IN THE MATTER OF AN ARBITRATION

BETWEEN:

BRITISH COLUMBIA PUBLIC SCHOOL EMPLOYERS' ASSOCIATION/BOARD OF EDUCATION OF SCHOOL DISTRICT NO. 39 (VANCOUVER)

(the "Employer")

AND:

BRITISH COLUMBIA TEACHERS' FEDERATION/ VANCOUVER TEACHERS' FEDERATION

(the "Union")

ARBITRATOR:	John Kinzie
COUNSEL:	Keith E.W. Mitchell, for the Employer
	Leo McGrady, Q.C. and Christopher Foy, for the Union
DATE OF HEARING:	November 6, 2007
PLACE OF HEARING:	Vancouver, British Columbia

PRELIMINARY AWARD

I

This proceeding is concerned with four grievances filed by Susan Davis, Jill Ferguson, Lynn Johnson, and Hillary Spicer against the Employer's refusal to pay them the early retirement incentive benefit under the parties' Early Retirement Incentive Plan (hereinafter the "Plan").

One of the requirements of the Plan is that:

> "The employee must have been in active service for the previous four (4) years, during which there may be a maximum of one year of leave."

The Employer maintains that each of the four grievors failed to meet this requirement, i.e., that each of them was absent from work on a leave for in excess of one year in their previous four years of service.

While acknowledging the fact of their absences from work, the Union says that each of the grievors was absent from work due to health reasons. It says that each of the grievors suffered from a physical disability within the meaning of the *Human Rights Code*, and that consequently, the Employer's refusal to pay them the early retirement incentive benefit was a violation of Section 13 (1) of the *Human Rights Code* and/or Section 15 (1) of the *Charter of Rights and Freedoms*.

The Employer disputes the allegations that its actions in respect of the four grievors entail a violation of the *Human Rights Code* or a breach of the grievors' *Charter* rights. However, at this stage of the proceeding, the Employer raises a preliminary objection in respect of my jurisdiction to hear and determine these four grievances. It says that I do not have jurisdiction, or in the alternative that I should decline jurisdiction, to hear these grievances because of an earlier arbitral decision dealing with the interpretation and application of the Plan.

That decision was *Board of School Trustees of School District No. 39 (Vancouver)*, Award dated June 24, 1997 (M. Jackson, Q.C.). It was concerned with the grievances of Marie Chan and Kathleen Russell who had also been denied early retirement incentive benefits under the Plan because they had been absent from work on leave for in excess of one year in the previous four years prior to their retirements.

Ms. Jackson described Chan's circumstances this way:

> "Marie Chan, a teacher assigned to Britannia Secondary School, had approximately twenty-two years of service with the Vancouver School Board. She applied for the ERIP on May 29th,

> 1995. In the four years immediately preceding Ms. Chan's application she was absent on various leaves in excess of one year. In particular, she was absent from April 19th, 1994 to January 3rd, 1995 during which time she received full salary as she was using accumulated sick leave. Her absence continued during the period between January 4th, 1995 to June 30th, 1995 when she was on health leave without pay as she had exhausted her accumulated sick leave. However, she received salary indemnity under the B.C. Teachers' Federation plan.
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> On or about May 30th, 1995 Ms. Chan was advised that she was not eligible for the ERIP because she had been on leave in excess of one year during the four years immediately preceding her application. Ms. Chan retired on June 30th, 1995."
>
> (Quicklaw, paras. 7 and 8)

With respect to Russell, she stated that:

> "Ms. Kathleen Russell, a teacher assigned to Maquinna Elementary School, worked for the Vancouver School Board for over 40 years. She applied for the ERIP on May 3rd, 1995. In the four years immediately preceding her application she was absent on various leaves for a period in excess of one year. In particular, she was absent from September 26th, 1991 to June 1st, 1992 during which time she received full salary. She was again absent from September 8th, 1992 to December 31st, 1992; for all but the last 5 days of her leave she was on full salary as she was using accumulated sick leave.
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> Ms. Russell was originally advised that she was eligible for the ERIP. Subsequently she was told that advice had been in error and that she was ineligible for the Plan as she had taken more than one year of leave during the past four years. Ms. Russell retired June 30th, 1995."
>
> (Quicklaw, paras 9 and 10)

After reviewing the evidence she heard regarding the parties' negotiation of the Plan, Ms. Jackson set out the issue that she had to decide. She put it this way:

