Labour Relations Board
Saskatchewan

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

LRB File Nos. 199-05, 200-05, 201-05, 202-05, 203-05, 204-05, 205-05, 206-05, 207-05, 208-05, 209-05, 210-05 & 211-05; October 31, 2008

(In Camera) Chairperson and Executive Officer, James Seibel

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), (p) and (q)**

REASONS FOR DECISION

Background:

[1] The Applicant, Barbara Metz, filed thirteen similar applications against Saskatchewan Government and General Employees' Union (the "Union"), alleging violation(s) of ss. 25.1 and 36.1 of *The Trade Union Act*, R.S.S. 1978, c. T-17 (the "*Act*"), by reason of the actions of various employees, officers and representatives of, and counsel for, the Union, including all individual members of the Union's Provincial Council from January 1994 to May 16, 2003, inclusive.

[2] Sections 25.1 and 36.1 of the *Act* provide as follows:

> *25.1 Every employee has the right to be fairly represented in grievance or rights arbitration proceedings under a collective bargaining agreement by the trade union certified to represent his bargaining unit in a manner that is not arbitrary, discriminatory or in bad faith.*
>
> *. . .*
>
> *36.1(1) Every employee has a right to the application of the principles of natural justice in respect of all disputes between the employee and the trade union certified to represent his bargaining unit relating to matters in the constitution of the trade union and the employee's membership therein or discipline thereunder.*
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> *(2) Every employee shall be given reasonable notice of union meetings at which he is entitled to attend.*
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> *(3) No employee shall unreasonably be denied membership in a trade union.*

[3] The particular application referring to the counsel for the Respondent, LRB File No. 210-05, alleges commission of an unfair labour practice in violation of the same provisions by virtue of s. 12 of the *Act*, which provides as follows:

> *No person shall take part in, aid, abet, counsel or procure any unfair labour practice or any violation of this Act.*

[4] In 2000, the Applicant had filed an application LRB File No. 164-00, alleging violation of the same provisions of the *Act* by the Union through the actions or omissions of certain of its employees, officers and representatives, including many of those referred to in the present applications. The application proper dealt with alleged events during the period 1994 to 2000. However, at the hearing of that application, the Board heard evidence of alleged events up until the date of the hearing on July 3, 2003.

[5] When the present applications were filed, the Board Registrar identified that they related to allegations of acts and omissions between 1994 and 2003, and may relate to matters raised in the previous application in LRB File No. 164-00. The Applicant was advised that a panel of the Board would consider the present applications pursuant to ss. 18(o), (p) and (q) of the *Act* (see sections, *infra*), in order to determine

whether to exercise its discretion to dismiss the applications without a hearing. Those sections provide as follows:

> *18. The board has, for any matter before it, the power:*
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> *(o) to summarily refuse to hear a matter that is not within the jurisdiction of the board;*
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> *(p) to summarily dismiss a matter if there is a lack of evidence or no arguable case;*
>
> *(q) to decide any matter before it without holding an oral hearing;*

[6] For the purposes of the present consideration, it is necessary to review the nature and disposition of the earlier application in LRB File No. 164-00, and then the nature of the present applications.

Summary of the Disposition of the Prior Application in LRB File No. 164-00:

[7] The relevant decisions are reported at *Metz v. Saskatchewan Government and General Employees' Union*, [2003] Sask. L.R.B.R. 28; [2003] Sask. L.R.B.R. 323; [2003] Sask. L.R.B.R. 551; [2004] Sask. L.R.B.R. c-8 (Sask. Q.B.).

[8] The Applicant initially filed the 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. Actions complained of dated back to 1994.

[9] The Applicant had also previously filed a complaint against the Employer with the Saskatchewan Human Rights Commission alleging discrimination and a failure to accommodate her disability.

[10] The evidence at the original hearing of 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.

[11] In a preliminary decision 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.

[12] 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."

