Saskatchewan
Labour Relations Board

DAVID LAPCHUK, Appellant v. GOVERNMENT OF SASKATCHEWAN, Respondent

LRB File No. 062-19; December 10, 2021
Chairperson, Susan C. Amrud, Q.C. (sitting alone pursuant to subsection 6-95(3) of *The Saskatchewan Employment Act*)

For the Appellant, David Lapchuk: Self-Represented

For the Respondent, Government of Saskatchewan: Kyle McCreary

Section 4-8 of *The Saskatchewan Employment Act* – Appeal of decision of Adjudicator to dismiss occupational health and safety appeal on basis of issue estoppel and abuse of process – Appeal dismissed.

Application for recusal on basis that Chairperson dismissed application to tender fresh evidence on appeal and is also hearing a different application brought by Appellant – Application dismissed – No evidence that would lead a reasonable observer to conclude that Chairperson needs to recuse herself from deciding appeal.

Standard of review is correctness – Adjudicator made no error of law – Three preconditions to application of issue estoppel met – No error of law in declining to exercise discretion to not apply issue estoppel – No error of law in dismissing appeal on basis of issue estoppel – No error of law in dismissing appeal on basis of abuse of process.

REASONS FOR DECISION

Background:

[1] Susan C. Amrud, Chairperson: On October 28, 2013 the employment of David Lapchuk with the Government of Saskatchewan ["Government"] 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] Lapchuk has instituted other legal proceedings in response to his termination. One of those proceedings was to file a complaint of discriminatory action ["OHS complaint"] under section 27 of *The Occupational Health and Safety Act, 1993* [2]. That complaint was dismissed by an

[1] *SGEU v Saskatchewan Government*, 2016 CanLII 95947 (SK LA).
[2] Now section 3-35 of *The Saskatchewan Employment Act*.

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. Mr. Lapchuk also raised a number of accommodation concerns which are not in the scope of Occupational Health and Safety Legislation. As such, it was not an attempt to enforce the Act within the meaning of section 27 of the Act.*[3]

[3] Lapchuk 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] Lapchuk appealed the OHS Director's decision to an Adjudicator. In response, the Government filed an application to dismiss the appeal on the basis of issue estoppel or abuse of process. The Adjudicator dismissed the appeal on those bases by decision dated February 28, 2019[5] ["Adjudicator's Decision"].

[5] The Adjudicator found that all three pre-conditions to the application of issue estoppel had been met. First, the substantive issue that Lapchuk was asking the Adjudicator to determine had already been determined by the grievance Arbitrator. Second, the Arbitrator's Decision was final. Third, at the arbitration hearing SGEU stood in the place of Lapchuk; the interests of Lapchuk and SGEU were essentially the same; the parties or their privies were the same in the arbitration and the appeal.

[6] Moving to the second step of issue estoppel, the Adjudicator was of the view that there was nothing in the circumstances of the appeal 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,*

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[3] Occupational Health Officer Report (22 January 2014) Ref. No. OR-NJH-0012, at page 5.
[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).

> *in the hopes of a different a different outcome, which is precisely what the "finality" doctrines are intended to prevent.*[6] [as written]

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

[8] Lapchuk appealed from the Adjudicator's Decision to the Board. The Board has issued two decisions on preliminary issues with respect to this appeal. First, on September 11, 2020[7], the Board dismissed Lapchuk's application for deferral of the hearing of this appeal until after the Board issues a decision in the duty of fair representation application Lapchuk has made against SGEU[8]. The Board also dismissed his application for an in-person hearing, since he was represented by legal counsel at that time.[9] Second, on December 4, 2020[10], the Board dismissed an application by Lapchuk to adduce fresh evidence on the appeal.

[9] The appeal from the Adjudicator's Decision was heard on July 19, 2021. These Reasons address the appeal.

Argument by Lapchuk:

Standard of Review:

[10] Following the hearing of the appeal, the Court of Appeal for Saskatchewan released its decision in *E.Z. Automotive Ltd. v Regina (City)*[11] ["*EZ Automotive*"]. The Government requested, and was granted, leave for the parties to file written submissions respecting the effect of that decision on the standard of review applicable to this appeal. Lapchuk's view is that *EZ Automotive* is not relevant to this appeal. Lapchuk argues that since the issue in this appeal is a question of jurisdiction, the standard of review is correctness.[12]

Appeal from Adjudicator's Decision:

[11] Lapchuk argued that the preconditions to the application of issue estoppel had not been met, however, he did not dispute that the Arbitrator's Decision is final.

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[6] Adjudicator's Decision, at para 64.
[7] *David Lapchuk v Government of Saskatchewan*, 2020 CanLII 65814 (SK LRB).
[8] LRB Files No 353-13 and 263-16.
[9] By the time the appeal was heard on July 19, 2021, Lapchuk was no longer represented by legal counsel and a renewed application for an in-person hearing was granted.
[10] *David Brian Lapchuk v Government of Saskatchewan*, 2020 CanLII 97896 (SK LRB).
[11] 2021 SKCA 109 (CanLII).
[12] *Hebron v University of Saskatchewan*, 2015 SKCA 91 (CanLII).

[12] With respect to whether the Adjudicator and the Arbitrator were deciding the same issue, Lapchuk argues that the Arbitrator did not consider section 27 of *The Occupational Health and Safety Act, 1993* in her decision. She did not consider the three questions that the Adjudicator is required to consider:

1) Did Lapchuk engage or participate in one of the activities described in section 27 that on its face could be the reason, even in part, for the discriminatory action?

2) Did the Government take discriminatory action against Lapchuk?

3) Is it more likely than not that the good and sufficient other reason provided by the Government is the real and only reason for the discriminatory action?

[13] The Arbitrator heard evidence that Lapchuk made an OHS complaint but she did not decide or analyze it. Occupational health and safety issues were not dealt with in the grievance because the Arbitrator did not have the authority to consider them. The Adjudicator recognized this[13] but she did not analyze them either. She assumed that the Arbitrator had fully answered these questions.

