Saskatchewan
Labour Relations Board

DAVID BRIAN LAPCHUK, Appellant v GOVERNMENT OF SASKATCHEWAN, Respondent

LRB File No. 148-20; December 4, 2020
Chairperson, Susan C. Amrud, Q.C. (sitting alone pursuant to subsection 6-95(3) of *The Saskatchewan Employment Act*)

For David Lapchuk: David R. Barth

For Government of Saskatchewan: Kyle McCreary

Application to Adduce Fresh Evidence on appeal from Adjudicator dismissed – All of the tendered evidence except one report could have, with the exercise of due diligence, been placed before Adjudicator – None of the tendered evidence is relevant to whether Adjudicator properly applied doctrines of issue estoppel and abuse of process – None of the tendered evidence could reasonably be expected to have affected the Adjudicator's decision.

REASONS FOR DECISION

Background:

[1] Susan C. Amrud, Q.C., Chairperson: On October 28, 2013 the employment of David Lapchuk ["Applicant"] with the Government of Saskatchewan ["Respondent"] was terminated. In response his union, Saskatchewan Government and General Employees' Union ["SGEU"], filed a grievance on his behalf. It was dismissed by an Arbitrator on August 31, 2016[1] ["Arbitrator's Decision"].

[2] The Applicant has also instituted many other legal proceedings in response to his termination. One of those proceedings was to file a complaint of discriminatory action under section 27 of *The Occupational Health and Safety Act, 1993*[2], on the basis that the Respondent terminated his employment because he raised a health and safety concern (that he had not been provided self-defence training). That complaint was dismissed by an Occupational Health and Safety Officer ["OHS Officer"] on January 22, 2014, on the following basis:

> *Training is a health and safety matter. However in this circumstance, Mr. Lapchuk continually asked for training that was not in his job description, or job duties.*[3]

---

[1] *SGEU v Saskatchewan Government*, 2016 CanLII 95947 (SK LA).
[2] Now section 3-35 of *The Saskatchewan Employment Act*.
[3] Occupational Health Officer Report (22 January 2014) Ref. No. OR-NJH-0012, at page 5.

[3] The Applicant appealed that decision to the Director of Occupational Health and Safety ["OHS Director"]. The OHS Director affirmed the decision of the OHS Officer, with written reasons dated March 25, 2014 that confirmed that:

> *With respect to the allegation that Mr. Lapchuk was terminated as a result of him requesting training in self defense, there is no evidence to support a contention that that self defense training was required for the position Mr. Lapchuk occupied. As self defense training is not required for this position, Mr. Lapchuk was not attempting to enforce the Act within the meaning of section 27 of the Act.*[4]

[4] The Applicant appealed the OHS Director's decision to an Adjudicator. In response, the Respondent filed an application to dismiss the appeal on the basis of issue estoppel or abuse of process. The Adjudicator dismissed the appeal on that basis by decision dated February 28, 2019[5] ["Adjudicator's Decision"]. She described the doctrines of issue estoppel and abuse of process as follows:

> *[37] In Penner v. Niagara (Regional Police Services Board [2013] 2 SCR 125, 2013 SCC 19 (CanLII) the Supreme Court of Canada explained the doctrine of issue estoppel as follows:*
>
> > *Relitigation of an issue wastes resources, makes it risky for parties to rely on the results of their prior litigation, unfairly exposes parties to additional costs, raises the spectre of inconsistent adjudicative determinations and, where the initial decision maker is in the administrative law field, may undermine the legislature's intent in setting up the administrative scheme. For these reasons, the law has adopted a number of doctrines to limit relitigation.*
> >
> > *The one relevant on this appeal is the doctrine of issue estoppel. It balances judicial finality and economy and other considerations of fairness to the parties. It holds that a party may not relitigate an issue that was finally decided in prior judicial proceedings between the same parties or those who stand in their place. However, even if these elements are present, the court retains discretion to not apply issue estoppel when its application would work an injustice.*
>
> *[38] To determine whether the doctrine of issue estoppel applies, the three preconditions set out in Danyluk*[6] *must be met:*
>
> 1. *Whether the same question has been decided;*
> 2. *Whether the earlier decision was final; and*
> 3. *Whether the parties, or their privies were the same in both proceedings.*
>
> *[39] The test for issue estoppel consists of a two-step process. The first step is to determine whether the three preconditions are met. If so, the second step is to determine whether, as a matter of discretion, issue estoppel ought to be applied.*

---

[4] Letter from Dr. Tareq Al-Zabet, (25 March 2014), at page 7.
[5] *Lapchuk v Ministry of Highways and Infrastructure* (28 February 2019) (Adjudicator Rusti-Ann Blanke).
[6] *Danyluk v Ainsworth Technologies Inc.*, [2001] 2 SCR 460, 2001 SCC 44.