[13] 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. 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 Corp. Ltd. v. Saskatchewan (Human Rights Commission)* (1999), 173 D.L.R. (4th) 609 (Sask. C.A.), 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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> ...
>
> *[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.*

[14] The Board further determined that it was appropriate to hear and determine those complaints in the application that dealt with the procedure followed by the Union in dealing with the Applicant's complaints, stating 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, 88 di 52, 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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> . . .

> *[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.*

[15] 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.

[16] On August 5, 2003, the Applicant filed an application with the Board for reconsideration of the Board's decision of 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*, Sask. L.R.B.R. 551,) 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.

[17] In dismissing the reconsideration application, the Board 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.*

[18] 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.*

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

[20] 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 (reported at, [2004] Sask. L.R.B.R. c-8 (Sask. Q.B.)), stating at c-19 and c-20:

> *[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*
> *.*
> *[48] Accordingly, the applicant has not met her onus of demonstrating that the decisions she attacks of the LRB are patently unreasonable.*

The Nature of the Present Applications — LRB File Nos. 199-05 to 112-05, incl.:

[21] All of the twelve applications are similar in form. The description of the application in LRB File No. 099-05 is set out in some detail to demonstrate the full form of the application. Our description of the other eleven applications will briefly identify where they differ materially from that in LRB File No. 099-05. It should be noted that some of the applications excerpt portions of the transcript from the proceedings in LRB File No. 164-00 (which related to alleged events of a failure to fairly represent the Applicant in the period 1994 to 2000) as the basis for the allegations in the new applications.

LRB File No. 199-05:

[22] Paragraphs 1, 3, 4 and 5 of the application state as follows:

> *1. Barbara Metz applies to the Labour Relations Board for an order determining whether an unfair labour practice (s) (or a violation(s) of the Act) is being and/or has been engaged in by the Saskatchewan Government and General Employees' Union (S.G.E.U.) staff, elected officials or other persons acting on behalf of the S.G.E.U. designated in paragraph 3 of this application, and requiring [them] to refrain from engaging in the said unfair labour practice(s). . . particulars of which are set out below.*
> *. . . .*
>
> *3.* [Reference is made to Doug Taylor as a representative of the Union.]

4. The Applicant alleges that an unfair labour practice(s) (or a violation(s) of the Act) has been and/or is being engaged in by the said Trade Union by reason of the following facts:

Parry Sound (District) Social Services Administration Board v. O.P.S.E.U. Local 324, [2003] 2 S.C.R. 157, 2003 SCC 42 (Parry Sound).

Saskatchewan Government and General Employees' Union v. Saskatchewan, [1998] CA98105 Docket: 2822 (SGEU BC).

Cadillac Fairview Corp. Ltd. v. Saskatchewan (Human Rights Commission), [1999] CA99046 (Cadillac Fairview).

March 1994 Doug Taylor, Union representative refused to represent Barbara Metz and/or file a grievance, on the employer's duty to accommodate in the workplace: stating "the employer can do what they want", and failed to represent the co-decision(s) made between Barbara Metz and Wayne Lee, when he failed to provide timely and appropriate representation and/or grievances under the Sask. Labour Standards Act section 44.3 such that Barbara Metz would have been working in an "unsoured" work environment and in a position that accommodated her disabilities without harm to her existing disabilities and to her emotional health; and, did not inform Ms. Metz as per the statutory obligations/provisions under the Sask. Labour Standards Act, as per September 8, 2005 Sask. Labour Standards decision by John Boyd, Executive Director:

"…The Labour Standards Act … applies to most employees in the province, including unionized employees."

Parry Sound states:

[then follows recitation of several paragraphs from that decision.]

The above does not limit the addition of further allegations, if necessary and/or as required or requested, at the Sask. Labour relations Board hearing, at a date to be determined.

5. The applicant Barbara Metz submits by reason of the facts hereinbefore set forth the said Saskatchewan Government and General Employees Union Staff, Elected Officials or other persons acting on behalf of the S.G.E.U. has been or is engaging in an unfair labour practice(s) (or violation(s) of the Act) within the meaning of Section 25.1 and 36.1 of The Trade Union Act.