[14] In September 2013 the Government removed Lapchuk's ergonomic equipment. Without this equipment he was in pain and could not do his job. Lapchuk complained about this in his OHS complaint, along with the other issues, but while these accommodations were mentioned in the decision of the OHS Officer, their removal was never adjudicated. Their removal was not grieved by SGEU and was not adjudicated by the Arbitrator. The issues of safety and appropriate training also were not grieved by SGEU. The only thing that the arbitration and this appeal have in common is the facts. The jurisdiction is different. None of the other proceedings claim contraventions of Part III – Occupational Health and Safety of *The Saskatchewan Employment Act* ["Act"]. Those are yet to be determined. No one can determine those issues except the OHS Officer and OHS Director. Ignoring or misinterpreting evidence is an error of law.[14]

[15] Lapchuk argues that the appeal is not a retrial of the facts in the arbitration. Many of the facts to be relied on in the appeal were not relied on in the arbitration because of the Government's late production of documents. For estoppel to apply, any parallel matter must have had all the facts.

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[13] At para 61.
[14] *Guthardt v SGI* CACV 2890 Endorsement.

[16] With respect to whether the parties are the same in both proceedings, Lapchuk argues that the Adjudicator ignored evidence that SGEU did not present medical evidence of his post traumatic stress disorder diagnosis at the arbitration hearing. The Adjudicator ignored the adversarial relationship between Lapchuk and SGEU. Lapchuk did not have a chance to meet the Government's case in front of the Arbitrator. Critical facts were withheld by the Government from the Arbitrator. Lapchuk had no input at any stage. The Arbitrator had no knowledge of the issue with respect to the lack of an appropriate violence policy, that is the basis of his OHS complaint. He also relied on *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Quebec (Attorney General)*[15], which, he says, found that unions are, on the face of it, opposed in interest to their members.

[17] He further argues that issue estoppel is not applicable to his OHS complaint, it is only applicable to court actions.

[18] Lapchuk argues that the Adjudicator should have held a full hearing within one year, but she did not do so because of the Government's interference.

[19] Lapchuk also requested that the Chairperson recuse herself from hearing this appeal. He argues that the Chairperson is biased because she did not allow his fresh evidence to be heard. He further argues that she is conflicted out as she is also hearing his duty of fair representation application and is carrying over her prejudiced opinion of him from that matter.[16]

Argument by Government:

Standard of Review:

[20] With respect to standard of review, the Government submitted that *EZ Automotive* means that, while a different analytical approach is required of the Board, the applicable standard of review remains the same: correctness on questions of law and palpable and overriding error on questions of fact and mixed fact and law. This determination is not based on an analysis of *Canada (Minister of Citizenship and Immigration) v Vavilov*[17] ["*Vavilov*"], which does not apply to appeals to administrative tribunals. Instead, a focus on legislative intent is required. The appellate structure pursuant to section 4-8 of the Act is close to a traditional appellate structure, and it limits appeals to questions of law. This is indicative of a legislative intent in the Act to grant deference

[15] 2004 SCC 39 (CanLII), [2004] 2 SCR 185.
[16] *Canadian National Railway Co. v. McKercher LLP*, 2013 SCC 39 (CanLII), [2013] 2 SCR 649.
[17] 2019 SCC 65 (CanLII).

to Adjudicators on questions of fact and mixed fact and law and only grant jurisdiction to the Board to review whether errors of fact rise to the level of being errors of law. All of the issues argued by Lapchuk appear to be either questions of fact or mixed fact and law. He is second guessing both the findings of fact and the inferences drawn from them. The Adjudicator's findings of fact and mixed fact and law are entitled to deference under a review for palpable and overriding error.

Appeal from Adjudicator's Decision:

[21] All of Lapchuk's litigation stems in some manner from an incident involving him that occurred in Fort Qu'Appelle on or about October 17, 2012. Lapchuk was terminated in relation to that incident and other issues, on October 28, 2013. After his termination, Lapchuk commenced multiple proceedings, including a grievance through SGEU, a court action, a human rights complaint and the OHS complaint underlying this appeal. The court action was dismissed on jurisdictional grounds.[18] SGEU's grievances on his behalf were dismissed by the Arbitrator on August 31, 2016. The dismissal of his human rights complaint was upheld by the Court of Appeal in 2019[19] ["*Lapchuk SKCA*"]. The Court of Appeal found that the Chief Commissioner of the Saskatchewan Human Rights Commission had not erred in dismissing his complaint as an attempt to re-litigate the Arbitrator's Decision.

[22] The issue in this appeal is whether the Adjudicator made an error of law in determining that Lapchuk's appeal should be dismissed on the basis of issue estoppel or abuse of process. The issues for the Board to consider are whether the Adjudicator made an error of law in relation to the identification of the tests for issue estoppel and abuse of process and the application of those principles to Lapchuk's appeal. The Government argues that the Adjudicator made no errors of law in her decision.

[23] The Adjudicator correctly selected the test for issue estoppel.[20] She correctly set out the preconditions and applied them to the facts of this case. The Adjudicator made no palpable and overriding error in the application of the test for issue estoppel.

[24] There is no palpable and overriding error in finding that the same question was decided. The core of both actions is whether the Government had cause to terminate Lapchuk's employment. That issue has been determined, as has the issue of whether the training he was

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[18] Dismissal upheld *Lapchuk v Saskatchewan (Highways)*, 2017 SKCA 68 (CanLII).
[19] *Lapchuk v Saskatchewan*, 2019 SKCA 98 (CanLII).
[20] *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44 (CanLII), [2001] 2 SCR 460*; Penner v. Niagara (Regional Police Services Board)*, 2013 SCC 19 (CanLII), [2013] 2 SCR 125.

demanding was necessary or related to his termination. The substantive issues in both matters are the same: necessity of training and just cause for termination. The substantive issues that Lapchuk was asking the Adjudicator to determine have already been determined by the Arbitrator.

