In the Matter of an Appeal to a Special Adjudicator / Adjudicator
pursuant to *The Occupational Health and Safety Act, 1993*
and *The Saskatchewan Employment Act, 2014*

DAVID LAPCHUK

Appellant/Worker

- and –

THE MINISTRY OF HIGHWAYS AND INFRASTRUCTURE

Respondent/Employer

For the Appellant:	self-represented
For the Respondent:	Kyle McCreary, Ministry of Justice
Decision Appealed:	Director's Decision dated March 25, 2014

REASONS FOR DECISION
APPLICATION TO DISMISS

I. INTRODUCTION

[1] This is an interim decision with respect to an appeal by David Lapchuk ("Lapchuk", the "Appellant") of a decision of the Executive Director of the Occupation Health and Safety ("OHS") Division of the Ministry of Labour Relations and Workplace Safety concerning a discriminatory action complaint. This interim decision considers the Respondent's application to dismiss the within appeal on the basis of issue estoppel or abuse of process.

[2] Following the termination of his employment on October 28, 2013, Lapchuk lodged a discriminatory action complaint against his former employer, the Ministry of Highways and Infrastructure ("MHI") pursuant to section 27 of *The Occupational Health and Safety Act, 1993*, SS 2013, c O 1.1 (now Part III of *The Saskatchewan Employment Act ("SEA"))* alleging discrimination on the basis that MHI had terminated his employment because he had raised a health and safety concern (that he had not been provided self defense training).

[3] On January 22, 2013, the investigating Occupational Health Officer dismissed Lapchuk's complaint. The Officer determined that although training is a health and safety issue, self-defence training was not in his job description or job duties. As such, [the concern raised] was not an attempt to enforce the Act within the meaning of section 27 of the *Act*. Lapchuk appealed the Officer's decision to the Director of OHS.

[4] On appeal, Lapchuk alleged that MHI had retaliated against him by 1) refusing to reclassify his position; and 2) terminating his employment as a result of him raising concerns that he had not received appropriate self defence training. On March 26, 2014, the Director of OHS affirmed the Officer's decision, stating as follows:

> With respect to the issue of reclassification, the appropriate classification of a position is not an issue that fall [sic] within the scope of the occupational health and safety legislation. As such, it was not an attempt to enforce the Act.
>
> 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 self defence 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.

[5] This preliminary application is heard by way of written submissions. For purposes of the written hearing, the Appellant has been self-represented, although I am advised he has again engaged counsel. The Respondent is represented by counsel.

II. BACKGROUND FACTS

[6] The within appeal is but one of a multiplicity of proceedings related to the termination of Lapchuk's employment, all of which are based on the same factual background and raise the same, similar or related issues. For purposes of my decision, I have familiarized myself with the OHS Officer's file, and subsequent filings by the parties, reviewed the parties' written submissions, and considered the authorities cited by both parties, as well as the Arbitration Award. The parties are well acquainted with the facts, and I propose only to sketch out sufficient background facts here to give context to my decision. I have drawn liberally from information provided by the parties for contextual background, including the Arbitrator's decision.

[7] The MHI is a Ministry of the Government of Saskatchewan that provides highway-related services such as ensuring commercial traffic laws are complied with on provincial highways. Some positions within the MHI are focused on the conduct of roadside inspections and enforcement by Highway Traffic Officers. Other positions within MHI are not focused on enforcement and require different skills and training depending on the type of position held.

[8] Lapchuk began his employment with the Government of Saskatchewan in 1987, and has held a number of positions since that time. In 2007, Lapchuk obtained employment with MHI in a newly created Level 7 position of Program Operator, a position he held until the termination of his employment on October 28, 2013.

[9] Over the course of Lapchuk's employment with MHI there have been a number of changes to his job description. As a Program Operator, Lapchuk's primary responsibility was to operate the remote-control weigh scale in Macklin, Saskatchewan. He also managed a database and provided technical support to Highway Traffic Officers doing on-road enforcement. After an internal reorganization, he became responsible for two additional remote sites. Lapchuk had inspection and enforcement responsibilities, but did that remotely from his office in Regina. From time to time, he worked in a Mobile Vehicle Inspection Station ("MVIS"), participating in enforcement activities by operating the portable weigh scales by computer from within the MVIS unit. He did not face-to-face contact with commercial vehicle operators.