> "The paramount issue is the meaning of the word 'leave' in the ERIP. An employee who otherwise qualifies for the ERIP is disentitled if the employee has taken more than one year of leave in the last four years. In ascertaining the proper meaning of the word 'leave', it is also necessary to consider the term 'one year'

> and determine what constitutes 'active service' in the context of the ERIP."
>
> (Quicklaw, para. 21)

The Union contended that the one year's leave referred to in the Plan only meant personal leaves, and did not include leaves of absence for health reasons. The Employer disagreed. It argued that there was no basis for restricting leaves to just personal leaves. After reviewing all of the evidence and argument she had heard, Ms. Jackson concluded that "leave" in the Plan was not just restricted to personal leaves but that "it includes any absence that is described or otherwise included as a leave of absence under Article 10." (Quicklaw, para. 38). Subsequently, she concluded that:

> ". . . it is my view that the language and the overall context favours the Employer's interpretation of 'leave' and 'active service'. The result is that to be entitled to the ERIP, an employee must have attended at work and carried out the required job duties for at least three of the previous four years."
>
> (Quicklaw, para. 59)

She then turned to consider an alternative argument advanced by the Union. She set out that argument and the Employer's response as follows:

> "The Union pointed to the other teachers – at least eighteen – who had been granted the ERIP even though they exceeded the maximum leave permitted in the Letter of Understanding. The Employer did not dispute this evidence. However, the Employer said what had happened was simply a mistake explainable by the limitations of the HTE [individual teacher's History of Teaching Experience]. However, the Union submitted that by relying only on the HTE, the School Board had applied the criteria arbitrarily and in a discriminatory fashion. The Union placed considerable emphasis in its argument on fairness and reasonableness, both of which it suggested were sadly lacking in the Employer's treatment of the Grievors who were disqualified for the ERIP when others with comparable leave histories retired with that benefit.
>
> . . .
>
> If the ERIP contemplated exceptions to the stated criteria, then it is arguable that how the Employer exercised its discretion in making exceptions could be open to the same type of scrutiny that is discussed in the two mandatory retirement cases. However, that is not what happened here. The ERIP does not contemplate

> exceptions to the stated criteria and the Employer was not exercising a discretion in granting the ERIP to some but not to others. There is no evidence that conscious decisions were made to grant the ERIP to the eighteen or more teachers despite their failure to satisfy all the stated criteria. Instead, reliance was placed on the HTE which, it turns out, contains only some of an employee's record of leaves.
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> While the Union has established that the ERIP has been granted in a number of instances in a manner contrary to the interpretation the Employer now advances, such mistakes are by their very nature arbitrary. The cases cited do not stand for the proposition that when the Employer makes a mistake, it is bound to extend that same mistake to all similarly positioned individuals. And it must be noted that there is no evidence that any Employer representative with authority to enforce the agreement accepted the reliance on the HTE as determinative of any issue.
>
> There may be cases where past practice or estoppel arguments arise because of an Employer's earlier actions. However, neither argument was advanced here, and rightly so in my view."
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> (Quicklaw, paras. 61, 63 to 65)

In the end, Ms. Jackson dismissed the two grievances.

The Employer also relies on another portion of the decision in *Board of School Trustees of School District No. 39 (Vancouver), supra*, where Ms. Jackson recorded that:

> "The parties agreed that this board has jurisdiction to resolve the matter and that the disposition of these grievances will apply to other similar disputes."
>
> (Quicklaw, para. 3)

In this regard, the Employer points to the fact that in 2004, the Union withdrew a grievance on behalf of Judy Gordon who was denied an early retirement incentive benefit under the Plan because of leaves taken for health reasons. In withdrawing the grievance, the Union stated that while it felt the Jackson award was wrong, it had been advised by its solicitors that her grievance would not succeed in the face of that award.

Finally with respect to the proceeding before Ms. Jackson, then counsel for the Union was asked about her alternative argument based on discrimination and whether the Union was alleging a violation of the *Human Rights Code*. She replied that the Union was not, but that instead it would argue that the Employer, in granting leave to the eighteen other teachers in similar circumstances to Chan and Russell but not to them, was

exercising its discretion in an arbitrary, unreasonable, unfair and discriminatory fashion vis-à-vis the two grievors. As we have seen, Ms. Jackson was not persuaded by that argument.