[25] The Arbitrator's Decision is final. Subsection 6-49(2) of the Act provides that the Arbitrator's Decision is final, conclusive and binding on the parties with respect to all matters within the legislative jurisdiction of Saskatchewan.

[26] There is no palpable and overriding error in finding that SGEU was Lapchuk's privy. He attended the arbitration and testified in it. The arbitration was seeking relief on his behalf. SGEU had a duty to fairly represent him in the arbitration. He claims that they failed to do so and separate litigation is pursuing relief for that allegation. That allegation does not change the fact that SGEU was advancing a case seeking remedies on his behalf.

[27] The Adjudicator also explicitly turned her mind to whether she should exercise her discretion and decide not to apply the doctrine of issue estoppel. She considered Lapchuk's various arguments on this issue and rejected them.[21]

[28] The Adjudicator made no error of law in the selection of the test for abuse of process.[22] The Adjudicator did not make a palpable and overriding error in the application of the test of abuse of process. The doctrine of abuse of process clearly applies. The degree of commonality between the two matters makes it clear this is re-litigation. In *Lapchuk SKCA*, the Court of Appeal rejected Lapchuk's argument that a second-in-time tribunal should delve into the details of how the first decision-maker conducted their hearing. It is not the role of the Adjudicator to sit in appeal of the Arbitrator's Decision.[23]

[29] With respect to Lapchuk's argument that the Adjudicator did not have jurisdiction to apply the tests of issue estoppel and abuse of process, the Government points to section 4-4 of the Act which gives the Adjudicator the authority to determine the procedure by which the appeal is conducted.

[30] With respect to Lapchuk's argument that issue estoppel does not apply to the appeal because the Arbitrator's Decision is not a judicial decision, the Government relies on *Danyluk v.*

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[21] At para 67 and 68.
[22] *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63 (CanLII), [2003] 3 SCR 77.
[23] *Lapchuk SKCA* at para 97.

Ainsworth Technologies Inc.[24] ["*Danyluk*"] which finds that issue estoppel is applicable to administrative decisions.

[31] The Government also points out that the abuse of process doctrine was applied in *Lapchuk SKCA*. The Government relies on this decision as being exactly on point. It relied on the same facts. The Court of Appeal held that the Arbitrator conclusively determined that Lapchuk's termination was for cause. The Government states that the question of whether Lapchuk should be permitted to re-litigate his termination in a second forum has already been determined in *Lapchuk SKCA*. Lapchuk's case has been heard and determined. His continued litigation against the Government is an abuse of process.

[32] Lapchuk's references to fresh evidence in his submissions, despite the Board's ruling denying the admission of fresh evidence, should be disregarded, other than as evidence that this appeal is an abuse of process.

[33] With respect to Lapchuk's request that the Chairperson recuse herself, the Government argues that the test for reasonable apprehension of bias imposes a heavy onus on Lapchuk to rebut the presumption of impartiality, that he has not met.[25]

Relevant Statutory Provisions:

[34] The following provisions of the Act are relevant to this appeal:

> *4-4(2) Subject to the regulations, an adjudicator may determine the procedures by which the appeal or hearing is to be conducted.*
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> *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.*
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> *6-49(2) The finding of an arbitrator or arbitration board:*
> *(a) is final and conclusive;*
> *(b) is binding on the parties with respect to all matters within the legislative jurisdiction of Saskatchewan; and*
> *(c) is enforceable in the same manner as a board order made pursuant to this Part.*

[35] Section 4-7 of the Act currently reads as follows:

> *4-7(1) Subject to the regulations, an adjudicator shall provide the written reasons for the decision required pursuant to clause 4-6(1)(b) within the following periods:*
> *(a) with respect to an appeal or hearing pursuant to Part II, 60 days after the date on which the hearing of the appeal or the hearing is completed;*

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[24] 2001 SCC 44 (CanLII), [2001] 2 SCR 460.
[25] *Jans Estate v Jans*, 2020 SKCA 61 (CanLII); *J.B. v. Ontario (Child and Youth Services)*, 2020 ONCA 199 (CanLII).

(b) with respect to an appeal pursuant to Part III:

(i) subject to subclause (ii), 60 days after the date on which the hearing of the appeal is completed; and

(ii) with respect to an appeal pursuant to section 3-54, the earlier of:

(A) one year after the date on which the adjudicator was selected; and

(B) 60 days after the date on which the hearing of the appeal is completed;

(c) with respect to an appeal pursuant to Part V, 60 days after the date on which the hearing of the appeal is completed.

(2) If the deadline in subsection (1) has not been met, any of the following may apply to the board for an order directing the adjudicator to provide the adjudicator's decision:

(a) any party to a proceeding before an adjudicator;

(b) the director of employment standards or director of occupational health and safety, as the case may be.

(3) On an application made pursuant to subsection (2), the board may do all or any of the following:

(a) direct the adjudicator to provide the decision;

(b) establish the period within which the decision is to be provided;

(c) set aside the adjudicator's selection and direct the registrar to select another adjudicator to hear the appeal;

(d) make any other order the board considers appropriate.

(4) A failure by an adjudicator to comply with subsection (1) or with an order made pursuant to subsection (3) does not affect the validity of a decision.

(5) As soon as is reasonably possible after receiving a decision, the board shall serve the decision on all persons mentioned in clause 4-4(1)(b) who received the notice setting the appeal or hearing.