> *[40] The doctrine of abuse of process also has as its goal the protection of fairness and integrity of the administration of justice by preventing needless multiplicity of proceedings. In Figliola[7], the Court also discussed the common law test for the doctrine of abuse of process:*
>
> > *[Even] if the same result is reached in the subsequent proceeding, the re-litigation 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]*
>
> *[41] As explained by Arbour, J. speaking for the majority of the Supreme Court of Canada in Toronto (City) v. C.U P.E., Local 79, 2003 SCC 63 (CanLII), [2003] 3 S.C.R. 7, abuse of process does not have the same strict requirements as issue estoppel.*
>
> > *The doctrine of abuse of process engages the inherent power of the court to prevent the misuse of its procedure, in a way that would be manifestly unfair to a party to the litigation before it or would in some other way bring the administration of justice into disrepute. It is a flexible doctrine unencumbered by the specific requirements of concepts such as issue estoppel. See House of Spring Gardens Ltd. v. Waite, [1990] 3 W.L.R. 347 at p. 358, [1990] 2 All E.R. 990 (C.A.).*
> >
> > *One circumstance in which abuse of process has been applied is where the litigation before the court is found to be in essence an attempt to relitigate a claim which the court has already determined." [Arbour, J.'s emphasis]*

[5] The Adjudicator found that all three pre-conditions to the application of issue estoppel had been met. First, the substantive issue that the Applicant was asking the Adjudicator to determine had already been determined by the grievance Arbitrator: whether the Respondent had good reason for the termination of the Applicant's employment. Second, the Arbitrator's decision was final. Third, at the arbitration hearing SGEU stood in the place of the Applicant; the interests of the Applicant and SGEU were essentially the same. Moving to the second step of issue estoppel, the Adjudicator was of the view that there was nothing in the circumstances of this case to indicate that the application of issue estoppel would be unfair or unjust:

> *On the facts of this case, I am satisfied there is no compelling reason to decline to apply the doctrine of issue estoppel. In my view, it is clear form the Appellant's written submissions that in arguing that the OHS matter ought to proceed to a hearing, the Appellant is essentially seeking to relitigate the issues that were decided by the Arbitrator, in the hopes of a different a different outcome, which is precisely what the "finality" doctrines are intended to prevent.[8]* [as written]

[6] The Adjudicator also found that it would be an abuse of process for the appeal to proceed.

---

[7] *British Columbia (Workers' Compensation Board) v. Figliola*, 2011 SCC 52 (CanLII), [2011] 3 SCR 422.

[8] Adjudicator's Decision, at para 64.

[7] The Applicant now appeals from the Adjudicator's Decision to the Board. On that appeal, the Applicant has filed a preliminary Application to Adduce Fresh Evidence. A hearing was held via Webex on October 22, 2020 to consider that application. Normally the Board would not convene a separate oral hearing to consider an Application to Adduce Fresh Evidence, but would decide the application on the basis of written material before or at the commencement of the main hearing. In this case it was considered necessary to convene a separate oral hearing because of the Applicant's extraordinary request that some of the fresh evidence be submitted by way of oral testimony, and that subpoenas be issued to summon four witnesses before the Board for that purpose. These Reasons address this preliminary application.

[8] The Applicant has filed three affidavits containing some of the fresh evidence he asks the Board to consider on his appeal.

[9] The first is an affidavit of David Brian Lapchuk sworn September 22, 2020. Attached to it are two documents that the Applicant asks to be admitted as fresh evidence in his appeal. The first document is an April 2, 2018 Decision of the Workers' Compensation Board of Saskatchewan, which held that the Applicant "was disabled from work within the meaning of Section 31 from the date of his dismissal onwards. This disablement was solely caused by his ongoing PTSD [Post Traumatic Stress Disorder] symptoms…."[9]. The second document is a Questioned Document Examiner Letter and Report dated March 2, 2019. In it, Brenda Petty indicates her opinion that a Union Authorization for Release of Information had been altered or signed by someone other than the Applicant in the portion of the document denying SGEU access to Dr. Natarajan's report respecting the Applicant. Paragraphs 13 and 14 of the affidavit provide information about events that occurred in 2013 respecting his OHS complaint. The balance is argument, including why Tyrell Digness and Tyler Mills should be subpoenaed to provide evidence in this matter and why the Kelly Hardy transcript should be admitted.

[10] The second affidavit was sworn by David Brian Lapchuk on October 9, 2020. Attached to it are two more documents that the Applicant asks to be admitted as fresh evidence in his appeal. The first document is Violence Policy 101-2, dated April 5, 2005, that he says was not before the Adjudicator. He argues that it should have applied to him, as he needed this training after management changed his job duties.[10] The second document is an Analysis of Digital Images dated August 24, 2014 prepared by Michael Plaxton, Certified Forensic Video Analyst.

