management Inc.* (1998), 50 B.C.L.R. (3d) 1; *Tranchemontagne v. Ontario (Director, Disability Support Program)*, 2006 SCC 14, [2006] 1 S.C.R. 513; *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559; *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27; *Becker v. Cariboo Chevrolet Oldsmobile Pontiac Buick GMC Ltd.*, 2006 BCSC 43, 42 Admin. L.R. (4th) 266; *Weber v. Ontario Hydro*, [1995] 2 S.C.R. 929; *Villella v. Vancouver (City)*, 2005 BCHRT 405, [2005] B.C.H.R.T.D. No. 405 (QL); *Schweneke v. Ontario* (2000), 47 O.R. (3d) 97; *Workers’ Compensation Appeal Tribunal (B.C.) v. Hill*, 2011 BCCA 49, 299 B.C.A.C. 129; *Allman v. Amacon Property Management Services Inc.*, 2007 BCCA 302, 243 B.C.A.C. 52.

**Statutes and Regulations Cited**

*Administrative Tribunals Act*, S.B.C. 2004, c. 45, ss. 44, 59.

*Attorney General Statutes Amendment Act, 2007*, S.B.C. 2007, c. 14, s. 3.

*Canadian Charter of Rights and Freedoms*, s. 15.

*Civil Code of Québec*, S.Q. 1991, c. 64, art. 2848.

*Human Rights Amendment Act, 1995*, S.B.C. 1995, c. 42.

*Human Rights Code*, R.S.B.C. 1996, c. 210, ss. 8, 25(2) [rep. & sub. 2002, c. 62, s. 11], (3) [rep. *idem*], 27(1), (2) [rep. & sub. *idem*, s. 12].

*Human Rights Code Amendment Act, 2002*, S.B.C. 2002, c. 62.

*Workers Compensation Act*, R.S.B.C. 1996, c. 492, ss. 96.4(2), 99, 245 to 250, 251.

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APPEAL from a judgment of the British Columbia Court of Appeal (Huddart, Frankel and Tysoe JJ.A.), 2010 BCCA 77, 2 B.C.L.R. (5th) 274, 316 D.L.R. (4th) 648, 284 B.C.A.C. 50, 481 W.A.C. 50, 3 Admin. L.R. (5th) 49, [2010] B.C.J. No. 259 (QL), 2010 CarswellBC 330, setting aside a decision of Stromberg‑Stein J., 2009 BCSC 377, 93 B.C.L.R. (4th) 384, 96 Admin. L.R. (4th) 250, [2009] B.C.J. No. 554 (QL), 2009 CarswellBC 737. Appeal allowed.

*Scott A. Nielsen* and *Laurel Courtenay*, for the appellant.

*Lindsay Waddell*, *James Sayre* and *Kevin Love*, for the respondents Guiseppe Figliola, Kimberley Sallis and Barry Dearden.

*Jessica M. Connell* and *Katherine Hardie*, for the respondent the British Columbia Human Rights Tribunal.

*Jonathan G. Penner*, for the intervener the Attorney General of British Columbia.

*Peter A. Gall*, *Q.C.*, and *Nitya Iyer*, for the intervener the Coalition of BC Businesses.

*Sheila Osborne‑Brown* and *Philippe Dufresne*, for the intervener the Canadian Human Rights Commission.

*Janice R. Ashcroft*, for the intervener the Alberta Human Rights Commission.

*Ryan D. W. Dalziel*, for the intervener the Vancouver Area Human Rights Coalition Society.

The judgment of LeBel, Deschamps, Abella, Charron and Rothstein JJ. was delivered by

1. Abella J. — Litigants hope to have their legal issues resolved as equitably and expeditiously as possible by an authoritative adjudicator. Subject only to rights of review or appeal, they expect, in the interests of fairness, to be able to rely on the outcome as final and binding. What they do not expect is to have those same issues relitigated by a different adjudicator in a different forum at the request of a losing party seeking a different result. On the other hand, it may sometimes be the case that justice demands fresh litigation.
2. In British Columbia, there is legislation giving the Human Rights Tribunal a discretion to refuse to hear a complaint if the substance of that complaint has already been appropriately dealt with in another proceeding. The issue in this appeal is how that discretion ought to be exercised when another tribunal with concurrent human rights jurisdiction has disposed of the complaint.

Background

1. Guiseppe Figliola, Kimberley Sallis, and Barry Dearden suffered from chronic pain. Mr. Figliola suffered a lower back injury while trying to place a sixty-pound, steel airshaft in the centre of a roll of paper. Ms. Sallis fell down a set of slippery stairs while delivering letters for Canada Post. Mr. Dearden, who also worked for Canada Post, developed back pain while delivering mail.
2. Each of them sought compensation from the British Columbia’s Workers’ Compensation Board for, among other things, their chronic pain. The employers were notified in each case.
3. The Board’s chronic pain policy, set by its board of directors, provided for a fixed award for such pain:

Where a Board officer determines that a worker is entitled to [an] award for chronic pain . . . an award equal to 2.5% of total disability will be granted to the worker.

(*Rehabilitation Services and Claims Manual*, vol. I, Policy No. 39.01, Chronic Pain, at para. 4(b); later replaced by vol. II, Policy No. 39.02, Chronic Pain (online).)

1. Pursuant to this policy, the complainants received a fixed compensation award amounting to 2.5% of total disability for their chronic pain. The Workers’ Compensation Board expresses partial disability as a percentage of the disability suffered by a completely disabled worker. This is intended to reflect “the extent to which a particular injury is likely to impair a worker’s ability to earn in the future” (*Rehabilitation Services and Claims Manual*, vol. II, Policy No. 39.00).
2. Each complainant appealed to the Board’s Review Division, arguing that a policy which set a fixed award for chronic pain was patently unreasonable, unconstitutional under s. 15 of the *Canadian* *Charter of Rights and Freedoms*, and discriminatory on the grounds of disability under s. 8 of the *Human Rights Code*, R.S.B.C. 1996, c. 210.
3. At the Review Division, the Review Officer, Nick Attewell, found that only the Workers’ Compensation Appeal Tribunal (“WCAT”) had the authority to scrutinize policies for patent unreasonableness. He also concluded that, since the combination of s. 44 of the *Administrative Tribunals Act*, S.B.C. 2004, c. 45 (“*ATA*”), and s. 245.1 of the *Workers Compensation Act*, R.S.B.C. 1996, c. 492,expressly deprived the WCAT of jurisdiction over constitutional questions, this meant that he too had no such jurisdiction.
4. The Review Officer accepted that he had jurisdiction over the *Human Rights Code* complaint. This authority flowed from this Court’s decision in *Tranchemontagne v. Ontario (Director, Disability Support Program)*, 2006 SCC 14, [2006] 1 S.C.R. 513, where the majority concluded that human rights tribunals did not have exclusive jurisdiction over human rights cases and that unless there was statutory language to the contrary, other tribunals had concurrent jurisdiction to apply human rights legislation.
5. In careful and thorough reasons, the Review Officer concluded that the Board’s chronic pain policy was not contrary to s. 8 of the *Code* and therefore not discriminatory*.*
6. The complainants appealed Mr. Attewell’s decision to the WCAT. Before the appeal was heard, the B.C. legislature amended the *Administrative Tribunals Act* and the *Workers Compensation Act*, removing the WCAT’s authority to apply the *Code* (*Attorney General Statutes Amendment Act, 2007*, S.B.C. 2007, c. 14)*.* The effect of this amendment on a Review Officer’s authority to address the *Code* is not before us and was not argued by any of the parties.
7. Based on the amendments, the complainants’ appeal of the Review Officer’s human rights conclusions could not be heard by the WCAT, but judicial review remained available. Instead of applying for judicial review, however, the complainants filed new complaints with the Human Rights Tribunal, repeating the same s. 8 arguments about the Board’s chronic pain policy that they had made before the Review Division. They did not proceed with their appeal to the WCAT from the conclusions of the Review Officer dealing with whether he had jurisdiction to find the chronic pain policy to be patently unreasonable.
8. The Workers’ Compensation Board brought a motion asking the Tribunal to dismiss the new complaints, arguing that under s. 27(1)(a) of the *Code*,the Tribunal had no jurisdiction, and that under s. 27(1)(f), the complaints had already been appropriately dealt with by the Review Division. Those provisions state:

**27** (1) A member or panel may, at any time after a complaint is filed and with or without a hearing, dismiss all or part of the complaint if that member or panel determines that any of the following apply:

(a) the complaint or that part of the complaint is not within the jurisdiction of the tribunal;

. . .