(6) This section applies to all appeals or hearings that:

(a) were commenced before the coming into force of this section and for which written reasons have still to be provided on or after the coming into force of this section; or

(b) are commenced on or after the coming into force of this section.[26]

[36] At the time that the Adjudicator issued her decision, section 4-7 provided:

4-7(1) Subject to the regulations, an adjudicator shall deliver the written reasons for the decision required pursuant to clause 4-6(1)(b) within the following periods:

(a) with respect to an appeal or hearing pursuant to Part II, 60 days after the date the hearing of the appeal or the hearing is completed;

(b) with respect to an appeal pursuant to Part III:

(i) subject to subclause (ii), 60 days after the date the hearing of the appeal is completed; and

(ii) with respect to an appeal pursuant to section 3-54, the earlier of:

(A) one year after the date the adjudicator was selected; and

(B) 60 days after the date the hearing of the appeal is completed.

(2) Any party to a proceeding before an adjudicator may apply to the Court of Queen's Bench for an order directing the adjudicator to provide his or her decision if the deadline in subsection (1) has not been met.

(3) A failure to comply with subsection (1) does not affect the validity of a decision.

(4) As soon as is reasonably possible after receiving a decision, the board shall serve the decision on all persons mentioned in clause 4-4(1)(b) who received the notice setting the appeal or hearing.

[26] Section 4-7 was enacted in these terms on March 16, 2020, but retroactive to April 29, 2014.

The Board has determined that this version of section 4-7 is the one applicable to the Adjudicator's Decision. In any event, the applicable provisions are the same in both versions.

Analysis and Decision:

Application for Recusal of Chairperson

[37] Lapchuk makes a very serious allegation against the Chairperson. He alleges bias and conflict of interest in her dealings with his appeal. The Board considered a similar application in *Lalonde v. United Brotherhood of Carpenters and Joiners of America, Local 1985* [27] ["*Lalonde*"]. In that matter the Board stated:

> *[11] Applications for recusal of members of the Board are uncommon, but must be treated with utmost seriousness. The duty to act fairly is an overarching requirement of administrative law, applying to the procedure the tribunal follows in arriving at its decision. The obligation that the decision-maker be unbiased is fundamental to the right to procedural fairness. In the present case, it must be determined whether there is actual bias or a reasonable apprehension of bias on the part of the Vice-Chairperson as alleged by the Applicant.*

[38] In *Lalonde*, the Board found that a quasi-judicial administrative tribunal like the Board is held to the same standard as that which applies to courts, in determining this issue:

> *[12] The Supreme Court of Canada decision in Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities), [1992] 1 S.C.R. 623, confirmed that a quasi-judicial administrative tribunal such as the Board is held to a high standard with respect to absence of bias in its decision-making – essentially that applicable to the courts. Cory J., stated, at 638, as follows:*
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> > *It can be seen that there is a great diversity of administrative boards. Those that are primarily adjudicative in their functions will be expected to comply with the standard applicable to courts. That is to say that the conduct of the members of the Board should be such that there could be no reasonable apprehension of bias with regard to their decision.*
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> *[13] In Re Emerald Transport (2001), 70 C.L.R.B.R. 304 (C.I.R.B.) (which decision provides a concise overview of the principles in this area applicable to labour relations tribunals) the Canada Industrial Relations Board described the nature of "bias" in this context, and the reason for the strict standard required, as follows at 310:*
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> > *Bias is a predisposition or lack of impartiality on the part of the decision-maker regarding the matter to be decided. The rule against bias is intended to ensure that tribunals are not improperly influenced when they make their decisions and that they make their decisions on the basis of the evidence presented.*

[27] 2003 CanLII 62882 (SK LRB).

[39] The Court of Appeal for Saskatchewan has recently considered the issue of the standard that applies to judges, in *Jans Estate v Jans* [28]:

> *[128] Appellants are not required to demonstrate actual bias in order to succeed in an appeal where a lack of partiality is alleged. They are only required to establish the existence of a reasonable apprehension of bias in order to successfully raise this ground of appeal. The test to be applied in evaluating such an allegation was set out by de Grandpré J. in Committee for Justice and Liberty v Canada (National Energy Board), [1978] 1 SCR 369 (at 394):*
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> > *The proper test to be applied in a matter of this type was correctly expressed by the Court of Appeal. As already seen by the quotation above, the apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information. In the words of the Court of Appeal, that test is "what would an informed person, viewing the matter realistically and practically – and having thought the matter through – conclude. Would he think that it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly.*
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> *While de Grandpré J.'s articulation of the test was set out in his dissenting reasons, the majority adopted his formulation. This expression of the test has been consistently applied by the Supreme Court and this Court and continues to be utilized when examining whether there was a reasonable apprehension of bias in relation to a trial judge: R v S.(R.D.), [1997] 3 SCR 484 at para 31; Wewaykum at para 60; Albers v Albers, 2013 SKCA 64 at paras 74–75, 387 DLR (4th) 473; Yukon Francophone School Board, Education Area No. 23 v Yukon Territory (Attorney General), 2015 SCC 25 at para 20, [2015] 2 SCR 282; and R v T.F., 2019 SKCA 82 at para 30 [T.F.].*
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> *[129] In T.F., Kalmakoff J.A. described the presumption of integrity and the burden of proof faced by a person asserting a reasonable apprehension of bias:*
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> > *[31] Trial judges benefit from a presumption of integrity, which in turn encompasses the notion of impartiality: R v Teskey, 2007 SCC 25 at para 19, [2007] 2 SCR 267. In order to have any legal impact, an apprehension of bias in respect of a trial judge must be reasonable, and the grounds must be serious and substantial. Real likelihood or probability of bias is necessary; a mere suspicion is not enough: Aalbers v Aalbers, 2013 SKCA 64, 417 Sask R 69.*
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> > *[32] The threshold for a successful allegation of perceived judicial bias is high. There is a strong presumption that judges will carry out their oath of office, and this presumption can only be displaced by cogent evidence that demonstrates the judge has done something which gives rise to a reasonable apprehension of bias: R v S.(R.D.), [1997] 3 SCR 484 at para 117.*

[40] The Board must consider the evidence that, Lapchuk argues, substantiates his allegation of bias. The first fact he refers to is that the Chairperson, writing on behalf of the Board, dismissed his application to adduce fresh evidence on this appeal. On that application, Lapchuk was represented by counsel. His counsel was given an opportunity to make submissions on his behalf.

