Labour Relations Board
Saskatchewan

BARBARA METZ, Applicant v. SASKATCHEWAN GOVERNMENT AND GENERAL EMPLOYEES' UNION, Respondent

LRB File Nos. 126-06 and 127-06; January 17, 2007
Vice-Chairperson, Angela Zborosky; Members: Gloria Cymbalisty and Leo Lancaster

The Applicant: Barbara Metz

Practice and procedure – Summary refusal to hear matter not within jurisdiction of Board – Where preliminary assessment by Board Registrar reveals that application potentially raises matters not within jurisdiction of Board, application and submissions of applicant placed before panel of Board for consideration prior to application being forwarded to respondents for reply – Board approves procedure for possible determination under s. 18(o) of *The Trade Union Act*.

Practice and procedure – Abuse of process – Doctrine of abuse of process similar to res judicata but unencumbered by specific requirements of res judicata thereby allowing Board discretion to prevent re-litigation for purposes of preserving integrity of Board's processes and adjudicative functions – Board exercises discretion to apply doctrine of abuse of process and refuses to hear applications for want of jurisdiction.

Practice and procedure – Res judicata – Board lacks jurisdiction to sit in appeal of its own decisions – Applicant prevented from using application as appeal mechanism through Board's application of doctrine of res judicata – Board has authority to apply doctrine of res judicata – Board applies doctrine to applications and determines that applications res judicata – Board summarily refuses to hear applications.

***The Trade Union Act*, s. 18(o).**

REASONS FOR DECISION

Background:

[1] The Applicant, Barbara Metz, filed two applications with the Board on August 8, 2006 alleging that the Saskatchewan Government and General Employees' Union (S.G.E.U.) staff, elected officials or other persons acting on behalf of S.G.E.U.

(hereinafter collectively referred to as the "Union") acted in violation of s. 25.1 (the duty of fair representation) and s. 36.1 (the requirements of natural justice) of *The Trade Union Act*, R.S.S. 1978, c. T-17, as amended (the "*Act*"). During the time period in question, the Applicant was employed by the Government of Saskatchewan (the "Employer").

[2] The application in LRB File No. 126-07 is nine pages in length and, in essence, alleges that a number of grievances filed by the Union on the Applicant's behalf in 1996 and 1997, relating to her disability and the accommodation of her disability, were inadequate or invalid because:

(i) the provision of the collective agreement alleged to have been violated in the grievances did not adequately state the legislated statutory requirements in s. 16 of *The Saskatchewan Human Rights Code* (the "*Code*") and/or s. 44.3 of *The Saskatchewan Labour Standards Act* (the "*LSA*");

(ii) the provision of the collective agreement alleged to have been violated in the grievances could not amend or repeal s. 16 of the *Code* or s. 44.3 of the *LSA*;

(iii) the grievances themselves did not state or quote the statutory requirements of s. 16 of the *Code* or s. 44.3 of the *LSA*;

(iv) a Letter of Understanding between the Union and the Employer concerning the provisions of a joint rehabilitation program did not adequately specify or quote s. 44.3 of the *LSA* or any provisions of the *Code*, including s. 16, and were in conflict with those sections of the *LSA* and the *Code*;

(v) the Applicant had never received a letter from an arbitrator indicating that the grievances were arbitrable; and

(vi) the grievances became invalid upon the Applicant filing a human rights complaint because the grievances related to the same issues as those contained in her human rights complaint.

[3] In making these allegations in LRB File No. 126-06, the Applicant relies on the relevant provisions of the *Code*, documents entered as exhibits and excerpts from a transcript of the evidence heard on LRB File No. 164-00 (an application by the Applicant against the Union alleging that the Union violated s. 25.1 of the *Act* for failing to fairly represent her), and the principles enunciated in *Cadillac Fairview Corp. Ltd. v.*

Saskatchewan (Human Rights Commission), [1999] 173 D.L.R. (4th) 609 (Sask. C.A.) and *Parry Sound (District) Social Services Administration Board v. O.P.S.E.U., Local 324*, [2003] 2 S.C.R. 157 (S.C.C.). The Applicant's submissions were as follows:

(a) With respect to the allegations in (i) and (iv) above, the Applicant suggests that the decisions of *Cadillac Fairview* and *Parry Sound, supra*, stand for the proposition that the parties cannot contract out of the *Code*; that the *Code* prevails if there is a conflict between the collective agreement and the *Code;* that the collective agreement should be read in light of the statutory provisions; that the statutory provisions are enforceable against the Employer as if they were part of the collective agreement; and that the Union, as a general practice, should specify any statutory provisions relied upon;

(b) With respect to the allegation in (ii) above, the Applicant relies on *Cadillac Fairview* and *Parry Sound* for the reasons set out above and because *Cadillac Fairview* says that a collective agreement cannot amend or repeal human rights legislation;

(c) With respect to the allegation in (iii) above, the Applicant relies on *Parry Sound* to suggest that the Union should specify the statutory provision the Employer is alleged to have breached;

(d) With respect to the allegations in (v) and (vi) above, the Applicant relies on *Cadillac Fairview* to suggest that the fact that the collective agreement contains an anti-discrimination clause does not affect the determination of the essential nature of a dispute or the question of jurisdiction. It may be noted that the human rights complaint referred to by the Applicant was filed by her against the Employer shortly following the filing of the first grievance by the Union.

[4] It may also be noted that, at the end of her application on LRB File No.126-06, the Applicant alleges that the facts set out in the application indicate that the Union's legal counsel had been engaging in an unfair labour practice within the meaning of s. 15 of the *Act* although we note that the Union's legal counsel was not specifically named as a party to the application. The Applicant is seeking costs and/or damages for the alleged violations by the Union.

[5] The application in LRB File No. 127-06 is eight pages in length and, in essence, alleges that the Union failed to meet its duty of fair representation toward the Applicant in 1993, concerning issues around her claim under *The Workers*

Compensation Act, 1979, S.S. 1979, c. W-17.1. The Applicant alleges that the Union's representative:

(i) gave her improper advice about going on a re-employment list and failed to advise her of her rights under s. 16 of the *Code* or to file a claim with the Saskatchewan Workers' Compensation Board, the Occupational Health and Safety Department or the Union's Long Term Disability Plan;[1]

(ii) gave her improper advice about signing a medical authorization for the Employer to obtain more evidence about her disability;

(iii) failed to advise her about her rights under s. 16 of the *Code*;

(iv) failed to advise her to file a claim with the Workers' Compensation Board and failed to advocate on her behalf when the claim was initially denied; and

(v) failed to advise her to file a grievance concerning the Employer's alleged harassment of her (presumably in relation to the request for medical information or the workers' compensation claim).

[6] The Applicant asserts that the above actions of the Union's representative were ill-advised, made without thoughtful judgment or without taking a reasonable view of the problem, were made in a perfunctory manner, with bad faith and without consideration of relevant legislation, all of which amounts to a breach of the Union's duty to fairly represent the Applicant. The Applicant submits that she should not have had to seek outside assistance with respect to her workers' compensation claim and says that the Union must assist a member if the member asks for such assistance. Since the Union did not advocate on her behalf with respect to the workers' compensation benefits, the Applicant says she suffered undue stress from the Workers' Compensation Board's refusal and the Union was therefore grossly negligent and in violation of its duty to represent her in a manner that was not arbitrary, discriminatory or in bad faith.

[7] In making these allegations in LRB File No. 127-06, the Applicant relies on s. 16 of the *Code*, excerpts of a transcript of the evidence heard on LRB File No. 164-00 (as noted above and which will be further detailed below) and the principles enunciated in *Cadillac Fairview*, *supra*, and *Central Okanagan School District No. 23 v. Renaud*, [1992] 2 S.C.R. 970 (S.C.C.), specifically that, with respect to the Union's duty

to accommodate, the Union must put forward alternative measures that are available and less onerous, that the Union and Employer cannot contract out of the provisions of the *Code* and that human rights legislation cannot be altered, amended or repealed by a collective agreement. The Applicant also relies on *Radke v. Canadian Paperworkers Union, Local 1120*, [1993] 2nd Quarter Sask. Labour Rep. 57, LRB File No. 262-92 to suggest that the Union failed to act honestly, conscientiously and without prejudgment or favoritism in that, in deciding which issues to pursue, it should have had regard to the interests at stake for the Applicant and should have carried out its duty seriously and carefully. The Applicant is seeking costs and/or damages for the alleged violations by the Union.

[8] On August 16, 2006, following receipt of the subject applications by the Board, the Registrar of the Board wrote to the Applicant advising that, because the allegations in the applications appeared to relate to the same time period and the same issues considered and determined by the Board in LRB File No.164-00, the applications would be sent to a panel of the Board for consideration without a hearing pursuant to ss. 18(o), (p) and/or (q) of the *Act*. The Registrar invited the Applicant to make a written submission concerning the issue of why the Board should not exercise its discretion to dismiss the applications pursuant to any or all of those statutory provisions.

[9] On September 12, 2006, the Applicant filed a written response to the Registrar's letter of August 16, 2006.

[10] On September 19, 2006, an *in camera* panel of the Board considered the preliminary issues of whether the Board should summarily refuse to hear the applications as the matters are not within the jurisdiction of the Board (s. 18(o)); whether the Board should summarily dismiss the applications for lack of evidence or no arguable case (s. 18(p)); and/or whether the Board should decide the matters without holding an oral hearing (s. 18(q)). These Reasons for Decision address those preliminary issues.

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[1] The Applicant referred to this allegation as having occurred in 2003, although based on the context of the remarks and the Applicant's past applications before the Board, we conclude that the use of "2003" is a typographical error and the allegation is actually in relation to the Union's conduct in 1993 and not 2003.

Arguments:

[11] In her written response to the Board, the Applicant provided further information in support of the applications. Although much of her written response has little to do with these particular applications before the Board, we will attempt to summarize all of her arguments in support of her submission that the Board should not refuse to hear these matters or summarily dismiss them without an oral hearing.

[12] Firstly, the Applicant acknowledges that the issues raised in these applications were raised before the Board in LRB File No. 164-00 but, in her view, there have been no written determinations pertaining to these issues. The Applicant submits that this was because the Board could not make any determination based on the *Cadillac Fairview* case, *supra*, in its July 17, 2003 decision because it had deferred all aspects of her claim to the Saskatchewan Human Rights Commission (the "Commission") and because the *Parry Sound* decision, *supra*, was decided subsequent to the Board's July 17, 2003 decision. The Applicant also states that the Board's reconsideration decision of December 18, 2003 did not and could not encompass the *Cadillac Fairview* and *Parry Sound* decisions.

