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(Winnipeg Centre)
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COURT OF KING'S BENCH OF MANITOBA

B E T W E E N:

THE ST. AMANT NURSES LOCAL 95 OF THE MANITOBA NURSES UNION, applicant,	)	Shannon Carson Kristen Worbanski for the applicant
-and-	)	
ST. AMANT INC., respondent.	)	Sherry D. Brown for the respondent
	)	JUDGMENT DELIVERED: January 29, 2024

GREENBERG J.

INTRODUCTION

[1] The applicant seeks judicial review of a preliminary ruling of an arbitrator in a grievance by Martina Persian regarding the termination of her employment for not complying with the respondent employer's mandatory COVID-19 vaccine policy. The respondent raises preliminary issues regarding the court's jurisdiction to review the ruling. For the reasons that follow, I find that the court lacks jurisdiction to hear the application because the decision under review is not a final decision of an arbitrator. Alternatively,

the issue raised by the application is moot and I decline to exercise my jurisdiction to hear it.

BACKGROUND

[2] The respondent is a not-for-profit organization that provides services and programs for children and adults with intellectual and developmental disabilities and autism. The respondent operates a facility in the City of Winnipeg and also provides services for people living in the community. Martina Persian is a registered nurse who started working for the respondent in January 2021. The applicant is the certified bargaining agent for the nurses employed by the respondent and is party to a collective agreement with the respondent.

[3] On August 24, 2021, in the course of the COVID pandemic, Manitoba's Chief Public Health Officer announced that a public health order ("PHO") would be issued under ***The Public Health Act***, C.C.S.M. c. P210, which would require designated workers (which included nurses) to be fully immunized against COVID-19 by October 31, 2021, or submit to rapid COVID testing up to three times per week. On August 25, 2021, the respondent sent a memorandum to staff indicating that they would be introducing a mandatory vaccine policy for all staff and volunteers with exemptions only for those with a valid reason for exemption. The memorandum explained that the respondent's policy differed from the provincial mandate because of the vulnerability of the population they served, the effectiveness of the vaccine, workplace safety and health obligations, and their responsibility to ensure quality of life and barrier-free participation. An earlier memorandum sent to staff had referred to the research that showed that people with

intellectual disabilities are twice as likely as the general population to die from COVID-19 and to the evidence that there was a decrease in COVID-19 cases and deaths in healthcare workers who are vaccinated. The respondent's COVID vaccine policy added to an existing policy that required staff to be vaccinated for tetanus, measles/mumps/rubella, diphtheria, and hepatitis. The applicant asked the respondent to issue a COVID vaccine policy that allowed a rapid test alternative and indicated it would challenge a mandatory policy.

[4] On September 10, 2021, the respondent sent an email to all staff advising that the mandatory vaccine policy would come into effect on October 31, 2021. The vaccine policy did not provide a rapid test alternative. However, it allowed employees to seek exemptions based on a protected characteristic under ***The Human Rights Code***, C.C.S.M., H175.

[5] On November 1, 2021, Ms Persian's employment was terminated for failing to provide proof of vaccination.

[6] The PHO terminated on February 28, 2022.

[7] Ms Persian filed a grievance seeking reinstatement and compensation. The matter was submitted to an arbitrator, Colin Robinson. The parties asked the arbitrator to decide two preliminary issues: 1) the interpretation of the PHO regarding vaccinations, in particular, whether the PHO required employers to provide a rapid test alternative; and 2) whether the arbitrator could take judicial notice of certain facts related to COVID-19. On August 18, 2022, Arbitrator Robinson issued his decision finding that: 1) the PHO did not require a rapid test alternative but established minimum measures only; and 2) he

would not take judicial notice of the facts relating to COVID-19. The remainder of the arbitration – to determine whether the policy was unreasonable, whether reasonable accommodation was made for Ms Persian, whether dismissal was a reasonable consequence for not complying with the policy and the appropriate remedy if liability was found - was scheduled to proceed in April and May 2023. In concluding his reasons on the first issue, Arbitrator Robinson said:

> Therefore, the preliminary motion of the Union that the Employer's policy was inconsistent with the PHO and, as a result, unlawful, is dismissed. Obviously, this conclusion does not determine the final outcome of the grievance. The Employer's policy remains subject to arbitral scrutiny, and the reasonableness of the policy, and any other issues relating to the grievance will be determined based upon the evidence and submissions presented by the parties during the subsequent hearing to be scheduled.