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[28] 2020 SKCA 61 (CanLII).

The Board issued a 17-page decision that carefully considered all of the arguments put forward by Lapchuk and the Government and explained why his application was dismissed. That decision provides no evidence of bias. The Board finds no grounds for recusal on that basis.

[41] The other ground for recusal argued by Lapchuk is that the Chairperson is also hearing the application he has made to the Board alleging that the Union breached the duty of fair representation that it owes to him. Lapchuk argues that this puts the Chairperson in a conflict of interest, and relies on *Canadian National Railway Co. v. McKercher LLP* [29] in this regard. That decision does not apply to a lawyer such as the Chairperson, who is acting as a decision-maker. It applies to a situation where a lawyer is in a conflict of interest for having breached their duty of loyalty to a client or former client.

[42] In *J.B. v. Ontario (Child and Youth Services)*[30] the Ontario Court of Appeal considered the issue of whether a question of bias or conflict of interest arises when a decision-maker is hearing more than one case involving the same party. It held:

> *A reasonable observer, informed of all the facts, would not conclude that a judge would appear to be biased only because of her involvement in another case affecting the same party: see Arsenault-Cameron v. Prince Edward Island, 1999 CanLII 641 (SCC), [1999] 3 S.C.R. 851, at para. 5; see generally Miracle v. Miracle, 2017 ONCA 195 and R. v. J.L.A., 2009 ABCA 344, 464 A.R. 289. As this court held in Miracle, at para. 4:*
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> > *A reasonable observer would not conclude that, because a judge has ruled against a party on a legal issue in one case, that judge, whether consciously or unconsciously, would likely be biased when deciding a different legal issue with respect to that same party in another case.*

[43] Lapchuk has not adduced any evidence that would lead a reasonable observer to the conclusion that the Chairperson needs to recuse herself from deciding this appeal. The recusal motion is denied.

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[29] 2013 SCC 39 (CanLII), [2013] 2 SCR 649.
[30] 2020 ONCA 199 (CanLII) at para 9.

Standard of Review:

[44] The next issue for the Board to address is the applicable standard of review. In recent appeals pursuant to Part IV of the Act[31], the Board found that the applicable standard of review is correctness, relying on the following direction from the Court of Appeal:

> *The Board dealt first with a jurisdictional issue raised by the Director and the standard of review. It decided, in my view correctly, that because LCL's statutory right of appeal to the Board was limited to questions of law, the standard of review was the appellate standard applicable to such questions, being correctness: Decision at para 30; Canada (Minister of Citizenship and Immigration) v Vavilov, 2019 SCC 65 at paras 36–37, 441 DLR (4th) 1. . . .* [32]

[45] In *EZ Automotive*, the Court of Appeal provided further direction with respect to this issue. The Court held that *Vavilov* does not apply to the determination of the standard of review on an appeal to an administrative tribunal. It stated:

> *[53] In City Centre – the key Saskatchewan authority on the approach to be taken in determining the internal standard of review – Whitmore J.A. asked the following question:*
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> > *[42] …What approach should be taken in determining the standard of review to be applied by an administrative appellate tribunal to the decision of an administrative tribunal of first instance? That is, should the approach be that of Dunsmuir, the appellate standard as stated in Housen v Nikolaisen, 2002 SCC 33, [2002] 2 SCR 235 [Housen], or something else entirely?*
> >
> > *[43] As will be demonstrated below, courts have not followed Dunsmuir or Housen in this context, and have instead taken different approaches. While the proper approach and what factors are considered remains unsettled, there is, nevertheless, one common theme among jurisdictions: What role did the Legislature intend the appellate tribunal to play? I will summarize the varying approaches taken to resolve this question.*
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> *. . .*
> *[59] In my view, this is the proper approach to determining the standard of review that the Committee should apply in the present case. <u>The standard of review should be determined by conducting a full exercise in statutory interpretation, which ultimately will answer what respective roles the Legislature intended the Committee and Board to fulfill.</u> Consequently, I will now turn to the governing principles of statutory interpretation, which demonstrate the Legislature intended for the Committee to fulfill a traditional appellate role such that it gives deference to the Board on questions of fact.* [emphasis added by Court]

[46] This means that, to determine the appropriate standard of review for the Board to apply to the Adjudicator's Decision, the Board must conduct a full exercise in statutory interpretation of the

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[31] *Lepage Contracting Ltd. v Lance McCutcheon*, 2020 CanLII 10515 (SK LRB*); Saskatchewan Polytechnic Students' Association Inc. v Ryan Benard*, 2021 CanLII 31416 (SK LRB).
[32] *Lepage Contracting Ltd. v Saskatchewan (Employment Standards)*, 2020 SKCA 29 (CanLII) at para 15.

applicable provisions of Parts III and IV of the Act. The Board undertook that review in a recent decision, and came to the following conclusion:

> *Based on the criteria set out in EZ Automotive, the Board finds that these provisions lead to a finding that the legislative intent is that the Board is to apply an appellate standard of review of correctness to the Adjudicator's decision.*[33]

[47] In applying the standard of correctness, the Board must keep in mind that the Act limits this appeal to questions of law, and therefore Lapchuk's grounds of appeal must first be reviewed to determine whether they actually raise questions of law. The Court of Appeal for Saskatchewan explained this in *PSS Professional Salon Services Inc. v Saskatchewan (Human Rights Commission)*[34] ["*PSS Professional Salon Services*"]:

> *[58] True, the presence or absence of a right of appeal is one of the four contextual factors to be considered in selecting an appropriate standard of review, but a right of appeal confined to a question of law is of greater significance than this. I say this with the distinction in mind between a ground of review and a standard of review. There must be a tenable ground for review before the issue of an appropriate standard of review arises. Here, the right of appeal, confined as it is, serves to limit the ground upon which an appellant may seek judicial review, limiting the ground to questions of law.*
>
> *[59] This serves to dictate the first order of business: To determine if the ground upon which the appeal is based gives rise to a question of law, for unless it does so there is no right in the appellant to seek judicial review of the decision of the Tribunal, nor any power in the Court to conduct that review.* [emphasis in original]

[48] In *Housen v Nikolaisen*[35] the Supreme Court of Canada explained the application of the appellate standard of review. Where the only ground of review is, as here, a question of law, the standard applies as follows.