II

In advancing its preliminary objection to the four grievances before me being heard, the Employer relies on the doctrines of estoppel, *res judicata*, issue estoppel and cause of action estoppel. It says that the issues before me in this proceeding have already been decided by, or should have been raised before, Ms. Jackson in the proceeding before her. With respect to the latter point, the Employer relies, *inter alia*, on *Federated Co-operatives Ltd.* (1996), 59 L.A.C. (4th) 30 (McPhillips) and *Telus Communications Inc.* (2006), 158 L.A.C. (4th) 67 (McConchie). As well, it submits that in view of the Union's agreement that the disposition of the Chan and Russell grievances would apply "to other similar disputes" and the withdrawal of the Gordon grievance consistent with that agreement, the Union is estopped from challenging the interpretation placed on the Plan by Ms. Jackson in her award.

The doctrines of *res judicata*, issue estoppel and cause of action estoppel have only a limited operation in the field of labour arbitration. This point was made by the Labour Relations Board of British Columbia in *Board of School Trustees, School District No. 57, Prince George*, BCLRB No. 79/76, [1977] 1 Can LRBR 45 where it stated that:

> "Initially, we would make clear that an arbitrator is not bound to follow earlier arbitration decisions as a matter of *law*, by reason, for instance, of such common law doctrine as *res judicata* (see *Re I.B.E.W. and Canadian General Electric* (1959), 9 L.A.C. 342 (Laskin). Indeed such common law doctrines could not strictly bind British Columbia arbitrators in view of the language of s. 92(3) of the Labour Code (see *A.I.M. Steel Limited and United Steelworkers of America, Local 3495* (1976), unreported (B.C.C.A.))."
>
> (at 50)

Section 92 (3) of the Labour Code is now Section 82 (2) of the Labour Relations Code and it provides that:

> "An arbitration board, to further the purpose expressed in subsection (1), shall have regard to the real substance of the matters in dispute and the respective merit of the positions of the parties to it under the terms of the collective agreement, and shall apply principles consistent with the industrial relations policy of this Code, and is not bound by a strict legal interpretation of the issue in dispute."

However, the Labour Relations Board then went on to say that that was "not the end of the matter". It continued:

> "There still remains the question about what should be the view taken by the arbitrator to this question as a matter of principle. In other words, what should be the policy worked out by arbitrators themselves, as part of their arbitration jurisprudence, concerning the weight to be given to earlier arbitration awards?"
>
> (at 50)

Its answer was as follows:

> "That analysis must be founded on a sense of the realities of the arbitration process. As this Board has pointed out a number of times, grievance arbitration is intended by the Labour Code to be an alternative to work stoppages as a means of resolving grievances. For that purpose arbitration must be an effective antidote to strikes during the term of a collective agreement. It is common practice under such an agreement for a dispute to arise, the language of the collective agreement to be somewhat unclear on the point, and for the union to take the case to an arbitrator who hears evidence and argument and issues reasons for decision disposing of the grievance. That is what had happened in this case. But it is not contemplated by the parties that the significance of such an arbitration award is to be confined to the facts of the immediate dispute which gave rise to that grievance. In the normal run of events, arbitration awards will contain a general analysis and ruling about the interpretation of the relevant language of the collective agreement. The typical and sensible expectation of the parties is that that general interpretation will be followed in the future in their own collective bargaining relationship.
>
> What would happen if that were not the practice? The next time the same issue arose the union would have to file a new grievance and take the matter up through to arbitration to secure the same result. That practice would not only generate extensive delays and additional costs, but the burden it would place on the arbitration process would so clog up the system that genuine new issues could not effectively be dealt with either. Further, suppose the employer were to win its favoured interpretation from a second arbitrator in the second case. Does that end the matter? There does not seem to be any reason that it would. At this stage, each party will have won one arbitration decision and the Union would be perfectly entitled to try a third time to break the tie.

> Obviously, that kind of practice is totally inconsistent with the needs of grievance arbitration under the Labour Code. Arbitration is supposed to provide a *final and conclusive* settlement of disputes between the parties about the interpretation and application of their agreement. If it cannot provide that kind of finality, the result will be industrial unrest as employees become more and more dissatisfied with the inadequacies of this peaceful mechanism for resolving grievances."
>
> (at 50)

The remedy, the Board said, for a party who did not like an interpretation placed on its collective agreement by an arbitrator was for it "to renegotiate the language in the clause in a future agreement."