[10] Highway Traffic Officers responsible for on-road enforcement are classified as Level 8. Highway Traffic Officers are special constables under *The Saskatchewan Police Act.* They undergo six months of comprehensive training which includes self-defence. Highway Traffic Officers are issued "use of force equipment", including a Kevlar vest, baton and handcuffs. Self-defense training includes courses in Verbal Judo and Pressure Point Control Tactics ("PPCT"). Verbal Judo is training to use verbal skills to de-escalate conflict and verbal aggression. PPCT is training in the use of force to defend against physical attacks and to control subjects where necessary.

[11] Lapchuk had taken partial Verbal Judo training (classroom only) in 2008. He did not receive PPCT training because it wasn't required for his position as a Level 7 Program Operator. After moving to work in the Southern Region Logistics unit in 2011, Lapchuk expressed interest in expanding his duties. He was prepared to take courses, including PPCT, with a view to having his position reclassified. Lapchuk was frustrated when he wasn't on the list of employees scheduled for PPCT training in December 2011.

[12] On October 17, 2012, Lapchuk was assigned to work with two colleagues (Highway Traffic Officers) conducting a compliance blitz in the Yorkton area. Lapchuk provided technical support in the MVIS. When Lapchuk and his colleagues stopped for lunch in Fort Qu'Appelle on their way back to Regina, Lapchuk was involved in a physical altercation with a civilian member of the public (the "civilian").

[13] As a result of the altercation, Lapchuk had suffered injury, and made a WCB claim. WCB accepted that the altercation had resulted in whiplash type injury to his neck and back, and had aggravated pre-existing Post Traumatic Stress Disorder "PTSD"). Lapchuk went off work on October 23, 2012. He returned to work on a graduated basis in late May 2013, and resumed full-time duties in mid-July 2013

without the need for any specific accommodation apart from WCB's request that he be provided with a new chair and arm-rest.

[14] The RCMP had attended the scene of the October altercation, and MHI later learned that assault. charges were laid against the civilian (which were eventually stayed by the Crown). The civilian filed a complaint with the Saskatchewan Police Commission, requesting an investigation into Lapchuk's actions. MHI had initiated an internal investigation in accordance with policy. Statements were obtained from Lapchuk and the other employees who had been on the scene, and the civilian complainant was interviewed. MHI decided that an independent investigation was warranted. The Ministry of Corrections, Public Safety and Policing declined jurisdiction on the basis that Lapchuk was not performing special constable duties at the time of the incident. Eventually, independent investigators were retained through Risk Management Services in the Ministry of Central Services on January 25, 2013. An investigation was conducted, concluding with a Report dated September 9, 2013.

[15] In a document dated July 9, 2013[1], entitled "OHS Complaint Oct. 17, 2012 physical injury incident at Fort Qu'Appelle, SK", Lapchuk set out his perspective of what occurred on October 17, 2012. He alleges that MHI failed to provide him with appropriate self-defence training to work in the field. He further alleges that the MHI failed to meet its duty to provide the training and return him to the duties he performed prior to his October 17, 2012 injury, and that the reclassification of his position had been put on hold as a result of the injury that had occurred in the altercation. The original purpose of this document is unclear, but it was later submitted to OHS in conjunction with Lapchuk's Discriminatory Action complaint.

[16] On Lapchuk's return to work in July 2013, the investigation was on-going into the October 17 altercation, and whether he had acted appropriately in the circumstances. Lapchuk was adamant that he should be given PPCT training given what happened in Fort Qu'Appelle, and he renewed his efforts to have his job reclassified. Lapchuk's supervisor reiterated that Lapchuk did not require PPCT training for his current position, and informed him he would not be going on the road in the future, i.e. not participating in enforcement activities by working in the Mobile Vehicle Inspection Station.

