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IN THE MATTER OF:

An appeal with respect to the decision of May 1, 2018, pursuant to
The Saskatchewan Employment Act
and an Application by the University of Saskatchewan
to Dismiss the Appeal

BETWEEN:

DR. AARON ANDERSON

Appellant/Respondent

-and-

THE UNIVERSITY OF SASKATCHEWAN (COLLEGE OF MEDICINE)

Respondent/Applicant

For the Appellant/Respondent:	Self-represented
For the Respondent/Applicant, University of Saskatchewan:	Robert J. Affleck, McKercher LLP

DECISION ON PRELIMINARY APPLICATION TO DISMISS THE APPEAL

I. Introduction and Background

1. The Appellant/Respondent, Dr. Aaron Anderson ("Dr. Anderson"), has appealed the May 1, 2018 decision of Occupational Health and Safety ("OH&S") Officer, Mr. Shawn Tallmadge. Mr. Tallmadge's investigation had been undertaken in response to the complaint filed by Dr. Anderson with OH&S on January 22, 2018. Dr. Anderson alleged discriminatory action on the part of the Respondent/Applicant, the University of Saskatchewan ("U of S"), regarding the termination of his residency in the General Practitioner Residency Program on May 6, 2016.

2. In his decision of May 1, 2018, Mr. Tallmadge concluded that Dr. Anderson's concerns regarding failures in accommodation did not fall within the purview of OH&S. He further noted that OH&S does not have jurisdiction in educational or academic matters. He stated in the penultimate paragraph of his letter addressed to Dr. Anderson, and copied to the U of S:

> Throughout this process, the common factor was the concern of not properly accommodating your disability of ADHD and Adjustment Disorder. Occupational Health and Safety does not have legislation to address accommodation matters. These concerns would fall under the purview of the Human Rights Commission, who has already determined both initially and through the appeal process that the appropriate body (the Investigation Committee) had addressed these concerns through an internal hearing. The U of S states that the actions taken against you were academic and not employment related. Occupational Health and Safety also does not have jurisdiction in educational or academic matters. When asked during a meeting held with OHS officers on April 3, 2018 why you felt this happened to you, you stated that you felt it was due to the fact that you needed to be accommodated.

Therefore, Mr. Tallmadge concluded that there had been no violation of section 3–35 of *The Saskatchewan Employment Act* which prohibits discriminatory action by an employer against a worker due to the conduct delineated in section 3-35.

3. Dr. Anderson's Notice of Appeal, which is undated but which was remitted by email to the OH&S Executive Office on May 23, 2018, requests "suspension of all of the decision being appealed as well as lost wages/salary/benefits, and reinstatement." In the Notice of Appeal Dr. Anderson reiterates his view that "my academic dismissal was the result of my employment-related harassment complaint against my then program faculty in the Family medicine Department and the employment-related sexual harassment by the Program Director." He further states that his requests for accommodation of his disability were delayed and says, "This lack of accommodation is how the University leveraged my disability to dismiss me academically in order [to] prevent my employment related harassment complaint from moving forward."

4. Following my appointment as Adjudicator in accordance with sections 3-54 and 4-3 of *The Saskatchewan Employment Act*, a pre-hearing conference call was arranged for July 19, 2018 to discuss the hearing process and address preliminary issues with the parties. During that discussion, Mr. Affleck, on behalf of the U of S, raised concerns regarding the multiplicity of proceedings to date and questioned the jurisdiction pursuant to *The Saskatchewan Employment*

Act to address matters of accommodation or academic evaluation, given the jurisdiction of the U of S in such matters. He further indicated that a preliminary application would be brought on behalf of the U of S to dismiss the appeal.

5. The Notice of Application to Dismiss, dated August 9, 2018, was served and filed and, by follow-up correspondence with the parties, dates were set for the exchange of affidavit materials. A further case management teleconference was conducted on September 25, 2018, at which time a date was set for hearing of the application and dates were set for the respective parties to provide their written arguments.

6. The application was heard on Friday, October 19, 2018, commencing at 1:30 p.m. Although during each of the teleconferences, Dr. Anderson had had Ms. Brenda Senger, Director of the Physician Support Programs with the Saskatchewan Medical Association, join him on line she was not present on October 19, 2018. Dr. Anderson, however, confirmed that he was comfortable proceeding in her absence.

7. The record in relation to the application consists of the following:

a. May 1, 2018 decision of Mr. Shawn Tallmadge;
b. Notice of Appeal by Dr. Anderson (undated but submitted by email May 23, 2018);
c. Notice of Application to Dismiss dated August 9, 2018;
d. Affidavit of Dr. Anurag Saxena, sworn September 6, 2018, with Exhibits A - O;
e. Affidavit of Dr. Anderson, sworn September 28, 2018, with Exhibits A – P;
f. Brief of Law on Behalf of the Applicant, U of S, dated October 11, 2018; and
g. Written Argument by the Respondent, Dr. Anderson, dated October 15, 2018.

8. When Dr. Anderson served and filed materials on the dates originally set for filing of Affidavit materials, it was noted that these were not in the form of an Affidavit. Mindful that Dr. Anderson is self-represented, during the September 25, 2018 teleconference clarification was sought as to whether he wished to provide evidence in affidavit form. As Dr. Anderson indicated he did wish to do so, with Mr. Affleck's consent, I granted an extension of time to Dr. Anderson to file materials in affidavit form.

II. The Applicant's Submissions

9. On behalf the U of S, it was noted that the College of Medicine, after receiving a series of complaints, conducted an investigation and ultimately recommended the dismissal of Dr. Anderson from the Family Medicine Program (the "Program"). Dr. Anderson challenged the dismissal decision before the Saskatchewan Human Rights Commission ("SHRC") and the Court of Queen's Bench. However, he elected not to utilize the U of S internal appeal process. Following his lack of success in those forums, Dr. Anderson launched a complaint with OH&S. As he was again unsuccessful at first instance in this context, the current appeal has been launched.

10. The U of S brought this application seeking to dismiss the appeal on the grounds of delay, lack of jurisdiction, and abuse of process.