One area in which the doctrines of *res judicata*, issue estoppel and cause of action estoppel have been held to apply is where one party seeks to bring before an arbitrator the same dispute that has already been decided by another arbitrator or another tribunal. *Telus Communications Inc., supra*, in my view, provides an example of such a case.

In that case, Telus unilaterally implemented changes to the terms and conditions of its employees during a lockout after a lengthy collective bargaining dispute with the Telecommunications Workers' Union (hereinafter the TWU"). One of the implemented changes was that Telus would no longer pay first day sick leave benefits to those employees entitled to them under Article XXVII of the terminated collective agreement. The TWU instructed its members to report to work while it filed a complaint with the Canada Industrial Relations Board against Telus' unilateral implementation of these changed terms and conditions.

Mr. McConchie described the position of the TWU before the Canada Industrial Relations Board this way:

> "The position of the Union before the CIRB was that the Employer should be prohibited from taking any lockout measures and from making any changes to working conditions. This was for two reasons. First, the Employer had not bargained in good faith and this was an implicit requirement of s. 89(1) of the *Code*. This made its lockout measures illegal. Secondly, and in the alternative, the Union argued that as a remedy for the Employer's failure to bargain in good faith, the Employer should be prohibited from implementing any lockout measures or changes to working conditions (see p.8 of Decision)."
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> (at 76)

As recorded in Mr. McConchie's decision, the Canada Industrial Relations Board did not agree with the TWU's argument that a finding of a failure to bargain in good faith would result in a subsequent lockout being rendered illegal. Although the Board did find Telus to have failed to bargain in good faith in certain respects, it did not prohibit it from exercising lockout measures or implementing changes in working conditions. Instead, it granted a number of different remedial orders. The TWU did not appeal the Board's decision nor did it raise the issue of work condition changes in a Board proceeding thereafter.

In the proceeding before Mr. McConchie, the TWU maintained that the change to the sick leave provisions was a breach of Section 94 (3)(d.1) of the *Canada Labour Code* because the TWU had not been given the opportunity to tender payments or premiums sufficient to continue the plan before Telus cancelled it. Telus objected, submitting that this issue had already been decided, or ought to have been decided, by the Canada Industrial Relations Board in the earlier proceedings before it. The TWU disagreed. It said that issue had never been addressed by the Board nor was there any need for it to have done so.

Mr. McConchie agreed with Telus that the doctrine of *res judicata* applied to the circumstances of his case. He reviewed the history of the proceedings before the Canada Industrial Relations Board and then concluded:

> "In short, the Union's entire focus in the proceeding was not on a specific argument but on a specific objective: to secure a CIRB order annulling the lockout.
>
> It was not explained to me in this proceeding why the Union did not bring forward its argument under s. 94(3)(d.1) at the same time. There can be no doubt that it was an argument that would have fit comfortably into the proceedings. In fact, I must conclude that it was inextricably linked to the other issues in the proceeding. The facts had all crystallized: the terms of the lockout were known, the fact that employees were not being paid sick pay was known, the contents of the Collective Agreement were known, and s. 94(3)(d.1) of the *Code* was in force. The objective of an application identifying s. 94(3)(d.1) at its foundation would have been to at least partially attack the lockout. If the Union's position regarding s. 94(3)(d.1) were correct, then the CIRB would presumably have had to declare the lockout/alteration to be at least partially illegal.
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> The Union's legal position under s. 94(3)(d.1) properly belonged to the subject of the litigation, which was the Employer lockout and alteration of terms. It arose out of the same facts as the arguments under s. 89 and the other unfair labour practice arguments raised as an alternative position by the Union at the

> hearing. In substance, the Union did not bring forward its whole case. It was bound to do so.
>
> I must also conclude that the policy reasons behind the application of the doctrine of *res judicata* are clearly invoked in this proceeding. In *Duhaime*, the British Columbia Labour Relations Board cited with approval the observation of the Ontario Labour Relations Board in *Re Oakwood Park Lodge and O.N.A.*, [1981] 1 C.L.R.B.R. 348 (MacDowell), to the following effect: 'Parties expect that a decision of the Board will clarify their legal relationship and put an end to the controversy between them.' In the case at hand, the parties should have had the expectation that the CIRB would clarify the legal relationship and put an end to the controversy, namely, whether and to what extent the Employer was entitled to lockout and/or change terms and conditions of employment."
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> (at 84-85)

In my view, what is significant about *Telus Communications Inc., supra*, is that the same facts, and it appears the same parties, underlay both the proceeding before the Canada Industrial Relations Board and that before Mr. McConchie. Those facts were the implementation of changed terms and conditions of employment along with Telus' lockout in April, 2005.

