MANITOBA HUMAN RIGHTS BOARD OF ADJUDICATION

IN THE MATTER OF: *The Human Rights Code*, C.C.S.M. c. H175, as amended;

IN THE MATTER OF: A Complaint by Glenn Dick against The Pepsi Bottling Group (Canada), Co., alleging a breach of section 14 of *The Human Rights Code*.

BETWEEN:

GLENN DICK,

Complainant,

- and -

THE PEPSI BOTTLING GROUP (CANADA), CO.,

Respondent.

Appearances: Isha Khan, counsel for the Manitoba Human Rights Commission
Glenn Dick, on his own behalf
Tina Giesbrecht, counsel for the Respondent
Diana Kiyon, on behalf of the Respondent

Before: M. Lynne Harrison

REASONS FOR DECISION

The Respondent The Pepsi Bottling Group (Canada) Co. ("PBG") seeks an order that this Complaint be dismissed without a hearing on the basis that the issues have been argued and decided in other proceedings.

The Complaint is one of discrimination in employment contrary to section 14 of *The Human Rights Code* (the "*Code*"). The Complainant Glenn Dick was a long-time employee of PBG who experienced a number of non-work related injuries over the years. PBG made various attempts to provide Mr. Dick with modified duties, but eventually concluded that it was unable to accommodate him and terminated his employment. Mr. Dick claims that PBG discriminated against him on a continuing basis up to and including April 3, 2009, when his employment was terminated, and failed to accommodate his special needs based on his disability, in contravention of section 14 of the *Code*.

A grievance was also filed by Mr. Dick's Union on his behalf, in which it was alleged that PBG unjustly terminated Mr. Dick's employment and failed to accommodate him as per the *Code*. The grievance proceeded to a hearing, following which the Arbitrator determined that PBG had met its duty to accommodate Mr. Dick to the point of undue hardship. In the result, the Arbitrator upheld the termination of Mr. Dick's employment and dismissed the grievance.

On this Motion, PBG submits that the issues which are raised in the Complaint are the same as those which were argued and decided by the Arbitrator, and that Mr. Dick should not be allowed to relitigate them in this proceeding. With particular reference to the decision of the Supreme Court of Canada in *British Columbia (Workers' Compensation Board)* v. *Figliola*, 2011 SCC 52, [2011] 3 S.C.R. 422 ("*Figliola*"), PBG submits that relitigating these issues would not serve the administration of justice and would violate important legal principles including *res judicata*, issue estoppel and collateral attack.

The Manitoba Human Rights Commission (the "Commission") has consented to PBG's Motion to dismiss the Complaint prior to its proceeding to an adjudication hearing.

Mr. Dick, however, is opposed to the Motion. He denies that the Union represented his interests through the grievance and arbitration process, and does not agree that the real issues were fully or properly addressed by the Union or the

Arbitrator. It is his position that this Complaint ought to proceed to a hearing on the merits.

The issue on this Motion, therefore, is whether the Complaint must or should be dismissed without a hearing in the circumstances of this case.

Background Facts

The Complaint which is the subject of these proceedings was filed May 6, 2009 (Exhibit 1B). In the Complaint, Mr. Dick states that he began his employment with PBG in 1982, where his job was that of "a forklift loader, picker, and transport loading". He says that he has experienced numerous non-work related injuries since 2001, including a fractured spine and chronic back and shoulder pain, and that he has had to be off work at various times due to his injuries and has received Short Term Disability (STD).

The Complaint sets out details of PBG's alleged failure to accommodate Mr. Dick dating back to late August 2006, when Mr. Dick's doctor advised that he could return to work with what should be considered permanent restrictions. Reference is made to various grievances which Mr. Dick filed regarding PBG's alleged lack of accommodation. It is stated, among other things, that a settlement was reached in April 2007 for three grievances which Mr. Dick had filed; that Mr. Dick returned to work, but although his work was to be at a static shift, he remained on a rotating shift; and that he continued working in that capacity until August 2008, when he reinjured his back and was again off work.

It is further alleged that when Mr. Dick returned to work in October 2008, he was assigned duties which caused him discomfort; that his duties were changed and updated, but were not what he had previously done or what his doctor had said he could do; that he filed another grievance on December 18, 2008 claiming that he had been improperly removed from his earlier position; and that in January 2009, PBG advised him that it could not continue workplace accommodation and transitional duties and requested that his STD claim be reopened.

The Complaint states that Mr. Dick and PBG were advised on April 2, 2009 that Manulife had approved his LTD claim, and that on April 3, 2009 PBG notified him that it was unable to accommodate him on a permanent basis and was terminating his employment. It is alleged, however, that Mr. Dick "could have been accommodated with the forklift position as [his] doctor had recommended", and that in April 2009, a grievance was filed.

In conclusion, the Complaint states as follows:

> I believe that [PBG] discriminated against me in my employment on the basis of my disability (chronic back problems) and that the discrimination was not based upon bona fide and reasonable requirements or qualifications for the employment or occupation, contrary to Section 14 of *The Human Rights Code*. I further believe that [PBG] failed to reasonably accommodate my special needs that are based on my disability, contrary to Section 14 of *The Human Rights Code*.

As mentioned in the Complaint, on April 7, 2009, or approximately one month before Mr. Dick filed the Complaint, a grievance was filed by his Union, United Food and Commercial Workers Union, Local 832 (the "Union") on his behalf (the "Grievance"). The text of the Grievance, as revised on April 24, 2009 (Exhibit 4B), reads as follows:

> **APPLICANT'S STATEMENT:**
>
> I have a grievance under the terms and conditions of the Collective Bargaining Agreement in that I have been unjustly terminated from my employment and failure to accommodate as per the Human Rights Code.
>
> This is a violation of the Collective Agreement as a whole, and Section 80(2) of the *Labour Relations Act*, for the Province of Manitoba.
>
> **REQUEST:**
>
> I request that I be immediately reinstated to my employment, and that this termination be rescinded and removed from my personnel file immediately. I further request to be made whole any lost monies (plus interest), benefits, and seniority as a result of this unjust action and any other remedy applicable in the circumstances.