11. Regarding delay, the U of S acknowledges that there is no limitation period expressed in *The Saskatchewan Employment Act* directly applicable to the time for initiating an OH&S complaint. The U of S likewise acknowledges that section 3 of *The Limitations Act* does not directly apply to administrative decisions. However, the U of S submits that the basic limitation period of two years is instructive with respect to assessing the reasonableness of a delay in submitting a complaint. Further, the Applicant submits that the OH&S complaint process is intended to be both "expeditious in resolution and timely in the commencement of claims."

12. The U of S also derives guidance from the judicial review context, which is also not governed by a specific timeline. A detailed consideration of the jurisprudence relating to delay was conducted by Smith, J. in *LaBrash v Saskatchewan Veterinary Medical Assn,* 2017 SKQB 267, [2017] SJ No 424 (QL). The jurisprudence reveals a multi-stage determination, which address the questions of:

(i) Has there been undue delay?
(ii) If so, does the delay cause substantial prejudice or hardship to a party?
(iii) If undue, is the delay detrimental to good administration?

13. In the context of labour disputes, the U of S submits that the decision in *Brady (Re),* [2017] SLRBD No 25 (QL), 300 CLRBR (2d) 150, examines similar factors to those considered in the judicial review analysis. From paragraph 62 of the *Brady* decision, these would include:

(i) Length of delay;
(ii) Prejudice;
(iii) Sophistication of the Applicant;
(iv) Nature of the Claim;
(v) Whether or not justice can be achieved despite the delay

14. In considering these factors in the current circumstances, the U of S submits that a period of two years and nine months constitutes undue delay. The calculation of this period is from Dr. Anderson's dismissal from the Program on May 6, 2015 and filing of the OH&S complaint which, according to the May 1, 2018 letter from OH&S Officer, Shawn Tallmadge, was on January 22, 2018.

15. With respect to an explanation for the delay, the U of S submits that Dr. Anderson's suggestion that he was unaware of the option of an OH&S process until he began searching for new legal counsel is not reasonable. Dr. Anderson was served by competent counsel through the Investigation Committee process, the SHRC Complaint, and the judicial review application. He therefore had ready access to legal advice, and assistance with strategic decisions, to at least September 18, 2017 and possibly longer. It is therefore the Applicant's submission that "the more reasonable explanation for the delay is that Dr. Anderson hoped he would be successful either before the SHRC, or the Court of Queen's Bench. After being unsuccessful at both, Dr. Anderson is unwilling to let the matter rest."

16. Regarding any prejudice or hardship which may arise from the delay, the U of S relies upon the Affidavit of Dr. Saxena, which notes that many of the individuals who participated in the Investigation Committee Report of 2015 may not be available if this matter were allowed to proceed to a full hearing. Further, if the scope of the hearing were expanded, as Dr. Anderson wishes, to encompass alleged harassment during the period 2010 to 2013, finding witnesses at this stage may be difficult. Residents are with the College of Medicine for finite periods and often have neither a geographical nor an employment connection with the College following completion of their residencies.

17. The U of S further submits that, although Dr. Anderson is himself not legally trained, he had the benefit of counsel for a significant period of time. The Applicant further suggests that while allegations of harassment and conspiracy raise important issues, a review of Dr.

Anderson's materials reveals that "Beyond bare assertions, there is no evidence that the decision to remove Dr. Anderson was anything other than an academic decision."

18. As to whether the delay impacts the proper administration of justice, the U of S submits that "the delay undermines the fundamental principles of finality and corrupts the expeditious administrative approach that is central to OH&S complaints."

19. Regarding the jurisdiction of adjudications pursuant to *The Saskatchewan Employment Act*, the U of S contends that academic determinations are "beyond the scope of authority of an OH&S complaint, and beyond the scope of this review process." Section 6 of *The University of Saskatchewan Act* notes the exclusive authority in relation to academic standards and their implementation. This was affirmed in *Hebron v University of Saskatchewan*, 2015 SKCA 91, [2015] SJ No 419 (QL) which recognized, at paragraph 66, that "the assessment of academic performance of its students is legally and logically the *exclusive* domain of the University."

20. The final submissions of the U of S pertain to pursuit of the appeal of the OH&S Officer's decision being an abuse of process on four bases. The Applicant first submits that the appeal is vexatious, being of no merit and of questionable motivation, elements the Saskatchewan Court of Appeal noted were of relevant consideration in *Sagon v Royal Bank of Canada*, (1992), 105 SaskR 133, [1992] SJ No 197 (QL) (SKCA).

21. The second basis on which the U of S states the within appeal would be an abuse of process is the doctrine of *res judicata*. This doctrine, along with collateral attack and issue estoppel, were addressed by the Supreme Court of Canada in *British Columbia (Workers' Compensation Board) v Figliola*, 2011 SCC 52, [2011] 3 SCR 422 (QL). Writing for the majority, Abella, J., at paragraph 36 stated:

> Justice is enhanced by protecting the expectation that parties will not be subjected to the relitigation in a different forum of matters they thought had been conclusively resolved. Forum shopping for a different and better result can be dressed up in many attractive adjectives, but fairness is not among them.

22. The *Figliola* decision further emphasized that parties ought to avail themselves of the available vertical lines of appeal. In this case, Dr. Anderson elected not to do so. Instead of pursuing the College-Level appeal, and if necessary the University-Level appeal process regarding the decision of the Investigation Committee, he filed a complaint with the SHRC.

When that SHRC decision was not in his favour, he sought judicial review by the Court of Queen's Bench.