(f) the substance of the complaint or that part of the complaint has been appropriately dealt with in another proceeding;

1. The Tribunal rejected both arguments (2008 BCHRT 374 (CanLII)). Of particular relevance, it did not agree that the complaints should be dismissed under s. 27(1)(f). Citing *British Columbia (Ministry of Competition, Science & Enterprise)* *v. Matuszewski*, 2008 BCSC 915, 82 Admin. L.R. (4th) 308, and relying on this Court’s decision in *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44, [2001] 2 S.C.R. 460, the Tribunal concluded that “the substance of the Complaints was not appropriately dealt with in the review process. . . . [T]he issue raised is an appropriate question for the Tribunal to consider and the parties to the Complaints should receive the benefit of a full Tribunal hearing” (para. 50).
2. On judicial review, the Tribunal’s decision was set aside by Justice Stromberg-Stein (2009 BCSC 377, 93 B.C.L.R. (4th) 384). She concluded that the same issues had already been “conclusively decided” by the Review Officer and that the Tribunal had failed to take into proper account the principles of *res judicata*, collateral attack, and abuse of process (paras. 40 and 54). She found that for the Tribunal to proceed would be a violation of the principles of consistency, finality and the integrity of the administration of justice. In her view, the complaints to the Tribunal were merely a veiled attempt to circumvent judicial review:

The Tribunal would be ruling on the correctness of the Review Division decision. That is not the role of the Tribunal and to do so constitutes an abuse of process. [para. 56]

1. As for which standard of review applied, her view was that the Tribunal’s decision ought to be set aside whether the standard was correctness or patent unreasonableness.
2. The Court of Appeal restored the Tribunal’s decision (2010 BCCA 77, 2 B.C.L.R. (5th) 274). It interpreted s. 27(1)(f) as reflecting the legislature’s intention to confer jurisdiction on the Tribunal to adjudicate human rights complaints even when the same issue had previously been dealt with by another tribunal. This did not represent the Tribunal exercising appellate review over the other proceeding, it flowed from the Tribunal’s role in determining whether the previous proceeding had substantively addressed the human rights issues.
3. On the question of the standard of review, the Court of Appeal concluded that the issue revolved around s. 27(1)(f). Since a decision under s. 27(1)(f) is discretionary, the appropriate standard according to the jurisprudence is patent unreasonableness: see *Workers’ Compensation Appeal Tribunal (B.C.) v. Hill*, 2011 BCCA 49, 299 B.C.A.C. 129; *Berezoutskaia v. Human Rights Tribunal (B.C.)*, 2006 BCCA 95, 223 B.C.A.C. 71; *Hines v. Canpar Industries Ltd.*,2006 BCSC 800, 55 B.C.L.R. (4th) 372; and *Matuszewski*. This was based on s. 59(3) of the *ATA*, which sets out the relevant standard, and on s. 59(4), which sets out a number of indicia:

**59** (1) In a judicial review proceeding, the standard of review to be applied to a decision of the tribunal is correctness for all questions except those respecting the exercise of discretion, findings of fact and the application of the common law rules of natural justice and procedural fairness.

. . .

(3) A court must not set aside a discretionary decision of the tribunal unless it is patently unreasonable.

(4) For the purposes of subsection (3), a discretionary decision is patently unreasonable if the discretion

(a) is exercised arbitrarily or in bad faith,

(b) is exercised for an improper purpose,

(c) is based entirely or predominantly on irrelevant factors, or

(d) fails to take statutory requirements into account.

1. The Court of Appeal concluded that the Tribunal’s decision was not patently unreasonable.
2. I agree with the conclusion that, based on the directions found in s. 59(3) of the *ATA*, the Tribunal’s decision is to be reviewed on a standard of patent unreasonableness. In my respectful view, however, I see the Tribunal’s decision not to dismiss the complaints in these circumstances as reaching that threshold.

Analysis

1. The question of jurisdiction is not seriously at issue in this appeal. Since *Tranchemontagne*,tribunals other than human rights commissions have rightly assumed that, absent legislative intent to the contrary, they have concurrent jurisdiction to apply human rights legislation. That means that at the time these complaints were brought, namely, before the amendments to the *ATA* removed the WCAT’s human rights jurisdiction, both the Workers’ Compensation Board *and* the Human Rights Tribunal had ostensible authority to hear human rights complaints. Since the complainants brought their complaints to the Board, and since either the Board or the Tribunal was entitled to hear the issue, the Board had jurisdiction when it decided the complainants’ human rights issues. But based on their concurrent jurisdiction when this complaint was brought to the Board, there is no serious question that the Tribunal, in theory, also had authority over these human rights complaints. This means that s. 27(1)(a) of the *Code* is not in play.
2. The question then arises: when two bodies share jurisdiction over human rights, what ought to guide the Tribunal under s. 27(1)(f) in deciding when to dismiss all or part of a complaint that has already been decided by the other tribunal?
3. In *Matuszewski*, Pitfield J. explored the contours and concepts of this provision. In that case, the collective agreement had banned the accrual of seniority while an employee was on long-termdisability. The union grieved, alleging that the provision was discriminatory. The arbitrator concluded that it was not. The union did not seek judicial review from the arbitrator’s decision. One of the employees in the bargaining unit filed a complaint with the Human Rights Tribunal alleging that the same collective agreement provision was discriminatory. The Human Rights Tribunal refused to dismiss this fresh complaint.
4. On judicial review of the Tribunal’s decision, Pitfield J. concluded that the Tribunal’s refusal to dismiss the complaint was patently unreasonable. In his view, s. 27(1)(f) is the statutory mechanism through which the Tribunal can prevent conflicting decisions arising from the same issues. This flows from the concurrent jurisdiction exercised over the *Code* by the Tribunal and other tribunals. While s. 27(1)(f) does not call for a strict application of the doctrines of issue estoppel, collateral attack, or abuse of process, the principles underlying all three of these doctrines are “factors of primary importance that must be taken into account when exercising discretion under s. 27(1)(f) of the *Human Rights Code* to proceed, or to refrain from proceeding, with the hearing of a complaint” (para. 31).
5. I agree with Pitfield J.’s conclusion that s. 27(1)(f) is the statutory reflection of the collective principles underlying those doctrines, doctrines used by the common law as vehicles to transport and deliver to the litigation process principles of finality, the avoidance of multiplicity of proceedings, and protection for the integrity of the administration of justice, all in the name of fairness. They are vibrant principles in the civil law as well (*Civil Code of Québec*, S.Q. 1991, c. 64,art. 2848; *Boucher v. Stelco Inc.*, 2005 SCC 64, [2005] 3 S.C.R. 279; *Rocois Construction Inc. v. Québec Ready Mix Inc.*, [1990] 2 S.C.R. 440, at p. 448).
6. As a result, given that multiple tribunals frequently exercise concurrent jurisdiction over the same issues,it is not surprising that the common law doctrines also find expression in the administrative law context through statutory mechanisms such as s. 27(1)(f). A brief review of these doctrines, therefore, can be of assistance in better assessing whether their underlying principles have been respected in this case.
7. The three preconditions of issue estoppel are whether the same question has been decided; whether the earlier decision was final; and whether the parties, or their privies, were the same in both proceedings (*Angle v. Minister of National Revenue*, [1975] 2 S.C.R. 248, at p. 254). These concepts were most recently examined by this Court in *Danyluk*, where Binnie J. emphasized the importance of finality in litigation: “A litigant . . . is only entitled to one bite at the cherry. . . . Duplicative litigation, potential inconsistent results, undue costs, and inconclusive proceedings are to be avoided” (para. 18). Parties should be able to rely particularly on the conclusive nature of administrative decisions, he noted, since administrative regimes are designed to facilitate the expeditious resolution of disputes (para. 50). All of this is guided by the theory that “estoppel is a doctrine of public policy that is designed to advance the interests of justice” (para. 19).
8. The rule against collateral attack similarly attempts to protect the fairness and integrity of the justice system by preventing duplicative proceedings. It prevents a party from using an institutional detour to attack the validity of an order by seeking a different result from a different forum, rather than through the designated appellate or judicial review route: see *Canada (Attorney General) v. TeleZone Inc*., 2010 SCC 62, [2010] 3 S.C.R. 585, and *Garland v. Consumers’ Gas Co*., 2004 SCC 25, [2004] 1 S.C.R. 629.
9. Both collateral attack and *res judicata* received this Court’s attention in *Boucher*. The Ontario Superintendent of Pensions had ordered and approved a partial wind-up report according to which members of the plan employed in Quebec were not to receive early retirement benefits, due to the operation of Quebec law. The employees were notified, but chose not to contest the Superintendent’s decision to approve the report. Instead, several of them started an action against their employer in the Quebec Superior Court claiming their entitlement to early retirement benefits. LeBel J. rejected the employees’ claim. Administrative law, he noted, has review mechanisms in place for reducing error or injustice. Those are the mechanisms parties should use. The decision to pursue a court action instead of judicial review resulted in “an impermissible collateral attack on the Superintendent’s decision”:

Modern adjective law and administrative law have gradually established various appeal mechanisms and sophisticated judicial review procedures, so as to reduce the chance of errors or injustice. Even so, the parties must avail themselves of those options properly and in a timely manner. Should they fail to do so, the case law does not in most situations allow collateral attacks on final decisions . . . . [para. 35]

1. In other words, the harm to the justice system lies not in challenging the correctness or fairness of a judicial or administrative decision in the proper forums, it comes from inappropriately circumventing them (*Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63, [2003] 3 S.C.R. 77, at para. 46).
2. And finally, we come to the doctrine of abuse of process, which too has as its goal the protection of the fairness and integrity of the administration of justice by preventing needless multiplicity of proceedings, as was explained by Arbour J. in *Toronto (City)*. The case involved a recreation instructor who was convicted of sexually assaulting a boy under his supervision and was fired after his conviction. He grieved the dismissal. The arbitrator decided that the conviction was admissible evidence but not binding on him. As a result, he concluded that the instructor had been dismissed without cause.
3. Arbour J. found that the arbitrator was wrong not to give full effect to the criminal conviction even though neither *res judicata* nor the rule against collateral attack strictly applied. Because the effect of the arbitrator’s decision was to relitigate the conviction for sexual assault, the proceeding amounted to a “blatant abuse of process” (para. 56).
4. Even where *res judicata* is not strictly available, Arbour J. concluded, the doctrine of abuse of process can be triggered where allowing the litigation to proceed would violate principles such as “judicial economy, consistency, finality and the integrity of the administration of justice” (para. 37). She stressed the goals of avoiding inconsistency and wasting judicial and private resources:

[Even] if the same result is reached in the subsequent proceeding, the relitigation will prove to have been a waste of judicial resources as well as an unnecessary expense for the parties and possibly an additional hardship for some witnesses. Finally, if the result in the subsequent proceeding is different from the conclusion reached in the first on the very same issue, the inconsistency, in and of itself, will undermine the credibility of the entire judicial process, thereby diminishing its authority, its credibility and its aim of finality. [para. 51]

(Seealso *R. v. Mahalingan*, 2008 SCC 63, [2008] 3 S.C.R. 316, at para. 106, *per* Charron J.)

1. At their heart, the foregoing doctrines exist to prevent unfairness by preventing “abuse of the decision-making process” (*Danyluk*, at para. 20; see also *Garland*, at para. 72, and *Toronto (City)*, at para. 37). Their common underlying principles can be summarized as follows:

• It is in the interests of the public and the parties that the finality of a decision can be relied on (*Danyluk*, at para. 18; *Boucher*, at para. 35).

• Respect for the finality of a judicial or administrative decision increases fairness and the integrity of the courts, administrative tribunals and the administration of justice; on the other hand, relitigation of issues that have been previously decided in an appropriate forum may undermine confidence in this fairness and integrity by creating inconsistent results and unnecessarily duplicative proceedings (*Toronto (City)*, at paras. 38 and 51).

• The method of challenging the validity or correctness of a judicial or administrative decision should be through the appeal or judicial review mechanisms that are intended by the legislature (*Boucher*, at para. 35; *Danyluk*, at para. 74).

• Parties should not circumvent the appropriate review mechanism by using other forums to challenge a judicial or administrative decision (*TeleZone*,at para. 61; *Boucher*, at para. 35; *Garland*, at para. 72).

• Avoiding unnecessary relitigation avoids an unnecessary expenditure of resources (*Toronto (City)*, at paras. 37 and 51).

1. These are the principles which underlie s. 27(1)(f). Singly and together, they are a rebuke to the theory that access to justice means serial access to multiple forums, or that more adjudication necessarily means more justice.
2. Read as a whole, s. 27(1)(f) does not codify the actual doctrines or their technical explications, it embraces their underlying principles in pursuit of finality, fairness, and the integrity of the justice system by preventing unnecessary inconsistency, multiplicity and delay. That means the Tribunal should be guided less by precise doctrinal catechisms and more by the goals of the fairness of finality in decision-making and the avoidance of the relitigation of issues already decided by a decision-maker with the authority to resolve them. Justice is enhanced by protecting the expectation that parties will not be subjected to the relitigation in a different forum of matters they thought had been conclusively resolved. Forum shopping for a different and better result can be dressed up in many attractive adjectives, but fairness is not among them.
3. Relying on these underlying principles leads to the Tribunal asking itself whether there was concurrent jurisdiction to decide human rights issues; whether the previously decided legal issue was essentially the same as what is being complained of to the Tribunal; and whether there was an opportunity for the complainants or their privies to know the case to be met and have the chance to meet it, regardless of how closely the previous process procedurally mirrored the one the Tribunal prefers or uses itself. All of these questions go to determining whether the substance of a complaint has been “appropriately dealt with”. At the end of the day, it is really a question of whether it makes sense to expend public and private resources on the relitigation of what is essentially the same dispute.
4. What I do *not* see s. 27(1)(f) as representing is a statutory invitation either to “judicially review” another tribunal’s decision, or to reconsider a legitimately decided issue in order to explore whether it might yield a different outcome. The section is oriented instead towards creating territorial respect among neighbouring tribunals, including respect for their right to have their own vertical lines of review protected from lateral adjudicative poaching. When an adjudicative body decides an issue within its jurisdiction, it and the parties who participated in the process are entitled to assume that, subject to appellate or judicial review, its decision will not only *be* final, it will be treated as such by other adjudicative bodies. The procedural or substantive correctness of the previous proceeding is not meant to be bait for another tribunal with a concurrent mandate.
5. I see the discretion in s. 27(1)(f), in fact, as being limited, based not only on the language of s. 27(1)(f), but also on the character of the other six categories of complaints in s. 27(1) in whose company it finds itself. Section 27(1) states:

**27** (1) A member or panel may, at any time after a complaint is filed and with or without a hearing, dismiss all or part of the complaint if that member or panel determines that any of the following apply:

(a) the complaint or that part of the complaint is not within the jurisdiction of the tribunal;

(b) the acts or omissions alleged in the complaint or that part of the complaint do not contravene this Code;

(c) there is no reasonable prospect that the complaint will succeed;

(d) proceeding with the complaint or that part of the complaint would not

(i) benefit the person, group or class alleged to have been discriminated against, or

(ii) further the purposes of this Code;

(e) the complaint or that part of the complaint was filed for improper motives or made in bad faith;

(f) the substance of the complaint or that part of the complaint has been appropriately dealt with in another proceeding;

(g) the contravention alleged in the complaint or that part of the complaint occurred more than 6 months before the complaint was filed unless the complaint or that part of the complaint was accepted under section 22(3).