[17] Lapchuk was not happy with his supervisor's response, and responded somewhat aggressively. The email exchange continued, and Lapchuk's responses grew increasingly aggressive and accusatory until, eventually, his supervisor's manager intervened, admonishing Lapchuk's inappropriate language. Lapchuk was issued a written directive to cease the activity. Another series of inappropriate emails prompted further intervention and a further directive to cease the activity and stop using the term "without prejudice" in his

[1] See: March 26, 2014 Decision of Director of OHS. The document copy on the OHS record is dated June 26, 2013,

emails. Notwithstanding the direction, Lapchuk sent three more emails using the term "without prejudice" in direct contravention of the direction given.

[18] On September 30, 2013, MHI suspended Lapchuk for three days for failing to follow specific directions from management regarding inappropriate and unprofessional email communications. When Lapchuk returned to work on October 4, 2013, he was placed on administrative leave with pay while MHI considered the Investigation Report, and decided on appropriate action to be taken.

[19] On October 23, 2013, Lapchuk, represented by the SGEU, filed a grievance in relation to his suspension.

[20] On October 28, 2013, MHI terminated Lapchuk's employment. One of the grounds for termination related to the altercation that occurred in Fort Qu'Appelle on October 17, 2012.

[21] On November 5, 2013, Lapchuk filed a discriminatory action complaint under section 27 *The Occupational Health and Safety Act, 1993*, SS 2013, c O 1.1 (now Part III of the *SEA)* alleging that MHI had terminated his employment because he had raised a health and safety issue (that MHI had failed to provide him with self-defence training).

[22] On or about November 8, 2013, the plaintiff filed a complaint under *The Saskatchewan Human Rights Code*, SS 1979, c S-24.1 [*Human Rights Code*] alleging that the MHI had discriminated against him by removing his specialized equipment and/or terminating his employment on the basis of his disability.

[23] On November 19, 2013, Lapchuk, represented by SGEU, grieved the termination of his employment on the grounds that it was without just and reasonable cause, and sought full redress, including reinstatement and lost wages and benefits under the collective bargaining agreement.

[24] On January 22, 2014, the Occupational Health Officer dismissed the discriminatory action complaint. Lapchuk appealed the Officer's decision to the Director of OHS.

[25] On March 26, 2014, the Director affirmed the Officer's decision (See: Para 3 herein). On or about April 3, 2014, Lapchuk appealed the Director's decision to a special adjudicator. Distilled, the grounds of the current appeal focus on challenging the employer's basis for terminating the Appellant's employment. Notably, no mention is made of suspension as an alleged discriminatory action in this appeal.. In particular, paragraphs c and d of the Notice of Appeal read:

> c) You ignore I was fired for "Use of force" when forced to position of self- defence when attacker choking me, use of force PPCT etc. and protective equipment are all a skill I was not required or trained in for the L7 Program Operator/Traffic officer position I was fired from. I was fired for defending myself when the trained Peace Officers with arresting rights as well as

training and weapons and flak vest did nothing to come to my assistance in my time of crisis. I had nothing at all essentially just a uniform. I had followed my verbal judo to a tee. The employer is using disinformation and baseless allegations as well as false and knowingly misleading claims to have conducted a OHS safety and risk assessment review per my requests in particular after placing my official complaint with Lance Reiss. Your own investigators show Lance Reiss lied to them as to my request assessment and essentially any existence of a request. This was separate for two NOC I had no idea at the time that they even existed as Deputy office covering this up since Jan 15, 2013. I filed for L7 non ppct officers by July 2013 your investigators believed the lying Lance Reiss until I provided them with a very critical email chain showing he is lying. You fail as well understand I still have not gotten any of the documents and reports used to fire me. I therefore request full and immediate disclosure of all documentations and reports you had unfettered access to. This is a principles of natural justice and your assessment neglects to give me the same basis to argue my case.

