Canadian Human Rights Tribunal **Tribunal canadien des droits de la personne**

BETWEEN:

COLLEEN CREMASCO

Complainant

- and -

CANADIAN HUMAN RIGHTS COMMISSION

Commission

- and -

CANADA POST CORPORATION

Respondent

REASONS FOR DECISION

Ruling No. 1

2002/09/30

MEMBER: Paul Groarke

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I. INTRODUCTION

[1] The present matter is before me by way of preliminary motion. The Complainant alleges that Canada Post has discriminated against her by failing to accommodate her disability, in the form of an injury to her lower back.

[2] A word of explanation may be helpful, in setting out the background of the present ruling. When the Tribunal receives a complaint, it sends a questionnaire to each of the parties. In responding to the questionnaire, the Respondent stated that it wished to raise the following issues:

1. The complaint is untimely and therefore in violation of section 41(1)(e) of the *Canadian Human Rights Act*;

2. That pursuant to section 41(1)(a), the Complainant exhausted grievance procedures and the Arbitrator made a decision which the Commission ought to have regard to;

3. The issue raised in this complaint is the same issue raised in a previous complaint which the Commission found was unfounded. Both the Commission and the Complainant ought to be estopped from proceeding with the second complaint.

The Chairperson of the Tribunal subsequently directed that these issues be dealt with in writing.

[3] The charitable view may be that the Respondent had not fully considered its position. The second issue is hard to make out, since the language of section 41(1)(a) is quite different than the wording used by the Respondent. In addition, the first two issues ask the Tribunal to review the Commission's exercise of its discretion under section 41 of the *Canadian Human Rights Act*. The Tribunal subsequently received written submissions from the Respondent and the Commission, which I have reviewed. The Complainant advised the Tribunal that she was adopting the same position as the Commission.

[4] In its written submissions, the Respondent set out the three issues that it was raising somewhat differently. There, it stated that:

1. The complaint is untimely pursuant to subsection 41(1)(e) of the *Canadian Human Rights Act*;

2. The Complainant, pursuant to subsection 41(1)(a) of the *Act*, has had the identical issue determined at arbitration.

3. The complaint is vexatious pursuant to subsection 41(1)(d) of the *Act*.

The general position of the Respondent was that the Canadian Human Rights Commission "ought not to have exercised its discretion" to deal with the complaint under section 41(1) of the *Act*.

[5] The essence of the Commission's reply was that the Tribunal does not have the jurisdiction to deal with any of the Respondent's submissions, as they are all based on the exercise of the Commission's discretion under section 41 of the *Canadian Human Rights Act*. It submits that these issues can only be dealt with in the Federal Court of Canada, by way of judicial review. I would only add that the time for such a review has long since elapsed.

[6] I am in agreement with the Commission's position in this regard and have some difficulty with the way in which the Respondent originally presented its case. There is still a substantive issue to be considered, however, which calls for a decision. After some consideration, I accordingly held a case conference on August 28, 2002 by telephone. In the course of the conference, I invited the parties to submit further argument on the issue of *res judicata*. I was particularly concerned that the third issue in the response to the questionnaire had not been adequately addressed.

[7] I have now received additional written submissions from the Commission and the Respondent. At the case conference, the Complainant again advised the Tribunal that she would be joining in the submissions of the Commission.

II. FACTS

[8] The parties have not provided me with a formal statement of facts, which would have been convenient. Nonetheless, the basic facts of the case run as follows.

[9] The Complainant injured her back while working in a full-time position at Canada Post in 1986. There is a description of the injury and the problems it presented in the award of the first arbitrator. These facts led to an ongoing discussion between the Complainant and the Respondent with respect to her duties as an employee.

[10] The Complainant subsequently transferred to a part-time position in Victoria, where there was a dispute with respect to accommodation. This was complicated by the fact that she re-injured her back and was placed on Workers' Compensation from November 1990 to September 1991. The Complainant asked Canada Post to clarify the medical restrictions on her duties when her benefits from the Worker's Compensation Board expired.

[11] While the Complainant was on compensation, on July 24, 1991, she submitted a formal request for a transfer to Cranbrook. In October 1991, the Cranbrook plant offered her a full-time position. This offer was withdrawn when Superintendent Siegenthaler discovered the Complainant's disability. In his view, to use the words of the Respondent, "the Complainant's physical limitations were incompatible with the requirements of the duties of the vacant position."

[12] The Complainant filed two grievances with her union on March 17, 1992. The first alleged that Canada Post had failed to accommodate her in the Victoria processing plant. The second took issue with the decision to withdraw the Cranbrook offer. Two and a half months later, on June 2, the Complainant then filed a complaint with the Canadian Human Rights Commission raising the same issues. The complaint mentioned that she had filed a grievance with respect to the transfer.