By letter dated March 2, 2010 (Exhibit 1C), counsel for PBG responded to the Complaint. Counsel prefaced that response by recording PBG's position that the Complaint should be held in abeyance pending the outcome of the arbitration hearing which was to be heard later that month, stating as follows:

> Further to your letter dated February 16, 2010, please note that the arbitration hearing into Mr. Glenn Dick's grievances against his former employer, The Pepsi Bottling Group (Canada), Co ("PBG") will take place March 16 and 17, 2010. It is PBG's position that the arbitration hearing addresses the same issues as Mr. Dick's complaint to the Manitoba Human Rights Commission . . . and that it is an abuse of process for Mr. Dick to pursue this matter in two different forums and that the Commission ought to hold the matter in abeyance pending the outcome of the arbitration. However, as you have insisted that the matter proceed now, we are responding to the complaint on behalf of PBG.

On October 7, 2011, I was designated by the Minister of Justice under clauses 32(1) and (2) of the *Code*, as a Board of Adjudication, to hear and decide this Complaint.

In the meantime, the Grievance proceeded to a hearing before Arbitrator Diane E. Jones, Q.C. PBG and the Union were both represented by counsel at that hearing. Nine witnesses were called to testify, four by PBG and five by the Union, including Mr. Dick. On December 15, 2011, Arbitrator Jones released an 89 page decision (Exhibit 6) in which she concluded that PBG had met its duty to accommodate Mr. Dick to the point of undue hardship, upheld the termination of his employment, and dismissed the Grievance (the "Arbitration Award").

No application was filed for judicial review of the Arbitration Award.

On February 16, 2012, the time period for seeking judicial review having expired, counsel for PBG wrote to the Commission to seek its consent to a joint application to have the matter dismissed on the basis that a decision on the relevant issues had been made.

By letter dated March 7, 2012 (Exhibit 5), counsel for the Commission

responded that the Commission was prepared to consent to a motion to dismiss the Complaint prior to its proceeding to an adjudication hearing.

By letter dated March 21, 2012, counsel for PBG submitted a formal Motion requesting that the Complaint be dismissed as a result of the Arbitration Award. In that letter, counsel referred to the decision of the Supreme Court of Canada in *Figliola* as setting out "the principles of *res judicata*, issue estoppel and collateral attack" which, it was stated, "are all applicable to our Motion", and concluded:

> We submit that the facts and issues before Arbitrator Jones Q.C. and those before you are the same and they have been appropriately dealt with and it would be an abuse of process for you to hear Mr. Dick's Complaint. Mr. Dick has clearly had full opportunity to have his grievances heard with the assistance of his Union and legal counsel and he should not be given another opportunity to relitigate on the same facts and issues.

A conference call was convened on June 12, 2012 with Mr. Dick, counsel for PBG and counsel for the Commission. At that time, Mr. Dick stated that he was not prepared to consent to PBG's Motion to dismiss, and wished to try to retain a lawyer to represent him. Counsel for PBG noted that the issue on the Motion was a very narrow legal issue relating to jurisdiction, and it was agreed that the Motion would proceed separately, on a preliminary basis.

During a second conference call, on June 28, 2012, Mr. Dick advised that he would not be retaining a lawyer to represent him in connection with PBG's Motion, and further confirmed that he was not prepared to consent to PBG's Motion. The Motion was therefore set to be heard on July 31, 2012, by agreement of the parties. The parties referred to certain documents which they expected to introduce by consent at the beginning of the hearing. It was agreed that the parties would provide each other with copies of such documents for their review and approval by July 6, 2012, and that no affidavit or oral evidence would be introduced at the hearing of the Motion.

The hearing of PBG's Motion to dismiss proceeded as scheduled in Winnipeg. Several Exhibits were filed at the commencement of the hearing by agreement of the parties, including the Complaint (Ex. 1B), PBG's response to the

Complaint (Ex. 1C), the Grievance (Exs. 4A and B) and the Arbitration Award (Ex. 6). Mr. Dick sought to file certain other documents which he had provided to the other parties, but counsel for PBG objected to their being filed and, by agreement, those documents were marked as Exhibits for Identification and the hearing continued. As previously agreed, no Affidavit or oral evidence was introduced at the hearing of the Motion.

Positions of the Parties

PBG

Counsel for PBG submitted that the termination of Mr. Dick's employment, including allegations of unlawful discrimination and failure to accommodate, were grieved. Mr. Dick was represented by the Union throughout the grievance and arbitration proceedings, and had full benefit of all available legal arguments and remedies. Numerous witnesses were called by both PBG and the Union at the arbitration hearing. Mr. Dick was himself a witness and evidence was presented on his behalf. The Union argued that Mr. Dick was not accommodated to the point of undue hardship and that PBG violated the *Code*. After a careful review of the evidence, the Arbitrator determined that PBG's actions were in good faith and that PBG had met the duty to accommodate Mr. Dick to the point of undue hardship. Due to the severity and permanence of Mr. Dick's physical restrictions, no suitable work could be found. The Arbitration Award was not appealed in any way and was final.

It was PBG's position that the facts and issues which were before the Arbitrator are the same as those which are raised in the Complaint. There is no doubt that the Arbitrator had jurisdiction to fully determine those issues, including the duty to accommodate to the point of undue hardship. The duty to accommodate was mentioned in the Grievance and repeatedly referred to in the Arbitration Award. Mr. Dick clearly had a full opportunity to have his grievances heard, with the assistance of his Union and legal counsel. The issues were appropriately dealt with and decided by the Arbitrator in favour of PBG. What Mr. Dick is attempting to do is to have the merits of his case and the Arbitration Award reconsidered. The time and place for that,

however, have passed.

On behalf of PBG, it was submitted that the decision of the Supreme Court of Canada in *Figliola* has clarified that parties should not be allowed to relitigate a matter where a final decision has been rendered in another forum. Relitigating the issue of whether PBG met its duty to accommodate Mr. Dick to the point of undue hardship would violate important legal principles including *res judicata*, issue estoppel and collateral attack. It would also be an abuse of process. To allow Mr. Dick to relitigate the issues would undermine the confidence and integrity of the judicial process, and would not serve the administration of justice. Another hearing would result in all witnesses being called again to testify, and would be disruptive and costly. It is in the public interest that the finality of the Arbitration Award be relied upon.

PBG's counsel referred to two decisions where Ontario's Human Rights Tribunal, applying *Figliola*, refused to allow a complainant to proceed with an application or part of an application on the basis that the allegations had previously been appropriately dealt with in arbitration proceedings. (*Gomez* v. *Sobeys Milton Retail Support Centre*, 2011 HRTO 2297 ("*Gomez*") and *Paterno* v. *The Salvation Army, Centre of Hope*, 2011 HRTO 2298 ("*Paterno*").