23. In *Anderson v University of Saskatchewan,* 2017 SKQB 277, Danyliuk, J. states, at paragraph 47:

> Secondly, I note there is a comprehensive vertically-integrated appeal process within the University system. The evidence is clear that Anderson took absolutely no steps to appeal the May 2015 decision from the University. As a result, the decision is "final" within the meaning of the current test for issue estoppel. As well, Anderson's election not to appeal but to complain places him directly into the type of case that Justice Abella was contemplating in *Figliola*: a person aggrieved by a decision by an administrative tribunal (acting with jurisdiction) takes no steps to directly challenge that decision, but rather attempts to attack that decision or seek a different result in an entirely different forum. Even though that alternate forum is cloaked with jurisdiction concurrent to that of the original tribunal, that is the very peril that Justice Abella was dealing with and commented negatively on in *Figliola.*

24. While the comments of Danyliuk, J. expressly reference issue estoppel, the U of S submits that Dr. Anderson's attempt to have the matter heard in the OH&S context, hoping for a different result than previously achieved, likewise offends the doctrine of *res judicata.*

25. The *Figliola* decision, at paragraph27, delineates three preconditions to issue estoppel, a third prong in the Applicant's argument that this appeal is an abuse of process. These are:

(i) Whether the same question has been decided;
(ii) Whether the earlier decision was final; and
(iii) Whether the parties, or their privies, were the same in both proceedings.

The U of S submits that these preconditions have been met in this case and, therefore, the appeal should be dismissed.

26. The fourth aspect of abuse of process is collateral attack. On behalf of the Applicant it is argued that the possibility of competing forums reaching differing conclusions on the same evidence "defies any attempt at finality and undermines the administration of justice." The Applicant goes on to note that the findings of fact made by Danyliuk, J. in judicial review of the SHRC decision parallel those facts set out in the Agreed Statement of Facts presented to the Investigation Committee. The U of S therefore submits that to be successful in the within

appeal, Dr. Anderson is effectively requiring this adjudicator to overturn Mr. Justice Danyliuk's findings of fact and that such offends the doctrine of collateral attack.

27. In light of the foregoing, the U of S submits that this appeal ought to be dismissed due to the delay in Dr. Anderson launching his complaint with OH&S, this body's lack of jurisdiction to address matters of academic evaluation with are within the exclusive domain of the University, and the abuse of process which would result if the appeal were permitted to proceed thereby bringing the administration of justice into disrepute.

III. The Respondent's Submissions

28. In responding to the application by the U of S, Dr. Anderson emphasized the absence of any limitation period in *The Saskatchewan Employment Act* pertaining to the time period in which a complaint may be lodged with OH&S. He further submitted that there are no decided cases dismissing OH&S complaints due to undue delay.

29. In explaining his delay in launching the complaint with OH&S, Dr. Anderson submitted that it would have been expensive and "considered poor form" to have claims pursued in multiple venues simultaneously. Thus, a motion to stay an appeal of the Investigation Committee decision was submitted by Dr. Anderson's counsel, and accepted by the U of S, in order that he may pursue his allegations before the SHRC.

30. Dr. Anderson further submits that the SHRC only reviewed the process of accommodation and did not address matters of workplace harassment and sexual harassment due to the expiry of the one year limitation on such matters. He notes that when his previous legal counsel could no longer represent him, at some point following issuance of the Queen's Bench decision on judicial review, he began searching for new counsel. In discussions with potential lawyers, he received information that OH&S was the appropriate body to address complaints of workplace and sexual harassment. Dr. Anderson therefore submits that any delay was not in the range of two years and nine months, but would only be measured from after conclusion of the SHRC process, which was September 18, 2017, the date of the Mr. Justice Danyliuk's decision on judicial review.

31. With respect to the issue of prejudice or hardship, while Dr. Anderson agrees that the unavailability of witnesses and/or documents could constitute prejudice, he suggests that this is effectively the Applicant's own fault. He alleges a culture within the U of S whereby witnesses were discouraged or intimidated from being involved in any investigation process.

32. In response to the submissions on behalf of the U of S that pursuit of the OH&S complaint is an abuse of process, Dr. Anderson reiterated his claims of harassment and stated in his brief, at page 9:

> If I would have pursued the complaints through the University appeal process the concerns of work place and sexual harassment would have continued to be ignored or labeled academic. At the final appeal step other legal avenues would have been made inaccessible.
>
> The issues of work place harassment and sexual harassment have not been heard on [*sic*] any forum.

33. Regarding the Applicant's submission that allowing this appeal to proceed to a full hearing would be detrimental to the administration of justice, Dr. Anderson submits that the allegations of harassment considered by the Independent Investigation Committee were limited in scope by the University which, in itself, is contrary to the proper administration of justice.

34. Dr. Anderson further submits that there is no academic element to the harassment complaints submitted to OH&S. As such, OH&S and this adjudicator have jurisdiction to address his concerns as *The Saskatchewan Employment Act* governs discriminatory actions. He therefore requests that the application by the U of S be dismissed and the matter be set for full hearing.

IV. Analysis

35. Of the grounds raised by the U of S in support of its application to dismiss the within appeal on a summary basis, lack of jurisdiction is, in my view, the most significant and will therefore be dealt with first.

Lack of Jurisdiction

36. As noted by Mr. Tallmadge in his decision letter of May 1, 2018, section 3-35 of *The Saskatchewan Employment Act* prohibits an employer from taking a discriminatory action

against a worker, including termination of his employment, because the employee "sought enforcement of the Act or regulations or participated in activities involving Occupational Health and Safety" in one of the ways delineated in section 3-35.

37. Section 3-36 of the Act authorizes an occupational health officer to serve a notice of contravention requiring the employer to, among other things, reinstate the employee. However, such is only authorized where the occupational health officer "decides that an employer has taken discriminatory action *for a reason* mentioned in section 3-35" [emphasis added]. Thus, a causal link between the termination, or other discriminatory action, and the conduct of the employee in the OH&S context must be established.

38. As noted above, at paragraph 2 of this decision, Mr. Tallmadge concluded that the focus of the concern was the alleged failure or inadequacy of accommodation, which is not within the purview of OH&S. Further, he concluded that the reason for termination related to educational or academic matters and, again, such is not within the jurisdiction of OH&S. Therefore, Mr. Tallmadge found there had been no violation of section 3-35 of *The Saskatchewan Employment Act*.

39. Regarding the question of accommodation, I concur with both Mr. Tallmadge and the submissions made on behalf of the Applicant that nothing within *The Saskatchewan Employment Act* enables OH&S to assess the adequacy of accommodations made in response to a disability. Such is therefore beyond the jurisdiction of an adjudicator in this context. As will be noted below, at paragraph 46, the SHRC would have jurisdiction in such matters, even concurrent with the U of S, but such is derived from its governing legislation and mandate in relation to human rights and prohibited grounds of discrimination.