[13] Ms. Cremasco did not return to work until February 1994, when she was given a set of modified duties in the Victoria plant. This is explained, in part, by the fact that she had gone on maternity leave. The Complainant returned to work, in her words, "on a gradual basis, part-time 5 hours/day, 4 days/week with a range of duties that took into account my limitations."[(1)] The Complainant and the Commission have taken the position that these arrangements came to an end in May or June of 1994.

[14] The grievances lodged with the union were heard shortly thereafter. During the hearing, Ms. Cremasco testified that her supervisor expected her to fulfill a full range of duties. On November 24, 1994, Arbitrator Jolliffe issued an award in her favour. His decision reviews the history of her relationship with her employer in considerable detail. It also discusses the Corporation's obligation to "permanently partially disabled" employees and the issue of "modified duties".

[15] Arbitrator Jolliffe was of the view that the two grievances should be treated as separate matters. At page 44 of the decision, he ruled that the Corporation's "action with respect to Cranbrook stood out as a separately identifiable alleged breach of the grievor's seniority rights under the collective agreement." He went on to find that this grievance was out of time under article 9.10(a) of the collective agreement, since it was grieved more than 25 working days after she became aware of the circumstances giving rise to the grievance.

[16] Here, there is a twist. In spite of his ruling that the grievance was out of time, Arbitrator Jolliffe appears to have accepted the Respondent's arguments on the substantive issue. These arguments are canvassed at page 48 of the decision. In any event, the Arbitrator found that the transfer was not "suitable" in the circumstances. His decision mentions the issue of undue hardship and discusses the employer's obligation to accommodate partially disabled employees at some length.

[17] As the process continued, the significance of the Arbitrator's comments seems to have become a focus of the dispute. Although the decision contains some criticism of the

Complainant, the Arbitrator makes it clear that the Corporation was derelict in its duty to accommodate her. At page 51, he states:

The facts of this matter disclose what amounts to a cavalier and unconcerned approach, over a lengthy time period, taken by some management persons towards the grievor's known lower back injury and limitations related thereto.

In his award, Arbitrator Jolliffe directed the Corporation to compensate the Complainant. Rather than specify the amount, he left it to the parties to negotiate a settlement. The decision discusses the current state of affairs between the parties and seems to assume that they will negotiate the outstanding issue of accommodation. The final line reads: "I remain seized of the matter in the event that [the parties] are unable to agree."

[18] In December 1994, a new issue arose when Ms. Cremasco made a second request for a transfer to Cranbrook. This was prompted by the fact that her husband was transferring to the Cranbrook office. The request was denied on the basis that the Cranbrook plant was unable to accommodate her disability. Canada Post took the view that the couple chose to move to Cranbrook, knowing that there was no position for Ms. Cremasco in the plant.

[19] The Complainant filed a grievance with respect to the second request for a transfer in early 1995. She also applied for educational leave, which the employer granted. This leave was extended in 1996 and 1997. In spite of the new grievance, and the existing human rights complaint, the Complainant, the union and the Respondent managed to negotiate an interim settlement later in the year. It provided Ms. Cremasco with approximately 34,000 dollars on the award granted by Arbitrator Jolliffe.

[20] The Commission and the Respondent continued to discuss the human rights complaint. In a letter of March 14, 1996, the Commission wrote that "the transfer issue" was still outstanding. The Corporation disagreed:

With respect to the issue of Ms. Cremasco's transfer request to Cranbrook, we still maintain that this was considered with by [sic] Arbitrator Jolliffe. If his entire decision is considered it is clear that all relevant facts and arguments have been introduced through a full arbitration process. Witnesses testified under oath and their testimony is set out in the decision. Even though the grievance was not subject to the Arbitrator's jurisdiction because of time limits, the Arbitrator does state that "Cranbrook was not a suitable modified duties placement for the grievor." This continues to be the Corporation's position on this matter.

In the same letter, the Corporation adds that the third grievance was on its way to arbitration.

[21] The Commission took the position that the evidence that Canada Post had presented on the transfer to Cranbrook was insufficient to determine whether it had met its duty to accommodate. The Commission also took the position that the question of

accommodation on Ms. Cremasco's return to work in 1994 was still outstanding. The Corporation replied that the matter was still in negotiation and could be referred back to the Arbitrator Jolliffe by any of the parties. It argued that the Arbitrator had dealt with the Cranbrook transfer, citing a number of passages from the arbitration award.