[13] On the basis of her submissions, it appears that the Applicant wants the Board to "rehear" her claims based on action taken by the Commission following the issuance of the Board's three decisions in LRB File No. 164-00. Although the Applicant is not entirely clear in her applications as to what decision was made by the Commission in its letter to the Applicant dated March 16, 2005, it appears, based on her written submission and on our review of the Court's decisions on her judicial review applications against the Board and the Commission, that the Applicant is referring to a recent decision by the Commission not to proceed with a human rights complaint she filed against the Union concerning its representation of her. The Applicant complains that the Chief Commissioner of the Commission made certain comments about the Board's decisions concerning the Union's representation of the Applicant that were not within the Commission's jurisdiction to make because these comments dealt with union representational issues and process issues which the Board did not defer to the Commission. The Applicant listed these alleged comments, most of which go beyond the scope of the applications before us and, in any event, are unnecessary for us to detail here.

[14] The Applicant submits that her interpretation of the Board's decision of February 6, 2003 to defer her substantive claims to the Commission is that the Board could not make a determination of her claims until the Commission made its determination of jurisdiction. The Applicant stated that the Commission has taken the position that the only issue it can determine is whether the Union has blocked the Employer's attempts to accommodate her. The Applicant submits that, because the Commission has declined jurisdiction over the Union's representational issues, these issues, initially dealt with by the Board on LRB File No. 164-00, now revert back to the Board for hearing and determinations and that that is the reason for the filing of these applications (LRB File Nos. 126-06 and 127-06) as well as applications in LRB File Nos. 199-05 through 211-05.[2] In her written submission, the Applicant stated that there "are specific requirements for performances, duty and obligation in the SGEU's representation when asked by the individual member regarding their individual statutory rights," pursuant to her view of the principles in *Parry Sound*, *supra*.

[15] The Applicant also submits that her claims require a rehearing because the Court of Queen's Bench decision involving the Applicant and the Board was based on the Board's deferral decision and not specifically on the representational issues involving the Union. The Applicant submits that the Court did not, and could not, make a determination on these representational issues on the basis of *Cadillac Fairview* because the Board had deferred these issues to the Commission and that, at the time of the court hearing, the Commission had not yet made an adequate determination of these issues.

[16] The Applicant also asserts that it is within her rights to take her concerns regarding the adequacy or enforceability of grievances filed by the Union and the Union's representation of those grievances before the Board, as procedural issues, based on the decision in *Parry Sound*. In this regard, the Applicant relies on the fact that, although the Employer and the Union proceeded to set up an arbitration process on a number of occasions to deal with her grievances, there was no arbitration hearing or determination by an arbitrator that the grievances were legally adequate or legally enforceable.

[17] The Applicant also submits that, with respect to her complaints before the Board in LRB File No. 164-00, "there were only dismissals due to my inability in assisting the Board to understand my complaint against the Union." The Applicant submits that she has relevant evidence and asks for a re-hearing before the Board on various grounds related to her inexperience and inability to represent herself without a lawyer at those previous hearings, her confusion about the meaning of the Board's decision on deferral and the issues at subsequent hearings, her failure to comprehend the *Cadillac Fairview* and *Parry Sound* decisions, *supra*, until after the hearings, her failure to call evidence she had wanted to call at those hearings (she provided no details of what evidence this was) and because she received other evidence subsequent to the hearings before the Board (although there was no information as to what evidence she had discovered nor any grounds stated which might provide good and sufficient reason for her failing to discover and adduce that evidence at the previous hearing). The Applicant also refers to certain "natural justice" grounds for a re-hearing such as the fact that the Union did not object at the reconsideration hearing to the Applicant raising issues that had been deferred to the Commission; the fact that the Union's witnesses, except for the instructing witness, were excluded at the hearing, thereby having the opportunity to collaborate their stories; and the fact that a part-time Board member (who was not sitting on any of the panels of the Board hearing LRB File No. 164-00) was in a conflict of interest because she was mentioned at the hearing as having involvement in the Applicant's work situation but did not remove herself as a member of the Board during the time period the applications were before the Board.

Analysis and Decision:

[18] In order to assess the applications before us, it is necessary to review the Board's prior decisions involving the Applicant and the Union on LRB File No. 164-00 where the Applicant alleged that the Union failed in its duty of fair representation pursuant to s. 25.1 of the *Act*.

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[2] The applications on LRB File Nos. 199-05 through 211-05 have not yet been dealt with by the Board, but also appear to relate to matters between the Applicant and the Union during the same time period as dealt with in LRB File No. 164-00.

[19] The Applicant initially filed an application on June 13, 2000 (LRB File No. 164-00) alleging that the Union was in breach of its duty of fair representation under s. 25.1 of *Act* and further alleging that the Employer committed an unfair labour practice in violation of s. 11(1)(c) of the *Act* by failing to bargain collectively. The Applicant had also previously filed a complaint against the Employer with the Commission alleging discrimination and a failure to accommodate her disability. The evidence at the original hearing of LRB File No. 164-00 on January 8, 2003 indicated that the Union and Employer had reached a settlement of the Applicant's grievances and an accommodation of her disability as well as a proposed financial settlement. The Commission, having reviewed the proposed agreements, determined that the Employer had properly accommodated the Applicant and that the proposed financial settlement was satisfactory. It was on this basis that the Commission had informed the Applicant that it would not proceed to a human rights tribunal with her complaint.

[20] In the Board's initial decision in LRB File No. 164-00, dated February 6, 2003, reported at [2003] Sask. L.R.B.R. 28, the Board dismissed the unfair labour practice complaint against the Employer on the basis of the Applicant's lack of standing to bring such a complaint. The Board also stated that had it not dismissed the complaint against the Employer it would have, in any event, deferred jurisdiction over the complaint to the Commission as the complaint was "in its essence a human rights dispute related to the obligations on the Employer to accommodate the Applicant's disability."

[21] With respect to the complaints against the Union, the Board noted that they consisted of both "substantive" and "procedural" complaints and, while the Board deferred jurisdiction over the substantive complaints to the Commission, the Board agreed to exercise its jurisdiction to hear and determine the Applicant's procedural complaints against the Union. In its February 6, 2003 decision, the Board indicated that the substantive complaints of the Applicant included all issues in relation to the accommodation settlement between the Union and the Employer, the proposed financial settlement between the Union and the Employer and the overall grievance settlement entered into by the Union with the Employer. The Board determined that, because these substantive issues were subsumed in the complaint before the Commission, the Board would defer these issues to the Commission. The Board, relying on the principles in

Brown v. Westfair Foods Ltd., [2002] 213 D.L.R. (4th) 715 (Sask. Q.B.) and *Cadillac Fairview, supra,* stated at 41 and 42:

> *[54] Applying the principles of Cadillac Fairview, supra, to the present case,* ***we find that the Human Rights Commission has primary jurisdiction over the Applicant's complaints that the Employer failed in its duty to accommodate her due to her disability****. Although the Applicant raised similar issues in her duty of fair representation complaint against the Union and her unfair labour practice application against the Employer,* ***the underlying issues in the complaint relate to discrimination on the basis of disability, a right established by The Human Rights Code****. Although the Labour Relations Board has the obligation to consider and apply human rights law when it interprets the provisions of the Act, our primary focus is on the enforcement of rights under the Act and,* ***unlike the Human Rights Commission, we have no specialized knowledge or practice in the area of human rights law or adjudication****.*
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> *. . .*
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> *[56]* ***Given this overlapping jurisdiction, the Board will defer its jurisdiction under s. 25.1 and will not determine if the agreements entered into by the Union and the Employer meet the tests under s. 25.1****. If the Board did not defer its jurisdiction over these aspects of the Applicant's duty of fair representation complaint, we would be required to examine the agreements reached on the accommodation and the financial settlement. Although the Board may use slightly different standards to judge the two agreements, nevertheless, the results of its examination might conflict with the ruling of the Human Rights Commission. If the Board were to find a breach of the duty of fair representation and order the parties to refer the Applicant's grievance to arbitration, an arbitration board would surely be bound by the findings of the Human Rights Commission that accommodation had been achieved and the financial settlement was satisfactory.* ***By deferring to the Human Rights Commission, we avoid unnecessary litigation and potentially contradictory results****.*
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> [**emphasis added**]

[22] The Board also relied on *United Food and Commercial Workers, Local 1400 v. Saskatchewan (Labour Relations Board)* (1992), 95 D.L.R. (4th) 541 (Sask. C.A.) in making its determination that it was appropriate to defer the substantive issues to the Commission and stated at 43:

> *[58] In the present case, the Applicant's complaint against the Union, to the extent that it raises issues of discrimination on the basis of disability, refusal to accommodate and denial of compensation for the period of non-accommodation, are matters that are squarely before the Human Rights Commission. The Commission has primary authority for enforcing compliance with The Saskatchewan Human Rights Code and it has equal or superior remedial powers to rectify the complaint. On these grounds, the Board should also exercise its discretion to defer to the Human Rights Commission and its processes.*

[23] As previously stated, the Board determined in LRB File No. 164-00 that it was appropriate to hear and determine those complaints in the application that dealt with procedural issues. The Board stated at 43 and 44:

> *[61] The remaining issues (i.e. those relating to the processes used by the Union) may give rise to a breach of the duty of fair representation in the sense described above in the Gagnon case, supra. That is, the outcome of the representation (the agreements) may be unassailable (here, by reason of the ruling of the Human Rights Commission), while the processes used to get to the agreements in question may be flawed by bad faith, discrimination or arbitrary treatment and require some compensation to the Applicant from the Union. To this extent, the Applicant's duty of fair representation complaint is not totally subsumed by the human rights complaint and the Board retains jurisdiction to determine this aspect of the complaint.*
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> *…*
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> *[63] The Board will retain jurisdiction over the Applicant's duty of fair representation complaint to determine* ***whether any of the processes that the Union used to arrive at the accommodation, financial or grievance settlements were taken in bad faith, with discrimination or in an arbitrary fashion.*** *If the Board were to determine that the Union had not processed the Applicant's grievances in accordance with the standards set down in s. 25.1 of the Act, liability would affect only the Union, not the Employer. On this limited aspect of the application, there is no possibility that the Board would order the Union to refer any of the Applicant's grievances to arbitration. Vis-à-vis the Union, the Employer and the Applicant, the settlement of these matters are in the hands of the Human Rights Commission.*
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> **[emphasis added]**

[24] On May 13, 2003, prior to the Board hearing the procedural complaints in the application on LRB File No. 164-00, the Applicant filed an amended application further detailing her complaints. Following three days of hearing, the Board issued a comprehensive decision on July 17, 2003 (*Metz v. Saskatchewan Government and General Employees Union*, [2003] Sask. L.R.B.R. 323, LRB File No. 164-00) dismissing the application upon concluding that there was nothing in the procedures used by the Union that constituted arbitrary treatment, bad faith or discrimination toward the Applicant.