40. As to education and academic matters, from a review of the materials before me, it is evident that Dr. Anderson, as a resident, was subject to academic evaluation. Dr. Saxena, at paragraph 2 of his Affidavit, states:

> The University pays residents a salary during their time as residents. At the same time, residents are still training and subject to academic evaluation. They must demonstrate academic competencies in order to graduate from their respective program.

41. Dr. Saxena further describes how residents are evaluated on their ability to demonstrate competencies considered essential by the Royal College of Physicians and Surgeons of Canada. These include: Medical Expert, Communicator, Collaborator, Manager, Scholar, Health Advocate; and Professional.[1] It was concern about these competencies, particularly arising out of complaints regarding his unprofessionalism, that resulted in Dr. Anderson, on May 21, 2014, being suspended with pay pending the outcome of an Investigation Committee hearing. That Investigation Committee had been struck pursuant to the College of Medicine's Postgraduate Education Assessment of Postgraduate Trainees: Guiding Principles (the "Guiding Principles").[2]

43. Before the Investigation Committee, the Program's position was that there were "broad and repetitive professionalism problems exhibited by Dr. Anderson."[3] Further, the Report of the Investigation Committee Regarding Dr. Aaron Anderson, which is Exhibit "C" to the Affidavit of Dr. Saxena, reviews the list of professionalism concerns which it describes as "troublingly long" and concluded that there had been a repeated "failure to uphold ethical/professional standards of the profession."[4]

44. Such an assessment and conclusion regarding Dr. Anderson's role in the Program was clearly within the purview of the Applicant. Sub-sections 6(1)(a) and (b) of *The University of Saskatchewan Act, 1995* state:

> 6(1) Subject to the other provisions of this Act, the university has the exclusive power to:
>
> (a) formulate and implement its academic and research programs, policies and standards;
> (b) formulate and implement its standards for admission and graduation . . .

45. In the case of *Hebron v University of Saskatchewan,* 2015 SKCA 91, [2015] SJ No 419 (QL), the Court of Appeal confirmed this unique responsibility, noting that "the academic assessment of a student's performance in his or her studies at the University must be invulnerable to review by anyone outside the University."[5] The Court further noted that, "The

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[1] Affidavit of Dr. Saxena, paragraph 5.
[2] Affidavit of Dr. Saxena, Exhibit G, Report of the Investigation Committee Regarding Dr. Aaron Anderson
[3] Affidavit of Dr. Saxena, Exhibit G, Report of the Investigation Committee Regarding Dr. Aaron Anderson
[4] Report of the Investigation Committee, paragraphs 41 and 40.
[5] *Hebron, supra,* at paragraph 63.

assessment of academic performance of its students is legal and logically the *exclusive* domain of the University.

46. While Mr. Justice Danyliuk, at paragraph 16 of the *Anderson* decision, notes, in the context of determining the appropriate standard of review, that the parties had agreed there is concurrent jurisdiction between the University and the SHRC, such is not a concurrent jurisdiction in all matters. This is clarified in paragraph 28, where Danyliuk, J. agrees with the Chief Commissioner's assessment that there is "concurrent jurisdiction as to the determination of human rights issues." It is further explained at paragraphs 59 through 62. This does not extend to the SHRC, or any other body, having concurrent jurisdiction on matters of academic assessment.

47. Although the decision of the Investigation Committee dealt with issues of accommodation, it was, as counsel for the Applicant has noted, "quintessentially academic in nature" as was affirmed by Danyliuk, J. at paragraph 10 of his decision:

> On May 1, 2015 the Investigation Committee handed down its report. It recommended Anderson's dismissal, which the College adopted on May 6, 2015. Anderson was dismissed from his residency program. The list of complaints and professionalism concerns is summarized at para. 41 of the Investigation Committee's report. I do not reproduce same verbatim here, but agree with the Investigation Committee that the list of concerns is "troublingly long" and that by the time of the decision Anderson had been in the residency program for over four years, deemed an unacceptable length of time to not have mastered basic communication and professional skills.

48. Indeed, a review of the Report of the Investigation Committee[6] makes it apparent the decision was academic in nature. For example, at paragraph 58 the Committee states:

> Furthermore, while the parties disagreed about whether Dr. Anderson had been fully accommodated prior to 2013, the Committee understood both the Program and the Resident to agree that the Accommodation Plan put in place in 2013 fully accommodated Dr. Anderson. Thus, the two most recent patient complaints in 2014 occurred at a time when both parties agree that his disability was being fully accommodated. In the Committee's view this is confirmation that *accommodation is not the issue regarding his failure to demonstrate professional standards.* [emphasis added]

49. The Investigation Committee made an academic determination of Dr. Anderson's suitability to remain in the Program and recommended the termination of his residency, in

[6] Affidavit of Dr. Saxena, Exhibit G, Report of the Investigation Committee Regarding Dr. Aaron Anderson

accordance with the Guiding Principles. The Applicant followed that recommendation, which was within its sole purview to do, pursuant to section 6(1) of *The University of Saskatchewan Act.*

50. In light of such exclusive authority having been delineated in the legislation and confirmed in *Hebron*, I accept the submission of the Applicant that such academic determinations are beyond the scope of authority of an OH&S complaint, and beyond the scope of this review process. The appeal must therefore be dismissed on the grounds of lack of jurisdiction.

51. While this conclusion is sufficient to dispose of the appeal, I will consider the other grounds proffered by the Applicant.

Delay

52. As noted above, the submission of the Applicant is that the appeal ought to be summarily dismissed given Dr. Anderson's delay in filing a complaint with OH&S. The U of S acknowledged, and Dr. Anderson emphasized, that there is no limitation period set out in *The Saskatchewan Employment Act* relating to when a complaint may be filed. Nonetheless, the Applicant submits that the passage of nearly two years and nine months from his dismissal from the Program on May 6, 2015 to the January 22, 2018 filing of the complaint constitutes an undue delay.