[22] The third grievance was dismissed by Arbitrator McKee on February 27, 1998, on the basis that the union had not challenged the view expressed by Arbitrator Jolliffe in the first award. Although Arbitrator McKee took the position that the doctrine of *res judicata* does not apply to arbitration hearings, he clearly felt that the substance of the two grievances was the same. In the circumstances, he was not prepared to go against the previous ruling that the Cranbrook office was not in a position to accommodate her.

[23] The narrative continued to unfold. The Complainant had requested a medical assessment in December 1997, apparently on the basis that she no longer suffered from her disability. She was examined by a doctor in March 1998 and found to be medically fit. As a result, her "permanently partially disabled" status was removed. At about the same time, the parties entered into a final Memorandum of Agreement on the first award, more or less on the heels of the McKee decision. This agreement provided an additional twelve thousand dollars in compensation for the period between November 1993 and February 1994. The text of the agreement states that it constitutes a "full and final settlement" of the grievance.

[24] One might have thought that this would assist in the resolution of the larger dispute. Such was not the case. The correspondence on the human rights complaint continued, in spite of these developments, with the Respondent advancing detailed reasons why the complaint should not go forward. When the Complainant's husband transferred to Ontario, later the same year, the Complainant requested a similar transfer. She was later offered and accepted a position as a part-time postal clerk in Belleville. There was no issue of accommodation, since she was no longer disabled.

[25] Marlene Chambers was assigned to complete the Commission's investigation into the original complaint in 1999. It was now over six years old. In a letter dated March 29, 1999, she advised the Respondent that several issues "within the scope of Ms. Cremasco's complaint" had not been addressed in the arbitration process. She then asked a series of questions with respect to the two requests for a transfer, and a series of questions with respect to the period in 1994.

[26] The Respondent maintained its position. In a letter dated May 10, 1999, it argued that the entire issue of accommodation had been dealt with in the first arbitration award. It also explained why the Respondent felt that the request for a transfer to Cranbrook was unreasonable. On the other hand, it provides little assistance on the question of Ms. Cremasco's return to work in 1994 and merely states that the situation was "not reduced to writing". There is an allegation that Ms. Cremasco was now asking that she be compensated for the sale of her home in Cranbrook, which illustrates the extent to which the relationship between the parties had deteriorated.

[27] The Commission recognized that the human rights complaint might have deficiencies. Since Ms. Cremasco had made her allegation in 1992, the Commission was apparently concerned that her request for a transfer in 1994 was not covered on the face of the complaint. In order to remedy the situation, the Complainant accordingly filed a second complaint on August 31, 1999. This is the complaint that has come before me.

[28] The complaint contains two allegations. The first is that Canada Post failed to accommodate the Complainant when she made the second request for a transfer to Cranbrook.

On December 1, 1994, I requested a transfer to Cranbrook, B.C. because my spouse had accepted a transfer there effective January 3, 1995. On December 16, 1994, Superintendent Siegenthaler informed me in writing that because I was still classified as permanently partially disabled, no position in either Cranbrook or Kimberley would fit my limitations, and I could not be placed on a transfer list for either location.

The Complainant states that the Respondent "failed to assess my accommodation requirements and, therefore, did not accurately determine whether my disability could be accommodated in Cranbrook".

[29] The second allegation is that Canada Post failed to accommodate the Complainant when she returned to work in 1994:

Canada Post failed to accommodate my return to work until February 1994, at which time I was accommodated at its Victoria, B.C. plant returning to work on a gradual basis, part-time 5 hours/day, 4 days/week with a range of duties that took into account my limitations. However, in approximately May, June 1994, the Plant Manager, John Brady, instructed that my range of duties accommodation arrangement cease. I was returned to culling duties which required my standing for an entire shift performing the same motion. In little time, this aggravated the strain on my lower back, resulting in my having to leave work and/or absent myself from work on a number of occasions due to the negative effect the culling duties had on my disability.

Ms. Cremasco states that Mr. Brady's decision to alter her "accommodation arrangement" was discriminatory and a violation of the *Canadian Human Rights Act*.

[30] As one might expect, the Respondent objected to the new complaint. In a letter, dated October 22, 1999, the Respondent observes that the complaint was laid "almost five years after the last alleged events occurred" and describes it as "an outrageous abuse of the system". It directs the attention of the Commission to section 41 of *the Canadian Human Rights Act*.

[31] On January 4, 2000, the Commission provided the Respondent with a "Sections 40/41 Analysis" recommending that the Commission deal with the new complaint. Although I have not been provided with a copy of this analysis, I have the Respondent's reply, which was sent on January 31, 2000. It is obvious that the investigator must have

concluded that the original complaint and the corresponding arbitration did not deal with either of the issues in the second complaint. It also stated, against the objections of the Respondent, that the Respondent would not be prejudiced by the second complaint.