These circumstances are to be contrasted with those before the arbitration board in *Dufferin-Peel Catholic District School Board* (2001), 94 L.A.C. (4th) 261 (Bendel). In that case, the arbitrator had a grievance alleging that the employer had violated the collective agreement by refusing to pay the grievor, a retired elementary school principal, the retirement gratuity provided for in that agreement. Another arbitrator, Donald Carter, had issued an award in a proceeding involving the same employer and same union relating to the retirement gratuity of another employee of the employer. The employer submitted that the doctrines of *res judicata* and issue estoppel applied in light of Mr. Carter's award since the facts in both cases were essentially identical.

Arbitrator Bendel disagreed and in so doing stated that:

> "I find no support in the judicial or arbitral authorities for Mr. Woon's argument that the principle of issue estoppel applies in a situation like the present. In all the cases where issue estoppel has been applied, the second dispute arose out of the very same facts as the first one. They were cases where a party that had been unsuccessful on a particular issue in earlier related proceedings was attempting to have a court or arbitrator reach a different conclusion on the matter. Issue estoppel, as I understand it, only precludes the re-litigation of the very same dispute: it has

no application where the dispute is a different one, even though it might be 'on all fours' with an earlier one. Where the two disputes arise from different but analogous facts, I am satisfied that while the earlier decision might have value as a precedent, it cannot be used as the basis for issue estoppel (or *res judicata*, as it is sometimes called). The board in *Re Burrard Yarrows, supra*, explained this distinction as follows (at pages 175-6):

> 'The reason why the doctrine of *res judicata* (in the sense of 'cause of action' estoppel) may not be applicable to bar a challenge to the earlier interpretation is that there is both a different set of facts (*i.e.*, a different 'cause of action') and, to the extent at least that the individual grievors are different, a lack of identity among the parties. Consequently, the criteria for the application of either species of *res judicata* are not fully satisfied, and to apply the doctrine in these circumstances would give the earlier award effect as against a stranger to it. The earlier award is relevant, it may be persuasive, but it is not conclusive. It is a precedent, though not a binding one.'

...

I should add that I find no support for the employer's position in the language of either section 48 (18) of the *Labour Relations Act, 1995* or of Article 10.013 of the collective agreement. Under both provisions, it is the 'decision' of the arbitrator that is binding on the parties. Arbitrator Carter's decision dealt with the grievance of Ms. Hamilton-Smith. It bound the parties as regards Ms. Hamilton-Smith's entitlement to a retirement gratuity. It did not purport to rule on the grievance of Mr. Martin and it would have been beyond arbitrator Carter's authority to do so. Mr. Woon would have me hold that section 48 (18) and Article 10.013 make an arbitrator's reasoning or contract interpretation binding on the parties, but I am satisfied that is not their effect.

Accordingly, in my view, arbitrator Carter's award does not estop the union from pursuing this grievance. The award certainly appears to be a relevant precedent on the interpretation of the provisions of the collective agreement that are in question before me. In addition, since it arose from an earlier arbitration between the same parties, it is entitled to an extra measure of deference from me. In this regard, I respectfully endorse the approach described by arbitrator Laskin in *Re Brewers' Warehousing Co. and International Union of Brewery, Flour, Cereal, Malt, Yeast, Soft Drink & Distillery Workers of America, Loc. 278C* (1954), 5 L.A.C. 1797, an approach that has been echoed by arbitrators

since then on numerous occasions. This is what arbitrator Laskin wrote (at page 1798):

> 'It is not good policy for one Board of Arbitration to refuse to follow the award of another Board in a similar dispute between the same parties arising out of the same Agreement where the dispute involves the interpretation of the Agreement. Nonetheless, if the second Board has the clear conviction that the first award is wrong, it is its duty to determine the case before it on principles that it believes are applicable' "

(at 264-266)

Thus, where the grievors are different, even where the grievance of the subsequent grievor is "on all fours" with the grievance that was the subject of the prior award, the doctrines of *res judicata*, issue estoppel and cause of action estoppel will not apply. See also *Eastern Provincial Airways Ltd.* (1984), 13 L.A.C. (3d) 128 (Christie). As well, see *Main Ouvertes – Open Hands Inc.* (1996), 54 L.A.C. (4th) 217 (Roach) where the arbitrator applied the doctrine of *res judicata* and upheld the employer's preliminary objection because his case involved

> ". . . a second grievance lodged by the same grievor, arising out of the same incident. It is clear, in reading pp. 133-5 of arbitrator Christie's award [*Eastern Provincial Airways Ltd., supra*], that he would apply the doctrine of *res judicata* in 'same grievance – same grievor' situations."