53. The *LaBrash* decision, *supra,* reviewed the jurisprudence on delay, revealing a multi-stage determination which asks:

(i) Has there been undue delay?
(ii) If so, does the delay cause substantial prejudice or hardship to a party?
(iii) If undue, is the delay detrimental to good administration?

54. Similarly, the *Brady* decision, *supra,* in the context of labour disputes outlines five factors to be considered, the latter three of which considered together are similar to the third element in *LaBrash*, namely "good administration":

(i) Length of delay;
(ii) Prejudice;
(iii) Sophistication of the Applicant;

(iv) Nature of the Claim;
(v) Whether or not justice can be achieved despite the delay

55. Given the absence of a limitation period in the legislation, I am not convinced that the mere passage of time is sufficient to categorize the delay as undue. However, as in *Brady, supra,* the length of delay may demand some explanation from Dr. Anderson.

56. Dr. Anderson, in his written argument, suggests that "any reasonable expiry date to advance an OH&S complaint would start *after* the HRC process had concluded and not at the start of legal representation." He further submits that issues of workplace and sexual harassment were not included in the University's appeal process, nor did they form part of the SHRC process. The Applicant, on the other hand, submits that allegations related to these issues were intentionally withdrawn by Dr. Anderson in such proceedings. However it occurred, Dr. Anderson and his counsel would have been well aware at the time that allegations of harassment were not the focus in those two contexts.

57. Thus, he had the opportunity early in the SHRC complaint process, when he asserts he learned that there was a one-year limitation on such matters, to consider the OH&S forum if he wished to pursue the harassment claims. Further, the independent Investigator's Report by DC Strategic Management,[7] which had been requested by the Dean of the College of Medicine pursuant to the Applicant's Harassment and Discrimination Prevention Policy, was finalized July 22, 2015. At that time, Dr. Anderson was aware that his claim of sexual harassment against Dr. Muller had been deemed unsubstantiated. He had opportunity then, in consultation with his legal counsel, to consider his legal options in relation to that report, one of which could have been to contact OH&S.

58. Dr. Anderson's written argument implies that consideration was given to the pursuit of claims in various venues. In the course of explaining that a motion to stay the University's appeal process had been accepted pending the SHRC process, he states: "It would be considerably more expensive and considered poor form to be involved in multiple venues simultaneously." During oral argument on October 19, 2018, Dr. Anderson confirmed that it was "an informed choice to not appeal at the time."

[7] Affidavit of Dr. Saxena, Exhibit K

59. As noted, it was Dr. Anderson's understanding that harassment would not have been included in either the SHRC or the U of S appeal processes. Given his current emphasis on the alleged harassment, and his claim that the Investigation Committee's Report[8] is "devoid of context" as it did not include full consideration of his claims of harassment, it is somewhat inconceivable that he was prepared to simply leave in abeyance what he now considers so fundamental.

60. In light of this, I am inclined to accept the Applicant's submission in its Brief of Law that:

> . . . the more reasonable explanation for the delay is that Dr. Anderson hoped he would be successful either before the SHRC, or the Court of Queen's Bench. After being unsuccessful at both, Dr. Anderson is unwilling to let the matter rest.

However, I am also of the view that this explanation is more applicable to a finding that proceeding to a hearing in this matter would be an abuse of process, as will be discussed below, rather than a ground for dismissing the appeal on the grounds of delay.

61. In relation to prejudice or hardship, the Applicant submits that in order to be successful in the OH&S context, Dr. Anderson would have to establish that the decision to terminate his residency was influenced by his harassment complaint. This conclusion would not only be inconsistent with the findings of the SHRC and the Court of Queen's Bench, but would essentially be an allegation that multiple parties conspired against him, including those who served on the Investigation Committee.

62. The composition of the Investigation Committee is derived from the Guiding Principles and includes representatives from various bodies. Some of these individuals do not work for the Applicant. Dr. Saxena, at paragraph 23 of his affidavit, notes his concern with respect to the availability of such witnesses should the matter proceed to a hearing, suggesting that it has been "many years" since the events in question.

63. While it has indeed been several years since the alleged conduct occurred, particularly if the scope of inquiry were to encompass the allegations relating to 2010 and 2013, assistance in locating the witnesses could presumably by obtained through the various entities represented on

[8] Affidavit of Dr. Saxena, Exhibit G, Report of the Investigation Committee Regarding Dr. Aaron Anderson

the Investigation Committee. As well, there is considerable documentation, through the Investigation Committee's report, and attachments referenced therein,[9] along with the independent Investigator's Report of July 22, 2015[10] which may be of relevant consideration.

64. The Applicant has relied on comments of Justice Smith in *LaBrash,*[11] which confirm that prejudice may result where witnesses and relevant documentation are no longer available. However, in *LaBrash*, it was known that a key witness "whose conduct comprise[d] a significant portion of Dr. LaBrash's complaints" was not able to testify. The lack of his testimony was considered significantly prejudicial to the Saskatchewan Veterinary Medical Association. There is no such specific concern in the instant case.

65. Further, Dr. Anderson would likely have a similar challenge in ensuring witnesses with direct observations of the alleged acts of harassment were located. He has suggested that the choice of Witness C to retract his statement, referenced in the independent Investigator's Report[12], demonstrates that the U of S discouraged or intimidated witnesses from being involved in the investigation process. I do not accept this argument. Rather, the action of that witness illustrates that in workplace and other conflicts there are often those who elect not to become involved.

66. In the circumstances, I am unable to conclude that the U of S would be subjected to particular prejudice or hardship.

67. Considering the elements of whether the delay impacts the proper administration of justice, I note that Dr. Anderson, although not trained in the law, is well-educated and had capable legal counsel at least up to September 18, 2017. Thus, he cannot be considered unsophisticated.