[49] First, on a pure question of law, the standard of review is correctness.

[50] Second, if it is determined that a matter being reviewed involves the application of a legal standard to a set of facts, it is thus a question of mixed fact and law. A question of mixed fact and law is subject to review on the correctness standard if an extricable question of law can be identified, and it is found that the Adjudicator's interpretation of that law was not correct. The extricable question of law raised in this appeal is whether the Adjudicator properly interpreted the doctrines of issue estoppel and abuse of process before applying them to the facts as she found them.

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[33] *Christine Ireland v Nu Line Auto Sales & Service Inc.*, 2021 CanLII 97414 (SK LRB), at para 70.
[34] 2007 SKCA 149 (CanLII).
[35] 2002 SCC 33 (CanLII), [2002] 2 SCR 235.

[51] Finally, with respect to findings of fact, the Court of Appeal for Saskatchewan described the test as follows in *PSS Professional Salon Services*:

> *[60] It is clear that the appeal against the decision of the Tribunal comes down to its findings of fact. This is not to say that there is, therefore, no tenable ground for review of the decision, but it must be understood that the decision is only reviewable to the extent the findings of fact upon which it rests are attended by error of law.*
> *. . .*
> *[67] As a matter of statutory implication, then, persons fastened with the duties and exercising the powers of a human rights tribunal when called upon to hear a complaint, are required as a matter of principle (much as judges are), to determine the facts in controversy on the basis of the relevant evidence before them (leaving aside matters of fact in relation to which they may take judicial notice). Hence, they are required in principle to consider and weigh the relevant evidence as the faculty of judgment commends when exercised impartially, fairly, in good faith, and in accordance with reason, bearing in mind the governing standard of proof and the location of the onus of proof.*
>
> *[68] It follows that a tribunal cannot reasonably make a valid finding of fact on the basis of no evidence or irrelevant evidence. Nor can it reasonably make a valid finding of fact in disregard of relevant evidence or upon a mischaracterization of relevant evidence. To do so is to err in principle or, in other words, to commit an error of law. (In addition to the cases referred to above, see Toneguzzo-Norvell v. Burnaby Hospital, 1994 CanLII 106 (SCC), [1994] 1 S.C.R.114 at 121; Wade & Forsyth, Administrative Law (7th ed.) (Oxford: Clarendon Press, 1994) at pp. 316—20; Jones & de Villars, Principles of Administrative Law (4th ed.) (Toronto: Thomson Carswell, 2004) at pp. 244—43 and 431—36; and Hartwig v. Wright (Commissioner of Inquiry), 2007 SKCA 74). Nor can a tribunal reasonably make a valid finding of fact based on an unfounded or irrational inference of fact.*
>
> *[69] The all-important point is that to make a finding of fact on any of these bases is to err in principle by offending the implicit requirements of the statute, as well as the common law duty of procedural fairness perhaps. To suppose otherwise is to suppose the legislature intended, in conferring power upon a human rights tribunal to determine facts in controversy much as judges do, to empower the tribunal to engage in unfounded, unreasonable, or arbitrary fact-finding. The fact-finding process, or method by which facts in controversy are to be determined in this quasi-judicial setting, does not permit of this, either in its statutory or common law conception.* [emphasis in original]

[52] In other words, it is not sufficient for Lapchuk to argue that he disagrees with the Adjudicator's interpretation of the facts. He must meet this very high bar of satisfying the Board that the Adjudicator made her findings of fact on the basis of no evidence or irrelevant evidence, in disregard of relevant evidence, on a mischaracterization of relevant evidence or on an unfounded or irrational inference of fact.

Appeal from Adjudicator's Decision:

[53] Much of the argument provided by Lapchuk related to the grounds of his appeal of the OHS Director's decision. However, the Adjudicator did not make a decision on the grounds of that appeal, but dismissed it on the preliminary bases of issue estoppel and abuse of process. Any

arguments that do not pertain to those issues were not considered. A number of his submissions also attempted to reargue the application to adduce fresh evidence. Those submissions are not relevant to this appeal and have also been disregarded.

[54] The Adjudicator 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 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.*
>
> *[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[36], 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 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]*

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

> *[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]*

[55] The Board finds that the Adjudicator correctly identified the doctrine of issue estoppel, and correctly found that she had jurisdiction to apply it to the appeal. In *Danyluk*, the Supreme Court of Canada described the doctrine as follows:

> *20 The law has developed a number of techniques to prevent abuse of the decision-making process. One of the oldest is the doctrine estoppel per rem judicatem with its roots in Roman law, the idea that a dispute once judged with finality is not subject to relitigation: Farwell v. The Queen (1894), 1894 CanLII 72 (SCC), 22 S.C.R. 553, at p. 558; Angle v. Minister of National Revenue, 1974 CanLII 168 (SCC), [1975] 2 S.C.R. 248, at pp. 267-68. The bar extends both to the cause of action thus adjudicated (variously referred to as claim or cause of action or action estoppel), as well as precluding relitigation of the constituent issues or material facts necessarily embraced therein (usually called issue estoppel): G. S. Holmested and G. D. Watson, Ontario Civil Procedure (loose-leaf), vol. 3 Supp., at 21§17 et seq. Another aspect of the judicial policy favouring finality is the rule against collateral attack, i.e., that a judicial order pronounced by a court of competent jurisdiction should not be brought into question in subsequent proceedings except those provided by law for the express purpose of attacking it: Wilson v. The Queen, 1983 CanLII 35 (SCC), [1983] 2 S.C.R. 594; R. v. Litchfield, 1993 CanLII 44 (SCC), [1993] 4 S.C.R. 333; R. v. Sarson, 1996 CanLII 200 (SCC), [1996] 2 S.C.R. 223.*
>
> *21 These rules were initially developed in the context of prior court proceedings. They have since been extended, with some necessary modifications, to decisions classified as being of a judicial or quasi-judicial nature pronounced by administrative officers and tribunals. In that context the more specific objective is to balance fairness to the parties with the protection of the administrative decision-making process, whose integrity would be undermined by too readily permitting collateral attack or relitigation of issues once decided.*

[56] The Court further considered the question of whether issue estoppel can apply when the first decision was made, not by a court, but by an administrative tribunal like the Arbitrator:

> *35 A common element of the preconditions to issue estoppel set out by Dickson J. in Angle, supra, is the fundamental requirement that the decision in the prior proceeding be a judicial decision. According to the authorities (see e.g., G. Spencer Bower, A. K. Turner and K. R. Handley, The Doctrine of Res Judicata (3rd ed. 1996), paras. 18-20), there are three elements that may be taken into account. First is to examine the nature of the administrative authority issuing the decision. Is it an institution that is capable of*

> *receiving and exercising adjudicative authority? Secondly, as a matter of law, is the particular decision one that was required to be made in a judicial manner? Thirdly, as a mixed question of law and fact, was the decision made in a judicial manner? These are distinct requirements:*
>
> > *It is of no avail to prove that the alleged res judicata was a decision, or that it was pronounced according to judicial principles, unless it emanated from such a tribunal in the exercise of its adjudicative functions; nor is it sufficient that it was pronounced by such a tribunal unless it was a judicial decision on the merits. It is important, therefore, at the outset to have a proper understanding of what constitutes a judicial tribunal and a judicial decision for present purposes. (Spencer Bower, Turner and Handley, supra, para. 20)*

[57] The Board is satisfied that the Adjudicator properly interpreted the law with respect to the application of issue estoppel to Lapchuk's appeal. She correctly determined that issue estoppel applied to the decision made by the Arbitrator. While she does not specifically address this issue in her decision, she does rely on ***Danyluk*** and *Penner v. Niagara (Regional Police Services Board)*[37] in considering the application of issue estoppel to the appeal, both of which found that issue estoppel applies to decisions of a quasi-judicial nature made by an administrative tribunal like the grievance Arbitrator. It is clear from the Adjudicator's Decision that she found that the Arbitrator's Decision was made in a judicial manner[38].

[58] The Adjudicator considered the application to Lapchuk's appeal of each of the preconditions to issue estoppel.

[59] The first precondition is whether the question asked of the Adjudicator is essentially the same as the question answered by the Arbitrator. This is a question of mixed fact and law. The role for the Board is to determine whether the Adjudicator properly interpreted the law that she applied to the facts as she found them. The Adjudicator described the issue as follows:

> *[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.*

[60] In determining that the two complaints were essentially the same, the Adjudicator found as follows:

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[37] 2013 SCC 19 (CanLII), [2013] 2 SCR 125.
[38] See, for example, paras 47, 65 and 66 of the Adjudicator's Decision.

> *[60] Counsel for the Respondent submits that the Arbitrator made the factual finding at para 227 of the Award that PPCT training was not required for the Appellant's Level 7 position as a Program Operator. (See para 31 above). Counsel submits that the arbitrator's factual finding in this regard is determinative of the Appellant's discriminatory action complaint. Counsel argues that even if it is not determinative, the arbitrator determined there was cause for the termination. That is, the arbitrator made factual findings leading her to determine conclusively that the reason for the termination was the Appellant's misconduct.*
>
> *[61] Strictly speaking, the arbitrator did not decide, or purport to decide that the Appellant failed to establish a prima facie case within the meaning of section 27 of the Act, nor did she even mention health and safety in relation to her factual finding. At the same time, I agree with counsel that the Arbitrator made the same factual finding as would be determinative of the threshold issue in a discriminatory action.*

[61] The Board finds no error of law in the Adjudicator's determination that the first precondition for the application of issue estoppel had been met. The Arbitrator's Decision was judicial and the hearing before her fulfilled the requirements of procedural fairness. Lapchuk and the Union appeared before the Arbitrator, led evidence, examined witnesses and made written submissions. The issues of Lapchuk's training and the reason for his termination were clearly before the Arbitrator and the findings made in the Arbitrator's Decision are a full answer to the issues raised on this appeal. The Adjudicator identified the issues in the grievance arbitration and associated them with the issues raised in the OHS complaint. The substance of the OHS complaint was addressed in the grievance arbitration.

[62] The second precondition is finality, whether the Arbitrator's award is a final decision. This includes a consideration of whether all available means of review or appeal were exhausted. The Union had an option, which it chose not to exercise, to make an application to the court for judicial review of the Arbitrator's Decision. Since it did not, the Adjudicator correctly found that the Arbitrator's Decision is final, pursuant to subsection 6-49(2) of the Act.

[63] The third precondition is whether the parties or their privies are the same in both proceedings. Lapchuk's argument that they are not the same is premised on his belief that the Union did not competently represent him in the arbitration. On this issue the Adjudicator made the following finding:

> *[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.*

[64] This is consistent with the finding of the Court of Appeal in *Lapchuk SKCA* that the issue of whether the Union breached its duty of fair representation is properly before the Board in a different application. It would not have been appropriate for the Chief Commissioner of the Saskatchewan Human Rights Commission to consider that issue, and it would not have been appropriate for the Adjudicator to consider that issue. The Board finds no error of law in that determination.