(at 226)

Applying the principles from these various awards, it seems to me that the doctrines of *res judicata*, issue estoppel and cause of action estoppel would not apply in this proceeding. Even if it can be said that the dispute raised by the four grievances before me is essentially the same as the dispute raised by the Chan and Russell grievances before Ms. Jackson, the grievors are different. That difference appears to be sufficient from the arbitral jurisprudence to render these doctrines inapplicable.

However, I am of the view that a different form of estoppel is present in this case. That estoppel is based on the Union's agreement recorded in Ms. Jackson's award that her decision in the Chan and Russell grievances would apply "to other similar disputes." The Union acted in accordance with that representation when it withdrew the Gordon grievance in 2004. Now it seeks to resile from that agreement in the context of four grievances that appear to be "on all fours" with the Chan and Russell grievances. Should the Union be allowed to do that? Would permitting the Union to proceed with these four grievances give rise to an abuse of process?

The doctrine of abuse of process was discussed by the Supreme Court of Canada in *City of Toronto v. Canadian Union of Public Employees, Local 79* [2003] 3 S.C.R. 77 as engaging "the inherent power of the court to prevent the misuse of its procedure, in a way that would . . . bring the administration of justice into disrepute", quoting Goudge, J.A., in *Canam Enterprises Inc. v. Coles* (2000), 50 O.R. (3d) 481 (CA). The Supreme Court later stated that:

> "As Goudge J.A.'s comments indicate, Canadian courts have applied the doctrine of abuse of process to preclude relitigation in circumstances where the strict requirements of issue estoppel (typically the privity/mutuality requirements) are not met, but where allowing the litigation to proceed would nonetheless violate such principles as judicial economy, consistency, finality and the integrity of the administration of justice."
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> (Quicklaw, para. 37)

It seems to me that the decision in *Federated Co-operatives Ltd., supra* is really about abuse of process rather than *res judicata*, issue estoppel or cause of action estoppel. There Mr. McPhillips was dealing with the third grievance relating to the pay of the employer's Steam Plant engineers and whether their positions had to be posted under the collective agreement. The dispute underlying the first grievance filed by Wayne Ratz was addressed in collective bargaining. The second grievance by Brent Kwok was the subject matter of awards by arbitrator Stephen Kelleher. Mr. McPhillips had the third grievance in which the union contended that the employer was obliged to post engineer positions by virtue of the provisions of the *Power Engineer and Boiler and Pressure Vessel Safety Act* and its regulations.

Mr. McPhillips concluded that it would be inappropriate to permit the union to relitigate the issue again in the third grievance which was before him. His reasons for reaching that conclusion were expressed this way:

> "The Kelleher decision indicates that the dispute about the appropriate position (job posting) and pay for those employees responsible for the steam plant actually arose between these parties in the 1980s. Since that time, the issue has taken on many guises, including the Ratz grievance, the Kwok grievance and the present Steam Plant grievances as well as being the subject of much discussion in bargaining. The October 9, 1991 Ratz grievance was based on a claim for wages and reclassification of employees who were responsible for the Steam Plant as Engineers. The Kwok grievance in front of Arbitrator Kelleher focused on the pay rate but it is implicit in the arguments presented that the Union was advocating that a position of Steam Engineer was required and it was on that basis that it was submitted that Mr. Kwok should be paid the Engineer's rate.