[25] On August 5, 2003, the Applicant filed an application with the Board for reconsideration of the Board's decision dated July 17, 2003 dealing with the procedural complaints against the Union. The Applicant subsequently filed three letters with the Board (one of which was 18 pages in length) which the Board treated as further argument in support of the application for reconsideration. In a decision dated December 18, 2003 (reported as *Metz v. Saskatchewan Government and General Employees Union*, [2003] Sask. L.R.B.R. 551, LRB File No. 164-00) the Board dismissed the application for reconsideration. The Board noted that, although the application for reconsideration requested reconsideration of only the Board's July 17, 2003 decision, at the hearing the Applicant sought to expand her request to include the February 6, 2003 decision. Given that the Union's counsel did not vigorously object to the expansion of the reconsideration application, the Board heard and considered all of the Applicant's submissions on the matter in relation to both the decision of July 17, 2003 and the one of February 6, 2003.

[26] In dismissing the reconsideration application, the Board relied on the principles in *Remai Investment Corporation o/a Imperial 400 Motel v. Ruff and Saskatchewan Joint Board, Retail, Wholesale and Department Store Union*, [1993] 3rd Quarter Sask. Labour Rep. 103, LRB File No. 132-93 and stated at 556:

> *[15] In the present case, Ms. Metz has essentially relied upon the second, fifth and sixth grounds, that is, (1) that she ought to be allowed to adduce further evidence; (2) that there has been a denial of natural justice in that the Board misinterpreted or misunderstood the evidence and/or the failure of the recording equipment resulted in a portion of the transcript of proceedings being unavailable; and (3) that the decision represents a*

> *significant policy adjudication which the Board may wish to change.*
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> *[16] In our opinion, the Applicant has not adduced solid grounds to persuade us to exercise our discretion to embark upon reconsideration of the original decision of the Board with respect to any of the grounds raised. The hearing of the original application lasted several days and involved the Board hearing copious evidence. We cannot say that it has been demonstrated that there are solid grounds that support reconsideration of the matter on the basis of a denial of natural justice, nor that the Board ignored or otherwise neglected to consider the whole of the evidence adduced. The Board simply found that much of the evidence was not helpful. The Applicant has not asserted good and sufficient reasons for being allowed to adduce further evidence. In our opinion, the Board's two decisions in the matter are well reasoned and sound, and we are not persuaded to embark upon consideration as to whether they should be changed in any way.*

[27] With respect to the additional evidence the Applicant sought to introduce on the reconsideration application, the Board outlined the Applicant's arguments as follows at 553:

> *[10] In a further letter to the Board dated August 14, 2003, Ms. Metz argued that, with respect to the July 17, 2003 decision of the Board, the Board "possibly misunderstood or misinterpreted [the evidence] due to lack of (and/or) presentation of evidence," and asserted that as a ground to be allowed to adduce further evidence in this matter. The bulk of the balance of the eighteen-page letter is essentially composed of allegations of fact and argument regarding the matters raised in the original application.*

[28] We also note that, on the reconsideration application, the Applicant asserted that certain evidence was not adduced because it had not been compiled or completed at the time of the original hearing.

[29] The Applicant applied for judicial review of the decisions of the Board. On April 7, 2004, the Saskatchewan Court of Queen's Bench dismissed the application for judicial review[3], stating at c-19 and c-20:

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[3] Reported at Metz v. Saskatchewan Government and General Employees' Union et al., [2004] Sask. L.R.B.R. c-8 (Sask. Q.B.).

> *[47] The LRB extended itself in addressing the complaints of the applicant against SGEU and the government. In the two impugned decisions, it reviewed at length the evidence and arguments advanced by Ms. Metz and articulated the basis for its decision. Even if I was inclined to reach a different decision than the LRB, and I am not, no review of the record would disclose a lack of rationality nor analysis which is not in accord with reason and good sense.*
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> *[48] Accordingly, the applicant has not met her onus of demonstrating that the decisions she attacks of the LRB are patently unreasonable.*

[30] We turn now to the applications before us.

[31] The Applicant has filed two new applications, LRB File Nos. 126-06 and 127-06. At first glance, these applications may appear to be additional applications for reconsideration of the Board's decisions in LRB File No. 164-00 given that the Applicant quotes extensively from the Board's reasons for decision on that application and makes reference to facts and issues dealt with on that application. As well, the Applicant makes a number of references in her written submission in the nature of requests for a "rehearing." We are, however, treating LRB File Nos. 126-06 and 127-06 as new applications because they were filed as new applications by the Applicant and because the Applicant has already received a reconsideration by the Board of the Board's two decisions in LRB File No. 164-00 at which time she had a significant amount of leeway to challenge all possible aspects of the Board's two decisions. In addition, the request of the Applicant for a "rehearing" and the acknowledgement by her that the issues raised in these applications were before the Board in LRB File No. 164-00, serve only to highlight one of the main issues before us, that is, whether the Board should allow the Applicant to re-litigate issues previously before the Board.

[32] The issues before the Board on these applications are whether the Board should summarily refuse to hear the applications as the matters are not within the jurisdiction of the Board (s. 18(o)); whether the Board should summarily dismiss the applications for lack of evidence or no arguable case (s. 18(p)); and/or whether the Board should decide the matters without holding an oral hearing (s. 18(q)). Given that we have determined that the applications may be disposed of under s. 18(o), it is unnecessary for us to consider the possible application of ss. 18(p) and (q). Because this is the first decision of the Board dealing with s. 18(o) of the *Act* since the

amendments to s. 18 in 2005, our analysis will be set out in some detail. Firstly, however, we will comment on the procedures to be utilized by the Board on a determination of whether the Board should refuse to hear an application not falling within its jurisdiction pursuant to s. 18(o) of the *Act*.

[33] In accordance with the Board's jurisdiction to develop its own procedures,[4] the Board has adopted a process for the consideration of the question of whether the Board should exercise its discretion to refuse to hear a matter for lack of jurisdiction pursuant to s. 18(o). The procedure utilized by the Board in this case involved a preliminary assessment by the Registrar, prior to processing the applications (by sending the applications to the respondents and imposing a requirement on them to file a reply), determining whether the applications potentially raised matters not within the jurisdiction of the Board. The Registrar, having determined that this was possible because the applications, on their face, appeared to be raising allegations covering the same time period and the same issues as the Board heard and determined in LRB File No. 164-00, wrote to the Applicant advising that the applications would be placed before a panel of the Board to consider that issue, along with other preliminary issues which are potentially raised by the application of ss. 18(p) and/or (q). In our view, this is entirely the correct approach by the Registrar when an application is filed where, on its face, there appears to be a possibility that the Board might refuse to hear it for want of jurisdiction. Jurisdiction is always the first matter for determination by the Board on any application and the Board of its own motion may raise the issue of jurisdiction if it appears to the Board to be of concern, even where the parties have not raised it. Given that s. 18(o) specifically provides the Board with power to refuse to even hear an application where it lacks jurisdiction, we must conclude that it was the intention of the legislature to permit the Board to make this determination prior to the receipt of a reply by the respondent(s) and before the application has been set down for hearing. In such circumstances, there is no utility in processing the application and requiring the replies of the respondent(s) if it is possible that the Board might exercise its jurisdiction to refuse to hear the matter - the positions of the respondent(s) on the merits of the application are typically not relevant to the preliminary issue of jurisdiction. We also note that, although

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[4] See *Canadian Paperworkers Union, Local 1120 et al. v. Prince Albert Pulp Company Ltd.* (1986), 52 Sask. R. 178 (Sask. C.A.), where Sherstobitoff, J.A., observed at 187: *". . . [Q]uestions of admissibility and interpretation of evidence and procedure are all matters assigned exclusively to the Board as are all questions of fact, and sufficiency or insufficiency of evidence. These are not jurisdictional matters."*

the legislation does not require the Board to give an applicant the opportunity to make submissions prior to the Board considering whether to refuse to hear a matter for want of jurisdiction, the Registrar did invite the Applicant to make submissions on this preliminary issue. In our view, this process ensures that the Board has the Applicant's full legal position before it on the issues in question.

[34] In approving of the procedure utilized by the Registrar for the possible determination under s. 18(o), we note that, had this panel of the Board determined that the application could not be disposed of on the basis of s. 18(o), we would have directed the Registrar to process the applications by serving the applications on the respondents and requesting their replies. If, at that time, the respondent(s) wished to challenge the application(s) under ss. 18(p) and/or (q), the respondent(s) could do so, at which time a panel would determine if summary dismissal, without an oral hearing, was an option. If the panel determined that summary dismissal was an option, further submissions would be invited from the Applicant and another panel of the Board would determine whether to actually dismiss the application(s) summarily without an oral hearing. Such a procedure was followed and approved by the Board in *Soles v. Canadian Union of Public Employees*, [2006] Sask. L.R.B.R. ---, LRB File No. 085-06 (not yet reported).

[35] The question before us is whether the Board has jurisdiction to decide the matters raised by the Applicant in her applications. While there may be a variety of situations where the Board could lack jurisdiction to embark on an inquiry, the applications before us appear to raise the specific questions of whether the applications are *res judicata* or are an abuse of process, given that the allegations appear to relate to the same time period and the same issues between these parties as determined by the Board in LRB File No. 164-00. It is therefore necessary for us to determine whether the principles of *res judicata* and abuse of process relate to the Board's jurisdiction to hear and determine a matter and, if so, to determine the nature of the appropriate tests in the labour relations context and whether they apply in the circumstances of the case before us such that the Board should refuse to hear these applications for lack of jurisdiction.

[36] The decision of the Board in *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union, Retail, Wholesale and Department Store Union, Local 568 and Retail, Wholesale and Department Store Union, Local 558 v.*

Canadian Linen and Uniform Service Co., [2004] Sask. L.R.B.R. 69, LRB File Nos. 062-02 and 090-02, illustrates a recognition by the Board that there may be situations where the Board will apply *res judicata* to determine whether it may decide a matter before it. Although the Board in *Federated Co-operatives Limited v. Retail Wholesale and Department Store Union, Local 504*, [1978] July Sask. Labour Rep. 45, LRB File No. 502-77, cited in the *Canadian Linen* decision, rejected the application of the doctrine specifically in relation to an application for amendment of a certification order, the Board's consideration of the doctrine and the policy reasons underlying its application in these decisions is instructive. In *Canadian Linen*, *supra*, the Board stated at 94 and 95:

> [75] *It is interesting to note that in none of O.K. Economy Stores, Canada Safeway Limited, nor MacDonald's Consolidated Limited, all supra, all decisions regarding consolidation, does the Board refer to the necessity that the applicant demonstrate that there has been a material change in circumstances before the application can succeed. The issue of demonstrating a material change on amendment applications gained currency with the Board's decision in Federated Co-operatives Limited v. Retail Wholesale and Department Store Union, Local 504, [1978] July Sask. Labour Rep. 45, LRB File No. 502-77 ("Federated Co-operatives Limited (1978)"). In that case the employer made application during the open period to exclude certain classifications of employees from the existing certification order issued following a lengthy hearing for amendment not too long before in 1975. Then Chairperson Sherstobitoff (as he then was) described the practical concern of the Board that underscores the requirement that such an application for amendment be premised upon a material change in circumstances, as follows, at 46-47:*
>
> > *A concern of the Board is to prevent applications for amendment year after year as a method of appeal from a previous decision of the Board upon the same issue merely because one of the parties is dissatisfied with the previous decision of the Board. In this case, the panel of the Board which heard the application resulting in the Order of October 8th, 1975 and the panel which heard the present application are very substantially different, in large part because of the turnover in membership of the Board between the dates of the two applications.* ***It can be inferred that some persons might make applications for amendment in the hope that a new panel will view the matter in a different light. The Board wishes to make it clear that it will not sit in appeal on previous decisions of the Board and***