[8] On October 26, 2022, the applicant's counsel sent a letter to Arbitrator Robinson and counsel for the respondent advising that the grievor found alternate employment shortly after her termination and did not wish to pursue the second phase of the hearing. As a result, the dates that had been set in April and May of 2023 for the continuation of the arbitration would not be needed. The letter also indicated that the applicant would be seeking judicial review of the arbitrator's preliminary ruling on the interpretation of the PHO. Respondent's counsel responded confirming that the dates could be cancelled but advising that the respondent's position was that the arbitrator's decision was not a final decision and therefore not subject to judicial review and that, in any event, the issues were moot. This application was filed in November 2022. The arbitrator's decision on judicial notice is not under review.

ISSUES

[9] The respondent raises two preliminary issues:

1. The respondent says that the court does not have jurisdiction to hear the application. They say that ***The Labour Relations Act***, C.C.S.M. c. L10, allows the court to review only final decisions of an arbitrator and the decision under review is not a final decision.
2. The respondent says that the issues raised by the application are moot because the PHO is no longer in effect, and that the court should not exercise jurisdiction to hear the matter.

[10] Assuming that I find that the court has jurisdiction to hear the application and should exercise it, the substantive issue raised by the application is whether the decision of Arbitrator Robinson interpreting the PHO is unreasonable. The applicant says that the decision is unreasonable because the PHO required employers to provide a rapid test alternative to vaccines. The applicant says that the arbitrator's decision should be quashed, and the grievance allowed.

[11] The respondent sought to have the questions of jurisdiction and mootness decided in advance of the substantive issue, but the motions court judge declined to bifurcate the issues.

WAS ARBITRATOR ROBINSON'S DECISION A FINAL DECISION?

[12] The parties agree that s. 128 of ***The Labour Relations Act*** allows judicial review of final decisions only. However, they disagree on whether the decision of Arbitrator Robinson was a final one. Section 128 reads:

Judicial review of final decision

128(2) Subject to subsection (3), a final decision of an arbitrator or arbitration board may be reviewed by a court of competent jurisdiction solely by reason that

(a) the arbitrator or arbitration board failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise the jurisdiction of the arbitrator or arbitration board; or

(b) the decision was obtained by fraud or was based on perjured evidence.

[13] In ***Tyndall v. S.M.W.L.A., Sheeters, Deckers & Cladders Section, Local 511***, [1998] 6 W.W.R. 382 (Man. C.A.); [1998] M.J. No. 74 (QL), the respondent (Tyndall) challenged the jurisdiction of an arbitration board to hear a grievance, arguing that at the time the grievance was commenced, she was not a party to a collective agreement. The board dismissed the challenge and Tyndall sought judicial review. The application judge agreed with Tyndall. On appeal, the Court of Appeal found that the application judge had erred in entertaining the application. Scott C.J.M. commented:

> 20 In my opinion, the motions court judge erred in law in dealing with the issue as and when he did. The matter should now proceed with all dispatch before the arbitration panel. If the respondent in the end is dissatisfied with the result and wishes to challenge it, an application for judicial review can then be made.
>
> 21 Although it is not strictly necessary for the decision in this case, I make one other comment. In his reasons the motions court judge, commendably, was obviously motivated by the desire to bring this troubled dispute to an end. While I totally agree with this objective, with respect, permitting the preliminary objection of the respondent to be dealt with as an isolated collateral issue was not the way to go about it. Experience teaches that there are many legitimate pragmatic reasons which, save for most exceptional circumstances, operate to discourage courts from accepting requests to become involved prior to the conclusion of administrative proceedings. Those exceptional circumstances, with respect, were not present here. Indeed, as this case illustrates, more times than not the stated goal of simplifying matters and saving time by determining a "preliminary issue" is counter-productive, and simply results in further court proceedings, delay and expense.
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> [emphasis added; references omitted]