---

[9] At page 18/19.

[10] In response, the Respondent filed an Affidavit of Terrance Alexander Kuyek, dated October 16, 2020, that indicated that Violence Policy 101-2 was before the Arbitrator. The Applicant did not object to the submission of this Affidavit.

[11] The third affidavit was sworn by Neil Morrison on October 22, 2020. This affidavit, for the most part, contains Morrison's opinion about the proper application of the safety policies of the Ministry of Highways and Infrastructure ["MHI"] in the time period leading up to the Applicant's termination.

[12] Next, the Applicant has asked that subpoenas be issued requiring the following persons to provide fresh evidence by way of oral testimony: Brendan Tuchscherer, Carey Scrivens, Tyrell Digness and Tyler Mills. The Applicant applies for leave to subpoena Scrivens, Digness and Mills to give evidence about what was said by an Assistant Deputy Minister of the MHI at a meeting in 2012 or 2013 about the circumstances surrounding the incident that led to the Applicant's termination, including that the Applicant was not properly trained. Mills was not present at the meeting, so anything he could say about it would be hearsay. Scrivens and Digness were present at the meeting. During the October 22, 2020 hearing of this application, the Applicant advised that Mills would be proffered as an expert witness on the application of Violence Policy 101-2. The evidence to be expected of Tuchscherer, if he was subpoenaed, is that he was the "Ministry of Highways use of force expert and PPCT [Pressure Point Control Tactics] only trainer at the time of my [the Applicant's] assault".[11]

[13] Finally, the Applicant asks for leave to obtain and file a transcript of evidence provided by Kelly Hardy, SGEU Labour Relations Officer, on February 14, 2020 during the hearing of his application to the Board alleging that SGEU failed in its duty to fairly represent him. In his September 22, 2020 Affidavit the Applicant states:

> *Other new evidence was in February 14, 2020 LRB DFR Hearing testimony of the witness Kelly Hardy who testified that the employer was at fault as I had never been trained for field work and should have never been in the field according to officer safety rules. This is a revelation as SGEU would do nothing to put in a OHS complaint at all and that has always been a contrary to their actual responsibilities under legislation. I request a transcript of that portion her testimony.*[12] [as written]

Argument on behalf of Applicant:

[14] The Applicant relied on *Ackerman v Ackerman*[13] ["*Ackerman*"] as establishing the test to be met on an application for fresh evidence:

---

[11] Paragraph 19 of Affidavit of David Brian Lapchuk dated October 9, 2020.
[12] At para 11.
[13] 2014 SKCA 137 (CanLII), at para 17.

> *To succeed in an application to admit fresh evidence, the applicant must establish the following:*
>
> > *(i) that despite due diligence, the evidence was not available for use at trial;*
> >
> > *(ii) that the evidence is relevant, in the sense that it bears upon a decisive or potentially decisive issue in the action;*
> >
> > *(iii) that the evidence is credible, in the sense that it is reasonably capable of belief; and*
> >
> > *(iv) that the evidence is such that, if believed, it could reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result.*

[15] He also referred to the following portion of the headnote in *Palmer v The Queen*[14] ["*Palmer*"], which summarizes the principles that apply to an application to admit fresh evidence:

> *(1) The evidence should generally not be admitted if, by due diligence, it could have been adduced at trial provided that this general principle will not be applied as strictly in a criminal case as in civil cases. (2) The evidence must be relevant in the sense that it bears upon a decisive or potentially decisive issue in the trial, (3) The evidence must be credible in the sense that it is reasonably capable of belief. (4) It must be such that if believed it could reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result.*

[16] The Applicant argues that a key issue in the appeal is whether the Adjudicator appropriately found that the Applicant should be bound by the Arbitrator's decision on the basis that the parties were the same in both proceedings. The Applicant argues that, even though SGEU was supposedly representing him at the arbitration hearing, the answer is no. The quality of the representation SGEU provided is relevant to this question. He has never had his own hearing at which he was allowed to present his own evidence. The Arbitrator said she needed more evidence to be able to find in his favour, and SGEU failed to provide it. The Applicant argues that a factor in the appeal is whether the Applicant received a fair hearing in front of the Arbitrator.