> ***it therefore determines that in this application, as in all applications for amendment, the applicant must show a material change in circumstances before an amendment will be granted.***

[76] The fundamental basis for the Board's determination is explained earlier in the Reasons for Decision, and has not been referred to in subsequent references to the decision in the Board's jurisprudence. The respondent union to the application for amendment had argued that the issues that the employer was asking the Board to consider were identical to the issues which had been considered and decided by the Board in the 1975 decision, and that the principle of res judicata should apply and the application be dismissed. The Board expressed reluctance to apply the principle in cases of application for amendment, one of the elements of which is that the order under consideration is a final order, given that the Act provides for a statutory right to apply for amendment annually during the open period, stating, at 46, as follows:

> ***Clearly, any party interested in a certification Order has the right to apply for an amendment during the time limited by Section 5(k)(i). In such circumstances the Board is reluctant to apply the principle of res judicata to an application made under that Section since it would appear to be contrary to the intention of the legislature which granted to the parties the right to apply for such amendments.***

[77] In referring to another element of res judicata - that the same question is to be determined - the Board stated, at 46, as follows:

> ***Another requirement before res judicata can apply is that the previous decision constituted a determination of the same question as that sought to be determined in the present application. It is here that a problem may arise when it is alleged that there has been a change in circumstances between the date of the first decision and the date of the second application.*** *When it is alleged that there has been a change in circumstances, the only manner in which the Board can properly determine the issue is by hearing the evidence. The exact nature of the change in circumstances which will be sufficient to warrant taking the matter outside of the principle of res judicata or to warrant an amendment is a factual matter to be decided upon the evidence in each individual case.*

> *[78]* ***The result of the decision in Federated Co-operatives Limited (1978) is that the principle of res judicata is not applied by the Board to applications for amendment under ss. 5(i), (j), and (k). The real basis for the requirement that an applicant demonstrate a material change in circumstances is, as stated above, to ensure that an application for amendment does not result in the Board sitting, in effect, in appeal of its previous order, a power that is not within the Board's jurisdiction****: See, Carpenters Provincial Council of Saskatchewan v. K.A.C.R. (A Joint Venture), [1985] Jan. Sask. Labour Rep. 41, LRB File No. 342-84.*
>
> *[79]* ***Despite the Board's reference in Federated Co-operatives Limited (1978) to the need to show a material change in circumstances "in all applications for amendment," such reference must be considered in the context of the application then before the Board and the mischief that the policy was intended to prevent, that being, as stated above, to prevent amendment applications from being used as a method of appeal in circumstances where the principle of res judicata cannot be applied to preclude the application or as the basis to dismiss it.***
>
> [**emphasis added**]

[37] On the basis of the analysis in *Canadian Linen*, *supra*, it is clear that the Board has no jurisdiction to sit in appeal of its own decisions. An applicant is prevented from utilizing an application as an appeal mechanism through the Board's application of the doctrine of *res judicata*. It is through the Board's consideration of the principle of *res judicata* that the Board decides whether it has jurisdiction to embark on the determination of an application – if *res judicata* applies, the Board lacks jurisdiction to do so. Therefore, in this case, if the Applicant is asking us, in essence, to sit in appeal of any or all of the Board's decisions in LRB File No. 164-00, we have no jurisdiction to proceed with the hearing and determination of the applications before us. The doctrine of *res judicata* assists us to determine whether an application is in the nature of an appeal. This principle also underlies our consideration of whether the Board lacks jurisdiction because the applications are an abuse of process, a doctrine that is similar in its application to *res judicata*, which will be further discussed below.

[38] Our conclusion that the Board may lack jurisdiction to hear a matter if the matter is *res judicata* is also supported by the reasoning of the Newfoundland and Labrador Labour Relations Board in *International Union of Operating Engineers, Local*

904 v. Hibernia Management and Development Co., [2004] N.L.L.R.B.D. No. 8, LRB File No. 2208. In that case, the union argued that certain preliminary objections of the employer, except those going to the jurisdiction of the Board such as *res judicata* and abuse of process, should not be decided prior to a hearing on the merits of the application. The Newfoundland and Labrador Board held that it could decide preliminary objections, both jurisdictional and non-jurisdictional, prior to a hearing on the merits and outlined the criteria to consider in making such a decision, at paragraphs 42 and 43:

> *[42] The Union submits that the preliminary objections, with the exception of those going to the jurisdiction of the Board, are not properly the subject of preliminary objections and should not be decided prior to the hearing on the merits of the application. The Board heard evidence and submissions from the parties on the preliminary objections, including the submission from the Union that the Board should not make a decision at this stage of the proceedings. The Board advised the parties that it would hear the submissions on the preliminary objections and it would also consider whether or not the Board found it appropriate to decide the preliminary objections at this time.*
>
> *[43]* ***The Board has the authority to control its own procedure to hold hearings under Section 22(2) of the Act.*** *The Board may hear and decide issues at a hearing as separate issues in a preliminary application, or as issues to be heard together with other issues related to the merits of the application. The Board advised the parties that it would hear the issues and, the Board would decide the issues if the Board found it to be appropriate to decide the issues. The Board has authority to defer its decision until after the hearing of further evidence and argument on other issues in the application.* ***There is no rule that the only issue the Board may hear and decide upon prior to hearing all the issues on the merits is an issue going to the jurisdiction of the Board. In making its determination as to the order in which the Board will hear and decide the issues, the Board will have regard to such factors as the convenience and costs to the parties and to the Board, the practicality of hearing and deciding upon one or more issues prior to hearing and deciding upon all the issues, the fairness of the proceedings, due process principles, and whether a decision on the preliminary issues will entirely dispose of the application.***
>
> [**emphasis added**]

[39] In *Hibernia*, *supra*, the Newfoundland and Labrador Board concluded that it would decide a number of the preliminary objections, including *res judicata* and abuse of process (questions going to its jurisdiction) because: (i) it was unnecessary to hear

evidence and submissions on the merits of the case in order to answer the questions raised by the preliminary objections; (ii) the preliminary objections, if upheld, could entirely dispose of the application; (iii) the hearing on the merits was likely to be lengthy and costly to the parties and the Board; (iv) it was the most practical procedure; and (v) the procedure did not operate unfairly to any of the parties.

[40] In the case before us, the only preliminary matters before us are those of *res judicata* and abuse of process, both of which were characterized in *Hibernia* as matters that require the Board to determine its jurisdiction to decide an application on its merits. In addition to the power the Board derives from s. 18 (o) of the *Act* to refuse to hear a matter for lack of jurisdiction, we also find it appropriate to exercise our discretion to determine these issues preliminary to a hearing of the applications on their merits on the basis of the criteria in *Hibernia*. In fact, we rely on the very same reasons as the Board did in the *Hibernia* case (as stated in the preceding paragraph) but, in addition, we also rely on concerns of fairness to the parties. The allegations in the applications relate to events that took place several years ago (up to 13 years) and involve at least one representative of the Union who has recently passed away. Fairness to the Union would dictate that it not be required to defend itself in such prejudicial circumstances when the doctrines of *res judicata* and abuse of process, if found to apply, could entirely dispose of the applications. Also, by proceeding in the fashion it has on these applications, the Board has taken into account any concerns of due process and fairness toward the Applicant through permitting her the opportunity to file written submissions on these preliminary matters.

[41] Having determined that the doctrines of *res judicata* and abuse of process go to the Board's jurisdiction to hear and determine an application, it is necessary to examine the Board's authority to apply such doctrines and the nature of the tests to be applied in the labour relations context.

[42] It is clear upon a reading of the *Canadian Linen* case, *supra*, and the *Federated Co-op* case, *supra*, that the Board has long proceeded on the basis that it has the power to apply the doctrine of *res judicata*. Also, in *International Brotherhood of Electrical Workers, Local 529 v. Mudjatik Thyssen Mining Joint Venture*, [2003] Sask L.R.B.R. 242, LRB File No. 271-00, the Board considered, as a preliminary issue going

to its jurisdiction, the doctrine of *res judicata* in the context of an employer's defence to an unfair labour practice by the union seeking to enforce a certification order and collective agreement. In that case, the employer took the position that certain of its employees ostensibly within the scope of the bargaining unit were employed in an undertaking that was within the legislative jurisdiction of the federal government and was therefore not subject to the jurisdiction of the Board or covered by the certification order issued by the Board**.** The Board considered the doctrine of *res judicata* but rejected its application in the circumstances of that case because the issue raised in the proceedings was different than that considered at the prior certification hearing, the employer having withdrawn that particular defence prior to the certification hearing (so that no evidence had been adduced with respect to that issue and no determination had been made by the Board on the merits). Key to the Board's conclusion in that case was its determination that the issue of constitutional jurisdiction must always be determined because the Board cannot properly issue an order the scope of which exceeds its jurisdiction. We also note that, in *Mudjatik*, the Board considered the doctrines of abuse of process and issue estoppel as preliminary issues but rejected their application in the circumstances of that case.