[32] In the Respondent's reply to the section 41 analysis, Richard Sharp, an Acting Manager for Canada Post, took issue with the suggestion that the second complaint had not prejudiced the Respondent.

Canada Post is deeply troubled by this conclusion…it is a given that reconstructing long-age events is difficult, i.e., the collection of documents, identifying witnesses, reliance on memories and recollection of details, lost context, etc.

The letter has a certain stridency. This merely provoked Ms. Cremasco, who responded with a letter of her own in March. The tone of her remarks is evident in her reference to the "disgusting treatment I received from the employer". She also refers to the "abuse to my human dignity".

[33] For reasons that escape me, the investigation into the two complaints proceeded separately. Four days after Mr. Sharp's letter, Ms. Chambers accordingly filed her report on the first complaint. I have been given a copy of this report, which recommends that the first part of the complaint be dismissed on the basis of the Jolliffe award. At paragraph 37, she states:

On the evidence, the Complainant's allegations that the Respondent failed to accommodate her return to work in 1991 is founded, however, the Complainant was awarded [a] remedy in the November 24, 1994 arbitration award. The November 24, 1994 award is consistent with the remedy that can be expected under the *Canadian Human Rights Act*.

Ms. Chambers did not concern herself with Ms. Cremasco's return to work in 1994.

[34] The investigator's report also recommended that the part of the complaint dealing with Ms. Cremasco's request for a transfer to Cranbrook be rejected. Ms. Chambers felt that the Complainant could not be accommodated without:

… excluding her from the rotation shift schedule, and removing all sedentary elements of the work from the other postal clerks, having to completely restructure the operations' duty schedule and violating the collective agreement…(¶38)

It is only fair to say that the conclusions reached by the investigator are entirely in keeping with the conclusions of Arbitrator Jolliffe some five years earlier. The investigator at least implicitly criticised the Complainant for requesting and accepting a full-time position in Cranbrook without disclosing her "limitations".

[35] On September 27, 2000, the Corporation was advised that the Commission had decided to deal with the second complaint. In December, it was provided with a copy of

the investigator's report, which apparently recommended the appointment of a conciliator. Although I do not have the report, the facts plainly establish that the parties had reached an impasse. The Respondent took the position that the complaint had been dealt with, on both counts. The Commission demurred. I cannot see that anything has changed with the referral to the Tribunal, and the matter remains as it was, locked in a clash of wills.

[36] Leslie Hine, a Complaints and Compliance Officer for Canada Post, replied in customary fashion, with a lengthy letter expressing the Respondent's exasperation with the developments in the case. The letter finds the position of the investigator "incredible" and raises a lengthy series of points regarding the report.

The Corporation has provided a lengthy justification as to why Ms. Cremasco could not be accommodated in Cranbrook. As well, the full text of the arbitration decision was submitted. It contained further exhaustive information regarding the accommodation considerations given Ms. Cremasco and included the opinion of the arbitrator that Ms. Cremasco could not have been accommodated in Cranbrook. Whether this opinion pertained to a 1991 or 1994 transfer request does not matter. The decision-making criteria in both cases were the same. (emphasis removed)

It seems to me that this sets out a decisive factor in the case.

[37] The author of the letter also refers specifically to the issue of prejudice.

Mr. Brady, the Plant Manager who is the key witness in Ms. Cremasco's complaint, simply could not remember critical events. If these facts do not demonstrate prejudice, one might be forgiven for asking, "What does?"

And again:

The report states that the Respondent's defence did not confirm or deny that in approximately May/June 1994, John Brady, Plant Manager, ceased the Complainant's accommodation arrangements. It is true that we could neither confirm nor deny. The passage of time is too great. We simply don't know (and hence the prejudice).

In spite of these protests, the Commission appointed a conciliator to bring about a settlement of the complaint.

[38] It will come as no surprise that the conciliator was unable to bring about a settlement of the complaint. I was initially concerned that the first complaint was held in place, while the second investigation proceeded, but take nothing from that fact. Both of the complaints were put before the Human Rights Commission in 2002. The Commission sent the Respondent a letter, dated March 21, 2002, stating that it had adopted the investigator's report with respect to the first complaint and closed its file on the matter. It had nevertheless decided to refer the second complaint to the Human Rights Tribunal. The second complaint was accordingly referred to the Tribunal on April 10, 2002.

[39] I think it is important, before reviewing the law, to state that none of the essential facts are in dispute. The parties disagree as to whether there is a triable issue, but the Commission has not taken issue with the facts set out by the Respondent. Nor has the Respondent taken issue with the facts provided by the Commission. As the record shows, I advised the parties during the telephone conference that I was proceeding on the basis that there was an agreement on the essential facts. There was no objection from any of the parties.