[14] Even in the absence of a privative clause restricting judicial review to final decisions, there is abundant case law from across the country holding that, in the absence of exceptional circumstances, courts should not entertain judicial review of preliminary rulings of arbitrators. (See e.g. ***S.U.N. v. Sherbrooke Community Centre*** (1996), 144 Sask. R. 15 (C.A.); ***Toronto Transit Commission v. Amalgamated Transit Union Local Union 113***, 2020 ONSC 2642 (Div. Ct.)) The case before the court in ***Toronto Transit Commission*** was one of 11 test cases regarding the dismissal of hundreds of employees. The applicant argued that the application for judicial review of a preliminary ruling of the arbitrator in that one case was exceptional because the decision would apply to the other 10 cases and potentially be relevant to hundreds of others. Nevertheless, the court found the application premature. Corbett J., writing for the court, explained:

> [15] The fact that there are 11 test cases is not a basis to conduct judicial reviews of interlocutory decisions in any of them. The parties have agreed between themselves that interlocutory decisions made in one of the test cases will be applied in the other test cases. They need not have so agreed -- in principle, the decision of one arbitrator is not binding on another. Just because the parties have agreed not to relitigate interlocutory issues at arbitration does not mean that this court should entertain interlocutory appeals: indeed, the efficiency achieved by litigating the issue only once below will be undone, at least in part, if, instead, there are interlocutory reviews and appeals.
>
> [emphasis added]

[15] The applicant refers to the following cases. In ***Atomic Energy of Canada Limited v. Wilson***, 2013 FC 733, an adjudicator appointed under the ***Canada Labour Code***, R.S.C., c. L-2, found that the complainant had been unjustly dismissed, but adjourned the question of remedy to allow the parties to discuss the appropriate remedy. When the employer sought judicial review of the liability issue, the union argued that it was premature to hear the application because remedy had not been decided. The court

held that, although courts discourage bifurcation of proceedings, there are exceptions to that rule, and it was appropriate to proceed with the hearing in that case. A similar result occurred in ***The University of Saskatchewan v. C.U.P.E. Local 1975***, 2014 SKQB 190, where the board of arbitration found dismissal of the grievors was an excessive disciplinary measure but left it to the parties to first try to resolve the remedy issue themselves.

[16] It is of note that in both these cases, the arbitral board had made a final decision on the "liability" issue – whether the grievors had been wrongfully dismissed – but adjourned the remedy issue. In the case at bar, the arbitrator did not decide liability. He only ruled on one of the arguments being advanced by the applicant to show that the grievor's dismissal was not justified.

[17] In their brief, the applicant acknowledges that the arbitrator did not decide the following "outstanding issues":

> 1) Whether the Employer's mandatory vaccination policy was unreasonable (apart from the issue of whether it violated the PHO);
>
> 2) Whether the employer provided reasonable accommodation to the point of undue hardship to the Grievor, who had sought a religious exemption from being vaccinated, in accordance with ***The Human Rights Code***; and
>
> 3) Whether imposing discipline on the Grievor for being unvaccinated was an appropriate response by the Employer (as opposed to a non-disciplinary response such as placing her on an unpaid leave of absence).
>
> (Applicant's Motion Brief on preliminary issues, para. 8)

[18] The applicant argues that, as they are not pursuing these outstanding issues, the decision under review is a final one. They say that Arbitrator Robinson's decision is a final decision because it is dispositive of the grievance. In my view, his decision on the

PHO was his last decision but it was not a "final" one. As he said, "this conclusion does not determine the final outcome of the grievance." The fact that the applicant acknowledges that there were outstanding issues shows that the decision was clearly not dispositive. Had they pursued the outstanding issues, they may well have been successful.