[43] The proposition that the Board has the authority to apply the doctrines of *res judicata* and abuse of process is also supported by decisions of other labour relations boards in Canada. In *Hibernia*, *supra*, the Newfoundland and Labrador Board concluded that it had the power to decide, on a preliminary motion, whether to dismiss an application without a hearing on the merits on the basis of *res judicata* and abuse of process. The Newfoundland and Labrador Board stated at paragraphs 45, 48 and 50:

> *[45] The Union questions the jurisdiction of the Board to apply such doctrines as abuse of process, res judicata and estoppel. The Board finds that it has jurisdiction to apply these doctrines, however, in doing so, the standard of judicial review would likely be one of correctness and not one of patent unreasonableness.*
>
> *. . .*
>
> *[48] The jurisdiction of the Labour Relations Board to apply general principles of law, such as res judicata, abuse of process and estoppel, is supported by the decision of the Supreme Court*

> *of Newfoundland and Labrador Court of Appeal[5] finding that the Board has jurisdiction to hear and determine issues under the Charter of Rights.. . .*
>
> *. . .*
>
> *[50] . . . Although the Central Newfoundland case addressed the question of application of the Charter of Rights, the decision was based upon a finding that the Board had the implied jurisdiction to determine questions of law arising in proceedings before it. The implied jurisdiction to determine questions of law would logically also apply to questions of res judicata, abuse of process and estoppel. . . .*
>
> [footnote added]

[44] In reaching this conclusion, the Newfoundland and Labrador Board in *Hibernia* also referenced the decision of the Supreme Court of Canada in *Toronto (City) v. Canadian Union of Public Employees, Local 79*, [2003] S.C.J. No. 64 as support for the proposition that administrative tribunals have the authority to apply the doctrine of abuse of process. The Newfoundland and Labrador Board stated at paragraphs 53 and 54:

> *[53] . . . The effect of the Supreme Court of Canada decision is that the arbitrator had the authority to apply the doctrine of abuse of process. It would also follow from the decision, that to give effect to the prevention of relitigation of prior judicial decisions, then administrative tribunals generally would have the jurisdiction to apply the doctrine of abuse of process. Therefore, on the authority of the Toronto case, the Labour Relations Board has the jurisdiction to apply the doctrine of abuse of process. It should be noted that application of the doctrine of abuse of process in this case is not based on the inherent jurisdiction of a court to control its own process. The application of the doctrine is based on the principles set out in the Toronto case. The doctrine may be applied to prevent abuse of any adjudicative process.*
>
> *[54] The Labour Relations Board has jurisdiction to apply doctrines such as abuse of process, res judicata and estoppel.*

[45] In *Hibernia*, the Newfoundland and Labrador Board found "as a matter of policy, that parties should not be allowed to relitigate decisions that are final and

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[5] The decision referred to was cited in the decision as *Central Newfoundland Health Care Board and Newfoundland Association of Public Employees et. al.* (1994) 121 Nfld. & P.E.I.R. 61.

binding." While noting that it used the terms "*res judicata*" and "estoppel" interchangeably, the Newfoundland and Labrador Board referred to the decision of the Supreme Court of Canada in *Danyluk v. Ainsworth Technologies Inc.* [2001] 2 S.C.R. 460, where the Court outlined three required conditions to establish *res judicata*. The Newfoundland and Labrador Board cited those at paragraph 61 as follows:

> *(1) the prior judicial decision must have been final,*
>
> *(2) the issue must be the same as the one decided in the prior decision, and*
>
> *(3) the parties to both proceedings must be the same, or their privies.*

[46] In determining that the doctrine of *res judicata* applies not only to the prior decision itself but that it may be applied to findings of fact or law necessary to reach the decision in question, the Newfoundland and Labrador Board, at paragraph 58, considered the following excerpt from its decision in *United Food and Commercial Workers, Local 2020 and Terra Nova Shoes Limited*, [1992] L.R.B.D. No. 23 as follows:

> *[58] . . . The scope of res judicata may apply to the findings of fact or law necessary to the decision in addition to the decision itself. In the case of Tandy Electronics Ltd. (Radio Shack) and the United Steelworkers (1980) 80 CLLC 83, the Ontario High Court of Justice (Divisional Court), stated at page 91 as follows:*
>
> > *In general terms, the continuing responsibility of the Board to monitor the relationships between companies, unions and employees may often render it necessary and essential for the Board to consider prior decisions made by other panels. So long as those prior decisions involve the same union and the same company, are relevant to the issue under consideration, are timely to the issues under consideration than it would seem to be appropriate for the Board to refer to those decisions. The extent to which they can be utilized must be restricted to the actual decision of the Board together with those findings of fact made by the Board that were essential to its decision. No other findings of fact or evidence that may be contained in the decisions should be considered.*

[47] The British Columbia Labour Relations Board had occasion to consider the doctrine of *res judicata* in *Lloyd Duhaime v. B.C. Government and Service*

Employees' Union and the Government of the Province of British Columbia, [2001] B.C.L.R.B.D. No. 55, Case No. 41435. In that case, the applicant made application pursuant to a provision of the Labour Relations Code of British Columbia, similar to our s. 25.1, alleging that the union breached its duty of fair representation by failing to advance several of his grievances to arbitration. The British Columbia Board considered the application without an oral hearing and after receiving only the application and any documents the applicant filed, but without submissions from either the union or the employer. The Board determined that the application raised no apparent contravention of the *Code* and dismissed the complaint on the basis that it was barred by the principles underlying the doctrine of *res judicata*. The British Columbia Board had rendered a prior decision involving the applicant and the respondent union where it had dismissed the applicant's duty of fair representation complaint regarding allegations that the union was responsible for significant delay in making a decision whether to pursue his grievances to arbitration and for the union's lack of communication with him.

[48] The British Columbia Board reviewed the principles of the doctrine of *res judicata* at length. At paragraphs 135 and 136, the British Columbia Board stated:

> *[135] The doctrine of res judicata was reviewed recently by the British Columbia Court of Appeal in Lim v. Lim [1999] B.C.J. No. 2317. In that case the Court of Appeal referred to the following quote taken from Henderson v. Henderson [1843] 3 Hare 100, 67 E.R. 313:*
>
> > *...I believe I state the rule of the court correctly, when I say, that* ***where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matters which might have been brought forward as part of the subject in contest, but which was not brought forward only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in a special case, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly***

> ***belonged to the subject of litigation and which the parties, exercising reasonable diligence, might have brought forward at the time.*** *(p. 4; emphasis added)*

[136] The Court also referred to Hoque v. Montreal Trust Co. of Canada, [1997] N.S.J. No. 430 (NSCA), in which the following comment was made:

> ***Res judicata is mainly concerned with two principles. First,*** *there is a principle that "...prevents the contradiction of that which was determined in the previous litigation, by* ***prohibiting the relitigation of issues already actually addressed****.": see Sopinka, Lederman and Bryant, The Law of Evidence in Canada (1991) at p. 997. The* ***second*** *principle is that* ***parties must bring forward all of the claims and defences with respect to the cause of action at issue in the first proceeding and that, if they fail to do so, they will be barred from asserting them in a subsequent action. This"...prevents fragmentation of litigation by prohibiting the litigation of matters that were never actually addressed in the previous litigation, but which properly belonged to it****.": ibid at 998. Cause of action estoppel is usually concerned with the application of this second principle because its operation bars all of the issues properly belonging to the earlier litigation. (para. 21; emphasis added)*

[own **emphasis added**]

[49] The British Columbia Board went on to examine the importance of the doctrine of *res judicata* in the labour relations context. At paragraphs 137 and 138, the British Columbia Board stated:

> *[137] The Board and its predecessors have applied the principles underlying the doctrine of res judicata in a number of cases. In Crestbrook Forest Industries Ltd., IRC No. C47/90 the Council adopted the reasoning of the Ontario Labour Relations Board in Oakwood Park Lodge, [1981] 1 Can LRBR 348 respecting the application of the principles of res judicata in labour relations matters:*
>
> > *Although the Act does not expressly authorize the application of the doctrine of res judicata, there are strong practical and policy grounds for doing so. Rights and duties have meaning only if they are certain and relatively stable.* ***Parties expect***

> ***that a decision of the Board will clarify their legal relationship and put an end to the controversy between them. ... Continuous litigation would undermine the harmonious relationship between the parties which the Act is designed to foster****... It could also give rise to costly duplication, inefficient utilization of the Board's scarce resources, and a serious impediment to the effective administration of the Act. This potential consequence is especially serious in labour relations matters where "time is the essence" and finality is an important statutory objective.* *...The doctrine of res judicata serves to minimize these possibilities, and is based upon the entirely reasonable expectation that if a judgement is rendered in an earlier case which is related logically to a subsequent proceeding, the former will be taken into account in resolving the latter. ... Cases involving similar factual and legal questions should be decided in the same way, and if there is a close relationship in terms of the parties and issues involved, the interrelationship of the two proceedings may legitimately preclude the relitigation of those issues already settled. ... (at pp. 350-351; emphasis added)*

[138] In TNL Construction Ltd., IRC No. C30/90 the Council expressly adopted the remarks of the Ontario Labour Relations Board in Wright Assemblies Ltd. 61 CLLC 956 at 957 and 958 as follows:

> ***The fact that a party did not present all his evidence in the earlier proceeding, generally affords no answer to a plea of res judicata raised against him in a subsequent proceeding involving the same matters.*** *As was argued by Counsel for the respondent,* ***a party is not permitted to present part of his evidence and then finding that the Court is against him, launch new proceedings for the purpose of having the same issues or questions re-litigated once again on the basis of further evidence which he could have advanced before.*** *(p. 5; emphasis added)*
>
> [own **emphasis added**]

[50] The Newfoundland and Labrador Board also applied the doctrine of abuse of process in *Hibernia*. There, the Newfoundland and Labrador Board stated, at paragraphs 64 through 66:

> *[64] The Board refers to its prior discussion of the Toronto case. The effect of the Toronto case is that a party is not permitted to relitigate an issue that was previously decided, regardless of whether that party or its privy was a party in the prior proceeding. Where the mutuality requirement of res judicata is not met, the doctrine of abuse of process may be applied to achieve the same result. The application of the doctrine was discussed in the Toronto case at paragraphs 42 and 43 as follows:*
>
> > *42 **The attraction of the doctrine of abuse of process is that it is unencumbered by the specific requirements of res judicata while offering the discretion to prevent relitigation, essentially for the purpose of preserving the integrity of the court's process.** (See Doherty J.A.'s reasons, at paras. 65; see also Demeter (H.C.), supra, at p. 264, and Hunter, supra, at p. 536.)*
> >
> > *43 Critics of that approach have argued that when abuse of process is used as a proxy for issue estoppel, it obscures the true question while adding nothing but a vague sense of discretion. I disagree. At least in the context before us, namely, an attempt to relitigate a criminal conviction, I believe that abuse of process is a doctrine much more responsive to the real concerns at play. **In all of its applications, the primary focus of the doctrine of abuse of process is the integrity of the adjudicative functions of courts.** Whether it serves to disentitle the Crown from proceeding because of undue delays (see Blencoe, supra), or whether it prevents a civil party from using the courts for an improper purpose (see Hunter, supra and Demeter, supra) **the focus is less on the interest of parties and more on the integrity of judicial decision making as a branch of the administration of justice. In a case such as the present one, it is that concern that compels a bar against relitigation, more than any sense of unfairness to a party being called twice to put its case forward, for example.** When that is understood, the parameters of the doctrine become easier to define, and the exercise of discretion is better anchored in principle.*

[65] The Supreme Court of Canada also stated at paragraph 51 as follows:

> *[51] Rather than focus on the motive or status of the parties,* ***the doctrine of abuse of process concentrates on the integrity of the adjudicative process. Three preliminary observations are useful in that respect. 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.***

[66] The Supreme Court of Canada discussed the discretionary factors that may be applied to limit the application of abuse of process at paragraph 53, as follows:

> *53 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. There are many circumstances in which the bar against relitigation, either through the doctrine of res judicata or that of abuse of process, would create unfairness.* ***If, for instance, the stakes in the original proceeding were too minor to generate a full and robust response, while the subsequent stakes were considerable, fairness would dictate that the administration of justice would be better served by permitting the second proceeding to go forward than by insisting that finality should prevail. An inadequate incentive to defend, the discovery of new evidence in appropriate circumstances, or a tainted original process may all overcome the interest in maintaining the finality of the original decision*** *(Danyluk, supra, at paras. 51; Franco, supra, at paras. 55).*

[**emphasis added**]

[51] The question that we must therefore determine is whether the doctrines of *res judicata* and/or abuse of process apply to the circumstances of this case, such that the Board should refuse to hear the applications before us.