1. Each subsection in s. 27(1) refers to circumstances that make hearing the complaint presumptively unwarranted: complaints that are not within the Tribunal’s jurisdiction; allege acts or omissions that do not contravene the *Code*; have no reasonable prospect of success; would not be of any benefit to the complainant or further the purposes of the *Code*; or are made for improper motives or in bad faith. These are the statutory companions for s. 27(1)(f). The fact that the word “may” is used in the preamble to s. 27(1) means that the Tribunal does have an element of discretion in deciding whether to dismiss these complaints. But it strikes me as counterintuitive to think that the legislature intended to give the Tribunal a wide berth to decide, for example, whether or not to dismiss complaints it has no jurisdiction to hear, are unlikely to succeed, or are motivated by bad faith.
2. This is the context in which the words “appropriately dealt with” in s. 27(1)(f) should be understood. All of the other provisions with which s. 27(1)(f) is surrounded lean towards encouraging dismissal. On its face, there is no principled basis for interpreting s. 27(1)(f) idiosyncratically from the rest of s. 27(1). I concede that the word “appropriately” is, by itself, easily stretched into many linguistic directions. But our task is not to define the word, it is to define it in its statutory context so that, to the extent reasonably possible, the legislature’s intentions can be respected.
3. Nor does the legislative history of s. 27(1)(f) support the theory that the legislature intended to give the Tribunal a wide discretion to re-hear complaints decided by other tribunals. Formerly, ss. 25(3) and 27(2) of the *Code* required the Tribunal to consider the subject matter, nature, and available remedies of the earlier proceeding in deciding whether to defer or dismiss a complaint without a hearing. These factors were interpreted by the Human Rights Commissionto include the administrative fairness of the earlier proceeding, the expertise of the decision-maker, which forum was more appropriate for discussing the issues, and whether the earlier proceeding could deliver an adequate remedy, factors which provided hurdles to the dismissal of complaints: see D. K. Lovett and A. R. Westmacott, “Human Rights Review: A Background Paper” (2001) (online), at pp. 100-101.
4. The legislature removed these limiting factors in 2002 in the *Human Rights Code Amendment Act,* *2002*, S.B.C. 2002, c. 62. By removing factors which argued *against* dismissing a complaint, the legislature may well be taken to have intended that a different approach be taken by the Tribunal, namely, one that made it easier to dismiss complaints. This is consistent with the statement of the then Minister of Government Services, the Hon. U. Dosanjh, on second reading of the *Human Rights Amendment Act, 1995*, S.B.C. 1995, c. 42, which included s. 22(1), the almost identically worded predecessor to s. 27(1). While he did not specifically refer to each of the subsections of s. 22(1) or their discrete purposes, it is clear that his overriding objective in introducing this legislative package, which included these provisions, was to reduce a substantial backlog and ensure “a system . . . which will be efficient and streamlined”:

In this proposed legislation, you now have the power to defer consideration of a complaint pending the outcome of another proceeding, so that there is no unnecessary overlap in the proceedings.

. . .

You have the power to dismiss the complaints, as I indicated, and that has been expanded. [Emphasis added.]

(British Columbia, *Official Report of Debates of the Legislative Assembly (Hansard)*,vol. 21, 4th Sess., 35th Parl., June 22, 1995, at p. 16062)

1. This then brings us to the Tribunal’s use of the *Danyluk* factors. Not only do I resist re-introducing by judicial fiat the types of factors that the legislature has expressly removed, it is not clear to me that the *Danyluk* factors even apply. They were developed to assist courts in applying the doctrine of issue estoppel. Section 27(1)(f), on the other hand, is not limited to issue estoppel. As Pitfield J. explained in *Matuszewski*, s. 27(1)(f) does not call for the technical application of any of the common law doctrines — issue estoppel, collateral attack or abuse of process — it calls instead for an approach that applies their combined principles. Notably, neither Stromberg-Stein J. nor the Court of Appeal referred to the *Danyluk* factors in their respective analyses.
2. Moreover, importing the *Danyluk* factors into s. 27(1)(f) would undermine what this Court mandated in *Tranchemontagne* when it directed that, absent express language to the contrary, all administrative tribunals have concurrent jurisdiction to apply human rights legislation. That means that *Danyluk* factors such as the prior decision-maker’s mandate and expertise, are presumed to be satisfied. Encouraging the Tribunal to nonetheless apply a comparative mandate and expertise approach would erode Bastarache J.’s conclusion that human rights tribunals are not the exclusive “guardian or the gatekeeper for human rights law” (*Tranchemontagne*, at para. 39).
3. This brings us to how the Tribunal exercised its discretion in this case. Because I see s. 27(1)(f) as reflecting the principles of the common lawdoctrines rather than the codification of their technical tenets, I find the Tribunal’s strict adherence to the application of issue estoppel to be an overly formalistic interpretation of the section, particularly of the phrase “appropriately dealt with”. With respect, this had the effect of obstructing rather than implementing the goal of avoiding unnecessary relitigation. In acceding to the complainant’s request for relitigation of the same s. 8 issue, the Tribunal was disregarding Arbour J.’s admonition in *Toronto (City)* that parties should not try to impeach findings by the “impermissible route of relitigation in a different forum” (para. 46).
4. “Relitigation in a different forum” is exactly what the complainants in this case were trying to do. Rather than challenging the Review Officer’s decision through the available review route of judicial review, they started fresh proceedings before a different tribunal in search of a more favourable result. This strategy represented, as Stromberg-Stein J. noted, a “collateral appeal” to the Tribunal (para. 52), the very trajectory that s. 27(1)(f) and the common lawdoctrines were designed to prevent:

. . . this case simply boils down to the complainants wanting to reargue the very same issue that has already been conclusively decided within the same factual and legal matrix. The complainants are attempting to pursue the matter again, within an administrative tribunal setting where there is no appellate authority by one tribunal over the other. [para. 54]

1. The Tribunal’s analysis made it complicit in this attempt to collaterally appeal the merits of the Board’s decision and decision-making process. Its analysis represents a litany of factors having to do with whether it was comfortable with the process and merits of the Review Officer’s decision.
2. To begin, it questioned whether the Review Division’s process met the necessary procedural requirements. This is a classic judicial review question and not one within the mandate of a concurrent decision-maker. While the Tribunal may inquire into whether the parties had notice of the case to be met and were given an opportunity to respond, that does not mean that it can require that the prior process be a procedural mimic of the Tribunal’s own, more elaborate one. But in any event, I agree with Stromberg-Stein J. that there were no complaints about the complainants’ ability to know the case to be met or the Board’s jurisdiction to hear it:

Each of the complainants participated fully in the proceedings; each knew the case to be met and had the chance to meet it. Each of the complainants had the benefit of competent and experienced counsel who raised the human rights issues within the workers’ compensation context. The issues were analyzed and addressed fully by the Review Division. It was implicit in their submissions to the Review Division that they accepted the Review Division had full authority to decide the human rights issue. [para. 52]

(See also *Rasanen v. Rosemount Instruments Ltd.* (1994), 112 D.L.R. (4th) 683 (Ont. C.A.), at p. 705.)

As long as the complainants had a chance to air their grievances before an authorized decision-maker, the extent to which they received traditional “judicial” procedural trappings should not be the Tribunal’s concern.

1. The Tribunal also criticized the Review Officer for the way he interpreted his human rights mandate:

. . . the Review Officer, who, in the absence of evidence, made findings about the appropriate comparator group, that the dignity of the Complainants was not impacted by the Policy, and that there was a [*bona fide* justification] for the Policy. There was no analysis regarding where the onus lay in establishing a [*bona fide* justification] or what the applicable interpretive principles with respect to human rights legislation are. . . . Further, any discriminatory rule must not discriminate more than is necessary; hence, there must be consideration given to possible alternatives to the impugned rule which would be less discriminatory while still achieving the objective . . . . [para. 46]

These too are precisely the kinds of questions about the merits that are properly the subject of judicial review, not grounds for a collateral attack by a human rights tribunal under the guise of s. 27(1)(f).