[19] The fact that the outstanding issues in this case were abandoned, as opposed to adjourned, also distinguishes this case from the decisions relied upon by the applicant. The situation might be different if the union had filed a policy grievance. But the applicant acknowledges that this is an individual grievance and they cannot now turn it into a policy grievance. In Brown & Beatty, **Canadian Labour Arbitration** (5th ed.), s. 2:60, the authors state: "where there are different procedures provided by the collective agreement, it has been held that the parties may not switch back and forth from an individual to a policy grievance as the case proceeds through the grievance procedure." The applicant provided no authority to refute this proposition.

[20] The applicant says that the grievance was not in fact abandoned because, if successful in their argument regarding the effect of the PHO, they will be asking the court for a remedy for the grievor. While they are not asking for her to be re-instated, they are asking for the removal of the termination from the grievor's employment record and lost pay for seven days (from the date of the grievor's termination to the date she found alternate employment). In my view, their letter to the arbitrator made it clear that they were abandoning all remaining issues in the grievance. The letter said:

> Phase 2 of this arbitration hearing is scheduled for April 11-14 and May 1-5, 2023. The grievance issues that the Union intended to raise in phase 2 were:

> - The overall reasonableness of St. Amant's vaccination policy without a rapid testing alternative;
> - St. Amant's duty to accommodate the Grievor based on the religious objection to vaccination that she had raised, and whether it was an undue hardship to permit an unvaccinated employee who was agreeable to rapid antigen testing to attend work; and
> - Whether the Employer had just cause to terminate the Grievor's employment for just cause for not complying with its mandatory vaccination policy.
>
> We write further to the above-noted matter to advise that the Grievor has instructed that she does not wish to further pursue the phase 2 issues in the grievance. She found alternate employment shortly after her termination. In accordance with the Grievor's instructions, MNU will not be proceeding with the outstanding issues for phase 2.

[21] The applicant now says that this letter does not abandon all claims for relief. They say that they only withdrew the outstanding arguments on liability and the claim for the grievor to be re-instated. In my view, the only way to interpret the letter is that the grievor did not wish to pursue further relief of any sort. The applicant's argument is not only inconsistent with the wording of the letter, it creates a conflict in the positions they advance. On the one hand, they say that the arbitrator's decision is reviewable because it is a final one. On the other hand, they say that they did not abandon the claim for a remedy, in effect that the decision is not a final one. They say that if I agree with their interpretation of the PHO, I can either grant a remedy or refer the matter back to the arbitrator to reconsider the interpretation of the PHO and grant a remedy.

[22] In a recent decision, ***Kinnarath v. People's Party of Canada***, 2024 MBCA 2, the Manitoba Court of Appeal discussed what is meant by a "final" decision, albeit in the context of whether an appeal of the decision to that court required leave. The defendant filed an appeal against a decision dismissing its motion for summary judgment. The court

held that the decision under appeal was interlocutory and, therefore, required leave under s. 25.2(1) of ***The Court of Appeal Act***, C.C.S.M., c. C240. In quashing the appeal, Mainella J.A. said:

> [13] Section 25.2(1) of the CA Act focuses attention on whether the order appealed from finally determines substantive rights in dispute in the claim that is the subject of the litigation, as opposed to resolving a collateral matter to the merits of the dispute (see *College of Registered Nurses of Manitoba v Hancock*, 2023 MBCA 70 at para 75). The latter scenario falls within that legislative provision, while the former situation falls outside the confines of section 25.2(1). As Feldman JA explained in *1476335 Ontario Inc v Frezza*, 2021 ONCA 822: "A final order disposes of the litigation, or finally disposes of part of the litigation [citation omitted]. An interlocutory order disposes of the issue raised, most often a procedural issue, but the litigation proceeds" (at para 7).
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> . . .
>
> [17] The relevant clues as to whether an order appealed from is final or interlocutory are to be found in the wording of the order and the reasons for decision. Here, the motion judge made no evidentiary findings that would be binding at trial. He also did not decide any of the substantive rights of the parties or the issues in dispute, as framed by the action, which was open to him under the KB Rules and the modern approach discussed in *Hryniak v Mauldin*, 2014 SCC 7, if appropriate. Rather, the determination he made under r 20 was only that a genuine issue requiring a trial exists. In our view, such an order is interlocutory, not final; leave to appeal under section 25.2(1) of the CA Act is therefore required (absent one of the exceptions in section 25.2(2) arising).