[40] As a matter of caution, I feel obliged to state that counsel for the Commission appears to be objecting to the preliminary motions, albeit in the most fragmentary fashion, in its reply to the second set of submissions. In my view, this comes altogether too late in the process and is not properly within the ambit of reply submissions. The Commission cannot simply balk, in the fourth round of submissions, and issue a general demurrer.

[41] The salient observation is that the Commission has not taken issue with any of the relevant facts. It will become apparent that I am not prepared to rule on the second part of the complaint, precisely because I believe it raises evidentiary issues that cannot be addressed on a preliminary motion. The position adopted by the Commission in its final reply, however, goes too far. It would prevent a Tribunal from ever considering the kinds of issues dealt with in the present ruling.

III. THE LAW

A. The question before the Tribunal

[42] Most of the original submissions dealt with the considerations that arise under section 41 of the *Canadian Human Rights Act*. Indeed, the Respondent complained repeatedly that the Commission failed to exercise its discretion appropriately in the circumstances.

[43] I have already commented that the Human Rights Tribunal has no authority to review the Commission's exercise of its discretion under section 41 of the *Canadian Human Rights Act*. As the Chairperson stated in *Eyerley v. Seaspan International Limited* (August 2, 2000, unreported), at paragraph 4:

It is not for the Tribunal to review either the jurisdiction or the conduct of the Canadian Human Rights Commission. These matters are within the exclusive purview of the trial division of the Federal Court.

In a similar vein, Justice Richard makes it clear, in *Canada (Attorney General) v. Liu*, (1994), 86 F.T.R. 235 (F.C.T.D.), at paragraph 10, that a Respondent is not entitled to launch a "collateral attack" on the Commission by raising the same issues before the Tribunal.

[44] Counsel for the Respondent has directed my attention to the decision in *Vermette v. Canadian Broadcasting Corp.* (1994), 28 C.H.R.R. D/89 (C.H.R.T.), where the Chairperson held that the Tribunal has the authority to dismiss a complaint that was filed outside the one year limitation period in section 41. This decision was reviewed by Justice Muldoon in *Canada (Canadian Human Rights Commission) v. Canadian Broadcasting Corp. (re Vermette)* (1996), 120 F.T.R. 81 (F.C.T.D.), where he held that a Tribunal may dismiss a complaint if it concludes that there was no reasonable justification for depriving a Respondent of the substantive benefits of section 41. At paragraph 69, he observes that a Tribunal may have matters before it that were not before the Commission and lists five factors that should be considered in deciding such an issue. These factors include prejudice to the Respondent.

[45] All I can say is that the decision in *Vermette* has been eclipsed by later developments. The issue was revisited by the Federal Court in *Oster v. International Longshore & Warehouse Union*, [2002] 2 F.C. 430, where a Tribunal had followed the lead of Justice Muldoon on the issue. At paragraph 30, however, Justice Gibson held that the Tribunal erred:

…in assuming jurisdiction with respect to the union's preliminary objections. The union, having decided not to seek judicial review before this court of the Commission's discretionary decision to extend the time limit under paragraph 1(e) of the Act, was simply precluded from adopting the alternative recourse that it chose, that being to raise precisely the same issues that it could have raised on judicial review, before the Tribunal.

This echoes the view of Justice Richard in *Liu, supra*. In my view, section 41 does not lend itself to the interpretation placed upon it in *Vermette* and I prefer the reasoning in *Oster*.

[46] In its written submissions, the Commission argues that the Respondent can only raise the issues under section 41 in the Federal Court. I am in agreement with the Commission, but this comes with a fundamental reservation. The mere fact that the Commission has referred a complaint to the Tribunal cannot deprive it of the authority to determine whether the complaint should go to a hearing. It is true that this may take a Tribunal into the kinds of issues that might arise in an application for judicial review. There is a fundamental difference, however, in the purpose of the Tribunal's inquiry, which is to determine whether it would be fair to proceed with a hearing rather than whether the Commission acted appropriately in the circumstances.

[47] Other Members of the Human Rights Tribunal have taken the same position. In the preliminary ruling in *Desormeaux v. Ottawa-Carleton Regional Transit Commission* (July 19, 2002 unreported), for example, at paragraph 13, Chairperson Mactavish distinguished between a challenge to the decision to refer a case to the Tribunal and a challenge to the jurisdiction of the Tribunal to proceed.