1. In addition, the Tribunal held that the decision of the Review Officer was not final. It is not clear to me what the Tribunal was getting at. “Final” means that all available means of review or appeal have been exhausted. Where a party chooses not to avail itself of those steps, the decision is final. Even under the strict application of issue estoppel, which in my view is not in any event what s. 27(1)(f) was intended to incorporate, the Review Officer’s decision was a final one in these circumstances. Having chosen not to judicially review the decision as they were entitled to do, the complainants cannot then claim that because the decision lacks “finality” they are entitled to start all over again before a different decision-maker dealing with the same subject matter (*Danyluk*, at para. 57).
2. The Tribunal concluded that the parties were not the same before the Workers’ Compensation Board as they were before the Tribunal. This, the Tribunal held, precluded the application of the doctrine of issue estoppel. This too represents the strict application of issue estoppel rather than of the principles underlying all three common law doctrines. Moreover, it is worth noting, as Arbour J. observed in *Toronto (City)*, that the absence of “mutuality” does not preclude the application of abuse of process to avoid undue multiplicity (para. 37).
3. Finally, the Tribunal suggested that Review Officers lacked expertise in interpreting or applying the *Code*. As previously mentioned, since both adjudicative bodies had concurrent jurisdiction at the time the complaint was heard and decided, this is irrelevant. Bastarache J., in *Tranchemontagne*, expressly rejected the argument that the quasi-constitutional status of human rights legislation required that there be an expert human rights body exercising a supervisory role over human rights jurisprudence. As he explained, human rights legislation must be offered accessible application to further the purposes of the *Code* by fostering “a general culture of respect for human rights in the administrative system” (paras. 33 and 39;*Nova Scotia (Workers’ Compensation Board) v. Martin*,2003 SCC 54, [2003] 2 S.C.R. 504; and *Council of Canadians with Disabilities v. VIA Rail Canada Inc.*, 2007 SCC 15, [2007] 1 S.C.R. 650).
4. Because the Tribunal based its decision to proceed with these complaints and have them relitigated on predominantly irrelevant factors and ignored its true mandate under s. 27(1)(f), its decision, in my respectful view, is patently unreasonable. Since it was patently unreasonable in large part because it represented the unnecessary prolongation and duplication of proceedings that had already been decided by an adjudicator with the requisite authority, I see no point in wasting the parties’ time and resources by sending the matter back for an inevitable result.
5. I would therefore allow the appeal, set aside the Tribunal’s decision and dismiss the complaints. In accordance with the Board’s request, there will be no order for costs.

The reasons of McLachlin C.J. and Binnie, Fish and Cromwell JJ. were delivered by

Cromwell J. —

1. Introduction
2. I agree with my colleague Abella J. that the decision of the Human Rights Tribunal was patently unreasonable (2008 BCHRT 374 (CanLII)). However, I do not, with respect, share Abella J.’s interpretation of the discretion conferred by s. 27(1)(f) of the *Human Rights Code*, R.S.B.C. 1996, c. 210, nor do I agree with her decision not to remit the complaints to the Tribunal.
3. I do not subscribe to my colleague’s understanding of what lies at the heart of the common law finality doctrines or of the principles underlying s. 27(1)(f) of the *Human Rights Code*. Abella J. writes that what is at the heart of these finality doctrines is preventing abuse of the decision-making process and that the discretion conferred by s. 27(1)(f) is a limited one, concerned only with finality, avoiding unnecessary relitigation and pursuing the appropriate review mechanisms. I respectfully disagree.
4. The common law has consistently seen these finality doctrines as being concerned with striking an appropriate balance between the important goals of finality and fairness, more broadly considered. Finality is one aspect of fairness, but it does not exhaust that concept or trump all other considerations. As for s. 27(1)(f), it confers, in very broad language, a flexible discretion on the Human Rights Tribunal to enable it to achieve that balance in the multitude of contexts in which another tribunal may have dealt with a point of human rights law. In my view, both the common law and in particular s. 27(1)(f) of the *Code* are intended to achieve the necessary balance between finality and fairness through the exercise of discretion. It is this balance which is at the heart of both the common law finality doctrines and the legislative intent in enacting s. 27(1)(f). In my respectful view, a narrow interpretation of the Tribunal’s discretion under s. 27(1)(f) does not reflect the clear legislative intent in enacting the provision.
5. I would allow the appeal and remit the Workers’ Compensation Board’s motion to dismiss the complaints under s. 27(1)(f) to the Tribunal for reconsideration in light of the principles I set out.
6. Analysis

A. *Common Law Finality Doctrines*

1. The leading authorities from this Court on the application of finality doctrines in the administrative law context are *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44, [2001] 2 S.C.R. 460, and *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63, [2003] 3 S.C.R. 77. Both emphasized the importance of balance and discretion in applying these finality doctrines.
2. In *Danyluk*, the question was whether Ms. Danyluk’s court action for damages for wrongful dismissal was barred by issue estoppel arising from an adverse decision of an employment standards officer. Writing for a unanimous Court, Binnie J. noted that while finality is a compelling consideration, issue estoppel is a public policy doctrine designed to advance the interests of justice (para. 19). He noted that the common law finality doctrines of cause of action estoppel, issue estoppel, and collateral attack have been extended to the decisions of administrative officers. Importantly, however, he added that in the administrative law context, “the more specific objective [of applying these doctrines] is to balance fairness to the parties with the protection of the administrative decision-making process” (para. 21). Thus, even when the traditional elements of the finality doctrines are present, the court must go on to exercise a discretion as to whether or not to allow the claim to proceed. He noted that this discretion existed even when the estoppel was alleged to arise from a court decision, but added that such discretion “is necessarily broader in relation to the prior decisions of administrative tribunals because of the enormous range and diversity of the structures, mandates and procedures of administrative decision makers”: para. 62 (emphasis added); see also D. J. Lange, *The Doctrine of Res Judicata in Canada* (3rd ed. 2010), at pp. 227-29. Binnie J. quoted Finch J.A. (as he then was) to the effect that “[t]he doctrine of issue estoppel is designed as an implement of justice, and a protection against injustice. It inevitably calls upon the exercise of a judicial discretion to achieve fairness according to the circumstances of each case”: *British Columbia (Minister of Forests) v. Bugbusters Pest Management Inc.* (1998), 50 B.C.L.R. (3d) 1 (C.A.), at para. 32, cited in *Danyluk*, at para. 63. Binnie J. then held that it is “an error of principle not to address the factors for and against the exercise of the discretion . . . . The objective is to ensure that the operation of issue estoppel promotes the orderly administration of justice but not at the cost of real injustice” (paras. 66-67).
3. To assist decision-makers in achieving the appropriate balance, the Court set out a detailed (although non-exhaustive) list of factors for a court to consider when exercising its discretion: the wording of the statute from which the power to issue the administrative order derives; the purpose of the legislation; the availability of an appeal; the safeguards available to the parties in the administrative procedure; the expertise of the administrative decision-maker; the circumstances giving rise to the prior administrative proceedings; and the potential injustice (*Danyluk*, at paras. 68-80). I note in passing that this list reflects a much broader conception of the discretion at common law than my colleague Abella J. envisions under s. 27(1)(f). The three factors to be considered set out at para. 37 of her reasons are limited to whether the previous decision-maker had concurrent authority to decide the matter, whether the issue was essentially the same and whether in the earlier proceeding the parties (or their privies) had an opportunity to know the case and have a chance to meet it.
4. Nothing would be served by my reviewing the *Danyluk* factors in detail. It is particularly noteworthy, however, that in that case, the Court refused to apply issue estoppel even though Ms. Danyluk, represented by counsel, had not pursued an administrative review of the employment standards officer’s decision and that her claim of substantial injustice turned largely on the facts that she had received neither notice of the employer’s allegation nor an opportunity to respond (para. 80). Also of importance was that the legislation did not view the employment standards proceedings as an exclusive forum for complaints of this nature (para. 69). To characterize *Danyluk* as simply emphasizing the importance of finality in litigation is an incomplete account of the Court’s approach in that case.
5. I turn next to *Toronto (City) v. C.U.P.E., Local 79*. It concerned the role of the abuse of process doctrine when an arbitrator reviewing an employee’s dismissal decided to make his own assessment of the facts relating to the conduct giving rise to a criminal conviction and on which the dismissal was based. Front and centre in Arbour J.’s analysis (on behalf of a unanimous Court on this point) was the importance of maintaining a “judicial balance between finality, fairness, efficiency and authority of judicial decisions” (para. 15). Referring to *Danyluk*, she acknowledged that there are many circumstances in which barring relitigation would create unfairness and held that “[t]he discretionary factors that apply to prevent the doctrine of issue estoppel from operating in an unjust or unfair way are equally available to prevent the doctrine of abuse of process from achieving a similar undesirable result” (para. 53). She thus emphasized the importance of maintaining a balance between fairness and finality and the need for a flexible discretion to ensure that this is done.
6. I conclude that the Court’s jurisprudence recognizes that, in the administrative law context, common law finality doctrines must be applied flexibly to maintain the necessary balance between finality and fairness. This is done through the exercise of discretion, taking into account a wide variety of factors which are sensitive to the particular administrative law context in which the case arises and to the demands of substantial justice in the particular circumstances of each case. Finality and requiring parties to use the most appropriate mechanisms for review are of course important considerations. But they are *not* the *only*, or even the most important considerations.
7. The need for this “necessarily broader” discretion (to use Binnie J.’s words at para. 62 of *Danyluk*) in applying the finality doctrines in the administrative law setting is well illustrated by the intricate and changing procedural context in which the complainant workers found themselves in this case. I will use the facts of Mr. Figliola’s case as an example.
8. As a result of a workplace injury, Mr. Figliola received a 3.5% functional disability award from the Workers’ Compensation Board, consisting of 1% for lumbar spine and 2.5% for chronic pain, determined under the Board’s Policy No. 39.01. He appealed the Board’s decision to the Review Division which is an internal appeal body. He raised four issues. He complained that his injury had not been properly assessed under the policy and in addition that the policy was patently unreasonable, violated s. 15 of the *Canadian Charter of Rights and Freedoms* and was contrary to the *Human Rights Code*.
9. Subject to Board practices and procedures, the Review Officer may conduct a review as the officer considers appropriate: *Workers Compensation Act*, R.S.B.C. 1996, c. 492 (“Act”), s. 96.4(2). As I understand the record, the review in this case was a paper review on the basis of written submissions on behalf of Mr. Figliola. His employer did not participate and there was no oral hearing. Although the Review Officer was undoubtedly the only appropriate forum in which to review the application of the Board’s policy to the facts of Mr. Figliola’s case, the role of the Review Officer with respect to his other complaints is much less clear.
10. With respect to Mr. Figliola’s claims that the policy was patently unreasonable, the Review Officer found that he had no authority at all. He noted that he was bound by s. 99 of the Act to apply a Board policy that applied to the case. While the appeals tribunal to which appeals lie from the Review Division had authority to consider the validity of a policy (s. 251 of the Act), even it had no authority “to make binding determinations as to the validity of policy. Rather, it is required to refer to the Board of Directors its determinations and is bound by the decision of the Board of Directors as to whether the policy should be maintained or changed” (A.R., vol. I, at p. 6). The Review Officer reasoned that “[i]t would be odd if [the appeals tribunal] was required to go through such a process but the Review Division had even greater authority of considering and deciding whether a policy was valid” (*ibid.*). He therefore concluded that the Review Division had no general jurisdiction to find a policy of the Board invalid on the basis that it was patently unreasonable.
11. As for Mr. Figliola’s *Charter* claims, the Review Officer similarly found that he had no jurisdiction to consider them at all. As he put it,