[52] It is useful to examine in greater detail the *Duhaime* case, *supra*, where the British Columbia Board found that the facts supported the application of the principle of *res judicata*. On the day the applicant filed his first duty of fair representation complaint alleging inordinate delay by the union in advancing his grievances to arbitration, the applicant received a letter from the union indicating it was not proceeding with his grievances to arbitration. The applicant filed a copy of that letter with the British Columbia Board indicating he still wished to proceed with his first complaint. He did not amend his complaint to include a challenge to the union's decision not to proceed to arbitration. The British Columbia Board proceeded with an adjudication of the first complaint in a substantive way and on the basis that the applicant was not challenging the union's decision not to proceed with his grievances. The British Columbia Board issued a final decision on the first complaint dismissing the application. The second complaint filed by the applicant (the subject of the British Columbia Board's decision cited above), again raised the issue of the union's delay up to the filing of the applicant's first complaint but it also raised the issues of the union's decision not to proceed to arbitration, several other complaints in respect of the union's conduct in the time period leading up to its making that decision and the union's confirmation of its decision through its internal appeal processes. With respect to the issues raised by the second complaint, the British Columbia Board concluded at paragraphs 143 through 145:

> *[143] I have concluded that all of these issues are part of the same subject matter in dispute. Whether it is delay, or the decision not to proceed to arbitration, or any of the other matters raised, except for the decision of the Grievance Appeal Committee, all arise out of the same set of facts and are inextricably linked. All occurred before the First Complaint was adjudicated. Accordingly, all of these issues ought properly to have been included in the First Complaint in view of Duhaime's insistence that the First Complaint be determined on its merits.*
>
> *[144] Prior to the First Complaint being adjudicated Duhaime clearly had a choice. If Duhaime had wanted to exhaust internal procedures first, he could have withdrawn the Section 12 complaint regarding the delay issue and proceeded with an internal appeal on the decision not to proceed. Once the internal*

> *appeal process was exhausted, he could have filed a Section 12 complaint encompassing all issues relating to BCGEU's handling of his grievances (as indeed the present complaint does).*
>
> *[145] Alternatively, he could have amended the First Application to include within its scope Fitzpatrick's decision not to proceed to arbitration. In other words, he had ample opportunity to put his best and fullest case forward before the matter was assigned and adjudicated. That would have been relatively simple to do as the matter had only just been filed when he received the Fitzpatrick letter. He did neither. Instead, he insisted that the matter was not moot and that the Board proceed with the First Complaint as it stood. In light of that development, the panel sitting on the First Complaint correctly concluded, in my view, that Duhaime was not challenging the May 18 decision not to proceed to arbitration.*

[53] After noting that the primary reasons for applying *res judicata* were "finality, fairness and ensuring a functioning system of adjudication," the British Columbia Board in *Duhaime* outlined the policy reasons for applying the principle of *res judicata* in the circumstances of the case before it, at paragraphs 149 through 151:

> *[149]* ***First, BCGEU and the Employer in this case both have in their possession a final decision of the Board dismissing the First Complaint and finding as a fact that Duhaime has not challenged the BCGEU decision not to proceed to arbitration. They are entitled to rely on that determination as conclusively ending their exposure in this matter.***
>
> *[150]* ***Second, the prejudice to both BCGEU and the Employer at this stage would be significant if out of the blue they were to now receive a Board determination that contradicted the previous decision.*** *Witness memories may have faded; relevant documents may have been destroyed; other sources of evidence may have evaporated.* ***It would work a substantial hardship on respondents and would be fundamentally unfair if applications were to be permitted to be brought in stages with an ever increasing amount of material being added until one day a case is actually made out and then, much to a respondent's horror, it was asked to defend itself.*** *That is the very scenario which the principles underlying res judicata seek to avoid.*
>
> *[151]* ***Finally, the Board must not encourage Section 12 complainants (or any applicants) to stagger or bring their complaints forward in stages.*** *Neither our system of justice nor the Board's adjudication arm could function properly if parties*

> *were permitted to litigate the same matters in perpetuity.* ***The Board simply does not have the resources to entertain a process whereby a complainant can bring part of a complaint forward to test the waters, and if unsuccessful, put in more to see if the threshold has been overcome. Such a process would result in an inefficient use of Board resources and costly duplication.*** *This case exemplifies such a result. The Board could not hope to achieve the efficient resolution of disputes if a system of escalating complaints was to be encouraged.*
>
> [**emphasis added**]

[54] We now turn to the case at hand. In examining whether the doctrine of *res judicata* applies to the applications before us, we are concerned with the Board's decisions and the facts underlying the Board's decisions on LRB File No. 164-00. In our view, it is abundantly clear that the first requirement of *res judicata* is met in that there has been a "final decision" made by the Board on LRB File No. 164-00. In its February 6, 2003 decision, the Board made a final decision with respect to the issue of deferral to the Commission of the substantive issues contained in the Applicant's complaint about the Union's representation of her. At that time, the Board also made a final decision that it would hear and determine any process issues that the Applicant wished to raise concerning the handling of her grievances and workplace problems by the Union. The Board then made a further final decision on July 17, 2003 when it determined that the Union had not violated its duty of fair representation toward the Applicant pursuant to s. 25.1 of the *Act* with respect to the process issues. The fact that the Board agreed to hear a request by the Applicant for reconsideration of those two decisions does not make those previous decisions any less "final" in nature. In its decision on the reconsideration application, the Board confirmed the "finality" of its previous decisions by determining that the Applicant had not established appropriate grounds (in accordance with its long established practice) for the Board to embark on a reconsideration of its decisions. Lastly, we note that the Applicant brought an application for judicial review and, typically, the Court only reviews decisions of the Board that are final in nature.

[55] It is also abundantly clear that the third requirement of *res judicata* has been met in this case, that is, that the parties are the same on these applications as they were on the application in LRB File No. 164-00. While the Applicant in this case has

named “the Saskatchewan Government and General Employees Union (S.G.E.U.) staff, elected officials or other persons acting on behalf of S.G.E.U.” as the respondents in the applications before us, for all intents and purposes it is the Union proper against whom she is making her complaints and it is the Union that is the legal entity on whose behalf the “staff, elected officials and other persons” acted. While we note that the Employer was also a party on LRB File No. 164-00, it was partly on the basis that the Applicant had alleged the Employer was guilty of an unfair labour practice in its own right, a claim that the Board dismissed as part of its February 6, 2003 decision. In addition, the Board always adds the employer as an interested party to a duty of fair representation application. Similarly, had we determined in this case that we would hold a hearing into the matters raised by these applications, the Employer would also have been added as an interested party to these applications, making the parties identical to those in LRB File No. 164-00.

[56] We note that in the body of the application on LRB File No. 126-06 the Applicant suggests that the Union’s legal counsel has also violated s. 25.1, however, the Union’s legal counsel was not specifically named in the application as a party. In any event, the Applicant fails to state the basis for her allegation. There are only vague references in the application to comments made by legal counsel at the previous hearing and to the fact that the Union sometimes gets legal opinions about certain issues, but the Applicant makes no reference as to what legal opinion, if any, was given by legal counsel in relation to the Applicant's matters, that would lead to liability on the part of counsel. Aside from the fact that the Union’s legal counsel has not specifically been named as a party, we would not treat legal counsel as a party to the application in any event. There is simply no legal basis whatsoever to find liability under s. 25.1 for the conduct of a party’s legal counsel during the course of the hearing while assisting the Union in defending its prior conduct toward the Applicant. To the extent that a claim might be made against legal counsel for conduct during the actual representation by the Union of its member, that claim would involve the actions of counsel on behalf of the Union thereby making the Union, and not legal counsel, the actual party to the application. In summary, because the Applicant names only the Union as a party in her applications and her current claims raise only allegations against the Union, we have therefore determined that the parties on these applications are the same as those in LRB File No. 164-00.

[57] With respect to the second requirement, that the issue be the same as that decided in the prior decision, we also find that this requirement has been met. The Applicant asks the Board to proceed with a hearing of certain complaints she has about the manner in which the Union represented her in relation to her workplace problems surrounding the issue of her disability and the Employer's duty to accommodate her. Her current applications contain both substantive and procedural complaints. Even aside from the fact that the Applicant acknowledges that the issues she now brings before the Board are the same as those considered by the Board in LRB File No. 164-00,[6] we also conclude that the issues raised by the current applications, in their essential character, are the same as those considered by the Board on LRB File No. 164-00.

[58] In LRB File No. 164-00 the Board determined that all of the Applicant's substantive complaints were deferred to the Commission. Those substantive complaints included *all issues* in relation to the accommodation settlement with the Employer, the proposed financial settlement between the Union and the Employer, and the overall grievance settlement entered into between the Union and the Employer, all of which arose out of the Applicant's injury in 1993 and resulting disability. The substantive claims in the current applications also all relate to this injury, the efforts of accommodation by the Union and the Employer and the handling and settling of grievances in relation to the workplace problems that arose out of the Applicant's disability.

[59] Similarly, in our view, the process complaints raised in the applications before us were, in their essential character, raised by the Applicant on LRB File No. 164-00. The Board ruled in its July 17, 2003 decision on LRB File No. 164-00 that there was nothing in the processes used by the Union to arrive at the accommodation, financial and grievance settlements that was taken in bad faith, with discrimination, or in an arbitrary fashion.

[60] We conclude that the matters raised by the present applications are *res judicata* and the Board therefore lacks jurisdiction to hear them.

[61] Although it is our view that the second requirement of the doctrine of *res judicata* examines whether the issues, in their essential character, are the same as in the prior litigation (as stated above), we also note that some of the specific complaints in the present applications were directly addressed by the Board in its July 7, 2003 decision. An examination of the Board's decision on LRB File No. 164-00 against the allegations in LRB File No. 126-06 is illustrative. In LRB File No. 164-00, the Applicant complained that the Union should have advised her about the *Cadillac Fairview* case, *supra*, that she had the option to pursue her discrimination complaint with the Commission without the assistance of the Union and that she could have, in fact, achieved a better resolution through the Commission had the Union not been involved. The Board previously ruled that there was nothing inappropriate about the Union continuing to pursue and attempt to settle the Applicant's accommodation grievances while the human rights complaint was proceeding. The Board also found that the Union had encouraged the Applicant to file a human rights complaint as part of its overall strategy of getting her back into the workplace, that the Union had provided her with considerable information and support in relation to her rights under both the collective agreement and the *Code*, and that the Union was not under a positive duty under s. 25.1 of the *Act* to advise the Applicant of all alternative avenues for her complaint nor to advise on the appropriate forum in which to pursue a complaint. The Applicant has attempted to again raise these issues through her complaints in LRB File No. 126-06 by stating that the provisions of the collective agreement alleged to have been violated and the accommodation grievances filed by the Union did not contain the legislated requirements of the *Code* (and a similar provision of the *LSA*), that the Union was somehow responsible to obtain a ruling on arbitrability of the Applicant's grievances even though the grievances were settled and that somehow the grievances were invalidated upon the filing of the Applicant's human rights complaint.