While the Tribunal may not purport to review Commission decisions, it does not follow from Oster that once a discretionary decision is made by the Commission pursuant to

sections 41 or 44 of the *Act*, the Tribunal is absolutely without jurisdiction to deal with the underlying facts giving rise to that decision.

If a Tribunal is of the view that these underlying facts affect the fairness of the process, it may accordingly deal with them.

B. The doctrine of *res judicata*

[48] The Respondent has essentially argued that the operation of the doctrine of *res judicata*, which includes the principle of issue estoppel, prevents the Complainant and Commission from taking the present complaint to a hearing. This requires a review of the law in the area.

[49] As the Latin indicates, the term *res judicata* means little more than "the thing decided". The French translates it, more accurately, as "la chose jugée".[(2)] One of the entries in Black's sets the doctrine out succinctly:

The sum and substance of the whole rule is that a matter once judicially decided is finally decided. *Massie v. Paul*, 263 KY. 183, 92S.W.2D11, 14. [(3)]

The doctrine takes a variety of forms, which are often confused.

[50] Before dealing with the specifics of *res judicata*, it may be helpful to say that the doctrine has two common rationales. The first is the need for finality in legal proceedings. The second is that a party should not be "vexed" twice by the same cause. I see no reason why these rationales would not apply to the human rights process, as long as the fundamental aims of the process are respected.

[51] The most helpful authority in the area seems to be the recent edition of The Doctrine of *res judicata* by George Spencer Bower, which sets out the general rule as follows:

In English Law a *res judicata* is a decision pronounced by a judicial tribunal having jurisdiction over the cause and the parties which disposes once and for all of the matter decided, so that except on appeal it cannot afterwards be re-litigated between the same parties or their privies. (¶3) [(4)]

This has two effects. It prevents parties from challenging the findings of law and facts "which the decision necessarily established" in subsequent proceedings.[(5)] And secondly, it extinguishes the cause of action, merging it in the judgment. This gives rise to the maxim: *transit in rem judicatem*.

[52] The first effect is generally referred to as issue estoppel. The second is merger, which seems to be known as cause of action estoppel in Canada. All I will say, in the admirable words of Bower, is that the first rule prohibits contradiction; the second, reassertion or recovery.[(6)] At this point, at least, the Respondent has restricted itself to the first rule.

[53] Bower states that the term "issue estoppel" was coined by Higgins J. in a dissenting judgment in *Hoysted* (1921) 29 CLR 537 at 561.[(7)] The term can be problematic, since it fails to distinguish between those situations where a *res judicata* is relied upon as a bar to proceedings and those situations where it merely prevents the parties from contesting an issue decided in a previous litigation. In any event, the former branch of the doctrine goes to jurisdiction; the latter to the introduction of evidence.

[54] Donald Lange recognizes the difficulty in characterization in The Doctrine of *Res Judicata* in Canada, where he writes that the doctrine of *res judicata* "is an exclusionary rule of evidence".[(8)] He then cites *Masunda v. Downing* (1986), 27 D.L.R. (4th) 268 (B.C.S.C.), for the proposition that "it goes to the capacity of the parties to raise the matter and to the capacity of the second tribunal to determine the matter now having no jurisdiction to do so". It may be this problem in characterization that explains why Bower prefers to describe *res judicata* as "a rule of public policy".[(9)]

[55] Since the question that needs to be answered is whether the complaint should proceed to a hearing there is no need to consider the evidentiary branch of the doctrine any further. There appears to be a third branch of the doctrine, however. It seems fair to say that a more informal concept of *res judicata* has sprung up in the case law, which arises in those situations where the existence of other proceedings would simply make it unfair to proceed.

[56] Donald Lange appears to describe this as a doctrine of abuse of process by re-litigation.[(10)] The function of such a doctrine is apparently to remedy the lapses in the application of the doctrine of *res judicata*, where the technical requirements of the doctrine have not been made out. This would appear to be a discretionary form of relief, which gives an adjudicative body the ability to reject a case that would undermine the integrity of its process.

[57] The effect of the first and third branches of the doctrine needs to be distinguished. If a matter has been previously decided by a superior court, for example, one would think that a tribunal has no jurisdiction to proceed. The Supreme Court of Canada has made the matter more difficult, in *Danyluk v. Ainsworth Technologies Inc.* [2001] S.C.J. No. 46 (Q.L.), by explicitly deciding that a decision maker has a residual discretion not to apply the doctrine where it would cause an injustice. This recognizes the origins of the doctrine in public policy: but the problem for a body like the Tribunal is that jurisdiction is not a discretionary matter.