Counsel further noted that the Commission has consented to PBG's Motion to dismiss. It was submitted that the law on this issue is clear: parties do not have the right to have their claims relitigated in a second forum. The parties have received a decision on Mr. Dick's complaint of discrimination with respect to the termination of his employment and the duty to accommodate, and there is no point in a human rights adjudicator convening another hearing on the same issues.

In response to a question from the Adjudicator regarding the differences in the legislation at issue in *Figliola* and the Manitoba *Code*, counsel for PBG submitted that although the statutory provisions are important, the common law principles are the same and should be applied. Those principles are well-accepted in common law, and a statutory provision to dismiss is not required. Counsel further pointed to the fact that the Commission has consented to PBG's Motion to dismiss the Complaint based on the

common law principles, and submitted that the Commission's consent ought to be persuasive and determinative.

The Commission

Counsel for the Commission confirmed that the Commission has consented to PBG's application to have the Complaint dismissed prior to its proceeding to an adjudication hearing. Counsel advised that the Commission relies on much of the argument made by PBG's counsel, as well as a few additional points which, in the Commission's view, are important to consider.

Counsel referred to the role of the Commission, noting that it is a party to the adjudication and has carriage of the Complaint. While the Commission presents the Complaint at the adjudication, it is not acting for the Complainant per se. Rather, its role is to represent the public interest. In consenting to the Motion to dismiss, the Commission must consider the public interest in the issue arising from the Motion. The Commission is not, at this stage, speaking to the merits or substantive aspects of the Complaint.

Counsel for the Commission submitted that an adjudicator has jurisdiction under section 42 of the *Code* to deal with any question that must be decided in completing the adjudication. It is therefore within the adjudicator's exclusive jurisdiction to determine the issues that arise from PBG's Motion.

Commission counsel acknowledged that there are specific provisions in the British Columbia and Ontario statutes dealing with a tribunal's ability to dismiss a complaint prior to adjudication, but that no such provision is found in Manitoba's *Code*. When considering PBG's application, the Commission applied a broad interpretation of the *Code*, with reference to the common law and the Supreme Court's direction in *Figliola* with respect to duplicative proceedings, abuse of process, collateral attack and issue estoppel. Counsel submitted that I must similarly determine on this Motion whether Mr. Dick's claim has been appropriately dealt with by another adjudicative body.

Counsel noted that the Complaint is a claim under section 14 of the *Code*, of discrimination and failure to accommodate. The law with respect to the duty to accommodate requires an analysis of whether there has been accommodation to the point of undue hardship. In the Commission's submission, the Arbitrator appropriately dealt with these issues and satisfied all of the requirements in *Figliola*. In this regard, counsel noted that the human rights issue was specifically plead in the Grievance, that the Arbitrator had jurisdiction to deal with it and did so; that the same issues and the same tests would be before me as were before the Arbitrator, and the evidence would be the same or similar; and that Mr. Dick or his privy had the opportunity to know the case to be met and to meet it, that he was represented by and worked with the Union to present his case.

Commission counsel stated that the Commission recognizes that Mr. Dick may wish that his case had been presented in another fashion, but that the parties should not be required to proceed to a hearing on that reason alone. She argued that *Figliola* is binding, and that the overriding principles of fundamental justice and fairness require that the Complaint be dismissed.

Counsel pointed out that PBG had requested throughout that the process under the *Code* be held in abeyance pending the outcome of the arbitration. Taking a cautious approach with respect to concurrent jurisdiction, the Commission was not prepared to hold the matter in abeyance and proceeded with its investigation under the *Code*. That investigation resulted in a determination that there was enough evidence of a contravention of the *Code* that it should be referred to adjudication. Since *Figliola*, however, the Commission has had to take a further look at duplicative or concurrent proceedings, and with respect to these proceedings, felt bound by *Figliola* to consent to PBG's Motion.

Counsel also noted that when determining whether a complaint is to be referred for adjudication pursuant to section 29(3) of the *Code*, the Commission must consider whether such further proceedings would further the objectives of the *Code* or assist the Commission in discharging its responsibilities under the *Code*. Counsel

0noted that things have changed since the Arbitration Award; the issue of discrimination has been dealt with, and it would not assist the Commission in the discharge of its responsibilities to relitigate the issues at another hearing.

In conclusion, it was submitted that to proceed to adjudication would result in an abuse of process and essentially the relitigation of the same issues. There were other avenues available to Mr. Dick if he disagreed with the Arbitration Award. As he has already obtained a decision in the arbitration proceedings, it is no longer in the public interest to attempt to establish his Complaint in another hearing. The Commission therefore asked that the Complaint be dismissed without holding a hearing.

Mr. Dick

In his submission, Mr. Dick argued that the Complaint should proceed to a hearing because the Union never helped him, even though it should have done so. Mr. Dick argued that there were documents and earlier grievances which should have been brought before the Arbitrator. He argued that reports and testimony which were relied on were contradictory.

He also suggested that there were significant errors in the Arbitration Award. The biggest error, he said, was that the Arbitration Award was based on a job description which he signed under duress, and which was not his job.

Mr. Dick stated that he had always said that he did not want to consent to this matter proceeding as it has. He could not understand why the Union had not advanced or was not advancing his case through the human rights process under the *Code*.

Mr. Dick did not make any submissions about the application of *Figliola* or any of the common law doctrines referred to by PBG and the Commission.

Reply by PBG

In reply, counsel for PBG stated that matters which Mr. Dick referred to in his submission, such as the issue of duress, were all discussed at the arbitration

hearing and dealt with in the Arbitration Award. Mr. Dick referred to contradictory reports, but these were examined and referred to by the Arbitrator in the Arbitration Award. The Arbitrator went through each position and the tasks within each position, and ultimately concluded that the risk of injury to Mr. Dick was too high. This was very much at the crux of the Arbitration Award.

Mr. Dick is clearly unhappy with the representation he received from the Union. However, the issues were all litigated, and there is nothing new for the human rights adjudicator to consider. The decision of the Arbitrator is final and should stand.

Analysis and Decision

As previously stated, the issue on this Motion is whether, in the circumstances of this case, the Complaint must or should be dismissed without a hearing on the basis that the issues have already been decided.

The submissions on behalf of PBG and the Commission focussed in particular on the decision of the Supreme Court of Canada in *Figliola*. It was argued that the Arbitrator has already appropriately dealt with the issues which are raised in the Complaint, that all of the requirements in *Figliola* have been met, and that PBG's Motion must therefore be allowed and the Complaint dismissed.