d) Grounds of appeal employer fired me for use of force a skill not required as a L7 Program Operator/Traffic Officer. The employer had deployed me after involuntary transfer from a desk job to operating a marked enforcement vehicle in the field solo. I worked on the non-ppct officer safety policy under John Meed and I was aware that my operation even transiting in the marked enforcement units such as MVIS II was contrary to MHI officer safety protocols. The injuries and recovery from those injuries are based on medical assessment done by professional medical officials and I had advised I needed training as they were exposing me to greater risk and given what had happened to me. The manager lied about doing a threat assessment in 2011 after CO-OP road rage incident. I relied on an employer to do their due diligence and follow the proper processes and as a result of this lie by Mr. Kreutzer as to a threat assessment done, in 2011 by PPCT expert that determined all I needed was flag person training, which the employer never delivered. This type of flagrant disregard for employees safety through non-reporting of these injuries puts all Traffic officers at an extreme risk as reports are being covered up illegally by the Deputies office. Please refer to Frank Brooks letter of March 2013 in which he admonishes the deputy ministers office of not sharing the Notice of Contravention with Ministry staff and traffic officers requesting this report. Please explain yourself why is it you are tolerating and allowing the continued contravention of your Ministry's own decisions and Notices. [sic throughout]

[26] On or about July 8, 2014, the Appellant commenced a civil action against the Government of Saskatchewan, two of his workplace managers and two co-workers, his representative Union SGEU, and his former SGEU Labour Relations Officer.

[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 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.

[30] The Arbitration was heard September 14-17 and November 12, 2015 by the appointed Arbitrator, Sheila Denysiuk, Q.C. The Arbitrator's Award issued, dated August 31, 2016 in which both the suspension and termination grievances were dismissed.

[31] On September 6, 2016, the Respondent forwarded a copy of the Arbitrator's Award and requested that this Tribunal decline jurisdiction for the OHS appeal pursuant to the doctrines of res judicata and abuse of process. The Respondent's Brief of Law advancing the within preliminary application to that effect was submitted January 17, 2017.

[32] Counsel for the Respondent submits the following additional facts, including extracts from the Arbitrator's Award. [2]

> 4. On or about August 31, 2016, the Arbitrator rendered an arbitration decision dismissing the Appellant's grievances against the Respondent in relation to his suspension and his termination ("the Arbitration Decision"). The decision dealt with numerous issues including issues related to the Respondent's responses to various emails sent by the Appellant and its decision to terminate his employment. PPCT training is specifically discussed in the Arbitration Decision at paragraphs 225-227:
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> > 225. The Union takes the position that Lapchuk wasn't properly trained. This has been Lapchuk's position throughout. He has consistently complained that he should have received PPCT training and, if he had such training, the altercation with Mr. B would have somehow been different.

[2] Brief of Law on Behalf of the Respondent, pp 4-5, para 4-7

226. With respect, it is difficult to see how PPCT would have assisted. As indicated, the culpable conduct was failing to de-escalate. PPCT is used to subdue and control subjects. In this case, PPCT could well have escalated the situation even more. Highways reasonably expected that Lapchuk would disengage and back away. Heinemann and Pylatuk had the same expectation. Both testified that they believe Lapchuk failed to take steps to de-escalate the situation.

227. Another comment about PPCT training is required. Following the Fort Qu' Appelle incident, Lapchuk pressed Kreutzer about taking the training Lapchuk felt he needed it because of what happened in Fort Qu' Appelle. He apparently told his doctor or therapist that he was going to go back into the field and they recommended he have self defence training before doing so. Lapchuk referred to this as an accommodation. To be clear, it wouldn't have been an accommodation. Lapchuk requested it because he thought he needed protection. However, it wasn't required for his position and Kreutzer and Davies had already decided that he wouldn't be going into the field.

5. The Arbitrator made extensive findings of fact throughout the Arbitration Decision in relation to the incident in Fort Qu' Appelle between the Appellant and a member of the public. In regard to whether that incident and the others cited in the termination letter there were grounds for discipline in the termination grievance the Arbitrator concluded as follows at paragraph 239:

> 239. The next question is whether the particular discipline, termination in this case, was a reasonable response by the Employer. The primary ground for termination was Lapchuk's misconduct in Fort Qu' Appelle. I am satisfied that misconduct has been proven. The termination letter raises other grounds, including Lapchuk's failure to report his lost ID, his inappropriate references to Mr. B as a "racist, sovereignty, police hater" and his inappropriate comments to Bachynski during the meeting with Moore. I am satisfied as well that these grounds have been established.