[62] In our view, these complaints in LRB File No. 126-06 are simply a different way of saying that the Union did not adequately advise or represent the Applicant in relation to her human rights interests. For the most part, the complaints in LRB File No. 126-06 are substantive in nature. The Board deferred to the Commission

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[6] In fact, in both applications, the Applicant quotes extensively from the transcripts of evidence taken at the hearings of LRB File No. 164-00 and uses this testimony in support of the claims/arguments she makes in

with respect to the Applicant's substantive complaints in LRB File No. 164-00 surrounding the settlement of her accommodation, financial issues and the grievances. At the time of the initial hearing in LRB File No. 164-00, there was evidence and a finding that the Commission had exercised its jurisdiction, which exercise obviously involved a consideration of s. 16 of the *Code* and its application to the agreements between the Union and the Employer dealing with the Applicant's accommodation, financial issues and grievances. The Board has therefore previously considered the Applicant's human rights interests by deferring those to the Commission for consideration. Similarly, the necessity of the Union to obtain a ruling from an arbitrator on the arbitrability of the grievances would fall within the jurisdiction exercised by the Commission in assessing whether the settlements complied with the *Code*.

[63] With regard to the complaints in LRB File No. 126-06 that might be considered procedural in nature, such as the Union not treating the Applicant's grievances as invalid after she filed her human rights complaint, the Board previously ruled that there was nothing improper about the Union continuing to pursue settlement of the grievances while the human rights proceeding continued.

[64] With respect to the Applicant's claims in LRB File No. 127-06 dealing with issues related to her workers' compensation claim, these types of issues, in their essential character, have also been previously dealt with by the Board. The issue concerning the re-employment list would have been tied to the Applicant's accommodation matter before the Commission and, in fact, was actually contained in the Applicant's human rights complaint. The issues of medical proof, both the denial and eventual receipt of benefits, as well as issues concerning her workers' compensation claim, would have been specifically tied to the financial settlement reviewed by the Commission. In addition, the Board also previously dealt with a number of process issues surrounding the Applicant's workers' compensation claim and claim for disability benefits. For example, the Board previously ruled that the Union handled the grievances in relation to discriminatory remarks made by a manager to the Workers' Compensation Board and there was no cause for complaint. The Board also ruled on the appropriateness of work assessments by the Employer that the Union did not object to.

The Board also dealt with the obligation of the Union to advise the Applicant of her rights under the *Code*.

[65] Even if we are incorrect in our conclusion that the claims raised in the current applications are *res judicata* because they were essentially raised on LRB File No. 164-00 (with the Applicant's acknowledgement that they were), the fact that the Board did not issue a specific ruling on each component of the claims in the applications before us when it made its decision on LRB File No. 164-00 does not prevent the application of *res judicata* in the circumstances before us. Similarly, the fact that the Applicant may not have raised every specific complaint now contained in LRB File Nos. 126-06 and 127-06 when the Board heard LRB File No. 164-00 does not prevent the application of *res judicata* in the circumstances of this case.

[66] As stated by the British Columbia Board in *Duhaime*, an applicant must bring forward its whole case at the time the subject matter is first dealt with. A party is not permitted to open the same subject of litigation to attempt to bring forward matters that could have been brought forward at the earlier hearing. In our view, it is clear that that is what the Applicant is attempting to do here. The subject matter of the litigation first dealt with in LRB File No. 164-00 is whether the Union was in violation of s. 25.1 of the *Act* for failing to fairly represent the Applicant in relation to the handling of her workplace problems and grievances arising out of the Applicant's 1993 injury and resulting disability. All of the complaints in the applications before us relate to that same subject matter and time period. The Applicant does not deny this. In fact, the Applicant specifically suggests that the Board should "re-hear" her case, in part because there is evidence that she believes the Board should hear, expecting that if it does it will, in effect, "change its mind" and find the Union in violation of the duty of fair representation to her. *Res judicata* applies not only to those aspects of her case that the Board ruled on in LRB File No. 164-00, but also to all matters that properly belonged to the subject matter of that prior litigation.

[67] It is very clear that the Applicant had every opportunity to present all of her possible complaints at the prior hearings, including at the hearing of her application for reconsideration. In fact, the Board allowed the Applicant to amend her application prior to the hearing of the procedural complaints and gave her significant leeway in

leading her evidence such that the Board heard and considered issues that appeared more “substantive” than “procedural” in nature. The Applicant cannot now claim that, as a result of deficiencies of her own, she should be provided with an opportunity to essentially present her case all over again. As stated in *Duhaime*, *supra*, it is of no consequence that certain claims were omitted at the first hearing through the applicant’s negligence, inadvertence or accident.

[68] In acknowledging that the issues currently before the Board are the same as those under consideration in LRB File No. 164-00, the Applicant suggests that the Board did not make a determination on certain of those issues and that is why she filed these applications. This argument demonstrates to us that the Applicant has, in part, misunderstood the Board's prior decisions. In those prior decisions, the Board noted that there were several issues raised in the Applicant’s amended application that were not dealt with by the Applicant at the hearing. She raised these issues but apparently failed to produce any evidence or any relevant evidence in support of the allegations. For example, at the previous hearing of LRB File No. 164-00, the Applicant raised the issue that the Union failed to apply for employment benefits on her behalf (which is similar to one of the claims made in LRB File No. 127-06). The Board did not rule on this issue stating that the Applicant either failed to call evidence in support of the allegation or she could not recall the basis of the complaint. On the basis of *Duhaime*, *supra*, this failure by the Applicant does not prevent the application of *res judicata*.

[69] In addition, it is clear that the Applicant essentially believes that she was not previously successful with her case because she was unable to assist the Board in understanding her complaints against the Union. We believe that this comment demonstrates that the Applicant has misunderstood the Board's comments in its prior decision. The Applicant repeatedly refers to the following comment made by the Board in its July 7, 2003 decision: “Much of the evidence presented at the hearing did not assist the Board in understanding [the Applicant’s] complaints.” In our view, this comment by the Board simply means that the evidence led by the Applicant at that hearing had no relevance to a violation of the duty of fair representation. We also note that the Applicant raised this very same argument at the reconsideration hearing on LRB File No. 164-00 as a ground for having her that application re-heard and allowing her to

introduce additional evidence. The Board rejected that argument in its Reasons for Decision issued December 18, 2003.

[70] As previously stated, while we believe that the substantive and procedural complaints in LRB File No. 127-06 dealing with the Applicant's workers' compensation claim were, in their essential nature, encompassed in the application and decision in LRB File No. 164-00, however, if one takes the view that they were not, the doctrine of *res judicata* still applies to these complaints. In LRB File No. 127-06, the Applicant alleges that the Union failed to properly advise her on a number of matters: giving her improper advice about going on a re-employment list, signing a medical release for the Employer, and her rights under s. 16 of the Code; filing a claim with the Workers' Compensation Board; and filing a grievance against the Employer for harassment about obtaining medical information. The Applicant also claims the Union failed to file claims for various employment benefits and failed to advocate on her behalf on her workers' compensation claim. According to the principle of *res judicata*, it is not now open to the Applicant to bring a new application and frame her assertions that the Union violated s. 25.1 of the *Act* in various additional ways concerning its handling of her workers' compensation or disability benefits when she could have raised these allegations at the time of the prior hearing. If this were permitted, there would be no finality to this matter, as it would continue to be open to the Applicant to file repeated applications with the Board asserting different grounds in an attempt to have the Union found in breach of the duty of fair representation. All of the Applicant's complaints in LRB File No. 127-06 arise out of the same facts and are inextricably linked with the matters that were the subject of litigation in LRB File No. 164-00. All of the conduct complained of occurred prior to 2003 when these matters were first heard and determined by the Board and therefore they should have been raised by the Applicant at the hearings of LRB File No. 164-00.

[71] With respect to the complaints made in the application on LRB File No. 126-06, it is our view, as previously stated, that all of these issues were dealt with on LRB File No. 164-00. For the most part, the application appears to be an attempt by the Applicant to re-argue her claim rather than assert any additional conduct of the Union that is in violation of s. 25.1. The Applicant is attempting to attack the contents of the parties' collective agreement and the grievances filed on her behalf by the Union by suggesting that they were invalid or illegal in some way because they did not reference

s. 16 of the *Code* (or a similar provision in the *LSA*). The Applicant asserts that she has a new understanding of the principles in the *Cadillac Fairview* and *Parry Sound* decisions and suggests that the Board must re-hear the matters in question in order to consider the following legal principles: that the parties cannot contract out of human rights law, that, generally, statutory provisions relied on should be specified, that the *Code* prevails if there is a conflict with the collective agreement, that the collective agreement cannot amend or repeal the provisions of the *Code*. In our view, it is apparent that these legal principles were considered by the Board in its decision to defer the substantive issues to the Commission. In fact, *Cadillac Fairview* was quoted extensively by the Board. In addition, the Board's prior decisions were not in conflict with the legal principles found in the decision in *Parry Sound*.

[72] To the extent that the application on LRB File No. 126-06 raises procedural issues, they are matters that should have been raised and argued by the Applicant at the hearing on LRB File No. 164-00. The Applicant is prevented from bringing any additional complaints regarding the same subject matter on the basis of the principle of *res judicata,* as outlined above in our analysis in relation to LRB File No. 127-06.

[73] In LRB File No. 126-06, the Applicant is also attempting to argue that she was somehow entitled to a ruling of an arbitrator concerning the arbitrability of the grievances and that her grievance became invalid upon the filing of her human rights complaint. The Applicant's argument, that *Cadillac Fairview* stands for the proposition that the fact that a collective agreement contains an anti-discrimination clause does not affect the determination of the essential nature of the dispute or the question of jurisdiction, was essentially one of the reasons for the Board's deferral of the substantive issues to the Commission. The Board found that the dispute under the collective agreement was substantially the same as the dispute in the human rights complaint and that the collective agreement provision did not oust the jurisdiction of the Commission, which the Board found to have primary jurisdiction in the circumstances. In our view, all of these arguments in LRB File No. 126-06 were either considered at the hearing of LRB File No. 164-00 or they should have been made at that time. It is not open to the Applicant to bring applications in an attempt to repeatedly challenge the Board's prior final decisions based on new or re-hashed legal arguments. In addition, cases decided

subsequent to the Board's decisions in LRB File No. 164-00, such as *Renaud*, *supra*, are irrelevant and cannot be used to re-open prior litigation and attack a prior Board decision. In any event, the principles in the *Renaud* case, *supra*, do not add anything and, in our view, would not have changed the Board's prior decisions on LRB File No. 164-00.