I am not persuaded that *Figliola* has direct application to this case or is itself determinative of the question on this Motion to dismiss. Rather, in my view, the response to PBG's Motion falls to be determined through the application of the common law doctrines, and in particular, of issue estoppel and/or abuse of process. Based on the application of those doctrines, I am satisfied that in the circumstances of this case, PBG's Motion ought to be allowed and the Complaint dismissed. My reasons are as follows.

Figliola

In *Figliola*, the Court dealt with the interpretation and application of section 27(1)(f) of British Columbia's *Human Rights Code* (the "*B.C. Code*"). That section reads as follows:

> 27(1) A member or panel may, at any time after a complaint is filed and with or without a hearing, dismiss all or part of the complaint if that member or panel determines that any of the following apply:
>
> . . .
>
> (f) the substance of the complaint or that part of the complaint has been *appropriately dealt with* in another proceeding; . . . .
>
> (Emphasis added)

The issue in *Figliola* was identified as follows, at paragraph 2 of the decision:

> In British Columbia, there is legislation giving the Human Rights Tribunal a discretion to refuse to hear a complaint if the substance of that complaint has already been appropriately dealt with in another proceeding. The issue in this appeal is how that discretion ought to be exercised when another tribunal with concurrent human rights jurisdiction has disposed of the complaint.

In *Figliola*, complainants who suffered from chronic pain had sought compensation from British Columbia's Workers' Compensation Board (WCB). Pursuant to the WCB's chronic pain policy, they received a fixed amount of compensation. They appealed to the WCB's Review Division, arguing that a policy which set a fixed award for chronic pain was patently unreasonable, unconstitutional and discriminatory on the grounds of disability under the *B.C. Code*. The Review Officer accepted that he had jurisdiction over the human rights complaint and concluded that the WCB's chronic pain policy was not contrary to the *B.C. Code* and therefore not discriminatory.

Instead of challenging that decision through judicial review, the complainants filed new complaints with the Human Rights Tribunal, repeating the same arguments they had made before the WCB's Review Division. The WCB then brought a motion asking the Tribunal to dismiss the new complaints, arguing in part that under section 27(1)(f) of the *B.C. Code*, the complaints had already been "appropriately dealt with" by the Review Division.

The Human Rights Tribunal rejected the WCB's argument and dismissed its motion. The Tribunal concluded that the substance of the complaints had not been

appropriately dealt with in the review process, that the issue raised was an appropriate question for the Tribunal to consider, and that the parties to the complaints should receive the benefit of a full Tribunal hearing.

The decision of the Human Rights Tribunal was ultimately set aside by the Supreme Court of Canada. The Court unanimously concluded that the Tribunal's decision was patently unreasonable and the appeal should be allowed. The Court was split, however, in its interpretation of the principles underlying section 27(1)(f) of the *B.C. Code*, and of the discretion conferred by that section.

Writing for the majority (5:4) in *Figliola*, Abella J. stated that section 27(1)(f) is the "statutory reflection of the collective principles underlying [the] doctrines" of issue estoppel, collateral attack and abuse of process, doctrines which are "used by the common law as vehicles to transport and deliver to the litigation process principles of finality, the avoidance of multiplicity of proceedings, and protection for the integrity of the administration of justice, all in the name of fairness." (para. 25)

Justice Abella summarized the collective underlying principles of those common law doctrines as follows, at paragraph 34:

> - It is in the interests of the public and the parties that the finality of a decision can be relied on . . . .
> - Respect for the finality of a judicial or administrative decision increases fairness and the integrity of the courts, administrative tribunals and the administration of justice; on the other hand, relitigation of issues that have been previously decided in an appropriate forum may undermine confidence in this fairness and integrity by creating inconsistent results and unnecessarily duplicative proceedings . . . .
> - The method of challenging the validity or correctness of a judicial or administrative decision should be through the appeal or judicial review mechanisms that are intended by the legislature . . . .
> - Parties should not circumvent the appropriate review mechanism by using other forums to challenge a judicial or administrative decision . . . .
> - Avoiding unnecessary relitigation avoids an unnecessary

> expenditure of resources . . . .

Justice Abella determined that section 27(1)(f) of the *B.C. Code* embraces those underlying principles, but does not codify the doctrines themselves, stating as follows, at paragraph 36:

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

She then set out three questions or factors which the Tribunal should consider (and others it should not consider) when applying section 27(1)(f) of the *B.C. Code* as follows, at paragraphs 37 to 38:

> Relying on these underlying principles leads to the Tribunal asking itself whether there was concurrent jurisdiction to decide human rights issues; whether the previously decided legal issue was essentially the same as what is being complained of to the Tribunal; and whether there was an opportunity for the complainants or their privies to know the case to be met and have the chance to meet it, regardless of how closely the previous process procedurally mirrored the one the Tribunal prefers or uses itself. All of these questions go to determining whether the substance of a complaint has been "appropriately dealt with". At the end of the day, it is really a question of whether it makes sense to expend public and private resources on the relitigation of what is essentially the same dispute.
>
> What I do *not* see s. 27(1)(f) as representing, is a statutory invitation either to "judicially review" another tribunal's decision, or to reconsider a legitimately decided issue in order to explore whether it might yield a different outcome. . . . The procedural or substantive correctness of the previous proceeding is not meant to be bait for another tribunal with a concurrent mandate.

Justice Abella concluded that the Tribunal's discretion under section 27(1)(f) was "limited", and that the legislature did not intend in that section to give the Tribunal a "wide berth" to decide whether or not to dismiss a complaint. (paras. 39-40)

She further differentiated between the application of the common law doctrines and the application of the principles underlying those doctrines, stating as follows, at paragraph 44:

> . . . [Section] 27(1)(f) does not call for the technical application of any of the common law doctrines - issue estoppel, collateral attack or abuse of process - it calls instead for an approach that applies their combined principles.

Turning to how the Tribunal had exercised its discretion in that case, she stated, at paragraph 46:

> . . . . Because I see s. 27(1)(f) as reflecting the principles of the common law doctrines rather than the codification of their technical tenets, I find the Tribunal's strict adherence to the application of issue estoppel to be an overly formalistic interpretation of the section, particularly of the phrase "appropriately dealt with".

Justice Abella went on to conclude that the Tribunal had based its decision to proceed with the complaints and have them relitigated on predominantly irrelevant factors, including whether the particular requirements of issue estoppel had been met, and ignored its true mandate under section 27(1)(f).