68. Further, as acknowledged by the U of S, claims of discrimination under *The Saskatchewan Employment Act* are serious. However, the alleged harassment underlying such

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[9] The attachments were not included as part of Exhibit "G" to Dr. Saxena's affidavit. However, a reading of the Report, particularly page 4, makes it clear that there were multiple appendices.
[10] Exhibit "K" to the Affidavit of Dr. Saxena
[11] *LaBrash, supra*, at para 76
[12] Exhibit "K" to the Affidavit of Dr. Saxena, section 4.3 at page 19

claims have been addressed by the independent investigators in the July 22, 2015 report.[13] Further, in light of the findings of the Investigation Committee, which were not subject to direct line appeal and which have been supported by both the SHRC and the Court of Queen's Bench, it is difficult to imagine what evidence could now be produced that would provide a causal link between Dr. Anderson's filing a complaint of harassment and the academic determination to conclude his residency.

69. Finally, while I accept the Applicant's view that the general approach to OH&S complaints is expeditious, the nature of *The Saskatchewan Employment Act* is for the benefit and protection of employees. The absence of a specific limitation period on the filing of complaints may well be considered an element of such protection. While I do not condone undue delay and am not suggesting that the opportunity for filing be expanded infinitely, in the case at hand I do not accept that the factors necessary for a dismissal of the appeal on the grounds of delay have been met.

Abuse of Process

70. On behalf of the U of S, it is submitted that pursuit of the appeal of the May 1, 2018 decision of the OH&S officer is an abuse of process, as it is vexatious and offends the doctrines of *res judicata,* collateral attack and issue estoppel.

71. Lack of merit and questionable motivation were elements the Court of Appeal considered relevant in *Sagon* when assessing whether the appeal was vexatious. The Court said:

> Striking out an entire claim on the ground that it is frivolous, vexatious or an abuse of process of the court is based on an entirely different footing. Instead of considering merely the adequacy of the pleadings to support a reasonable cause of action, it may involve an assessment of the merits of the claim, and the motives of the plaintiff in bringing it. Evidence other than the pleadings is admissible. Success on such an application will normally result in dismissal of the action, with the result that the rule of *res judicata* will likely apply to any subsequent efforts to bring new actions based on the same facts.

72. With respect to the absence of merit, to succeed in the current appeal, Dr. Anderson would have to demonstrate that the recommendation of the Investigation Committee to terminate

[13] Exhibit "K" to the Affidavit of Dr. Saxena

his residency, which the Applicant followed, was not an academic decision and was causally related to his submission of the harassment complaint against Dr. Muller. Counsel for the U of S submits that Dr. Anderson's current complaint is founded on the notion that there was inappropriate influence on the Investigation Committee. It appears this assumption is derived from the wording of his SHRC Intake Questionnaire[14] where Dr. Anderson alleges a "lack of natural justice" as well as his notice of appeal of the May 1, 2018 decision, which was submitted by email May 23, 2018. For example, in paragraph 1 a. of the notice of appeal, he states:

> I believe my academic dismissal was the result of my employment-related harassment complaint against my then program faculty in the Family Medicine Department and the employment-related sexual harassment by the Program Director Dr. Muller. My academic record did not warrant an academic dismissal. U of S simply used an academic dismissal to avoid an employment-related harassment issue from moving forward.

73. In his Affidavit sworn September 28, 2018, Dr. Anderson suggests that the bias against him was widespread. He states, at paragraph 13:

> I verily believe that, because of my complaints of harassment and unfair treatment brought forward, a biased environment developed at Saskatoon prior to my accommodation and continued despite the University implementing an accommodation process. This bias led to additional workplace antagonism and academic pressure which exacerbated my anxiety levels and my diagnosed ADHD.

At paragraph 16, he adds:

> It was this environment and a lack of professionally addressing this environment . . .that led to my academic dismissal, it was not my academic abilities in and of itself . . . it was a hostile work environment at Saskatoon that led to my dismissal.

74. During the presentation of oral argument on October 19, 2018, it became evident that Dr. Anderson's understanding of bias is very different and much broader than what would generally be considered by the courts or administrative tribunals. He encompasses any decision on procedure or scope of inquiry made contrary to his position, and his concept of "doctors not being familiar" with his situation, within his allegation that the U of S, and particularly the Investigation Committee, was biased against him. This is not a correct view of bias. Nor is there anything in the evidence to suggest that the Investigation Committee, or the U of S generally, acted with bias or developed a "biased environment," as Dr. Anderson alleges.

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[14] Affidavit of Dr. Saxena, Exhibit "L"

75. In reviewing the Guiding Principles[15] the composition of the Investigation Committee ensures that those with "direct involvement" in the matter are excluded and several members come from outside the U of S, such as the relevant health region and the College of Physicians and Surgeons. A resident, chosen by PAIRS,[16] is also on the committee.

76. The processes followed by the Investigation Committee were in accordance with the Guiding Principles, which included Dr. Anderson being fully advised in writing as to the nature of the allegations or complaints and having opportunity to respond to them. Indeed, Dr. Anderson and his legal counsel necessarily assisted in the preparation of the lengthy Agreed Statement of Facts.[17] The process was transparent and reasonable, as recognized by both the SHRC[18] and the Court of Queen's Bench. Justice Danyliuk, at paragraph 45 of his decision, writes:

> Almost half of the Investigation Committee's members were external to the College of Medicine, in the interests of fairness. The Committee ensured there was disclosure to Anderson, that he had the ability to attend a hearing where *viva voce* evidence was called, that he had an opportunity to question that evidence and to present his own evidence, and make submissions to the tribunal. Given these facts it is impossible to see how the Commissioner's decision that Anderson had received a full and fair hearing could be unreasonable.

77. As to the scope of the Committee's mandate, the Report of the Investigation Committee[19] makes it clear that Dr. Anderson, through his counsel, was given opportunity to make submissions on this issue. That the Committee's conclusions may have differed from the position presented on behalf of Dr. Anderson does not, as noted previously, establish bias or suggest that the Committee was inappropriately influenced.