[74] What appears to have prompted the Applicant to make these additional arguments on LRB File No. 126-06 at this stage is the recent ruling by the Commission that it does not have jurisdiction to entertain the Applicant's complaint against the Union (a complaint made after her initial duty of fair representation complaint to the Board) that it discriminated against her in the handling of her workplace problems and grievances. We reject the Applicant's argument that these matters should revert back to the Board because the Commission declined jurisdiction to hear that complaint. In its decision of February 6, 2003, the Board very clearly deferred all of the Applicant's substantive complaints against the Union to the Commission and did not, as the Applicant suggests, simply decline to determine the matters until the Commission had determined its jurisdiction. It matters not that the Applicant did not at that time have an outstanding complaint against the Union with the Commission. At the time of the hearing of LRB File No. 164-00 that resulted in the Board's February 6, 2003 decision, the Commission had already exercised its jurisdiction, having approved the settlements entered into between the Union and the Employer and having declined to proceed to a board of inquiry on the Applicant's complaint. As regards the Applicant's recent complaint to the Commission, it appears to have involved "process" type complaints that had been dealt with by this Board in its July 2003 decision. The Board's decisions in LRB File No. 164-00 were final in nature and were not overturned on reconsideration by the Board or on judicial review by the Court of Queen's Bench. As stated above, the principle of *res judicata* also prevents the Applicant from bringing new applications before the Board only to make different legal arguments about the same subject matter as dealt with in prior litigation.

[75] The Applicant also argues that the Court of Queen's Bench was unable to review the Board's decision concerning the Union's improper representation of her because, at the time the matter went before the Court, the Board had deferred the matter to the Commission and the Comission had not yet declined jurisdiction to hear her complaint against the Union. In our view, the Court dealt with the judicial review

application in a comprehensive manner and found no error by the Board in its decision to defer the substantive portions of the Applicant's claims against the Union to the Commission or in the decision of the Board to dismiss the Applicant's process complaints. The Board's decision to defer to the Commission did not guarantee success to the Applicant before the Commission – only that the substantive aspects of her claim against the Union concerning the settlement entered into between the Employer and the Union were to be dealt with by the Commission and not the Board. The matter of the Union's representation of the Applicant cannot be relitigated before the Board simply because the Applicant was not successful with a subsequent claim against the Union at the Commission.

[76] The application of the doctrine of *res judicata* still requires some exercise of discretion by the Board. As stated by the Supreme Court of Canada in the *Danyluk* decision, quoted in *Hibernia*, *supra*, there maybe certain factors that limit the application of the doctrine of *res judicata*. One must weigh these factors or concerns of fairness against the principle of finality enshrined in the doctrine of *res judicata*. According to *Danyluk*, *supra*, a consideration of fairness includes an examination of the following factors: if the stakes in the original proceeding were too minor in nature "to generate a full and robust response" but the current stakes are considerable; if there was an inadequate incentive to defend at the original hearing; there has been the discovery of new evidence in appropriate circumstances; or that the original proceeding was tainted in some way.

[77] We do not find that these factors or any concerns of fairness toward the Applicant are outweighed by the principle of finality underlying the application of *res judicata*. The stakes in the original proceeding were not so minor as to generate a less than full presentation by the Applicant. The Board held three separate hearings into the Applicant's complaint, which ran the course of several days. It appears that many accommodations were made in the Board's processes to allow the Applicant every opportunity to put any and all possible claims before the Board. The Board heard the matter of the Applicant's request for reconsideration of both the Board's prior decisions (even though her initial application only requested reconsideration of one of those decisions), taking into account the many written materials filed by the Applicant. We also note that a number of the issues now brought before the Board were previously

brought by the Applicant on her reconsideration application. While the Applicant may have been unrepresented at and inexperienced with Board matters, this does not lead us to the conclusion that she was unable to fully present her case, particularly given the degree of attention which the Board gave to the Applicant's complaints on LRB File No. 164-00 and the accommodations it made in its procedures. It is not uncommon for parties to appear before the Board unrepresented by legal counsel. In fact, the *Act* and the procedures developed by the Board to carry out its responsibilities under the *Act* are designed to be "user-friendly" by parties not represented by legal counsel.

[78] In her written submission, the Applicant also argued that she should be entitled to a rehearing of her claims against the Union and the opportunity to introduce new claims, on a number of specified grounds. Those grounds included her inexperience and inability to represent herself without a lawyer at the previous hearings, her confusion about the meaning of the Board's decision on deferral and the issues at subsequent hearings, her failure to comprehend the *Cadillac Fairview* and *Parry Sound* decisions, *supra*, until after the hearings, her failure to call evidence she had wanted to call at those hearings (she provided no details of what evidence this was) and because she received other evidence subsequent to the hearings before the Board (although there was little information as to what evidence she had discovered or its relevance). The Applicant also referred to certain "natural justice" grounds as a basis for a re-hearing.

[79] These arguments of the Applicant are framed in a manner similar to that which we would see on an application for reconsideration and, in fact, the Board did see some of these on the Applicant's request for reconsideration on LRB File No. 164-00 (i.e. the request to introduce new evidence). To this extent, those matters are also *res judicata*. While we accept that in limited circumstances a party might be entitled to more than one reconsideration application, we have, for the reasons stated earlier, treated the applications before us as new applications. However, to the extent that these concerns of the Applicant raise issues of fairness requiring consideration by the Board of the principles in *Danyluk*, we will examine those grounds in a manner similar to that done on a reconsideration hearing.

[80] In our view, these fairness concerns raised by the Applicant do not outweigh any concerns of finality. All of the "new" evidence that the Applicant proposes to call at a "rehearing," to the extent that it is outlined in her application and written submission, appears to have existed and been discoverable at the time of the original hearing. The Applicant simply offered no good and sufficient reasons for not having discovered or introduced that evidence at the time of the original hearing, other than her lack of understanding of legal precedent and her inexperience and lack of legal counsel. For reasons previously stated, these concerns do not provide a justification for us to reject the application of *res judicata* in this case.

[81] In addition, we reject the Applicant's argument that a re-hearing is necessary because of certain natural justice concerns. The Applicant argued that it was inappropriate that the Union did not it object at the reconsideration hearing to the Applicant raising issues that the Board had deferred to the Commission; that the Union's witnesses were excluded from the hearing, thereby having the opportunity to collaborate their stories; and that a part-time Board member was in a conflict of interest because the Board member was mentioned at the hearing as having some prior involvement in the Applicant's work situation yet the Board member did not remove herself as a member of the Board during the time period the Board held hearings on LRB File No. 164-00. If we were to examine these concerns on the grounds of fairness, specifically, whether "the original proceeding was tainted in some way" (as per *Danyluk, supra*), we do not find that they outweigh concerns of finality and *res judicata*. The Union's lack of objection to the Applicant raising issues on her reconsideration hearing that had been deferred to the Commission and the Board permitting the Applicant to raise those issues support our conclusion that the Board allowed the Applicant as much leeway as possible in challenging the Board's decisions and, accordingly, the Union's conduct. With respect to the allegation concerning the absence of the Union's witnesses from the hearing room, it is typical for the Board to make an order at a hearing excluding witnesses from being present until after they have testified. Such an order prevents witnesses from hearing the evidence of prior witnesses, who may be testifying about similar facts and then tailoring their evidence accordingly. In our view, such an order does not encourage or result in witnesses collaborating their stories outside the hearing room. The final concern about the alleged conflict of interest by the Board member is also without merit. On the basis of the Board's decision in *Kaufmann*, [2006] Sask. L.R.B.R. 97, LRB File

No. 287-00, it is not necessary that a part-time Board member resign in these circumstances. *Kaufmann* stands for the proposition that, if a part-time Board member is an instructing party or a witness in a proceeding before the Board, that member shall not subsequently sit with the members of the panel who heard the application in which they were involved until that panel renders a decision on that application. These were not the circumstances before the Board in this matter.

[82] In the circumstances of this case, the Applicant's concerns of fairness must be weighed against the principle of finality enshrined in the doctrine of *res judicata*, specifically, the ability of a party to rely on a judicial determination as conclusively ending its exposure on a matter. It could cause great prejudice to a party, including the Union in this case, if it now received a decision that contradicted a previous decision on the matter. In addition, by simply being required to present its case a second time, we conclude that the Union will suffer prejudice as a result of faded memories, lost or destroyed documents/evidence and the death of a witness. It is important that we do not encourage applicants to bring their claims in stages, filing ever-increasing numbers of claims and material until they can make out their case. We agree with the British Columbia Board's comments in the *Duhaime* case that if the Board encouraged "a system of escalating complaints," it could not "function properly if parties were permitted to litigate the same matters in perpetuity," as it would result "in an inefficient use of Board resources and costly duplication," and would prevent the Board from achieving a timely and "efficient resolution of disputes," which is one of the statutory objectives of the *Act*. In addition, to permit the continuous litigation of the matters in question would undermine the harmonious relationship between the parties, which the *Act* is designed to foster.

[83] For the foregoing reasons, we conclude that any concerns of fairness to the Applicant do not prevent the application of the doctrine of *res judicata*.

[84] Although our findings concerning the application of the doctrine of *res judicata* dispose of these matters and make it unnecessary for us to consider whether the applications in question represent an abuse of process, it is our conclusion that the Board lacks jurisdiction to hear these applications on this basis as well. The doctrine of abuse of process is similar to that of *res judicata* but it is unencumbered by the specific

requirements of *res judicata*, thereby allowing the Board the discretion to prevent re-litigation for the purposes of preserving the integrity of the Board's processes and its adjudicative functions. For reasons previously stated, it is our view that the Applicant is attempting to re-litigate the matters in question, matters that were either raised at the original hearings or should have been raised given that they were part of the subject matter of that prior litigation. In examining the doctrine of abuse of process, we start with the assumption that re-litigation will not necessarily yield a more accurate result than that obtained as a result of the original hearings into the matters raised by the Applicant. The re-litigation of these issues will result in either: (i) the same conclusion as made on the original hearings in which case the re-litigation constitutes a waste of time and resources for the Board and the parties; or (ii) a different conclusion than that made on the original hearings in which case the re-litigation results in inconsistent Board decisions which undermines the Board's credibility and diminishes its authority The goal of finality will not be achieved. In order to protect the Board's credibility and authority, meet the objectives of the Act and prevent wasteful use of time and resources we exercise our discretion to apply the doctrine of abuse of process and refuse to hear the applications for lack of jurisdiction.

[85] Therefore, on the basis of the doctrines of *res judicata* and abuse of process, the Board refuses to hear these applications because of a lack of jurisdiction.

DATED at Regina, Saskatchewan, this **17th** day of **January, 2007.**

LABOUR RELATIONS BOARD

Angela Zborosky
Vice-Chairperson