6. The Arbitrator also considered whether termination was appropriate in the circumstances and concluded at paragraph 243 there was no basis to mitigate the penalty:

> 243. Having considered the above factors, I am not persuaded that there are grounds to mitigate the penalty of termination. In summary then, I conclude that the Employer had just cause to terminate Lapchuk and I find no basis for the exercise of arbitral discretion to alter or mitigate the penalty. Had Lapchuk shown remorse or taken any responsibility for the incident, I would most certainly have considered reducing the penalty. As it is, Lapchuk stubbornly maintained he had no responsibility whatsoever for what happened.

7. The conduct of the Appellant and the Respondent in the months leading up to the Appellant's termination are also addressed in the Arbitration decision. In particular, reclassification is discussed at numerous paragraphs including but not limited to: 28, 32, 91, 98,

99 and 211. Findings of fact were also made in the Arbitration Decision in relation to the chronology of meetings [Award, pars 89-121], the Appellant's email communications [Award paras 205 and 211] and that the Respondent had cause to suspend the Appellant for his conduct in relation to emails [Award, paras 215-216].

III. BACKGROUND FACTS

[33] The Respondent argues that this appeal should be dismissed through the application of the doctrine of issue estoppel. The Respondent submits that essentially the same dispute has already been determined in arbitration, and it offends the principle of finality for the Appellant to seek to re-litigate that issue in another forum. In the alternative, if the technical requirements of issue estoppel are not met, the Respondent submits the appeal should be dismissed as an abuse of process. The Respondent submits that the Adjudicator has the authority to hear this application pursuant to common law that administrative tribunals control their own process, and s. 4-4(2) of The Saskatchewan Employment Act.

[34] The Appellant has not disputed my authority to hear this application. The Appellant's position is that his [discriminatory action] complaint to OHS was the first action taken in response to his dismissal, and his right to a hearing of the OHS appeal was vitiated by adjournments (pending the outcome of arbitration). The Respondent submits that OHS has sole jurisdiction over health and safety, and is the proper forum for a hearing of workplace safety or training issues. The Respondent was not a party to the arbitration, and takes the position that the OHS appeal is, "finally", his opportunity to present facts and argument that his bargaining agent "purposely" and in "bad faith" failed to provide in the arbitration. The Respondent relies on the fairness principle enunciated in *Dunsmuir* v. *New Brunswick*, [2008] 1 S.C.R. 190, 2008 SCC 9 and submits that he "wishes to proceed to the hearing of this very serious officer safety issue that has negatively affected his career and life altering injuries due to MHI not following Officer Safety policies, OHS regulations or having applicable self-defence training of all officers, this is an ongoing matter that was scheduled and adjourned contrary to Mr. Lapchuk's protestations for the past three years".

IV. ANALYSIS

[35] The issue for my determination raised by the Respondent's application, is whether to dismiss the Appellant's appeal of the decision of the Director of OHS on the grounds of issue estoppel or abuse of process. My jurisdiction to decide the question was not challenged.

[36] One of the most basic principles of the common law is that an issue, once determined by a competent court or tribunal, cannot be redetermined except by appeal or review. The finality doctrines of collateral attack, issue estoppel and abuse of process are intended to prevent endless litigation of matters that have previously been determined. As stated by Binnie, J., in *Danyluk* v. *Ainsworth Technologies Inc.*,

[2001] 2 S.C.R. 460, 2001 SCC 44: "A litigant...is only entitled to one bite at the cherry. Duplicative litigation, potential inconsistent results, undue costs and inconclusive proceedings are to be avoided".

[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.
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> 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,* the Court also discussed the common law test for the doctrine of abuse of process:

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

[41] As explained by Arbour, J. speaking for the majority of the Supreme Court of Canada in *Toronto (City) v. C.U.P.E., Local 79,* 2003 SCC 63 (CanLII), [2003] 3 S.C.R. 7, abuse of process does not have the same strict requirements as issue estoppel.