LRB File No. 200-05:

[23] The application in LRB File No. 200-05 is very similar to that in 099-05, but is eight pages long. Reference is made in paragraph 3 to Susan Jeannotte-Webb as a representative of the Union. The balance of the application makes allegations of refusal or failure on the part of Ms. Jeannotte-Webb to fairly represent the Applicant on certain occasions in 1995 through 1998.

LRB File No. 201-05:

[24] Reference is made in paragraph 3 of the application to Pat Gallagher as a representative of the Union. Again allegations are made of a failure by Ms. Gallagher to fairly represent the Applicant on various occasions. The exact time frame of the allegations is not stated, but by reference in the application to her alleged interference in Ms. Jeannotte-Webb's representation of the Applicant, the time frame is apparently 1995 to 1998, as in LRB File No. 200-05.

LRB File No. 202-05:

[25] Reference is made in paragraph 3 of the application to Kevin Yates as a representative of the Union. Allegations are made of a failure by Mr. Yates to fairly represent the Applicant on various occasions in 1995 to 1997, including the negotiating and signing of a collective agreement that allegedly contracted out of the requirements of *The Labour Standards Act,* and failure to inform the Applicant of alleged obligations of the Employer under *The Labour Standards Act*.

LRB File No. 203-05:

[26] Reference is made in paragraph 3 of the application to Larry Langgard as a representative of the Union. Allegations are made of a failure by Mr. Langgard to fairly represent the Applicant in 1997, by refusing to have the Union pay for the Applicant to attend a medical facility, causing a delay in the grievances moving forward in a timely fashion. Allegations are also made of a failure to fairly represent the Applicant by a failure to inform her of alleged obligations of the Employer under *The Labour Standards Act*.

LRB File No. 204-05:

[27] Reference is made in paragraph 3 of the application to Barry Nowoselsky as a representative of the Union. Allegations are made, *inter alia*, of interference by Mr. Nowoselsky in 2001 in the Union's representation of the Applicant, and a failure to fairly represent the Applicant by a failure to inform her of alleged obligations of the Employer under *The Labour Standards Act*.

LRB File No. 205-05:

[28] Reference is made in paragraph 3 of the application to Susan Saunders as a representative of the Union. In a lengthy application, allegations are made, *inter alia*, of a failure to fairly represent the Applicant by reason of various acts or omissions in 1998 and 1999.

LRB File No. 206-05:

[29] Reference is made in paragraph 3 of the application to Rod McCorriston as a representative of the Union. In a lengthy application, allegations are made, *inter alia*, of a failure to fairly represent the Applicant by reason of various acts or omissions in 1995 through 1998, including the negotiation and signing of a collective agreement as in LRB File No. 202-05, above.

LRB File No. 207-05:

[30] Reference is made in paragraph 3 of the application to Fred Bayer as a representative of the Union. In a lengthy application, with excerpts of evidence from the hearing in LRB File No. 164-00, in July, 2003 (see, above), which included evidence of events in 2001, after the application was filed, allegations are made, *inter alia*, of a failure to fairly represent the Applicant by reason of various acts or omissions in 2001.

LRB File No. 208-05:

[31] Reference is made in paragraph 3 of the application to Doug Blanc as a representative of the Union. Referring to excerpts of evidence given in the hearing in LRB File No. 164-00, in July, 2003 (see, above), which included evidence of events in 2002, after the application was filed, allegations are made, *inter alia*, of a failure to fairly represent the Applicant by reason of various acts or omissions in, it appears, 2001.

LRB File No. 209-05:

[32] Reference is made in paragraph 3 of the application to Bob Bymoen as a representative of the Union. Allegations are made, *inter alia*, of a failure to fairly represent the Applicant by reason of various acts or omissions in, 2002 and early 2003, relative to the past proceedings by or concerning the Applicant.

LRB File No. 210-05:

[33] Reference is made in paragraph 3 of the application to Rick Engel as a representative of, and legal counsel for, the Union. In a lengthy application, allegations are made, *inter alia*, of a failure to fairly represent the Applicant by reason of certain particulars of Mr. Engel's legal representation in relation to its representation of the Applicant, pursuant to s. 12 of the *Act*.