[17] He argues that, had the tendered evidence been available to the Adjudicator, she would not have made the following finding:

> *I agree with counsel that the Appellant had a participatory interest. There is nothing before me which would lead me to conclude that the Union and the Appellant did not have sufficiently similar or common interests regarding the grievances/arbitration, or that the Union did not represent the Appellant's interests. Whether the Union did so competently is not for me to decide. In my view, the interests of the Appellant and SGEU were essentially the same, and the Appellant was a privy to a legal proceeding brought by SGEU on his behalf.*[15]

---

[14] 1979 CanLII 8 (SCC), [1980] 1 SCR 759 at 760.
[15] Adjudicator's Decision, at para 48.

[18] The tendered evidence, the Applicant argues, will show that the Adjudicator erred in finding that the parties or their privies were the same in the arbitration and this appeal. If the tendered evidence had been before the Adjudicator she would not have found that the third precondition to issue estoppel had been met.

[19] The Applicant argues that the tendered evidence is relevant, in that it bears on the issue of whether the parties were the same in both this appeal and the grievance arbitration. The Applicant argues that all of the tendered evidence is credible. He also argues that if it had been in front of the Adjudicator, it would have affected the result.

[20] When the Adjudicator applied the test for issue estoppel, she had first to consider whether the three preconditions had been met. Even after she found they had been met, she then had to consider whether applying the doctrine would work an injustice to the Applicant. If the tendered evidence had been before the Adjudicator, the Applicant says, she would have come to a different conclusion on that question: she would have decided that it would be unjust to dismiss the Applicant's appeal without a full hearing.

[21] The Applicant's affidavit of October 9, 2020 proves that the wrong Violence Policy was in front of the OHS Officer, the OHS Director, and probably the Arbitrator. This means the Arbitrator made an error of law in her decision. If the Adjudicator had realized this, she would not have come to the conclusion that the same question had been decided in the grievance arbitration as was before her on the appeal. Ignoring or misinterpreting evidence is an error of law.[16]

[22] The Applicant argues that issue estoppel is not applicable to appeals. The Adjudicator did not consider that issue.

[23] The Board must determine what date is determinative in deciding when evidence is fresh: After the OHS Officer made a decision? After the OHS Director made a decision? After the Arbitrator made a decision? After the Adjudicator made a decision? The Applicant argues that all of the tendered evidence is fresh evidence because none of it was in front of the OHS Officer or OHS Director. Violence Policy 101-2 was not considered by them. The Workers' Compensation Board decision came after 2014. The Petty Report and the Plaxton Report are dated after the decisions of the OHS Officer and the OHS Director.

---

[16] *Guthardt v SGI* (2017-06-05) CACV2890 (SKCA).

[24] With respect to the requested subpoenas the Applicant provided the following arguments. With respect to Tuscherer, no one has heard his evidence about Violence Policy 101-2, PPCT training, use of force or reporting of violent incidents. The Applicant was not aware, before the OHS Officer made her decision, that this information was not before her. Scrivens and Digness were at a meeting with the MHI Assistant Deputy Minister in 2012 or 2013 in which she admitted there were problems with how the Applicant's OHS complaint was handled. The Applicant was not aware of that meeting in 2014. Digness was the Chair of the OHS Committee for the MHI. Mills is an expert on Violence Policy 101-2. The Applicant did not know any of this in 2014.

[25] With respect to Kelly Hardy's admission that the Applicant was not provided with adequate training, the Applicant argues that this was never adequately presented to the Arbitrator. This proves that he and SGEU are not the same party, and it would be an injustice to apply issue estoppel to his appeal.

Argument on behalf of Respondent:

[26] The Respondent relies on *Missick v Regina's Pet Depot*[17], in which the Board dismissed an application to admit fresh evidence on an appeal, on the basis of the principles cited in *Palmer*[18].

[27] The Respondent argues that none of the tendered evidence should be admitted. None of it except the Petty Report meets the due diligence test. None of the tendered evidence is relevant to this appeal. The appeal is on a question of law, not a hearing *de novo* on the merits of the appeal.

[28] The correct Violence Policy 101-2 was before the Arbitrator; whether or not it was before the Adjudicator is not relevant to this appeal because this is an appeal on the questions of issue estoppel and abuse of process. In any event, with due diligence, the Applicant could have put it before the Adjudicator.

[29] The Respondent argues that the Board should follow the decision of the Saskatchewan Court of Appeal in *Lapchuk v Saskatchewan* ["*Lapchuk SKCA*"], the Applicant's appeal from the dismissal of his complaint to the Saskatchewan Human Rights Commission with respect to his termination:

---

[17] 2020 CanLII 90749 (SK LRB).
[18] See paragraph [15].