[a]mendments to the *Act* resulting from the *Administrative Tribunals Act* (the “*ATA*”) took effect on December 3, 2004. Those amendments stated that [the appeals tribunal] has no jurisdiction over constitutional questions . . . . Although this change did not specifically refer to the Review Division, the Review Division considers that the change indicates a statutory intent that it does not have jurisdiction over constitutional questions, including *Charter* questions. [A.R., vol. I, at p. 7]

1. Turning finally to Mr. Figliola’s claims under the *Human Rights Code*, the Review Officer relied on *Tranchemontagne v. Ontario (Director, Disability Support Program)*, 2006 SCC 14, [2006] 1 S.C.R. 513, for his conclusion that he had authority to decline to apply the policy if it conflicted with the *Code*, given the provision in s. 4 of the *Code* that it prevails in the event of conflict with any other enactment. If I am reading the Review Officer’s decision correctly, I understand him to reason that his statutory obligation to apply Board policies (s. 99 of the Act) conflicts with the *Code*’s prohibitions against discrimination. However, because the *Code* prevails in the event of conflict, the Review Officer can determine whether the policy is consistent with the *Code*. Assuming, without deciding, that this is the correct view and therefore that the Review Officer can assess the policy’s compliance with the *Code*, there remains the question of what remedy the Review Officer can fashion if he or she concludes that the policy is not compliant. According to the Board’s submissions, the process that was followed at the relevant time (although it was not formalized until later) was this: if the Review Officer found the *Code* challenge had merit, he or she would not apply the policy to the particular case. The policy itself would be referred to the Board “for inclusion in the Policy and Research Division’s work plan as a high priority project” (A.F., at para. 59).
2. As noted earlier, the Review Officer’s decisions are appealable to the Workers’ Compensation Appeal Tribunal (“WCAT”), with certain exclusions not relevant here. Mr. Figliola pursued such an appeal and it was set down for an oral hearing. The WCAT, it should be noted, has extensive authority to review the matter, including hearing evidence; it is not simply an appeal in the usual sense (ss. 245 to 250 of the Act). However, the *Administrative Tribunals Act*, S.B.C. 2004, c. 45 (“*ATA*”), was amended effective October 18, 2007, removing the WCAT’s jurisdiction to apply the *Code*: *Attorney General Statutes Amendment Act, 2007*, S.B.C. 2007, c. 14, s. 3. Thus in midstream, Mr. Figliola lost the right to a thorough, evidence-based review of the merits of the Review Officer’s decision on the human rights issue.
3. The question of what this amendment did to the Review Officer’s authority to address the *Code* issues is not before us. However, the amendment taking away the WCAT’s jurisdiction would appear to engage the same reasoning that led the Review Officer to conclude that he had no jurisdiction with respect to the attacks on the Board’s policy as being patently unreasonable and contrary to the *Charter*. As noted earlier, the Review Officer reasoned that as the WCAT did not have this jurisdiction, it followed that the Review Division did not have that jurisdiction either. Thus it seems (although I need not decide the point) that the *ATA* amendments taking away the WCAT’s *Code* jurisdiction not only took away a right of review on the merits, but also had the effect of taking away the Review Officer’s authority to test Board policies against the *Code* which he exercised in this case. I recognize that the Board takes the opposite view, maintaining that even though *Code* jurisdiction was removed from the WCAT, a review officer may still review Board policies for consistency with the *Code*. It is not my task to resolve this issue here. One thing is certain, however. The amendments were intended to reverse the effects of the Court’s decision in *Tranchemontagne* in relation to the human rights jurisdiction of the WCAT (British Columbia, *Official Report of Debates of the Legislative Assembly (Hansard)*, vol. 21, 3rd Sess., 38th Parl., May 16, 2007, at pp. 8088-93).
4. I simply wish to note the rather complex, changing and at times uncertain process available in the workers’ compensation system to address the human rights issue in this case. To my mind, this underlines the wisdom of applying finality doctrines with considerable flexibility in the administrative law setting. The decision that is relied on by the Board in this case as being a final determination is in fact an internal review decision given after a paper review in which the employer did not participate. Whether the Review Officer had authority to consider the question is at least debatable. (Of course, Mr. Figliola’s position before the Review Officer was that he did have authority.) The remedy available in the proceedings was a decision not to apply the policy and refer it to the Board for study. At the time Mr. Figliola raised the point before the Review Officer, there was a right of appeal to the WCAT which included the opportunity to call evidence. In the midst of the proceedings, that right was removed and indeed the whole authority of the WCAT to even consider *Code* issues was removed. It surely cannot be said that there was any legislative intent that the Review Officer was to have exclusive jurisdiction over the human rights questions.
5. It seems to me that whether a Review Officer’s decision in these circumstances should bar any future consideration by the Human Rights Tribunal of the underlying human rights complaint cannot properly be addressed by simply looking at the three factors identified by my colleague, viz., whether the Review Officer had concurrent jurisdiction to decide a point that was essentially the same as the one before the Human Rights Tribunal and whether there had been an opportunity to know the case to meet and a chance to meet it. There is, as *Danyluk* shows, a great deal more to it than that. The kinds of complications we see in this case are not uncommon in administrative law, although this case may present an unusually cluttered jurisdictional and procedural landscape. The point, to my way of thinking, is that these are the types of factors that call for a highly flexible approach to applying the finality doctrines, a flexibility that in my view exists both at the common law and, as I will discuss next, under s. 27(1)(f) of the *Code*.