> The doctrine of abuse of process engages the inherent power of the court to prevent the misuse of its procedure, in a way that would be manifestly unfair to a party to the litigation before it or would in some other way bring the administration of justice into disrepute. It is a flexible doctrine unencumbered by the specific requirements of concepts such as issue estoppel. See House of Spring Gardens Ltd. v. Waite, [1990] 3 W.L.R. 347 at p. 358, [1990] 2 All E.R. 990 (C.A.).
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> 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]

[42] I have considered the three preconditions in reverse order.

Mutuality: Whether the parties or their privies are the same in both proceedings.

[43] The mutuality precondition to issue estoppel requires that the parties to the decision or their privies were the same as the parties to the proceedings in which the estoppel is raised or their privies.

[44] Whether there is privity depends on whether there is a sufficient degree of identification or common interest between the party and the privy to make it fair that the party be bound by what was decided in the previous proceedings. A determination as to whether there is a sufficient degree of common interest must by made on a case-by-case basis. (See: *Danyluk*, at para 56 and 60).

[45] The parties to the current OHS appeal are the worker, David Lapchuk, and the Ministry within the Government of Saskatchewan that employed him at the time, i.e., the Ministry of Highways and Infrastructure. In the arbitration, the parties were SGEU and the Government of Saskatchewan. The Appellant submits he was not a party to the arbitration proceedings. Clearly, he was not a named party. The question is whether SGEU and the Appellant were privies.

[46] The Appellant argues that SGEU acted in bad faith and failed to represent him adequately. The Appellant's written submissions indicate he has filed DFR complaints in that regard with the Saskatchewan Labour Relations Board. For purposes here, I recognize the Appellant is not happy with the outcome of the arbitration in which his grievances were dismissed, and blames the incompetence of his Union. The fact that his grievances were dismissed, however, does not mean he and the Union did not have similar interests, or that the Union did not represent his interests.

[47] On my review of the lengthy and detailed Arbitration Award, it is apparent that SGEU put forward evidence and argument in the Appellant's case, and sought the applicable remedies, including reinstatement and full redress, through compensation for lost wages and benefits. As submitted by counsel for the Respondent, the Appellant had a participatory interest in the proceedings. Counsel submitted the Appellant

was present for much of the hearing, and was called as a witness by SGEU to testify on his own behalf. Indeed, it would appear that the Appellant was the primary witness called by SGEU in the five-day hearing, with one other witness being called to present medical evidence.. Had SGEU been successful, the Appellant would have benefited from the outcome.

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

[49] In my view, the third precondition is met.

Finality: whether the arbitrator's award is a final decision

[50] The prior proceeding in this case is that of an Arbitrator dealing with two grievances filed by the Appellant against MHI pursuant to a collective agreement. Counsel for the Respondent submits that pursuant to ss 6-49(2) of *The Saskatchewan Employment Act*, SS 2013, c S-15.1 ("*SEA*"), an arbitrator's decision is final and binding with respect to all matters within the legislative jurisdiction of Saskatchewan. (Note: ss 6-49(2) of the *SEA* is identical to ss 25 (1.2) of *The Trade Union Act*: RSS 1978, c T-17 (since rep) ["*TUA*"] in force and effect at the time (since repealed, now the *SEA)*.

[51] The SEA/TUA statute(s) read:

> (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.

[52] The statute alone is not determinative. "Finality" was further elucidated in *Figliola*. At para. 51, Abella J. stated that "final" means that all available means of review or appeal must have been exhausted. When a party chooses not to avail itself of these means of review or appeal, the decision is final".

[53] In this case, the Arbitrator reached a final and conclusive decision. There is no evidence before me that SGEU sought judicial review. I find, therefore, that the Arbitrator's decision of August 31, 2016 is final, and the second precondition is met.

Whether the same question was decided

[54] The remaining precondition requires me to consider whether the issue in the appeal of the Director's decision ("the OHS appeal), is the same as that decided in the arbitration.