[58] Be that as it may, there are cases that make the necessary distinction. In *Kaloti v. M.C.I.* [2000] 3 F.C. 390 (F.C.A.), for example, Décary J. quotes a passage from Auld L.J. in *Bradford & Bingley Building Society v. Seddon* [1999] 1 W.L.R. 1482 (C.A.), with approval. There, at page 1490, the English judge distinguishes between *res judicata* and abuse of process:

The former, in its cause of action estoppel form, is an absolute bar to re-litigation, and in its issue estoppel form also, save in "special cases" or "special circumstances" . . . The

[doctrine of abuse of process], which may arise where is no cause of action or issue estoppel, is not subject to the same test, the task of the court being to draw the balance between the competing claims of one party to put his case before the court and of the other not to be unjustly hounded given the earlier history of the matter . . .

The point in the immediate case is that the jurisdictional branch of *res judicata* is not, perhaps I need to say is not, by and large, a discretionary remedy. Abuse of process, on the other hand, is a discretionary doctrine.

[59] The comments in *Kaloti* and *Bingley* go to the origins of *res judicata*, which appear to lie in the inherent authority of the decisions from the superior courts. Thus, in *Canadian Human Rights Commission v. British American Bank Note Co.*, [1981] 1 F.C. 578 at paragraph 4, Thurlow C.J. held that the Human Rights Tribunal was not authorized to decide a question relating to the division of powers "and its opinion on the point renders nothing *res judicata* and binds no one".[(11)] The same line of reasoning was adopted by the Supreme Court of Canada in *Canadian Pacific Ltd. v. Matsqui Indian Band*, [1995] 1 S.C.R. 3 at ¶26, where the court states that the decisions of administrative tribunals lack the force of *res judicata*.

[60] In spite of these decisions, there is regrettably little case law on the application of *res judicata* to administrative proceedings. David J. Mullan seems to be right in saying that the doctrine is at least more limited in such a context:

The extent to which *res judicata* and issue estoppel pertain in the administrative process is uncertain. The bulk of authority holds that either that they have no application or that they apply in a different and less decisive form than they do in the context of regular litigation.[(12)]

The obvious example is in the field of labour relations, as exemplified by the decision of Arbitrator McKee in the immediate case.

[61] There is still considerable room for *res judicata* in the administrative arena. In Judicial Review of Administrative Action, for example, at 12:6212, Donald Brown and John Evans accept that *res judicata* and issue estoppel would preclude a tribunal "from hearing a matter that had been decided in other proceedings involving identical issues and the same parties".[(13)] They then suggest that a ruling of an administrative body may be sufficient to prevent a party from re-litigating the same issues in a court of law. The two authors also recognize that a tribunal may decline to hear a case on the basis that it constitutes an abuse of process.

C. The application of the jurisdictional branch of *res judicata* to the awards of arbitrators

[62] The Respondent has raised the question whether the awards of labour arbitrators give rise to the doctrine of *res judicata*. It has also raised a more straightforward jurisdictional argument, however, which needs to be considered first. The Respondent

submits that the court in *Weber v. Ontario Hydro*, [1995] 2 S.C.R. 929 rejected the idea of "concurrent jurisdiction, and overlapping jurisdiction, and adopted a model of exclusive jurisdiction on the part of the labour arbitrator". It then cites *Rasannen v. Rosemount Instruments Ltd.* (1994), 14 O.R. (3rd) 267 (Ont. C.A.) in support of this position: "In considering both the *Rasannen* decision and the *Weber* decision, it is evident that the courts have strongly suggested that, whenever possible, employment issues should be comprehensively dealt with in one forum".

[63] In my view, this line of reasoning is easily overstated. There are a number of cases from appellate courts which hold that the *Weber* principle should not be interpreted in a way which deprives Complainants of their right to file human rights complaints. These decisions include: *Ford Motor Co. v. Ontario (Human Rights Commission)* (2001), 209 D.L.R (4th) 465 (Ont. C.A.), *Saggers v. Calgary (City)* (2000), 193 D.L.R. (4th) 120, and *Saskatchewan Human Rights Commission v. Cadillac Fairview Corporation* (1999), 173 D.L.R. (4th) 609 (Sask. C.A.).[(14)] The recent decision of the Federal Court in *Société Radio-Canada v. Syndicat des Communications de Radio-Canada*, [2002] A.C.F. No. 1060 (F.C.T.D.) (QL) also recognizes the concurrent jurisdiction of the Commission with respect to matters arising under a collective agreement, even if it expresses some misgivings in the matter.