LRB File No. 211-05:

[34] Reference is made in paragraph 3 of the application to "All individual members of the Provincial Council as per the Constitution of the Saskatchewan Government and General Employees' Union, from January 1994 to May 16, 2003, inclusive". In a very lengthy application, allegations are made that the Council was negligent in its representation of the Applicant, including vicarious liability for the actions of its legal counsel, Mr. Engel.

The Applicant's submissions:

[35] By letter dated November 15, 2005, the Applicant was advised that the Board would consider the applications without a hearing pursuant to ss. 18(o), (p) and (q) of the Act, as they appeared to relate to the same time period and issues heard and determined by the Board in LRB File No. 164-00. The Applicant was invited to make a written submission with respect to the Board's consideration of the applications.

[36] On November 29, 2005 the Applicant filed an 8-page letter with the Board containing her submissions, and various attachments including, correspondence with the Saskatchewan Human Rights Commission ("the Commission") regarding her complaint

to the Commission, the Judgment of Gunn, J. dated November 2, 2004, and fiat of Ball, J. dated January 7, 2005 ordering the Commission to accept her complaint, the decision of the Commission dated March 16, 2005 dismissing her complaint, and correspondence with Saskatchewan Labour regarding *The Labour Standards Act*. The submissions essentially argue that the panel that heard and determined LRB File No. 164-00 did not consider the issues raised on these applications, because the Applicant did not raise them and place them before the panel for consideration. The letter reads in part as follows:

> *These applications relate to issues not yet submitted, heard and/or determined by the Sask. Labour Relations Board (Board) in LRB File No. 164-00. No one has ever challenged the merit of facts, nor has anyone has disputed with the presentation of merit of facts [sic]. Merits cannot be looked at until jurisdiction has been determined where the merits are relevant [sic]. The Board's then chairperson, Gwen Grey did not rule on the processes used by the Union under Trade Union Act [sic], as per the Saskatchewan Labour Standards Act s. 44.3 … see Parry Sound … . In addition, Ms. Grey did not make decision(s) relating to "sole" representation as it pertains to representation of "co-decision(s)", already made between the AAA representing SGEU, the Shop steward representing the Union, and Barbara Metz; and, there has been no decision on the grievances as they pertain to … s. 44.3.*
> *….*
>
> *Failure to present evidence and not assisting the Board in understanding is not a decision for or against the Union. …*

[37] On November 30, 2005 the Applicant filed a further letter with the Board asking for leave to amend the applications in LRB File Nos. 199-05, 200-05, 201-05 and 202-05, to include allegations related to the *Parry Sound* and *Cadillac Fairview* cases, both *supra*, and how the representatives of the Union named therein had violated *The Labour Standards Act*. The time frame of the allegations appears to be between 1995 and 1997.

[38] On December 2, 2005 the Applicant filed a further letter with the Board, in replacement of the letter of November 29, 2005. The letter adduces argument as to why the Board has jurisdiction over the applications pursuant to *Parry Sound*, *supra*, and *The Labour Standards Act*, and appears to be seeking that the Board determine whether the Union violated s. 44.3 of the said statute.

[39] On December 21, 2005 the Applicant filed a further letter with the Board, seeking leave to make further amendments to the applications in LRB File Nos. 199-05 and 200-05, related to her argument regarding the *Parry Sound* and *Cadillac Fairview* cases, both *supra*, and *The Labour Standards Act*.

[40] On December 22, 2005 the Applicant filed copies of two letters from Saskatchewan Labour and of a grievance dated March 1, 1996.

[41] On December 30, 2005 the Applicant filed an Affidavit of one Wayne Lee, her former shop steward, to the effect, *inter alia*, that the he was not advised by the Union to mention *The Labour Standards Act* in the grievances filed on the Applicants' behalf.

[42] We have considered all of the above in making our determination.