Writing for the minority, Cromwell J. viewed the common law finality doctrines "as being concerned with striking an appropriate balance between the important goals of finality and fairness, more broadly considered", and section 27(1)(f) as conferring, in very broad language, a flexible discretion on the Tribunal to enable it to achieve that balance. In his view, both the common law, and in particular section 27(1)(f) of the *B.C. Code*, were intended "to achieve the necessary balance between finality and fairness through the exercise of discretion." (para. 58)

Justice Cromwell would therefore have held that the Tribunal had a broader scope of discretion when applying section 27(1)(f). He went on to conclude,

nevertheless, that the Tribunal had erred in several respects in the exercise of that discretion. He found that the Tribunal had, among other things, failed to consider whether the "substance" of the complaint had been addressed, thus failing to take that statutory requirement into account, and failed to consider the fundamental fairness or otherwise of the earlier proceeding, all of which led the Tribunal "to give no weight at all to the interests of finality and to largely focus instead on irrelevant considerations of whether the strict elements of issue estoppel were present." (para. 97) As indicated above, at the end of the day, the minority therefore agreed with the majority's conclusion that the Tribunal's decision not to dismiss the complaint under section 27(1)(f) was patently unreasonable.

Gomez and *Paterno*

In its submission on this Motion, PBG also relied on two decisions of the Ontario Human Rights Tribunal which applied *Figliola*: *Gomez* and *Paterno*. Those two decisions, both of which were issued by Adjudicator David A. Wright on December 22, 2011, involved the interpretation of section 45.1 of Ontario's *Human Rights Code* (the "*Ontario Code*"). The wording of that section was nearly identical to that of section 27(1)(f) of the *B.C. Code*. Thus, as with section 27(1)(f), section 45.1 empowered the Tribunal to dismiss an application, in whole or in part, if the Tribunal was of the opinion that another proceeding had "appropriately dealt with the substance of the application".

In *Gomez* and *Paterno*, Adjudicator Wright concluded that the Court's reasoning in *Figliola* applied equally to the interpretation and application of section 45.1 of the *Ontario Code*. In *Gomez*, Adjudicator Wright went on to state, at paragraph 4:

> . . . . *Figliola* instructs this Tribunal not to consider the procedural or substantive correctness of the other proceeding or decision when deciding whether the application or part of the application can proceed. If the reasons in the other decision dispose of the human rights issues before the Tribunal, the application or part of the application must be dismissed on the basis that it was appropriately dealt with in the other proceeding.

Application of *Figliola*

Figliola involved the interpretation and application of section 27(1)(f) of the *B.C. Code*. There is no similar or equivalent provision to that section (or Ontario's section 45.1) in Manitoba's *Code*. Obviously, neither of those sections has any application to this proceeding.

Counsel for PBG has argued, however, that *Figliola* has clarified that parties should not be allowed to relitigate a matter where a final decision has been rendered in another forum; that the common law principles are the same and should be applied regardless of whether there is a statutory provision to dismiss. It was submitted, therefore, that I must similarly determine whether the issues which are raised in the Complaint have been appropriately dealt with.

I have some difficulty with this submission. I am not satisfied, given the absence of an equivalent provision to section 27(1)(f) in the *Code*, that *Figliola* has direct application to this proceeding or that the applicable test is whether the issues have been "appropriately dealt with".

The test of whether the substance of a matter has been "appropriately dealt with" was expressly set out in the statutory provision which was at issue in *Figliola*. Without such an express statutory provision, I am not convinced that that particular standard or test can be said to apply under the *Code*, or in other words, that an adjudicator under the *Code* has the authority to dismiss a complaint without a hearing on the basis that the issues or substance of the complaint have been "appropriately dealt with".

PBG refers to and is apparently relying on the "common law principles" which are identified in *Figliola*, arguing that they are the same and should be applied regardless of whether there is a statutory provision to dismiss. In my view, this submission confuses or equates the application of the *principles underlying the doctrines* of issue estoppel, collateral attack and abuse of process with the application of the *doctrines* of issue estoppel, collateral attack and abuse of process.

Yet in *Figliola*, the Supreme Court expressly distinguished between the application of the principles underlying the common law doctrines and the application of those doctrines themselves. Both the majority and the minority thus concluded that while section 27(1)(f) reflected the collective principles underlying issue estoppel and the other common law doctrines, it did not codify those doctrines. They also both went on to conclude that the Tribunal had erred in focusing on whether the strict elements of the doctrine of issue estoppel had been met when applying section 27(1)(f).

In my view, in the absence of an express statutory provision to dismiss, the Motion to dismiss the Complaint in this case must be based on and satisfy the requirements of the common law doctrines of *res judicata* (issue estoppel), collateral attack and abuse of process, not simply the principles underlying those doctrines.

The doctrines of *res judicata* (issue estoppel), collateral attack and abuse of process consist of a long-established and complex body of common law rules. In *Figliola*, the Court determined that the Tribunal ought not to have considered the strict requirements of those doctrines in applying section 27(1)(f). I do not read the decision in *Figliola* as directing that, in the absence of a statutory provision to dismiss, the basic requirements of the common law doctrines no longer apply and need no longer be considered or satisfied, or as establishing a separate “finality” doctrine or independent test to preclude relitigation.

It is well established that the doctrines of issue estoppel, collateral attack and abuse of process apply to judicial or quasi-judicial decisions of administrative officials and tribunals. An adjudicator under the *Code* is the master of his or her own process, except to the extent that the legislature has withdrawn this power, and has an obligation to ensure that that process is not abused.

As noted by the Commission, section 42 of the *Code* expressly provides that subject to the other provisions of the Code, “every adjudicator has exclusive jurisdiction and authority to determine any question of fact, law, or mixed fact and law that must be decided in completing the adjudication and in rendering a final decision respecting the complaint.”

While section 42 is stated to be subject to the other provisions of the *Code*, it was not suggested that there is, and I have not identified, any provision in the *Code* which would prevent an adjudicator from dismissing a complaint by way of preliminary motion on the grounds of issue estoppel, abuse of process, or any other common law "finality" doctrine, assuming of course that there are valid grounds for doing so.

Issue Estoppel

The test for issue estoppel, as outlined in *Danyluk* v. *Ainsworth Technologies Inc.*, [2001] 2 S.C.R. 460, 2001 SCC 44, consists of a two-step analysis. The first step is to determine whether the three requirements or preconditions to the operation of issue estoppel have been established. Those requirements, which were set out by the Supreme Court in *Angle* v. *Minister of National Revenue*, [1975] 2 S.C.R. 248, at page 254, are:

> (1) that the same question has been decided;
>
> (2) that the judicial decision which is said to create the estoppel was final; and
>
> (3) that the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised or their privies.