[23] As Arbitrator Robinson said in his reasons, his ruling on the interpretation of the PHO did not determine the final outcome of the grievance.

[24] The applicant says that this is the union's grievance and they are entitled to decide what issues to pursue. After the grievor decided not to pursue the grievance, the applicant decided not to allocate more resources to the arbitration process but instead focused their attention on the issue of the interpretation of the PHO. They say that by seeking review of the arbitrator's decision in that regard, they are not undermining the policy against fragmenting proceedings. Rather they have chosen to proceed in a manner

that creates efficiency. The difficulty is that, while it may not have been pragmatic to pursue a grievance where the grievor has lost interest, that does not mean it is appropriate for this court to review the challenged ruling, particularly when, as I explain below, the issue is also moot.

IS THE APPLICATION MOOT?

[25] The applicant concedes that, because the PHO is no longer in effect, the respondent would be able to impose a mandatory COVID vaccine policy today. Therefore, the determination of the preliminary issue will have no effect on current practice.

[26] The leading case on mootness is ***Borowski v. Attorney General for Canada et al.***, [1989] 1 S.C.R. 342; [1989] S.C.J. No. 14 (QL). Mr. Borowski challenged the constitutionality of the provisions of the ***Criminal Code*** which criminalized non-therapeutic abortions. The challenge was unsuccessful in the trial and appeal courts. Before the appeal to the Supreme Court was heard, that court struck down the challenged ***Criminal Code*** provisions in another case, ***R. v. Morgentaler***, [1988] 1 S.C.R. 30. As a result, Mr. Borowski's appeal was moot.

[27] The court in ***Borowski*** held that a matter will be moot where there is no longer a live controversy. The court provided several examples of situations where there was no longer a live controversy, including cases where there is a challenge to a by-law or legislation that is repealed before the challenge is decided. That is the situation here.

[28] The court held that there is discretion to hear a moot matter "if the circumstances warrant" (at par. 16). In deciding not to entertain Mr. Borowski's appeal, Sopinka J. (writing for the court) said:

> 26 In my opinion, there is no longer a live controversy or concrete dispute as the substratum of Mr. Borowski's appeal has disappeared. The basis for the action was a challenge relating to the constitutionality of subss. (4), (5) and (6) of s. 251. That section of the Criminal Code having been struck down in *R. v. Morgentaler (No. 2), supra*, the raison d'être of the action has disappeared. None of the relief claimed in the statement of claim is relevant. Three of the five constitutional questions that were set explicitly concern s. 251 and are no longer applicable. The remaining two questions addressing the scope of ss. 7 and 15 Charter rights are not severable from the context of the original challenge to s. 251. These questions were only ancillary to the central issue of the alleged unconstitutionality of the abortion provisions of the Criminal Code. They were a mere step in the process of measuring the impugned provision against the Charter.
>
> [emphasis added]

[29] The court held that, in determining whether to exercise discretion to hear a moot case, a court should consider the three rationales for the mootness doctrine. The first rationale is the requirement for an adversarial context that allows the court to properly consider an issue. It may be appropriate to hear a moot case where there may be collateral consequences of a decision, as was the case in ***Vic Restaurant v. Montreal***, [1959] S.C.R. 58, where the appellant challenged a by-law that resulted in his liquor licence not being renewed. As he had sold the restaurant, he no longer needed the licence. However, because there were on-going prosecutions against him for breaching the by-law, there remained a live controversy in the issue under appeal.