In our case, the Union has argued that the basis for this grievance is that the Employer was breaching the *Power Engineers and Boiler and Pressure Vessel Safety Act* and, hence, had violated the Collective Agreement. When Arbitrator Kelleher was discussing the Ratz grievance between the parties he quoted the grievance statement in that matter and it made explicit reference to illegality under the *Power Engineers and Boiler and Pressure Vessels Act*. It stated that Engineers should be paid and classified in accordance with that *Power Engineers and Boiler and Pressure Vessel Safety Act*. From his discussion, it is evident that grievance was not pursued further by the Union and they agreed to simply raise the premium rate during the next round of negotiations. Therefore, when the Kwok grievance arose before Arbitrator Kelleher it is implicit that the parties were aware of the statutory provisions and the potential application of the *Act* to the issue. Yet it apparently was not raised at the time. As a result, it must be concluded that it was accepted by the parties at the time that there was no breach of the statute or at least, the Union did not intend to argue the point. Arbitrator Kelleher went on to find in this decision that the Company's practice (which is exactly the same one which is at issue before this board) did not violate the terms of the Collective Agreement. On the basis of this evidence, it must be concluded that Arbitrator Kelleher has already ruled on the question of the contractual legality of the Company's paying a premium to the steam plant employees rather than being classified and paid as Engineers.

Therefore, even if the Union could establish that a breach of the *Act* in these circumstances would extend into a breach of the Collective Agreement (thereby providing arbitral relief), that matter should have been raised before Arbitrator Kelleher. The relevant statutory requirements in the *Power Engineers and Boiler and Pressure Vessels Safety Act* are identical now to what they were at the time of the Ratz and Kwok grievances. As well, the Union expressly stipulated in its submissions before this board that they were relying on the facts as found by Arbitrator Kelleher. In my opinion the issue of the position and pay for a Steam Engineer has been litigated by these parties in the Kwok grievance before Arbitrator Kelleher. Despite the fact each of the grievances used slightly different expressions in setting out the complaint, the nature of the protest was identical, namely that the Employer refused to establish (and post) a Steam Engineer position and pay the appropriate wage rate. The Union appealed Arbitrator Kelleher's decision to the Labour Relations Board and

> had the matter again considered by him and once again the grievance was dismissed.
>
> To allow the Union to raise an argument in these proceedings that was available to them at the previous hearing would be inappropriate in my opinion. This would be a classic example of litigation by installments. As indicated above, finality in labour relations is critically important and must be encouraged. For that reason I conclude that it is not appropriate that this matter be relitigated and, therefore, the grievance is dismissed on that basis."
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> (at 43-44)

In my view, the doctrines of *res judicata*, issue estoppel, and cause of action estoppel would not have applied in *Federated Co-operatives Ltd., supra*, because there were different grievors in each of the grievances. However, the issues in all three grievances were essentially the same and the union was not contesting that Mr. Kelleher was wrong in his earlier award. It simply wanted to raise a different argument that it felt had not been addressed by Mr. Kelleher. Mr. McPhillips decided that it would be wrong to permit the union to engage in such litigation by instalments and dismissed the third grievance. In my view, he was really saying that to permit the union to engage in such relitigation would be countenancing an abuse of the grievance-arbitration process.

In my view, there are a number of similarities between the circumstances of this case and those in *Federated Co-operatives Ltd., supra.* In both cases, there is an arbitral award in respect of the interpretation of the contested language in the collective agreement as well as a withdrawn grievance consistent with that interpretation. The contested language has not been changed although several rounds of collective bargaining have intervened. In addition, in this case, the Union agreed to be bound by Ms. Jackson's award in respect of "other similar disputes". It now seeks to go back on that agreement and raise an argument that was open to it to raise before Ms. Jackson, i.e., that the interpretation being advanced by the Employer was in contravention of Section 13 of the *Human Rights Code*. Permitting the Union to do so would seem to offend the various principles the abuse of process doctrine was designed to protect, i.e., "judicial economy, consistency, finality and the integrity of the administration of justice." See *City of Toronto v. Canadian Union of Public Employees, Local 79, supra.*

In response, the Union says that the fact is that Ms. Jackson's award did not address the issue of whether the Employer's interpretation of the Plan which she adopted amounts to a contravention of Section 13 (1) of the *Human Rights Code* nor the issue of whether that interpretation violated the grievors' Section 15 *Charter* rights. It submits that neither an estoppel argument nor an abuse of process argument should be used to defeat the grievors' right to have it determined whether their constitutional or quasi-constitutional rights are being infringed upon.

In making this submission, the Union relies upon *British Columbia Institute of Technology* (1997), 62 L.A.C. (4th) 168 (Kelleher) and the Labour Relations Board's decision in *Southam Inc. (Prince George Citizen and Prince George This Week)*, BCLRB No. B 248/2001.