Analysis and Decision:

[43] The issues before the Board on these applications include, whether the Board should summarily refuse to hear the applications as the matters are not within the jurisdiction of the Board (s. 18(o) of the *Act*); 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)). Subsumed in the jurisdictional issue is the important matter as to whether the Board should allow the Applicant to re-litigate issues previously before the Board – are issues raised on the new applications *res judicata* or an abuse of process? As 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).

[44] The Applicant has filed 13 new applications. On initial review they appear to be, essentially, further applications for reconsideration of the Board's decision in LRB File No. 164-00. In the new applications, the Applicant extensively excerpts and refers to testimony given at the hearing of the prior application, and the alleged facts in support of the applications concern acts and omissions during the time frame covered in the evidence adduced at the hearing of the prior application.

[45] 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. We must apply appropriate tests in the labour relations context and determine 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.

[46] 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] S.L.R.B.D. No. 10, [2004] Sask. L.R.B.R. 69, LRB File Nos. 062-02 and 090-02, the Board recognized that there may be situations where the Board will apply *res judicata* to determine whether it may decide a matter before it. On the basis of the analysis in that case, 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.

[47] A hearing on the merits of all 13 applications will be time consuming and expensive for the parties. As a matter of policy, parties should not be allowed to re-litigate decisions that are final and binding. In our opinion, it is not necessary to hear evidence and submissions on the merits of the applications in order to answer these preliminary questions, which, if upheld, will entirely dispose of them.

[48] In *Danyluk v. Ainsworth Technologies Inc.* [2001] 2 S.C.R. 460, the Supreme Court of Canada outlined three required conditions to establish *res judicata*:

> *(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.*

[49] In our opinion, all three of these conditions exist in the present case, and the applications must be dismissed for want of jurisdiction. The Applicants complaints in the 13 new applications are substantially the same as in LRB File No. 164-00. The Applicant is attempting to obtain a "rehearing" of the issue considered in the earlier case, i.e., whether the Union violated s. 25.1 of the Act during the time frame of 1994 to 2003 in the handling of her complaints and grievances. The fact that the new applications refer to some different "players", and that the Applicant seeks to make new arguments based on her interpretation of testimony adduced at the hearing of LRB File No. 164-00, (much of which, the Board stated in its decision, "did not assist the Board in understanding [the Applicant's] complaints"), is immaterial: the issue heard and determined by the Board is the same as that which the Applicant seeks to place before the Board in the present applications. If the Applicant neglected to make certain legal arguments at that hearing, that is not necessarily a basis on which to revisit the main issues in a new hearing.

[50] As noted above, the Applicant's request for reconsideration of LRB File No. 164-00 was dismissed. We note that the Board on the reconsideration application

found no grounds to allow reconsideration on the basis of the assertion by the Applicant that “certain crucial evidence was not adduced [at the hearing of LRB File No. 164-00] for good and sufficient reasons”. On this point, in *TNL Construction Ltd.*, [1990] B.C.L.R.B.D. No. 26, IRC No. C30/90, the British Columbia Industrial Relations Council expressly adopted the remarks of the Ontario Labour Relations Board in *Wright Assemblies Ltd.* [1962] OLRB Rep. February 393, 61 C.L.L.C. 956, at 957-58 as follows:

> *The fact that a party did not present all of his evidence in the earlier proceed generally affords no answer to a plea of res judicata raised against him in a subsequent proceeding involving the same matters. … 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.*
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> *In Hoque v. Montreal Trust Co. of Canada, [1997] N.S.J. No. 430 (N.S.C.A.), the Nova Scotia Court of Appeal stated as follows, at para. 21:*
>
> > *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.*

[51] In the interests of finality, fairness and ensuring a functioning system of adjudication, we also find that the present applications ought to be dismissed as an abuse of process.

[52] Finally, the applications appear to have nothing to do with issues that would be considered a breach of s. 36.1 of the Act respecting the application of the principles of natural justice respecting membership in a union.

[53] Accordingly, the applications are summarily dismissed.

DATED at Saskatoon, Saskatchewan this **31st** day of **October, 2008.**

LABOUR RELATIONS BOARD

James Seibel,
Chairperson