[30] The second rationale for the mootness doctrine is the need to ration scarce judicial resources. A court may decide to hear a moot case where the case raises an issue of public importance or the issue would otherwise be evasive of review, as in cases that will almost always be resolved before the matter gets to court (see e.g. ***Tremblay v. Daigle***, [1989] 2 S.C.R. 530). Sopinka J. commented (at par. 36):

> … The mere fact, however, that a case raising the same point is likely to recur even frequently should not by itself be a reason for hearing an appeal which is

> moot. It is preferable to wait and determine the point in a genuine adversarial context unless the circumstances suggest that the dispute will have always disappeared before it is ultimately resolved.

[31] The third rationale underlying the mootness doctrine is the need for the court to respect its proper role in law making and to not unnecessarily intrude in the legislative function. That rationale is not at play in this case. However, concerns about an adversarial context and rationing judicial resources are. The applicant has not shown that the circumstances in this case override these two concerns. There is no issue of public importance, nor is this an issue that is evasive of review.

[32] I note that, in ***Borowski***, the court refused to decide the substantive issue even though they had heard argument on the matter. Sopinka J. explained:

> 44 The second factor to be considered is the need to promote judicial economy. Counsel for the appellant argued that an extensive record had been developed in the courts below which would be wasted if the case were not decided on the merits. Although there is some merit in this position, the same can be said for most cases that come to this Court. To give effect to this argument would emasculate the mootness doctrine which by definition applies if at any stage the foundation for the action disappears. Neither can the fact that this Court reserved on the preliminary points and heard the appeal be weighed in favour of the appellant. In the absence of a motion to quash in advance of the appeal, it was the only practical course that could be taken to prevent the possible bifurcation of the appeal. It would be anomalous if, by reserving on the mootness question and hearing the argument on the merits, the Court fettered its discretion to decide it.

[33] The applicant relies on ***Children's Aid Society of Toronto and CUPE, Local 2316 (Garrick), Re***, 2020 CarswellOnt 6849 (Ont. Arb.). In that case, the arbitrator decided to hear a grievance over whether the employer had failed to accommodate an employee when she returned to work after being injured in a car accident. The grievance related to events that had occurred four years earlier. As the employee had since returned to full time work, the employer argued that the issues were moot. The majority of the

arbitral board found that it was still important to consider the events to determine how similar situations should be dealt with in the future. As well, the question of whether there was any compensable harm was not moot. However, the board referred to similar cases where the issues were determined to be moot and acknowledged that each case turns on its own facts.

[34] In the ***Children's Aid*** case, the grievor's entitlement to damages remained to be determined. As I explained earlier, in my view, the applicant indicated a clear intent to abandon any claim for relief in their letter of October 26, 2022.

[35] The respondent referred to several cases where the court refused to hear a matter that was moot (see ***Apotex v. Aktiebolaget Hässle***, 2008 FCA 88; ***Tamil Co-operative Homes Inc. v. Arulappah***, [2000] O.J. No. 3372 (C.A.) (QL); ***Al-Turki v. R.***, 2022 ONSC 5771 (Div. Ct.)). It is clear from the cases relied upon by both parties, and by the decisions referred to in those cases, that the question of mootness is very fact specific. So, relying on precedents is of limited help.

[36] The applicant relies on the ***Children's Aid*** case for the proposition that the approach to mootness in labour arbitration cases is different than the approach in court litigation because the parties to arbitrations have an ongoing relationship and arbitrators are often dealing with systemic issues. To be sure, where there is a systemic issue, it may be appropriate to hear a moot case. But there is no ongoing systemic issue in this case. The PHO has ended, and the applicant concedes that a mandatory vaccination policy, if implemented today, would be reasonable.