If all three requirements are established, the second step is to determine whether, as a matter of discretion, issue estoppel ought to be applied. (*Danyluk*, para. 33)

(1) The Same Question

Turning to the first of the three preconditions for issue estoppel, it is clear on the face of the Grievance (Exhibit 4B) that issues of discrimination, and in particular, the duty and alleged failure to accommodate Mr. Dick in accordance with the *Code*, were squarely before the Arbitrator.

A review of the Arbitration Award indicates that a significant amount of evidence was adduced at the hearing with respect to Mr. Dick's injuries and absences, and PBG's efforts to accommodate him since at least 2006. The allegations in the Complaint relate to the same period of time, and in particular, PBG's efforts to

accommodate Mr. Dick from 2006 onwards.

The summary of the submissions of the parties, as set out in the Arbitration Award, further indicates that legal issues relating to discrimination and PBG's duty and alleged failure to accommodate Mr. Dick's disability were argued at length, with reference to the relevant provisions of the *Code* and numerous authorities on the subject of the duty to accommodate to the point of undue hardship. The issues which were argued are the same as those which have been raised and would be before me at the hearing of the Complaint.

It is evident from the Arbitration Award, and the Arbitrator expressly confirms, that she carefully considered the evidence and issues in arriving at her decision. After reciting and commenting on the most salient points of the evidence and argument, the Arbitrator thus writes, at page 80:

> I have carefully reviewed and considered the material filed, evidence and argument presented. Mr. Dick has suffered several injuries outside of the workplace which have significantly impacted his working and personal life. The evidence I heard and examined details this as well as the Employer's efforts since September 5, 2006 when the grievor was first cleared to return to work after an absence of many months. After each injury the grievor came back to the Pepsi plant with restrictions which varied according to the injury sustained and which the Employer accommodated.

The Arbitration Award refers not only to numerous medical notes, reports and other documents dating back to 2006, but also to a report prepared by a certified athletic therapist (Mr. Hrynkow) as the result of a joint referral from the Union and PBG following the termination of Mr. Dick's employment and the filing of the Grievance and the Complaint. Based on the evidence, the Arbitrator found that PBG was well aware of its duty to accommodate to the point of undue hardship and had accommodated Mr. Dick since 2006, stating as follows, at pages 82 to 83:

> The Employer's evidence was that it had examined with members of its production management team every job and every task in every job and that it was not able to find a position, and was not able to bundle, unbundle or rebundle tasks to accommodate the grievor given his restrictions. I am

> satisfied, based on Ms. Dezan and Mr. Slama's evidence that the Employer examined every job and every task prior to the grievor's termination and did so again upon receipt of Mr. Hrynkow's analysis. The Employer is well aware of its duty to accommodate to the point of undue hardship and had since 2006 accommodated the grievor in one manner or another. There is no evidence before me to suggest that the Employer undertook these examinations pre and post termination other than in the utmost good faith and in recognition of its legal obligations.

The Arbitrator ultimately determined that PBG had not breached its duty to accommodate Mr. Dick to the point of undue hardship, stating as follows, at page 87:

> I conclude from the whole of the evidence that there is no existing position that can be modified, or bundled/rebundled tasks that can be created, to accommodate the grievor without causing undue hardship to the Employer and the termination is upheld.

With respect to this particular element, I have considered Mr. Dick's submission that there were documents and earlier grievances which should have been brought before the Arbitrator. It is not my place to evaluate whether additional evidence should have been brought before the Arbitrator. Can it be said, however, that such documents or grievances point to separate issues which form part of the Complaint but were not before the Arbitrator? In my view, it cannot.

Among other things, it is not clear what documents or grievances Mr. Dick is referring to. Mr. Dick filed seven documents as Exhibits for Identification. No other documents were referred to in particular in respect of this argument. All of the seven documents which were filed are from 2007 or 2008, and are thus within the time period that is addressed in the Arbitration Award and in respect of which the Arbitrator concluded that PBG had accommodated Mr. Dick. It would also appear from references in the Arbitration Award that most, if not all, of the seven documents were before the Arbitrator and were actually marked as Exhibits at the arbitration hearing. (see, e.g. Grievance Resolve (Final Settlement) dated May 31, 2007 (Ex. C), referred to in the Arbitration Award at p. 68; Letter dated April 20, 2007 (Exs. D and E), referred to in the Arbitration Award at pp. 7, 10 and 45)

In light of the foregoing, I am satisfied that the issues which are raised in the Complaint are the same as those which were decided by the Arbitrator, and that this requirement for issue estoppel is therefore met.

(2) A Final Judicial Decision

With respect to the second of the three preconditions of issue estoppel, there is no question that the decision of the Arbitrator was "judicial" (as opposed to administrative or legislative). (see: *Danyluk*, at para. 56)

The requirement that the decision also be "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. (see: *Figliola,* at para. 51)

Here, judicial review of the Arbitration Award was available but was not sought. The Arbitration Award is therefore final, and the second precondition to issue estoppel is satisfied.

(3) The Same Parties or their Privies

The third precondition to issue estoppel is that the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised or their privies.

In this instance, the parties are not the same. The parties to the arbitration proceedings were the Union and PBG. The parties to these proceedings are Mr. Dick, the Commission and PBG. Neither Mr. Dick nor the Commission were parties to the previous proceedings.

Were the parties, however, "privies" for the purposes of issue estoppel? Whether there is privity depends upon 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 be made on a case-by-

case basis. (see: *Danyluk*, at para. 60)

For his part, Mr. Dick was represented by the Union during the grievance and arbitration process. I recognize that although a unionized employee's interests are advanced by and through his or her union, this does not necessarily mean that the interests of the union and the employee are always the same. There is nothing before me in this case, however, which would lead me to conclude that the Union and Mr. Dick did not have sufficiently similar or common interests in respect of the Grievance or that the Union did not represent Mr. Dick's interests.

From my review of the Arbitration Award, I would note, among other things, that the case for Mr. Dick was put in at the hearing by experienced counsel. Mr. Dick attended the hearing and testified on his own behalf. Four other witnesses were also called by the Union to give evidence on his behalf. The Union argued that PBG had not accommodated Mr. Dick to the point of undue hardship, in violation of sections 9, 12 and 14 of the *Code*. Counsel specifically argued "that there are jobs that can accommodate Mr. Dick that exist currently with little modification or unbundling" (p. 67), and discussed at some length different positions and tasks which, in the Union's submission, Mr. Dick could do and why. The Union sought various remedies for Mr. Dick, including that he be reinstated and made whole through compensation for lost wages and benefits and any other remedy applicable in the circumstances. There is no indication in the Arbitration Award or other materials which are before me that Mr. Dick disagreed at that time with the positions taken by the Union or with the manner in which the matter was proceeding.