[65] Lapchuk refers to *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Quebec (Attorney General),*[39] as support for his argument that the Union was not his privy during the arbitration. He argues that this decision found that unions are opposed in interest to their members. That is not what that decision says. In that case, union members made a human rights complaint alleging discrimination against them in the formation and validity of the collective agreement. The Court stated:

> *27 It is argued that the Tribunal should not have taken jurisdiction because the complainants could have asked their unions to "grieve" the alleged violation under the collective agreement. I cannot accept this argument. First, the nature of the question does not lend itself to characterization as a grievance under the collective agreement, since the claim is not that the agreement has been violated, but that it is itself discriminatory. Without suggesting that the arbitrator could not have considered these matters incidentally to a different dispute under the collective agreement, the complainant cannot be faulted for taking this particular dispute to the Human Rights Commission, which then filed a claim before the Human Rights Tribunal.*
>
> *28 Second, the unions were, on the face of it, opposed in interest to the complainants, being affiliated with one of the negotiating groups that made the allegedly discriminatory agreement. If the unions chose not to file a grievance before the arbitrator, the teachers would be left with no legal recourse (other than possibly filing a claim against their unions for breaching the duty of fair representation). . . .*

[66] In other words, what the Court found was that in that situation, where the claim was against the union, the union and the members are opposed in interest. The Adjudicator correctly found that in the course of the grievance arbitration, the Union and Lapchuk were aligned in interest.

[67] Having found that all three preconditions to the application of issue estoppel had been met, the Adjudicator then considered whether, as a matter of discretion, issue estoppel ought to be applied. The Adjudicator had discretion to refuse to apply issue estoppel if its application would work an injustice. The Board finds that the Adjudicator made no error of law in declining to exercise her discretion and deciding to apply issue estoppel to Lapchuk's appeal. She correctly

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[39] 2004 SCC 39 (CanLII), [2004] 2 SCR 185.

identified the issues she was required to consider, and applied them to the facts as she found them.

[68] Finally the Adjudicator considered the doctrine of abuse of process. Lapchuk has not persuaded the Board that the Adjudicator made an error of law when she determined that the application of that doctrine leads to a conclusion that the appeal should be dismissed:

> *[74] I agree with counsel for the Respondent that this Tribunal has subject matter jurisdiction in relation the health and safety issues in the discriminatory action appeal, and it is clear that the Appellant does not disagree. The Appellant has argued OHS has "sole" jurisdiction over health and safety. The Court of Appeal for Saskatchewan held that as between The Occupational Health and Safety Act, 1993 and The Trade Union Act, R.S.S. 1977, c. T-17, (now both in the SEA), the former is paramount. However, in this case, the Appellant chose to defer to arbitration. In my view, it would be an abuse of process to now allow the Appellant to take an institutional detour to attack the Arbitration Award by seeking a different result from a different forum.*
>
> *[75] Under the Act, the adjudicator of an OHS appeal controls his or her own process. In my view, that authority encompasses an obligation to prevent abuses of the process.*

[69] The Board agrees with the Adjudicator that to proceed with the appeal of the substance of the OHS complaint at this point would be to allow for a collateral attack on the Arbitrator's Decision.

[70] The Board is satisfied that the Adjudicator's Decision reflects a due consideration of the evidence before her. Lapchuk has not satisfied the Board that the Adjudicator made her findings of fact on the basis of no evidence or irrelevant evidence, in disregard of relevant evidence, on a mischaracterization of relevant evidence or on an unfounded or irrational inference of fact. As a result, the Board is bound by the Adjudicator's findings of fact; no error of law was identified.

[71] On his appeal to the Board Lapchuk objected to the fact that the Adjudicator waited until after the Arbitrator issued her decision to consider his appeal. Though he argues that he objected to this procedure all along, the facts as set out by the Adjudicator do not support his argument:

> *[27] In September 2014, the Respondent raised the issue/idea that a multiplicity of proceedings should be avoided. At the time, the Appellant's grievances had not been advanced to arbitration. On application, the Respondent sought an adjournment sine die of the OHS appeal until it was determined whether SGEU would proceed with arbitration. I determined that the issues in the application (deferral and the essential nature of the dispute) were premature, and adjourned the matter for 30 days to December 12, 2015* [sic] *for the arbitration question to crystalize.*
>
> *[28] By March 2015 discussions regarding mutually agreeable dates for a hearing of the within appeal narrowed to the week of May 12, 2015. On or about April 8, 2015, it was confirmed that the grievances would be heard the week of September 14, 2015. In parallel,*

> *the Respondent pressed its earlier position and submitted a second preliminary application seeking deferral of the appeal hearing to arbitration. The application was scheduled to be heard by teleconference on May 11, 2015.*
>
> *[29] On May 10, 2015, counsel for the Appellant sent the following email:*
>
> > *Having read the materials now and conferred with my client, I advise that we agree that this matter should be adjourned/deferred until the arbitration which is set in September 2015 and that we can tentatively set dates in November or December (as Mr. Lapchuk is not available in October)*
> >
> > *I apologize for the lateness in getting my position to you.*

[72] Whether this agreement by the parties extends the timeline established in subsection 4-7(1) of the Act was not argued in this appeal. Subsection 4-7(2) of the Act provided a remedy to the parties when the Adjudicator did not comply with subsection (1). That remedy was not sought prior to the Adjudicator issuing her decision. This means that, at this point, this argument is moot and subsection 4-7(3) provides as follows: "(3) A failure to comply with subsection (1) does not affect the validity of a decision".

[73] The Board thanks the parties for the comprehensive oral and written arguments they provided, which the Board has reviewed and found helpful.

[74] The decision of the Adjudicator is affirmed.

DATED at Regina, Saskatchewan, this **10th** day of **December, 2021.**

LABOUR RELATIONS BOARD

Susan C. Amrud, Q.C.
Chairperson