78. Counsel for the U of S, as noted, focussed on the procedural aspects of the Investigation Committee's Report, emphasizing that there was no inappropriate influence on the Committee as the claim of harassment by Dr. Anderson played no part in the Committee's considerations. I accept this view, which is also supported from a full reading of the Report.[20] The Investigation

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[15] Exhibit "C" to the Affidavit of Dr. Saxena, at page 25
[16] Professional Association of Internes and Residents of Students
[17] Exhibit "E" to the Affidavit of Dr. Saxena
[18] Exhibit "N" to the Affidavit of Dr. Saxena, at para 20
[19] Exhibit "G" to the Affidavit of Dr. Saxena, at p. 1
[20] Exhibit "G" to the Affidavit of Dr. Saxena

Committee's recommendation—which the Applicant acted on—to terminate Dr. Anderson's residency was entirely an academic determination, as has been discussed earlier, at paragraphs 40 – 49. Thus, I find that Dr. Anderson's claim is without merit.

79. Regarding the question of Dr. Anderson's motivation in seeking to pursue this appeal, the U of S candidly admits that it does not know what is driving his actions. The Applicant speculates that it may be he wishes to complete his residency.

80. It may also arise from Dr. Anderson's "entrenched sense of victimization" which was noted in evidence before the Investigation Committee,[21] and his corresponding frustration that no reviewing body to date has agreed with his allegations. The Investigation Committee considered the complaints filed by patients, and reviewed the course of his residency, ultimately recommending its termination. The independent Investigator's Report of July 22, 2015 concluded that Dr. Anderson's claim of sexual harassment was not substantiated. The SHRC summarily dismissed his complaint in its February 13, 2017 decision.[22] The Court of Queen's Bench dismissed Dr. Anderson's application for judicial review,[23] and the OH&S Officer concluded there was no violation of section 3-35 of *The Saskatchewan Employment Act*.

81. Dr. Anderson's claims have been pursued without success. The conclusions of the various bodies have been consistent. Regardless of any potential frustration he may be experiencing, the continued pursuit of related claims in multiple legal forums has become vexatious and an abuse of process. Although it is not necessary to do so as I have already determined that this appeal is beyond the jurisdiction of the OH&S, I would dismiss the appeal on this ground as well.

82. Three further aspects of abuse of process raised by the Applicant are the doctrines of *res judicata*, collateral attack and issue estoppel, although the latter was not emphasized. With respect to each of these, the U of S places considerable reliance on the Supreme Court of Canada decision in *British Columbia (Workers' Compensation Board) v Figliola*, 2011 SCC 52, [2011] 3

[21] Evidence discussed at paragraph 43, page 9 of Exhibit "G" to the Affidavit of Dr. Saxena
[22] Affidavit of Dr. Saxena, Exhibit "N"
[23] *Anderson, supra,*

SCR 422 (QL) [*Figliola*]. I will therefore consider these concepts together, as they are all an impediment to forum shopping.

83. In *Figliola,* the Court considered the provisions of s. 27(1)(f) of the British Columbia *Human Rights Code*, which granted the Human Rights Tribunal discretion to refuse to hear a complaint if the substance of that complaint had already been appropriately dealt with in another proceeding. The issue before the Court was how that discretion ought to be exercised when another tribunal, the Workers' Compensation Appeal Tribunal, with concurrent human rights jurisdiction has disposed of the complaint.

84. After noting that the various doctrines are intended to prevent unfairness and abuse of process, the Court said, at paragraphs 35 and 36 of the *Figliola* decision:

> These are the principles which underlie s. 27(1)(f). Singly and together, they are a rebuke to the theory that access to justice means serial access to multiple forums, or that more adjudication necessarily means more justice.
>
> Read as a whole, s. 27(1)(f) does not codify the actual doctrines or their technical explanations, it embraces their underlying principles in pursuit of finality, fairness, and the integrity of the justice system by preventing unnecessary inconsistency, multiplicity and delay. That means the Tribunal should be guided less by precise doctrinal catechisms and more by the goals of the fairness of finality in decision-making and the avoidance of the relitigation of issues already decided by a decision-maker with the authority to resolve them. Justice is enhanced by protecting the expectation that parties will not be subjected to the relitigation in a different forum of matters they thought had been conclusively resolved. Forum shopping for a different and better result can be dressed up in many attractive adjectives, but fairness is not among them.

85. The Court in *Figliola* noted that where vertical lines of appeal are available and a party chooses not to exercise them, the decision is final.[24] In the instant case, Dr. Anderson was informed of his right to appeal, and the means by which to do so, in the letter of May 6, 2015 from the Dean's Office, which notified him of his dismissal from the Program pursuant to the recommendation of the Investigation Committee.[25]

86. From the *Procedure for Student Appeals in Academic Matters*,[26] it is evident that Dr. Anderson could have availed himself of a College-Level appeal of the Report of the

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[24] *Figliola*, at paragraph 51
[25] Affidavit of Dr. Saxena, Exhibit "H"
[26] Affidavit of Dr. Saxena, Exhibit "D"

Investigation Committee and, if unsuccessful at that level, a further appeal to the University-Level appeal board could have been undertaken. Notably, in the course of oral argument, counsel for the U of S emphasized the Grounds of Appeal available on the University Appeal Form[27] as they demonstrate that the concerns Dr. Anderson now seeks to raise in the OH&S context could readily have been addressed in that appeal context. For instance, an appeal could be brought on the basis of "Differential treatment compared to other students in the class or program . . ." or on the grounds of "Alleged discrimination or harassment as set out in the university's Policy on Discrimination and Harassment Prevention and associated procedures, where the alleged discrimination or harassment affected assessment of the student's academic work or performance."

87. Why Dr. Anderson elected not to appeal the decision of the Investigation Committee may forever be a mystery. However, his choice resulted in the Report of the Investigation Committee becoming a final decision, regarding which Justice Danyliuk commented, at paragraph 47, in *Anderson*:

> Secondly, I note there is a comprehensive vertically-integrated appeal process within the University system. The evidence is clear that Anderson took absolutely no steps to appeal the May 2015 decision from the University. As a result, that decision is "final" within the meaning of the current test for issue estoppel. As well, Dr. Anderson's election not to appeal but to complain places him directly into the type of case that Justice Abella was contemplating in *Figliola*: a person aggrieved by a decision by an administrative tribunal (acting with jurisdiction) takes no steps to directly challenge that decision, but rather attempts to attack that decision or seek a different result in an entirely different forum. Even though that alternate forum is cloaked with jurisdiction concurrent to that of the original tribunal, that is the very peril that Justice Abella was dealing with and commented negatively on in *Figliola*.