Mr. Dick has argued in these proceedings that the Union has never helped him. Mr. Dick is clearly unhappy with what has transpired and with the fact that his Grievance was not successful. That his Grievance was dismissed does not mean, however, that the Union and he did not have sufficiently similar interests, or that the Union did not help Mr. Dick or represent his interests.

In all of the circumstances, I am satisfied that Mr. Dick and the Union are in fact "privies" for the purposes of this aspect of issue estoppel.

But what about the Commission? None of the parties, in their submissions on this Motion, addressed the element of privity as it relates to the Commission and its role at an adjudication.

There is no dispute that, as submitted by Commission counsel, the Commission and a complainant are separate and distinct parties to an adjudication under the *Code*. By virtue of section 34(a) of the *Code*, the Commission has carriage of the complaint at an adjudication. Its role in adjudication proceedings is to represent the public interest.

There has been no suggestion that the Commission participated in or was somehow represented at the proceedings before the Arbitrator. Does this mean that the requirement of mutuality cannot be satisfied? In the circumstances of this case, and in particular given that the Commission has consented to the dismissal of the Complaint, I do not consider it necessary to address this question.

In my view, given its consent to the Motion, the Commission has effectively acknowledged that it is satisfied that the issues underpinning the Complaint have been addressed, and that no outstanding issues remain as between it and the other parties to the adjudication. In other words, the Commission has indicated that it has no further interest in, and no intention of pursuing, the adjudication. It has submitted, moreover, that it is in the public interest that the proceedings be brought to an end. In these circumstances, I am of the view that whether the Commission (or a privy of the Commission) was a party to the previous proceedings or not is irrelevant for the purposes of determining whether issue estoppel applies.

Based on all of the foregoing, I am satisfied that the three criteria or preconditions to the operation of issue estoppel are met in the circumstances of this case.

Discretion

Having concluded that the necessary requirements for the application of issue estoppel are satisfied, I must go on to the second step of the test for issue

estoppel and consider whether I ought to exercise my discretion to refuse to give effect to issue estoppel in the circumstances of this case.

The appropriate approach or scope of discretion, and factors which may or may not properly be considered in the exercise of such discretion, have been considered by the Supreme Court of Canada in several recent or relatively recent decisions.

In *Danyluk*, the Supreme Court observed that the list of factors for and against the exercise of discretion is open, and that the objective of those factors is "to ensure that the operation of issue estoppel promotes the orderly administration of justice but not at the cost of real injustice in the particular case". (para. 67) Seven factors which the Court identified as being relevant in that case were the wording of the statute from which the power to issue the administrative order derived, the purpose of the legislation, the availability of an appeal, the safeguards available to the parties in the administrative procedure, the expertise of the administrative decision-maker, the circumstances giving rise to the prior administrative proceedings and the potential injustice. (paras. 68-80)

As indicated previously, in *Figliola*, the majority of the Court emphasized 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" (para. 36) and found that the Tribunal had a limited discretion under section 27(1)(f) of the *B.C. Code*. (para. 39) Relying on the underlying principles of the common law doctrines, the majority determined that there were three factors which should be considered when exercising discretion under section 27(1)(f), namely whether the previous decision-maker had concurrent authority to decide the matter, whether the issue was essentially the same and whether the parties (or their privies) in the earlier proceeding had an opportunity to know the case and to meet it. (para. 37)

The minority in *Figliola*, on the other hand, focused on striking an appropriate balance between finality and fairness, and concluded that both the common law, and section 27(1)(f) in particular, are intended to achieve that balance through the

exercise of discretion. The minority was of the view that section 27(1)(f) conferred a much broader scope of discretion on the Tribunal, to enable it to achieve the appropriate balance between finality and fairness.

Subsequent to the hearing of the Motion in this case, the Supreme Court of Canada released its decision in *Penner* v. *Niagara (Regional Police Services Board)*, 2013 SCC 19, [2013] 2 S.C.R. 125 ("*Penner*"), which involved the application of the doctrine of issue estoppel. On the appeal to that Court, it was noted that the appellant did not seriously challenge a finding that the preconditions of that doctrine had been established. The case focused, therefore, on the discretionary aspect of the application of issue estoppel.

In *Penner*, Justices Cromwell and Karakatsanis, writing for the majority of the Court (4:3), stated that even if the requirements of issue estoppel are present, the court retains discretion to not apply issue estoppel "when its application would work an injustice" (para. 29), and that the doctrine of issue estoppel "calls for a case-by-case review of the circumstances to determine whether its application would be unfair or unjust." (para. 35)

The majority determined that the legal framework governing the exercise of the discretion not to apply issue estoppel is set out in *Danyluk*, and has not been overtaken by the Court's subsequent jurisprudence. (para. 31) They noted that the list of factors which were recognized in *Danyluk* as being relevant to this exercise of discretion is not exhaustive, that it "is neither a checklist nor an invitation to engage in a mechanical analysis." (para. 38) The majority identified two main ways in which injustice or unfairness might arise, stating as follows, at paragraph 39:

> Broadly speaking, the factors identified in the jurisprudence illustrate that unfairness may arise in two main ways which overlap and are not mutually exclusive. First, the unfairness of applying issue estoppel may arise from the unfairness of the prior proceedings. Second, even where the prior proceedings were conducted fairly and properly having regard to their purposes, it may nonetheless be unfair to use the results of that process to preclude the subsequent claim.

Writing for the minority, in dissent, Justices LeBel and Abella found that the applicable approach to issue estoppel had most recently been articulated in *Figliola* and that that was the precedent which should govern the application of issue estoppel in that case. (para. 75) The minority thus emphasized finality, concluding that the residual discretion not to apply issue estoppel should be governed by the interests of fairness in preserving the finality of litigation. (para. 110)

Application of Discretion

On the facts of this case, and in the absence of argument, I do not consider it necessary or appropriate to attempt to compare or reconcile differences in the approaches or factors which are referred to in the above cases, and do not intend to do so. Applying the broader approach and more expansive view of the relevant factors, as reflected in *Danyluk* and the decision of the majority in *Penner*, I am satisfied that there is no compelling reason to exercise my discretion to refuse to apply the doctrine of issue estoppel in this case.