> *[105] As I have noted, Mr. Lapchuk applies to introduce fresh evidence on this appeal. The evidence is said to show that Mr. Lapchuk had authorized the union to secure medical evidence for presentation to the grievance arbitrator and to show that the union had fabricated evidence to cover up its failure to obtain that evidence.*
>
> *[106] Among other criteria, in order to admit fresh evidence in an appeal, the evidence must be relevant. For the reasons I have given, it would have been inappropriate for the Chief Commissioner to have inquired into the quality of the representation provided by the union to Mr. Lapchuk. Therefore, the proposed fresh evidence is irrelevant. On this basis, I would dismiss Mr. Lapchuk's application to admit this evidence on this appeal.*[19]

[30] The Respondent argues that, at the grievance arbitration, SGEU was acting as the Applicant's advocate, in the same manner as a lawyer would have, therefore there is no issue but that the parties were the same in both proceedings. Whether or not the Applicant believes SGEU did a competent job of representing him at the arbitration is not an issue before the Board on this appeal; it will be considered by the Board on the Applicant's application alleging that SGEU failed in its duty to fairly represent him.

[31] The question whether the Arbitrator made the correct decision is also irrelevant. The same question should not be tried twice. This appeal and this application are simply a continuation of the Applicant's unwillingness to accept the Arbitrator's decision. This appeal is not an appeal of the Arbitrator's decision.

[32] The Respondent argues that it was within the Adjudicator's discretion to determine that the appeal was an abuse of process, and none of the tendered evidence would have affected that determination.

Relevant Statutory Provisions:

[33] The following provisions of *The Saskatchewan Employment Act* ["Act"] were referred to as being relevant to these proceedings:

> ***Discriminatory action prohibited***
> *3-35 No employer shall take discriminatory action against a worker because the worker:*
>
> *(a) acts or has acted in compliance with:*
>
> *(i) this Part or the regulations made pursuant to this Part;*
>
> *(ii) Part V or the regulations made pursuant to that Part;*
>
> *(iii) a code of practice issued pursuant to section 3-84; or*

[19] 2019 SKCA 98 (CanLII). The Petty Report was tendered as fresh evidence on that appeal.

(iv) a notice of contravention or a requirement or prohibition contained in a notice of contravention;

(b) seeks or has sought the enforcement of:

(i) this Part or the regulations made pursuant to this Part; or

(ii) Part V or the regulations made pursuant to that Part;[20]

Referral to occupational health officer
3-36(1) A worker who, on reasonable grounds, believes that the employer has taken discriminatory action against him or her for a reason mentioned in section 3-35 may refer the matter to an occupational health officer.
. . .
(3) If an occupational health officer decides that no discriminatory action has been taken against a worker for any of the reasons set out in section 3-35, the occupational health officer shall advise the worker of the reasons for that decision in writing.

(4) If discriminatory action has been taken against a worker who has acted or participated in an activity described in section 3-35:

(a) in any prosecution or other proceeding taken pursuant to this Part, there is a presumption in favour of the worker that the discriminatory action was taken against the worker because the worker acted or participated in an activity described in section 3-35; and

(b) the onus is on the employer to establish that the discriminatory action was taken against the worker for good and sufficient other reason.[21]

Appeal of occupational health officer decision
3-53(1) A person who is directly affected by a decision of an occupational health officer may appeal the decision.
. . .
(4) Subject to subsection (10) and section 3-54, an appeal pursuant to subsection (1) is to be conducted by the director of occupational health and safety.
. . .
(8) After conducting an appeal in accordance with this section, the director of occupational health and safety shall:

(a) affirm, amend or cancel the decision being appealed; and

(b) provide written reasons for the decision made pursuant to clause (a).[22]

Appeal of director's decision to adjudicator
3-56(1) A person who is directly affected by a decision of the director of occupational health and safety made pursuant to subsection 3-53(8) may appeal the decision to an adjudicator in accordance with subsection (2) within 15 business days after the date of service of the decision.[23]

Procedures on appeals
4-4(2) Subject to the regulations, an adjudicator may determine the procedures by which the appeal or hearing is to be conducted.

---

[20] Previously section 27 of *The Occupational Health and Safety Act, 1993*.
[21] Previously section 28 of *The Occupational Health and Safety Act, 1993*.
[22] Previously section 49 of *The Occupational Health and Safety Act, 1993*.
[23] Previously section 50 of *The Occupational Health and Safety Act, 1993*.