B. *Statutory Interpretation*

1. My colleague is of the view that s. 27(1)(f) confers a “limited” discretion, the exercise of which is to be guided uniquely “by the goals of the fairness of finality in decision-making and the avoidance of the relitigation of issues” (para. 36). Putting aside for the moment whether the discretion is “limited” or “broad”, I have difficulty with my colleague’s treatment of the relevant factors which she identifies.
2. I repeat the three factors identified as those to be considered: whether the previous adjudicator had concurrent authority to decide the matter, whether the issue decided was essentially the same, and whether the previous process provided an opportunity to the parties or their privies to know the case to be met and have a chance to meet it (Abella J.’s reasons, at para. 37). However, at para. 49 of my colleague’s reasons, the question of whether the Review Division’s process met the “necessary procedural requirements” is dismissed as “a classic judicial review question and not one within the mandate of a concurrent decision-maker”. Thus if I understand correctly, the Tribunal is to consider whether the earlier process was fair but cannot consider at all whether the earlier process met the “necessary procedural requirements”. I would have thought that the “necessary procedural requirements” would include the obligation to act fairly. But if that is so, I do not understand how procedural fairness can be at the same time a question beyond the concurrent decision-maker’s mandate (para. 49) and a proper factor for the Tribunal to consider in exercising its discretion under s. 27(1)(f) (para. 37).
3. It would also seem to me that whether the adjudicator had authority to decide the matter is generally the sort of issue that is raised on judicial review, but it figures here as a factor to be considered in exercising the Tribunal’s discretion (para. 37). In my respectful view, relevant factors cannot simply be dismissed as “classic judicial review question[s]” and therefore “not one within the mandate of a concurrent decision-maker” (para. 49). This was not the approach in *Danyluk*. Rather, all relevant factors need to be considered and weighed in exercising the discretion.
4. Be that as may be, it remains that my colleague’s conception of s. 27(1)(f) is that it confers a more limited discretion to apply the finality doctrines than has been recognized at common law with respect to decisions of administrative decision-makers. With respect, and for the following reasons, I cannot accept this interpretation of the provision.
5. We must interpret the words of the provision “in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament”: *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559, at para. 26, quoting E. A. Driedger, *Construction of Statutes* (2nd ed. 1983), at p. 87; *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at para. 21.
6. I turn first to the grammatical and ordinary sense of the words. It is difficult for me to imagine broader language to describe a discretionary power than to say the Tribunal may dismiss a complaint if the substance of it has been appropriately dealt with elsewhere. To my way of thinking, the grammatical and ordinary meaning of the words support an expansive view of the discretion, not a narrow one. I agree with my colleague that this provision reflects the principles of the finality doctrines rather than codifies their technical tenets (para. 46). However, as I discussed earlier, the “principles” of those doctrines, especially as they have developed in administrative law, include a search for balance between finality and fairness and a large measure of discretion to allow that balance to be struck in the wide variety of decision-making contexts in which they may have to be applied. The provision’s focus on the “substance” of the complaint and the use of the broad words “appropriately dealt with” seem to me clear indications that the breadth of the common law discretion is expanded, not restricted.
7. I turn next to look at the provision in the context of the rest of the section in which it is found. It is suggested that s. 27(1)(f) should be read narrowly because the character of the other six categories of discretion conferred by s. 27(1) relates to clear circumstances in which dismissal would be appropriate. The premise of this view is that all of the other parts of s. 27(1) clearly call for a narrow discretion. Respectfully, I do not accept this premise. It is the case, of course, that some of the other grounds of discretionary dismissal set out in s. 27(1) do indeed arise in circumstances in which it would be demonstrably undesirable to proceed with the complaint: Abella J.’s reasons, at paras. 39-41. For example, it is hard to see how the Tribunal has discretion, in any meaningful sense of the word, to refuse to dismiss a complaint not within its jurisdiction (s. 27(1)(a)), or which discloses no contravention of the *Code* (s. 27(1)(b)). However, not all of the categories set out in s. 27(1) are of this character: see, e.g., *Becker v. Cariboo Chevrolet Oldsmobile Pontiac Buick GMC Ltd.*,2006 BCSC 43, 42 Admin. L.R. (4th) 266, at paras. 38-42. In my view, the nature of the discretion in the various paragraphs of s. 27(1) is influenced by the content of each paragraph rather than the use of “may” in the section’s opening words.
8. Section 27(1)(d) confers discretion to dismiss where the proceeding would not benefit the person, group or class alleged to have been discriminated against or would not further the purposes of the *Code*. Exercising this discretion requires the Tribunal to consider fundamental questions about the role of human rights legislation and human rights adjudication. The discretion with respect to these matters is thus wide-ranging, grounded in policy and in the Tribunal’s specialized human rights mandate (*Becker*,atpara. 42). It does not share the character of some of the other more straightforward provisions in s. 27(1), but is similar in breadth to the discretion set out in s. 27(1)(f). In s. 27(1)(f), the breadth of the discretion is apparent from the very general language relating to the “substance” of the complaint and whether it has been dealt with “appropriately”. I see nothing in the structure of or the context provided by s. 27(1) read as a whole that suggests a narrow interpretation of the discretion to dismiss where the “substance” of a complaint has been “appropriately” dealt with.
9. A further element of the statutory context is the provision’s legislative history. That history confirms that it was the legislature’s intent to confer a broad discretion to dismiss or not to dismiss where there had been an earlier proceeding. It is significant that the *Human Rights Code* previously set out in s. 25(3) mandatory factors to take into account in the exercise of this discretion in *deferring* a complaint. The now repealed s. 27(2) provided that those same factors had to be considered when *dismissing* a complaint. These factors included the subject matter and nature of the other proceeding and the adequacy of the remedies available in the other proceeding in the circumstances. However, the legislature removed these specified factors (*Human Rights Code Amendment Act, 2002*, S.B.C. 2002, c. 62, ss. 11 and 12). This is consistent with an intention to confer a more open-ended discretion. That intention is explicit in the *Official Report of Debates of the Legislative Assembly* *(Hansard)*. Indeed, in response to the question as to why the mandatory factors were removed, the Honourable Geoff Plant, then-Attorney General of British Columbia and responsible minister for this legislation, said the following:

The fundamental issue in any attempt to seek the exercise of this power is whether there is another proceeding capable of appropriately dealing with the substance of the complaint. Our view is that that test is sufficient to ensure that the power is exercised in a case-by-case way in accordance with the principles and purposes of the code. It may well be that the panel members will consider the facts and factors that are now referred to in subsection (3), but we did not think it was necessary to tie the hands of a panel or a tribunal member with those specific criteria.

. . .

. . . [What the amendment] does is express the principle or the test pretty broadly and pretty generally. [Emphasis added.]

(*Official Report of Debates of the Legislative Assembly (Hansard)*, vol. 9, 3rd Sess., 37th Parl., October 28, 2002, at p. 4094)

1. The intent was clearly to broaden, not to narrow, the range of factors which a tribunal could consider. I would also add, with respect, that the comments of the Minister of Government Services at second reading of the *Human Rights Amendment Act, 1995*, S.B.C. 1995, c. 42, cited by Abella J., at para. 43, have nothing to do with the scope of discretion under s. 27(1)(f) or its predecessor provisions.
2. A further aspect of the legislative context is the legal framework in which the legislation is to operate. I have developed earlier my understanding of the common law approach to the discretionary application of finality doctrines in the administrative law context. Read against that background, my view is that the provision may most realistically be viewed as further loosening the strictures of the common law doctrines.
3. It is also part of the pre-existing legal framework that under earlier legislation (*Human Rights Code*, R.S.B.C. 1996, c. 210, s. 27), the Commissioner of Investigation and Mediation had developed a policy about how to decide whether to proceed with a complaint that had been the subject of other proceedings. That policy called for consideration of factors such as these:

(1) the administrative fairness of the other proceeding; (2) the expertise of the decision-makers and investigators; (3) whether the case involves important human rights issues which invoke the public interest enunciated by the Code; (4) which forum is more appropriate for discussion of the issues; (5) whether the other proceeding protects the complainant against the discriminatory practice; and (6) whether there is a conflict between the goals and intent of the Code and the other proceedings, and practical issues including the time which each procedure would take and the consequences in terms of emotional strain, personal relations and long term outcome of processes.