[37] Moreover, to the extent that the issue of mootness is assessed differently in labour arbitration cases, the guiding policy considerations here are those that govern the doctrine in court cases. In ***York University v. C.U.P.E., Local 3903***, [2010] O.L.A.A. No. 505 (QL), relied upon by the applicant, the arbitrator suggested that it should be up to the parties to decide whether a hearing should proceed (see para. 22). But there is a difference between a situation where the parties are paying for the arbitrator and where they are asking to use public resources to decide an issue. As explained in the concurring reasons of Wakeling J.A. in ***The Alberta Teachers' Association v. Buffalo Trails Public Schools Regional Division No. 28***, 2022 ABCA 13:

> 18 Most of the time it is in the public interest to remove moot cases from the litigation stream. The judicial branch of government has finite resources and they are best expended to resolve controversies that actually affect the parties' interests and merit the expenditure of public taxpayers' funds. A court relieved of the obligation to decide a moot case is free to decide other cases. [footnotes omitted]

[38] The applicant also relies on ***Baycrest Centre for Geriatric Care v. O.P.S.E.U.***, 2005 CarswellOnt 7876, where the board of arbitration decided that a grievance regarding a work disruption was not moot because there was an outstanding policy grievance and "numerous outstanding individual grievances" (para. 11) regarding the discipline that was imposed.

[39] The applicant points to the fact that another nurse at St. Amant filed a similar grievance, which has been kept in abeyance pending the outcome of this case. The applicant says that the doctrine of issue estoppel will mean that the arbitrator in the other grievance is bound by Arbitrator Robinson's decision on the interpretation of the PHO.

They rely on this excerpt from Brown & Beatty, ***Canadian Labour Arbitration*** (5th ed., s. 2:73):

> A related doctrine of somewhat broader application, known as issue estoppel, may apply to single issues between the same parties which were the subject of a prior determination, were referred to another arbitrator who is still seized o the matter, were the subject of a previously withdrawn grievance, or were earlier determined by a court or other adjudicative tribunal. … For example, a finding that a particular agreement amounted to waiver has been held to fall within the principle. However, issue estoppel will not arise where the prior decision was not judicial or not final, nor where it can be classified as *obiter*. Nor will it apply where the issues are not the same. Furthermore, it has been held that findings of fact in one arbitration arising out of the same circumstances vis-à-vis one grievor are not binding in a second arbitration involving a different grievance or another grievor. However, as one arbitrator has noted, the application of the doctrine of issue estoppel is discretionary, even where all the criteria for its application are satisfied.
>
> [references omitted, emphasis added]

[40] This reference makes it clear that to the extent that issue estoppel applies, it is discretionary. In any event, I was given no information about the other grievance or whether the other grievor still wishes to pursue it.

[41] The applicant says that "This is the Union's grievance" and the union is entitled to decide whether to advance or withdraw issues. Again, I note that, while the union is representing the grievor, this is not a policy grievance filed on behalf of the union. It is clear on the grievance form that this is an individual grievance and the applicant conceded that at the hearing. While the union has conduct of the grievance and can decide which issues to pursue, their choice was not to pursue the grievance but to ask the court to engage in an analysis of a PHO that is no longer in effect.

[42] The issue raised by this application – whether the PHO required the respondent to provide a rapid test option - is moot and the applicant has not provided a good reason for me to consider the issue.

CONCLUSION

[43] As I said, the respondent sought to have the issues of prematurity and mootness addressed as preliminary issues to avoid the necessity of filing materials and using court time to consider the substantive issue, in the event the court found that the application was premature and/or moot. The applicant was put on notice that these issues would be raised as soon as they indicated that they would be seeking judicial review of Arbitrator Robinson's decision. So, this is not a case where the applicant had already filed material on the substantive issue when the jurisdictional issues were raised. However, the applicant insisted that all issues be considered at the same time. It would have been prudent for both parties, and more expeditious, to have bifurcated the jurisdictional issues and the substantive issue. As stated by Sopinka J. in ***Borowski*** (at p. 367-8):

> 57 Accordingly, the appeal is dismissed on both the grounds that it is moot and that the appellant lacks standing to continue the appeal. In my opinion, in lieu of applying to adjourn the appeal, the respondent should have moved to quash. Certainly, such a motion should have been brought after the adjournment was denied. Failure to do so has resulted in the needless expense to the appellant of preparing and arguing the appeal before this Court.

[44] The application is dismissed. Costs may be spoken to if they cannot be agreed upon.

_____J.