Powers of adjudicator
4-5(1) In conducting an appeal or a hearing pursuant to this Part, an adjudicator has the following powers:

> *(a) to require any party to provide particulars before or during an appeal or a hearing;*
>
> *(b) to require any party to produce documents or things that may be relevant to a matter before the adjudicator and to do so before or during an appeal or a hearing;*
>
> *(c) to do all or any of the following to the same extent as those powers are vested in the Court of Queen's Bench for the trial of civil actions:*
>
> > *(i) to summon and enforce the attendance of witnesses;*
> >
> > *(ii) to compel witnesses to give evidence on oath or otherwise;*
> >
> > *(iii) to compel witnesses to produce documents or things;*
>
> *(d) to administer oaths and affirmations;*
>
> *(e) to receive and accept any evidence and information on oath, affirmation, affidavit or otherwise that the adjudicator considers appropriate, whether admissible in a court of law or not;*

Decision of adjudicator
4-6(1) Subject to subsections (4) and (5), the adjudicator shall:

> *(a) do one of the following:*
>
> > *(i) dismiss the appeal;*
> >
> > *(ii) allow the appeal;*
> >
> > *(iii) vary the decision being appealed; and*
>
> *(b) provide written reasons for the decision to the board, the director of employment standards or the director of occupational health and safety, as the case may be, and any other party to the appeal.*

Right to appeal adjudicator's decision to board
4-8(2) A person who is directly affected by a decision of an adjudicator on an appeal pursuant to Part III or Part V may appeal the decision to the board on a question of law.

(3) A person who intends to appeal pursuant to this section shall:

> *(a) file a notice of appeal with the board within 15 business days after the date of service of the decision of the adjudicator; and*
>
> *(b) serve the notice of appeal on all parties to the appeal.*

(4) The record of an appeal is to consist of the following:

> *. . .*
> *(b) in the case of an appeal pursuant to Part III, any written decision of an occupational health officer or the director of occupational health and safety respecting the matter that is the subject of the appeal;*

> *(c) the notice of appeal filed with the director of employment standards pursuant to Part II or with the director of occupational health and safety pursuant to Part III or Part V, as the case may be;*
>
> *(d) any exhibits filed before the adjudicator;*
>
> *(e) the written decision of the adjudicator;*
>
> *(f) the notice of appeal to the board;*
>
> *(g) any other material that the board may require to properly consider the appeal.*
>
> *. . .*
> *(6) The board may:*
>
> *(a) affirm, amend or cancel the decision or order of the adjudicator; or*
>
> *(b) remit the matter back to the adjudicator for amendment of the adjudicator's decision or order with any directions that the board considers appropriate.*
>
> ***Powers re hearings and proceedings***
> *6-111(1) With respect to any matter before it, the board has the power:*
> *. . .*
> *(c) to do all or any of the following to the same extent as those powers are vested in the Court of Queen's Bench for the trial of civil actions:*
>
> *(i) to summon and enforce the attendance of witnesses;*
>
> *(ii) to compel witnesses to give evidence on oath or otherwise; and*
>
> *(iii) to compel witnesses to produce documents or things;*
> *. .*
> *(e) to receive and accept any evidence and information on oath, affirmation, affidavit or otherwise that the board considers appropriate, whether admissible in a court of law or not;*

Analysis and Decision:

[34] Section 4-8 of the Act provides that the appeal from the Adjudicator's Decision to the Board is on a question of law. When that appeal is considered, the Applicant will have to satisfy the Board that the Adjudicator's decision to dismiss the appeal on the grounds of issue estoppel and abuse of process were wrong in law.

[35] In making her decision, the Adjudicator considered whether, in looking at the Arbitrator's Decision, the three preconditions of issue estoppel had been met:

1) *Whether the same question has been decided;*
2) *Whether the earlier decision was final; and*
3) *Whether the parties, or their privies were the same in both proceedings.*[24]

[24] Adjudicator's Decision, at para 38.

[36] The Adjudicator found that all three preconditions had been met. The Applicant's fresh evidence is tendered for the purpose of arguing that her decision, particularly with respect to the third precondition, is wrong. Her findings on that precondition are as follows:

> *[43] The mutuality precondition to issue estoppel requires that the parties to the decision or their privies were the same as the parties to the proceedings in which the estoppel is raised or their privies.*
>
> *[44] Whether there is privity depends on whether there is a sufficient degree of identification or common interest between the party and the privy to make it fair that the party be bound by what was decided in the previous proceedings. A determination as to whether there is a sufficient degree of common interest must by made on a case-by-case basis. (See: Danyluk, at para 56 and 60).*
>
> *[45] The parties to the current OHS appeal are the worker, David Lapchuk, and the Ministry within the Government of Saskatchewan that employed him at the time, i.e., the Ministry of Highways and Infrastructure. In the arbitration, the parties were SGEU and the Government of Saskatchewan. The Appellant submits he was not a party to the arbitration proceedings. Clearly, he was not a named party. The question is whether SGEU and the Appellant were privies.*
>
> *[46] The Appellant argues that SGEU acted in bad faith and failed to represent him adequately. The Appellant's written submissions indicate he has filed DFR complaints in that regard with the Saskatchewan Labour Relations Board. For purposes here, I recognize the Appellant is not happy with the outcome of the arbitration in which his grievances were dismissed, and blames the incompetence of his Union. The fact that his grievances were dismissed, however, does not mean he and the Union did not have similar interests, or that the Union did not represent his interests.*
>
> *[47] On my review of the lengthy and detailed Arbitration Award, it is apparent that SGEU put forward evidence and argument in the Appellant's case, and sought the applicable remedies, including reinstatement and full redress, through compensation for lost wages and benefits. As submitted by counsel for the Respondent, the Appellant had a participatory interest in the proceedings. Counsel submitted the Appellant was present for much of the hearing, and was called as a witness by SGEU to testify on his own behalf. Indeed, it would appear that the Appellant was the primary witness called by SGEU in the five-day hearing, with one other witness being called to present medical evidence. Had SGEU been successful, the Appellant would have benefited from the outcome.*
>
> *[48] I agree with counsel that the Appellant had a participatory interest. There is nothing before me which would lead me to conclude that the Union and the Appellant did not have sufficiently similar or common interests regarding the grievances/arbitration, or that the Union did not represent the Appellant's interests. Whether the Union did so competently is not for me to decide. In my view, the interests of the Appellant and SGEU were essentially the same, and the Appellant was a privy to a legal proceeding brought by SGEU on his behalf.*
>
> *[49] In my view, the third precondition is met.*

[37] With respect to whether the question asked of the Adjudicator is essentially the same as the question already decided by the Arbitrator, the Adjudicator made the following findings:

> *[57] In the arbitration, the specific question is whether there was just cause for termination. In the OHS appeal, the question is whether the employer had good and sufficient reason to dismiss the Appellant, other than his participation in an activity protected by s. 3-35 of the Act.*

> *[58] Ultimately, the same fundamental question in both forums was whether the employer had 'good' reason for the termination of the Appellant's employment.*

[38] The Applicant does not dispute that the second precondition has been met. The Arbitrator's Decision is final.

[39] In conclusion, on the question of issue estoppel, the Adjudicator stated:

> *[69] In summary, I am not satisfied that there is anything in the circumstances of this case to indicate the application of issue estoppel would be unfair or unjust.*

[40] She turned then to the question of abuse of process and found that it also applied so as to preclude the hearing of the appeal on its merits.

[41] On this application, the issue is whether, bearing in mind those findings, any of the tendered evidence should be admitted, on the basis that it satisfies the principles set out in *Ackerman* and *Palmer*.

[42] The first issue for the Board to determine is the relevant date for the determination of whether the tendered evidence can be considered fresh evidence. The Board has determined that the appropriate date is the date that written submissions were filed with the Adjudicator for the purpose of making her decision. The Brief of Law on behalf of the Respondent was dated January 17, 2017; the Applicant's response is undated. Therefore, the relevant date will be considered to be January 17, 2017. This was the Applicant's opportunity to provide the Adjudicator with all of the information he considered relevant to the Respondent's application. The Record of the appeal to the Board indicates that, in addition to legal argument, the Applicant filed approximately 200 pages of evidence for the Adjudicator to consider.

[43] Turning next to the tendered evidence, the Board will first consider the issue of whether subpoenas should be issued to the four persons named by the Applicant. The evidence that the Applicant proposes be provided by Tuchscherer was with respect to the training the Applicant repeatedly requested prior to his termination. There is no reason why, with due diligence, this evidence could not have been made available to the Adjudicator. Further, it is not relevant to the questions of issue estoppel or abuse of process, so could not reasonably be expected to have affected the result. The same can be said of the proposed evidence of Scrivens, Digness and Mills. With due diligence, information about a meeting in 2012 or 2013 could have been discovered and submitted sooner. With due diligence, information about the proper application of Violence Policy 101-2 to the Applicant could have been submitted sooner. The Applicant provided

no explanation respecting why, with due diligence, he could not have made all of the evidence available to the Adjudicator that he is proposing these witnesses now provide. The application for subpoenas to be issued is dismissed.

[44] The application for admission of the Affidavit of Neil Morrison is dismissed. This evidence could have been made available by the Applicant to the Adjudicator, with the exercise of due diligence. The evidence is not relevant, as it does not address the issue of whether SGEU and the Applicant were privies or whether the Adjudicator was being asked to answer the same question that the Arbitrator has already answered. It could not reasonably be expected to have affected the Adjudicator's Decision.