[55] The arbitration dealt with two issues: a suspension grievance in which SGEU argued the Appellant had not been afforded Union representation at the discipline meeting, and the Appellant's termination grieved on the basis that it was a termination without just and reasonable cause.

[56] In original complaint, the Appellant claimed that MHI took discriminatory against him for raising a health and safety concern (not providing him with self-defence training) by terminating his employment. It does not appear the Appellant claims the suspension as a discriminatory action, and it is not mentioned at all in the Appellant's detailed submissions in his appeal or in this application.

[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.

[59] In a discriminatory action, the employer's reason for termination does not come into play unless the worker first establishes a *prima facie* case. Failure to do so is determinative. In this case, both the OHO and the Director of OHS concluded Lapchuk had not raised a valid health and safety concern. That is, he was not attempting to enforce the Act because self-defence (PPCT) training was not required in the position he held, concluding, in effect, that he had failed to establish a threshold component of a *prima facie* case.

[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.

[62] In my view, the final precondition has been met.

Should the doctrine of issue estoppel be applied?

[63] Having concluded the necessary preconditions for the application of issue estoppel are satisfied, I must proceed to the second step and consider whether to give effect to issue estoppel in the circumstances of this case. Would the application of application of issue estoppel be unfair or unjust?

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

[65] The Appellant relies on "the fairness principle in *Dunsmuir v. New Brunswick*"[3]. As a matter of procedure, there is no evidence offered to suggest that the arbitration proceedings were unfair, or conducted unfairly. The Appellant argues the he was denied natural justice/procedural fairness by the adjournment of the OHS appeal (and his Human Rights Code complaint) pending arbitration against his protestations, and by the within application to dismiss his OHS appeal. While the Appellant was opposed to adjournment pending arbitration, the facts reflect that by and through counsel, the Appellant agreed to "adjournment/deferral" pending arbitration.

[66] I understand the Appellant to argue that the arbitration was not a fair hearing insofar as the Appellant contends that the Arbitrator made "legally incorrect" finding(s) of fact. It is not my place to assess whether the Arbitrator's findings of facts reflect the evidence, or to evaluate the determinations made in Arbitration Award. Although it was SGEU's decision whether to seek judicial review of the arbitrator's decision, there is no evidence before me that such a step was taken or that the Appellant exhorted the Union to do so.

[67] The Appellant argues that arbitration did not address his health and safety concerns over which OHS has sole jurisdiction. That said, there is virtually no discernible mention of health and safety issues mentioned in his 26-page written submission that are within the scope of his OHS appeal. Rather, the Appellant relies on the fairness principle in *Dunsmuir v. New Brunswick,* to submit that he should be given "the opportunity to prove that the employer's failure to accommodate stems from a discriminatory belief or bias in terms of his medical deficits leading to a constructed malicious dismissal".[4] Further, the Appellant submitted 200-odd pages of additional documents, largely in support of the PTSD/disability defence he advanced in the arbitration, accommodation for workplace injuries, the merits of his WCB claim in light

[3] Appellant's written submission, "Letter to Special Adjudicator...", 26 pages (my pagination inserted)
[4] Appellant's Reply, p 25, first full paragraph

of an amendment to WCB legislation which did not become law and affidavit evidence from his civil claim naming MHI, two workplace managers, two co-workers, SGEU and a Labour Relations Officer as defendants, which appear to be submitted in support of the argument in his argument that he should be allowed to prove perjury and obstruction of justice by the said defendants whom he alleges lied to OHS, WCB and in arbitration, and engaged in a cover-up or conspiracy to cover-up assorted transgressions, including the shortcomings of MHI's safety regime, its failure to follow OHS regulations or its own policies (in general) or comply with Notices of Contravention or to have self-defence training of all officers.

[68] Without reservation, I am satisfied that the Appellant, in arguing the OHS appeal ought to proceed to a hearing, seeks to relitigate matters that were raised and determined in arbitration and/or other issues, some of which may or may not pertain to his DFR complaints, but which are clearly well beyond the scope of the OHS appeal.