88. Although Justice Danyliuk was considering the concurrent jurisdiction on human rights issues between the SHRC and the Investigation Committee, his comments are of assistance here. As noted earlier, included in potential grounds for appeal within the university context related to academic matters are issues of harassment. This implies that the Investigation Committee, had it considered it relevant, could have addressed such issues, particularly if the alleged harassment was proffered as a contributing cause for Dr. Anderson's unprofessionalism. Further, the

[27] Found at the second last page of the *Procedure for Student Appeals in Academic Matters,* Affidavit of Dr. Saxena, Exhibit "D"

Investigation Committee was presented with an Agreed Statement of Facts, to which Dr. Anderson and his counsel necessarily contributed to the drafting. Presumably at Dr. Anderson's election, or at the very least with his consent, matters of harassment were not deemed pertinent for inclusion in the consideration of his failure to master even "basic communication and professional skills."[28] If, however, I am incorrect in this and the circumstances regarding concurrent jurisdiction on the question of harassment do not bring the matter squarely within the technical requirements of the doctrine of *res judicata*, the claims taken as a whole still portray a pattern of forum shopping, which *Figliola* regards as unfair.

89. On behalf of the U of S, it was noted that the Court of Queen's Bench enumerated findings of fact, including internal and external complaints about Dr. Anderson's lack of professionalism and inappropriate communications. These are set out at paragraphs 8 through 9 of the *Anderson* decision and both the U of S and Dr. Anderson agreed before me that these parallel those set out in the Agreed Statement of Facts presented to the Investigation Committee.[29]

90. As noted by counsel for the Applicant, Dr. Anderson did not appeal the Queen's Bench decision, nor did he challenge the underlying findings of facts. He, however, is effectively seeking this Adjudicator to come to a different conclusion on the same evidence. This offends the rule against collateral attack, as the Supreme Court noted in *Garland v Consumer's Gas Co.*, 2004 SCC 25, [2004] 1 SCR 629:[30]

> It has long been a fundamental rule that a court order, made by a court having jurisdiction to make it, stands and is binding and conclusive unless it is set aside on appeal or lawfully quashed. It is also well settled in the authorities that such an order may not be attacked collaterally—and a collateral attack may be described as an attack made in proceedings other than those whose specific object is the reversal, variation, or nullification of the order or judgment.

91. On behalf of the U of S it is submitted that the "possibility of competing conclusions defies any attempt at finality and undermines the administration of justice." Therefore, "Courts and administrators have assiduously avoided duplication of adjudication of the same evidence

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[28] *Anderson, supra,* at paragraph 10
[29] Affidavit of Dr. Saxena, Exhibit "E"
[30] *Garland, supra,* at paragraph 71, quoting *Wilson v The Queen,* [1983] 2 SCR 594

where it may result in jurisprudential discord." This view is supported in *Figliola* where, at paragraph 27, it is noted, that "duplicative litigation, potential inconsistent results, undue costs, and inconclusive proceedings are to be avoided."

92. In response to these submissions, Dr. Anderson's written submissions include the statement, "The agreed statement of facts is not an accurate record." He provides no foundation or support for this bald assertion. Given that Dr. Anderson had the assistance of counsel when the Agreed Statement of Facts was prepared for use before the Investigation Committee, I find this submission to be untenable.

93. Dr. Anderson, by his notice of appeal, is seeking reinstatement in the Program. Thus, he is looking for a reconsideration of the decision to terminate his residency, although endeavouring to package it as "employment-related harassment." His re-packaging ignores the fact that his employment is inextricably linked to his academic training, for which he is subject to academic evaluation, as has been repeatedly recognized.[31] If his appeal of the OH&S Officer's May 1, 2018 decision were allowed to proceed, it would be a consideration of the same question that was before the Investigation Committee, with the same parties participating. That decision was final, as has been discussed earlier.[32] Thus, the three preconditions to issue estopped outlined in *Figliola*[33] have been met in this case.

94. Further, given the array of proceedings to date, and the elections Dr. Anderson has made to not pursue vertical lines of appeal, it would not be unfair to apply the doctrine of issue estoppel. This additional consideration was noted in *Penner v Niagara (Regional Police Services Board)*, 2013 SCC 19, [2013] 2 SCR 125 at paragraph 49.

95. In view of the multiplicity of hearings already undertaken in relation to Dr. Anderson's dismissal from the Program, and considering the doctrines of *res judicata*, collateral attack and issue estoppel, I conclude that these provide additional grounds to view the within appeal as an abuse of process and one which must be dismissed summarily.

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[31] *University of Saskatchewan v Wilde and The Professional Association of Internes and Residents of Saskatchewan*, 2008 SKCA 171 (CA) at para 2; *Anderson, supra,* at para 7; Affidavit of Dr. Saxena, at para 2.
[32] As discussed at paragraphs 85 - 87
[3333] *Figliola, supra*, at paragraph 27

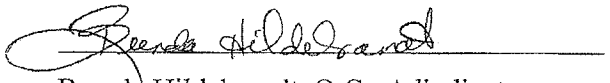
Conclusion

96. In light of all of the foregoing, I have determined that the academic determination regarding Dr. Anderson's dismissal from the Program is beyond the scope and authority of an OH&S complaint and outside the jurisdiction of this appeal process. That conclusion is sufficient to dismiss the appeal. However, I have further found that to permit this appeal to proceed would constitute an abuse of process.

V. Order

97. The application by the U of S is granted and the appeal by Dr. Anderson of the May 1, 2018 decision of the OH&S Officer is dismissed.

Dated at Saskatoon, Saskatchewan this 27th day of October, 2018.



Brenda Hildebrandt, Q.C., Adjudicator

Right to appeal adjudicator's decision to board

s. 4-8

(2) A person who is directly affected by a decision of an adjudicator on an appeal pursuant to Part III 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 persons mentioned in clause 4-4(1)(b) who received the notice setting the appeal or hearing.

(5) The commencement of an appeal pursuant to this section does not stay the effect of the decision or order being appealed unless the board orders otherwise.