[45] The application for admission of a transcript of the evidence of Kelly Hardy is dismissed. This evidence, if available to the Adjudicator, could not reasonably be expected to have affected the result. If anything, it reinforces the Adjudicator's Decision that SGEU and the Applicant were privies. It is evidence that SGEU was making the same argument at the arbitration hearing that the Applicant is making:

> *180. The Union's primary position is that the Employer failed to properly train Lapchuk in advance of the Fort Qu'Appelle incident. The Union acknowledges that Lapchuk had Verbal Judo, but theory only with no practical experience or training in scenarios. The Union notes that Lapchuk repeatedly asked for more training, PPCT in particular, when he was transferred to the Southern Region. Lapchuk's requests were ignored. The Union's position is that additional training would have altered the outcome of the incident and Lapchuk shouldn't be held responsible for the Employer's failed policies and procedures.*
>
> *. . .*
>
> *225. The Union takes the position that Lapchuk wasn't properly trained. This has been Lapchuk's position throughout. He has consistently complained that he should have received PPCT training and, if he had such training, the altercation with Mr. B would have somehow been different.*[25]

[46] Next the Board will consider the Affidavits of the Applicant. The Board is of the view that nothing in those affidavits should be admitted in this appeal.

[47] At paragraph 9 of the Applicant's Affidavit of September 22, 2020, he stated that "[t]he December 2014 report of Dr. Natarajan is already part of the Adjudicator's Record". In other words, the Adjudicator knew that the Applicant had been diagnosed as suffering from PTSD. Therefore, the Workers' Compensation Board decision does not provide any new evidence.

[48] Whether or not Violence Policy 101-2 was before the Adjudicator is irrelevant. Despite the Applicant's requests that his position be reclassified so that Policy would apply to him, the

---

[25] Arbitrator's Decision. Para 225 was quoted in the Adjudicator's Decision, at para 32.

Respondent was not prepared to do so. The Policy sets out, at pages 14 to 19, the Training Needs Assessment for various positions in the MHI. No training is identified as being required for a Program Operator, the position held by the Applicant. In addition, being dated April 5, 2005, it does not meet the due diligence test.

[49] The Plaxton Report was dated more than two years before the Arbitrator's Decision and was referred to in her decision[26], meaning it is not new evidence either. The Applicant admits this at paragraph 18 of his October 9, 2020 affidavit. He provided no explanation respecting why he did not provide it to the Adjudicator.

[50] That leaves only the Petty Report. That Report goes to the issue of whether SGEU failed in its duty to fairly represent him. Another one of the Applicant's proceedings arising out of his termination was a complaint to the Saskatchewan Human Rights Commission alleging discrimination under *The Saskatchewan Human Rights Code*. The Chief Commissioner dismissed his complaint and, in *Lapchuk SKCA*, the Court of Appeal dismissed the Applicant's appeal of that decision and his application to enter the Petty Report as fresh evidence on the appeal. The Court of Appeal found that it would have been inappropriate for the Chief Commissioner to have inquired into the quality of the representation provided by SGEU to the Applicant.

[51] The same conclusion applies to the Adjudicator. The Applicant's complaints about the quality of SGEU's representation of him will be considered and decided by the Board on the Applicant's pending duty of fair representation application.[27] Therefore, none of the evidence tendered for that purpose, including the Petty Report, is relevant to this appeal.

[52] The Board did not consider the Applicant's argument that the doctrine of issue estoppel does not apply to appeals. That argument, if valid, will apply to the appeal and not this application.

[53] In summary, the Application to Adduce Fresh Evidence is dismissed. All of the evidence other than the Petty Report could have, with the exercise of due diligence, been placed before the Adjudicator. An application for fresh evidence is not an opportunity for the Applicant to bolster the case he made to the Adjudicator by providing additional evidence that he chose not to submit or neglected to submit sooner.

---

[26] At para 80.
[27] *Lapchuk SKCA* at para 98.

[54] None of the tendered evidence is relevant to the question of whether the Adjudicator properly applied the doctrines of issue estoppel and abuse of process.

[55] The Board makes no finding on the credibility of the tendered evidence. Even if the tendered evidence is believed, it could not reasonably be expected to have affected the findings in the Adjudicator's Decision that the three pre-conditions of issue estoppel had been met, there was no compelling reason to decline to apply it, and it would be an abuse of process for the appeal to proceed. This determination applies whether the tendered evidence is considered individually or in its entirety.

[56] In particular, with respect to the Petty Report (the only piece of tendered evidence to which the due diligence principle does not apply), the Board reiterates the finding of the Court of Appeal[28] that the Report is relevant only to the issue of whether SGEU failed in its duty to fairly represent the Applicant, a question that will be answered in a different proceeding before this Board.

[57] The appeal will be set down for a hearing, based on the current Record.

DATED at Regina, Saskatchewan, this **4th** day of **December, 2020.**

LABOUR RELATIONS BOARD

Susan C. Amrud, Q.C.
Chairperson

[28] *Lapchuk SKCA* at para 106.