British Columbia Institute of Technology, supra, involved a grievance against the employer's refusal to return an employee to her former position after she returned to work from an automobile injury. Mr. Kelleher preferred the union's interpretation that she was entitled to return to her former position over the interpretation advanced by the employer. He then turned to the employer's estoppel argument and addressed it in the following terms:

> "Finally, I turn to the Employer's submission that the Union is estopped from asserting this interpretation of the Collective Agreement.
>
> When a Union passively acquiesces in a well-established employer practice, the principles of promissory estoppel normally prevent the Union from suddenly relying on its strict contractual rights. See, for example, *Re Consolidated-Bathurst Packaging Ltd. and I.W.A., Loc. 2-242* (1982), 6 L.A.C. (3d) 30 (MacDowell). The difficulty in the present case is that the Employer's actions are inconsistent not only with the Collective Agreement but also with Section 8 of the *Human Rights Act*. The doctrine of estoppel applies to contractual rights. It has no application to a breach of human right's legislation. The argument based on estoppel must therefore fail."
>
> (at 178)

See also *St. James Assiniboia School Division No. 2 (2001)*, 95 L.A.C. (4th) 262 (A.B. Graham, Q.C.) where the arbitration board reached a similar conclusion following *British Columbia Institute of Technology, supra.*

The Labour Relations Board of B.C. reached the same conclusion in *Southam Inc., supra.* There, the Board was hearing an application under Section 99 of the Labour Relations Code that the decision of an arbitrator was inconsistent with the principles expressed or implied in the Code. The union there was grieving that various dependent contractor delivery drivers were not being paid in accordance with the requirements of Parts 4, 5 and 7 of the *Employment Standards Act* then in force. The arbitrator dismissed the grievance declaring that the union was estopped from advancing its grievance because it had expressly agreed that the individuals on whose behalf the grievance was brought were not employees.

The Board defined the principal issue that it had to decide this way:

> "Was the Employer entitled to raise an estoppel defence to prevent the Union from asserting that the delivery drivers are employees to whom Section 4 of the Act applies? An ancillary issue is: Does Section 4 of the Act represent social policy or a societal interest that must prevail over what would otherwise be an unassailable argument founded on the doctrine of equitable estoppel?"
>
> (Quicklaw, para. 13)

The Board allowed the union's application stating that:

> "In summary, we find that the modern approach to estoppel does not entail that estoppel declarations are appropriate regardless of the nature of the statutory provisions 'that confront the estoppel'. If, as in this case, the statutory provisions in issue represent policy of significant social importance and impose a clear positive duty on employers and/or unions, arbitrators must give effect to those provisions despite what would otherwise be an unassailable argument founded on the doctrine of equitable estoppel. An estoppel declaration that, in effect, permits parties to contract out of the minimum requirements of the Act is inconsistent with the principles expressed or implied in the Code and is also inconsistent with the Act.
>
> . . .
>
> This result may seem unfair. The Employer relied, to its detriment, on an express agreement with the Union. However, it must be remembered that the Act imposes clear positive obligations on the Employer and it expressly renders any agreement to waive those obligations of no effect. Given the importance of the social policy of the Act, ensuring that employers comply with their statutory obligations must prevail over perceptions of unfairness."
>
> (Quicklaw, paras. 45 and 48)

In my view, the *Human Rights Code* and the *Charter of Rights and Freedoms* are statutory and constitutional provisions that represent policies "of significant social importance" such that they must override any argument founded on the doctrines of equitable estoppel and abuse of process. In my view, to deny the grievors the opportunity to have it determined whether their human rights and *Charter* rights are being offended by the Employer's administration of the Plan would not be consistent with maintaining the integrity of the grievance-arbitration process, nor with my obligations under Section

82 (2) of the *Labour Relations Code*. Because they were not argued before her, Ms. Jackson did not make any determinations on these issues.

For these reasons, I have concluded that it would not be appropriate for me to decline to hear and determine the four grievances before me which allege that the Employer's interpretation and application of the Plan offends the grievors' rights under Section 13 of the *Human Rights Code* and their *Charter* rights under Section 15 of the *Charter of Rights and Freedoms*. Consequently, the hearing into the merits of their grievances will proceed on the dates set aside for that purpose in January, 2008.

During this stage of the proceeding, the Employer made a number of submissions which, in my view, more properly go to the merits of the Union's claims than to the issue of whether I have the jurisdiction to hear them. I make no comment on those submissions here. That will be for the next stage in the proceeding.

Dated this 19th day of November, 2007.

JOHN KINZIE
ARBITRATOR