(D. K. Lovett and A. R. Westmacott,“Human Rights Review: A Background Paper” (2001) (online), at p. 100, fn. 128)

1. The use of the broad language employed in s. 27(1)(f), introduced into the pre-existing practice, does not support the view that the discretion was narrowly conceived; it supports the opposite inference.
2. A final contextual element relates to the similarly worded power to defer a complaint pending its resolution in another forum under s. 25(2) of the *Code*. That provision reads as follows:

**25.** . . .

(2) If at any time after a complaint is filed a member or panel determines that another proceeding is capable of appropriately dealing with the substance of a complaint, the member or panel may defer further consideration of the complaint until the outcome of the other proceeding.

1. The power to defer a complaint is not based on the finality doctrines because when deferral is being considered there has been no other final decision. Nonetheless, the legislature chose to use essentially the same language to confer discretion to defer as it did to confer the discretion to dismiss. The repetition of this language in s. 27(1)(f) suggests to me that a broad and flexible discretion was intended.
2. Looking at the text, context and purpose of the provision, I conclude that the discretion conferred under s. 27(1)(f) was conceived of as a broad discretion.

C. *Exercising the Discretion*

1. As I see it, s. 27(1)(f) broadens the common law approach to the finality doctrines in two main ways. By asking whether the substance of the complaint has been addressed elsewhere, the focus must be on the substance of the complaint — its “essential character” to borrow a phrase from *Weber v. Ontario Hydro*, [1995] 2 S.C.R. 929, at para. 52; and *Villella v. Vancouver (City)*, 2005 BCHRT 405, [2005] B.C.H.R.T.D. No. 405 (QL), at para. 21. The focus is not on the technical requirements of the common law finality doctrines, such as identity of parties, mutuality, identity of claims and so forth. The section compels attention to the substance of the matter, not to technical details of pleading or form. If the Tribunal concludes that the substance of the complaint has not in fact been dealt with previously, then its inquiry under s. 27(1)(f) is completed and there is no basis to dismiss the complaint. Where the substance of the matter has been addressed previously, the important interests in finality and adherence to proper review mechanisms are in play. It then becomes necessary for the Tribunal to exercise its discretion, recognizing that those interests must be given significant weight.
2. Faced with a complaint, the substance of which has been addressed elsewhere, the Tribunal must decide whether there is something in the circumstances of the particular case to make it inappropriate to apply the general principle that the earlier resolution of the matter should be final. Other than by providing that the previous dealing with the substance of the complaint has been appropriate, the statute is silent on the factors that may properly be considered by the Tribunal in exercising its discretion to dismiss or not to dismiss. This exercise of discretion is “necessarily case specific and depends on the entirety of the circumstances”: *Schweneke v. Ontario* (2000), 47 O.R. (3d) 97 (C.A.), at paras. 38 and 43, cited with approval in *Danyluk*, at para. 63. *Danyluk*, however, provides a useful starting point for assembling a non-exhaustive group of relevant considerations.
3. The mandate of the previous decision-maker and of the Tribunal should generally be considered. Is there a discernable legislative intent that the other decision-maker was intended to be an exclusive forum or, on the contrary, that the opposite appears to have been contemplated? The purposes of the legislative schemes should also generally be taken into account. For example, if the focus and purpose of the earlier administrative proceeding was entirely different from proceedings before the Human Rights Tribunal, there may be reason to question the appropriateness of giving conclusive weight to the outcome of those earlier proceedings. The existence of review mechanisms for the earlier decision is also a relevant consideration. Failure to pursue appropriate means of review will generally count against permitting the substance of the complaint to be relitigated in another forum. However, as *Danyluk* shows, this is not always a decisive consideration (paras. 74 and 80). The Tribunal may also consider the safeguards available to the parties in the earlier administrative proceedings. Such factors as the availability of evidence and the opportunity of the party to fully present his or her case should be taken into account. A further relevant consideration is the expertise of the earlier administrative decision-maker. As Binnie J. noted in *Danyluk*, the rule against collateral attack has long taken this factor into account. While not conclusive, the fact that the earlier decision is “based on considerations which are foreign to an administrative appeal tribunal’s expertise or *raison d’être*”may suggest that it did not appropriately deal with the matter: para. 77, citing *R. v. Consolidated Maybrun Mines Ltd.*, [1998] 1 S.C.R. 706, at para. 50. The circumstances giving rise to the prior administrative proceedings may also be a relevant consideration. In *Danyluk*, for example, the fact that the employee had undertaken the earlier administrative proceedings at a time of “personal vulnerability” was taken into account (para. 78).
4. The most important consideration, however, is the last one noted by Binnie J. in *Danyluk*, at para. 80: whether giving the earlier proceeding final and binding effect will work an injustice. If there is substantial injustice, or a serious risk of it, poor procedural choices by the complainant should generally not be fatal to an appropriate consideration of his or her complaint on its merits.
5. The Tribunal’s approach to the s. 27(1)(f) discretion is in line with the *Danyluk* factors. For example, in *Villella*,the Tribunal discussed a number of the factors which it should consider. It emphasized that the question was not whether, in its view, the earlier proceeding was correctly decided or whether the process was the same as the Tribunal’s process. The Tribunal recognized that it is the clear legislative intent of s. 25 that proceedings before the Tribunal are not the sole means through which human rights issues can be appropriately addressed. However, the Tribunal also noted that s. 27(1)(f) obliged it to examine the substance of the matter and not to simply “rubber stamp” the previous decision (para. 19). This requires looking at such factors as the issues raised in the earlier proceedings; whether those proceedings were fair; whether the complainant had been adequately represented; whether the applicable human rights principles had been canvassed; whether an appropriate remedy had been available; and whether the complainant chose the forum for the earlier proceedings. This flexible and global assessment seems to me to be exactly the sort of approach called for by s. 27(1)(f).

D. *Application*

1. At the end of the day, I agree with Abella J.’s conclusion that the Tribunal’s decision not to dismiss the complaint under s. 27(1)(f) was patently unreasonable within the meaning of s. 59 of the *ATA*. For the purposes of that section, a discretionary decision is patently unreasonable if, among other things, it “is based entirely or predominantly on irrelevant factors” (s. 59(4)(c)), or “fails to take statutory requirements into account” (s. 59(4)(d)). While in my view, the Tribunal was entitled to take into account the alleged procedural limitations of the proceedings before the Review Officer, it committed a reversible error by basing its decision on the alleged lack of independence of the Review Officer and by ignoring the potential availability of judicial review to remedy any procedural defects. More fundamentally, it failed to consider whether the “substance” of the complaint had been addressed and thereby failed to take this threshold statutory requirement into account. It also, in my view, failed to have regard to the fundamental fairness or otherwise of the earlier proceeding. All of this led the Tribunal to give no weight at all to the interests of finality and to largely focus instead on irrelevant considerations of whether the strict elements of issue estoppel were present.
2. However, I do not agree with my colleague’s proposed disposition of the appeal. In her reasons, Abella J. would allow the appeal, set aside the Tribunal’s decision and dismiss the complaints. In my opinion, the appeal should be allowed and, in accordance with what I understand to be the general rule in British Columbia, the Workers’ Compensation Board’s application to dismiss the complaints under s. 27(1)(f) should be remitted to the Tribunal for reconsideration. As the Court of Appeal held in *Workers’ Compensation Appeal Tribunal (B.C.) v. Hill*, 2011 BCCA 49, 299 B.C.A.C. 129, at para. 51, “the general rule is that where a party succeeds on judicial review, the appropriate disposition is to order a rehearing or reconsideration before the administrative decision-maker, unless exceptional circumstances indicate the court should make the decision the legislation has assigned to the administrative body” (see also *Allman v. Amacon Property Management Services Inc.*, 2007 BCCA 302, 243 B.C.A.C. 52). This case does not present exceptional circumstances justifying diverging from this general rule.
3. I would therefore allow the appeal without costs and remit the Workers’ Compensation Board’s application under s. 27(1)(f) to the Tribunal for reconsideration.

*Appeal allowed.*

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