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

Abuse of process

[70] Further, and in the event my conclusion with respect to the precondition and/or the application of issue estoppel is incorrect, I am of the view that the doctrine of abuse of process applies so as to preclude the advancement of the Appellant's discriminatory action appeal to this Tribunal to a hearing for the above-stated reasons.

[71] As indicated earlier, abuse of process does not have the same strict requirements as issue estoppel. I find it useful to reiterate the previously cited comments of Arbour, J., speaking for the Court *Toronto (City) v. C.U.P.E., Local 79*:

> 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."

[72] Justice Arbour stated that the focus of abuse of process "is less on the interest of parties and more on the integrity of judicial decision making as a branch of the administration of justice." (para. 43)

[73] It is in the public interest and the interest of the parties that the finality of a decision can be relied on. Finality must be balanced with fairness. However, relitigation of issues that have been decided in another forum undermines confidence in the fairness and integrity of judicial or administrative decisions by creating inconsistent results (or creating the spectre of inconsistent results) and unnecessarily duplicative proceedings at the expense of judicial/administrative resources and the expense of the parties.

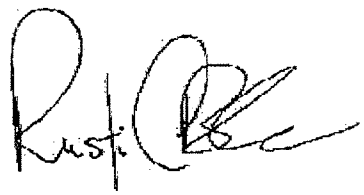
[74] I agree with counsel for the Respondent that this Tribunal has subject matter jurisdiction in relation the health and safety issues in the discriminatory action appeal, and it is clear that the Appellant does not disagree. The Appellant has argued OHS has "sole" jurisdiction over health and safety. 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.[5] 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.[6]

[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.

V. CONCLUSION

[77] For all of the reasons set out above, I conclude that the doctrine of issue estoppel, or alternatively, that doctrine in combination with the doctrine of abuse of process applies so as to preclude the Appellant from advancing his OHS claim on the basis. Accordingly, the appeal is dismissed.

Dated this 28th day of February 2019



Rusti-Ann Blanke
Adjudicator

Right to appeal adjudicator's decision to board

[5] *Jeff Parr, Executive Director of Occupational Health and Safety v. Prince Albert District Health Board* (unreported - April 15, 1999; C.A. 2948),

[6] Canada (Attorney General(() v. TeleZone Inc., 2010 SCC 62 (CanLII), [2010] 3S.C.R. 585 and Garland v. Consumer's Gas Co., 2004 SCC 25 (CanLII), [2004] 1 S.C.R. 629

4-8(1) An employer, employee or corporate director who is directly affected by a decision of an adjudicator on an appeal or hearing pursuant to Part II may appeal the decision to the board on a question of law.

(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.

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

(a) in the case of an appeal or hearing pursuant to Part II, the wage assessment or the notice of hearing;

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

(c) the notice of appeal filed with the director of employment standards pursuant to Part II or with the director of occupational health and safety pursuant to Part III, as the case may be;

(d) any exhibits filed before the adjudicator;

(e) the written decision of the adjudicator;

(f) the notice of appeal to the board;

(g) any other material that the board may require to properly consider the appeal.

(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.

(6) The board may:

(a) affirm, amend or cancel the decision or order of the adjudicator; or

(b) remit the matter back to the adjudicator for amendment of the adjudicator's decision or order with any directions that the board considers appropriate.

The Appeal process is a prescribed process, as set out in *The Saskatchewan Employment (Labour Relations Board) Regulations*:

PART II

Applications and Forms

Notice of appeal, re Parts II and III of the Act

4(1) An employer, employee or corporate director who intends to appeal a decision of an adjudicator on an appeal or hearing pursuant to Part II of the Act or a person who intends to appeal a decision of an adjudicator pursuant to Part III of the Act shall:

(a) file a notice of appeal in Form 1; and

(b) serve a copy of Form 1 on the persons mentioned in clause 4-8(3)(b) of the Act and on the adjudicator.

(2) On being served with a copy of Form 1 pursuant to clause (1)(b), the adjudicator shall, as soon as is reasonably possible, send to the board a certified copy of the record of appeal mentioned in subsection 4-8(4) of the Act.