It is clear, in my view, that in arguing that the Complaint ought to proceed to hearing, Mr. Dick is essentially seeking to relitigate the issues that were decided by the Arbitrator, in the hopes of obtaining a more favourable result. That is precisely what the “finality” doctrines are intended to prevent.

There is no evidence to indicate that the arbitration proceedings were unfair or were conducted unfairly. Mr. Dick had the opportunity to know the case to be met at the arbitration and to meet it. Having carefully reviewed and considered the material filed, and the evidence and argument before me, I am not satisfied that dismissing the Complaint based on the Arbitration Award would be unfair or result in injustice.

Mr. Dick has argued that the real issues were not fully or properly addressed by the Arbitrator. It is not my place to evaluate whether the Arbitrator fully or properly addressed the issues before her, whether she was correct in the determinations she made, or whether they reflect the evidence or a proper interpretation of the *Code*. The Arbitrator had jurisdiction to decide the dispute between the parties

and did so. Any challenge to her decision would have to be through the courts, by way of judicial review which, as previously indicated, was not sought in this case.

Mr. Dick has also argued that there were documents and grievances which should have been brought before the Arbitrator. As indicated above, it is not within my purview to evaluate whether there is additional evidence which should have been before the Arbitrator. Further, or in any event, it is not clear what documents and grievances Mr. Dick is referring to in this regard or whether they were or were not actually before the Arbitrator.

In addition, Mr. Dick has argued that reports and testimony which were relied on were contradictory. It is not entirely clear what is meant by this argument. It was up to the Arbitrator to interpret and weigh the evidence which was before her. As stated previously, it is not my place to evaluate whether the Arbitrator was correct in her interpretations and determinations.

Mr. Dick has further argued that there were significant errors in the Arbitration Award, stating in particular that the decision was based on a job description dated April 20, 2007 which he signed under duress and was not his job. Again, this is not a matter which is properly before me. I would observe, however, that a review of the Arbitration Award discloses that the Arbitrator was well aware that it was Mr. Dick's position that that job description was signed "under duress". (see e.g., pp. 43-45) It also reveals that the Arbitrator did not simply base her decision on that job description. Rather, after considering "the whole of the evidence", she concluded that there was "*no* existing position that [could] be modified, or bundled/rebundled tasks that [could] be created" to accommodate Mr. Dick without causing undue hardship to PBG. (p. 87)

Mr. Dick has argued in these proceedings that the Union has never helped him. As stated previously, there is no indication in the Arbitration Award or other materials which are before me that Mr. Dick disagreed with the positions taken by the Union prior to or at the time of the arbitration hearing, or with how the matter was proceeding. There is no evidence that Mr. Dick's opportunity to advance his interests was fettered by the Union's handling of his case, and no indication that he was denied

the opportunity to provide evidence or make arguments on his own behalf.

If Mr. Dick felt that he had a complaint against the Union with respect to how it represented him and the manner in which it proceeded, including the fact that it did not seek judicial review (and there is nothing before me to suggest that he did), his remedy would have been pursuant to the duty of fair representation provision in section 20 of *The Labour Relations Act*. It is not to pursue the Complaint under the *Code*.

In summary, I am not satisfied that there is anything in the circumstances of this case to indicate that the application of issue estoppel would be unfair or would work an injustice. I therefore conclude that the Complaint ought to be dismissed on the grounds of issue estoppel.

Abuse of Process

Further, or in the event that I am wrong in my conclusion with respect to the application of issue estoppel in this case, I would also conclude that the Complaint ought to be dismissed on the grounds of abuse of process.

Abuse of process is a flexible doctrine, which exists to ensure that the administration of justice is not brought into disrepute. While elements of mutuality of issues and privity are requirements of the doctrine of issue estoppel, they are not requirements of the doctrine of abuse of process. In *Toronto (City)* v. *C.U.P.E., Local 79*, [2003] 3 S.C.R. 77, Arbour J. stated, at paragraph 37, that the doctrine of abuse of process has been applied:

> . . . to preclude relitigation in circumstances where the strict requirements of issue estoppel (typically the privity/mutuality requirements) are not met, but where allowing the litigation to proceed would nonetheless violate such principles as judicial economy, consistency, finality and the integrity of the administration of justice.

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) In that regard, she made the following three observations, at paragraph 51:

> First, there can be no assumption that relitigation will yield a more accurate result than the original proceeding. Second, if the same result is reached in the subsequent proceeding, the relitigation will prove to have been a waste of judicial resources as well as an unnecessary expense for the parties and possibly an additional hardship for some witnesses. Finally, if the result in the subsequent proceeding is different from the conclusion reached in the first on the very same issue, the inconsistency, in and of itself, will undermine the credibility of the entire judicial process, thereby diminishing its authority, its credibility and its aim of finality.

Having found that relitigation carries serious detrimental effects and should be avoided unless the circumstances dictate that relitigation is in fact necessary to enhance the credibility and the effectiveness of the adjudicative process as a whole, Justice Arbour acknowledged, at paragraph 52, that:

> . . . there may be instances where relitigation will enhance, rather than impeach, the integrity of the judicial system, for example: (1) when the first proceeding is tainted by fraud or dishonesty, (2) when fresh, new evidence, previously unavailable, conclusively impeaches the original results, or (3) when fairness dictates that the original result should not be binding in the new context.

She also noted that the discretionary factors that apply to prevent the doctrine of issue estoppel from operating in an unjust or unfair way are equally available to prevent the doctrine of abuse of process from achieving a similar undesirable result. (para.53)

In this case, with reference to the examples which were identified by Justice Arbour, I note that there has been no suggestion that the arbitration was in any way tainted by fraud or dishonesty, or that there is fresh, new evidence which was previously unavailable and would conclusively impeach the original result. Further, as indicated previously, I am not satisfied that treating the Arbitration Award as binding and dismissing the Complaint on that basis would result in unfairness.

In the result, I am satisfied that allowing the Complaint to proceed to hearing in the circumstances of this case would violate the principles as judicial

economy, finality and the integrity of the administration of justice.

Conclusion

Based on the foregoing, PBG's Motion is granted. Mr. Dick's Complaint against The Pepsi Bottling Group (Canada), Co. is hereby dismissed.

Dated at the City of Winnipeg, in Manitoba, this 7th day of April, 2014.

"M. Lynne Harrison"
Adjudicator