[64] Other decisions have held that there is no parity between proceedings under a collective agreement and proceedings before human rights tribunals. The reasoning of the Federal Court in *Canadian Broadcasting Corp. v. Paul*, [1999] 2 F.C. 3 (F.C.T.D.), draws attention to the fact that parties cannot "contract out" of human rights legislation. Justice Tremblay-Lamer stresses the "paramountcy" of the *Canadian Human Rights Act* over ordinary legislation.[(15)] The Commission has referred me to the decision of the B.C. Supreme Court in *British Columbia v. Tozer* (1998), 33 C.H.R.R. D/327, which adopts a similar position.

[65] At this point in time, the argument that proceedings under a collective agreement act as a formal bar to human rights proceedings seems unlikely to succeed. As the Tribunal's own jurisprudence has recognized, in *Desormeaux, supra* and *Leonardis v. Canada Post* (July 30, 2002, unreported), the Respondent's argument would usually deprive the Commission of its right to address human rights complaints. This would contravene the public interest.

[66] This leaves open the question whether a decision from a labour arbitrator creates a *res judicata*, which would prevent a Complainant and the Commission from taking a present complaint to a hearing. If there is an estoppel of this nature, it is clearly jurisdictional and is something more than a discretionary matter. On the other hand, it seems strange to suggest that the principle of *res judicata* applies, at least as a matter of course, when it does not apply in the field of labour relations in the first place.

[67] Part of the answer may lie in the decision of the Federal Court in *Canada (Attorney General) v. Canada (Canadian Human Rights Commission)*, (1991), 43 F.T.R. 47 (F.C.T.D.), where a Complainant had appealed her dismissal to the Public Services

Commission Appeal Board. Although the Board considered the issue of discrimination, Mr. Justice Muldoon held, at ¶65, that this did not prevent her from pursuing a human rights complaint.

As already noted, the P.S.C.A.B.'s focus was on the Complainant's "doing of her job," rather than discrimination. As a result, the Chairperson of the Appeal Board "could not go into her 'defense' as a tribunal can, and treated it dismissively as really not very helpful upon the question of competence. The question not being *eadem questio*, this is not a case of issue estoppel; *Angle v. M.N.R.*, [1975] 2 S.C.R. 248 at page 257; *Department of Aviation v. Ansett Transport*, (*supra*, page 24) at pages 199 and 200."[(16)]

If the questions raised in the interpretation of a collective agreement and the *Canadian Human Rights Act* are not the same, they will not attract the doctrine of *res judicata*, even where the subject matter of the litigation overlaps.

[68] It is notable that the Federal Court did not find the legal character of the body in making the decision particularly important. At ¶55, Justice Muldoon writes:

The essential question is whether the parties are, or would be, subjected to the same impact of the application or non-application of the principle, and not whether the body making the pronouncement be curial, quasi-judicial or administrative in nature. The lack of traditional written pleadings and discovery presents little, if any, difficulty in perceiving whether a litigant seeks to litigate an issue in or before a federal board, commission or other tribunal, which has been previously litigated conclusively between the parties in or before the same, or any other such board, commission or tribunal.

This would also support the argument that the issue of *res judicata*, in this context, must be considered on a case-by-case basis.

[69] The case law establishes that *res judicata* estoppel does not apply unless three basic conditions have been met. In *Leonardis*, *supra* at ¶9, Member Hadjis described these conditions as follows:

1. The prior decision dealt with the same question;

2. The prior decision was final; and

3. The parties to the prior decision or their privies are the same persons as the parties in the subsequent proceedings.

It is clear that these conditions will not be met in the majority of cases that come before the Tribunal, if only because the Commission will not be privy to the other litigation.

[70] In the immediate case, I simply cannot see how the Respondent can satisfy the criteria in the case law. It is true that the question is significantly more complex when it comes to the Complainant's request for a transfer, since the Commission adopted the

same position as the Respondent on the first arbitration, in rejecting the initial human rights complaint. It might therefore be possible to argue that the Commission was, in some notional sense, privy to the earlier litigation. This is exactly the kind of situation, however, where it seems more appropriate to deal with the matter under the doctrine of abuse of process.

D. Abuse of process

[71] In my view, the real issue on the present motion is whether the complaint before me constitutes an abuse of process, which compromises the Respondent's right to a fair hearing. The first question that I face is accordingly whether the Tribunal has the authority to remedy an abuse of process. In my view, the answer must be in the affirmative.

[72] Like any adjudicative body, the Human Rights Tribunal has the authority to regulate the proceedings before it. In *Prassad v. Canada (Minister of Employment and Immigration)*, [1989] 1 S.C.R. 560 at ¶16, for example, Sopinka J. considered the powers of an adjudicator under the *Immigration Act*:

We are dealing here with the powers of an administrative tribunal in relation to its procedures. As a general rule, these tribunals are considered to be masters in their own house. In the absence of specific rules laid down by statute or regulation, they control their own procedures subject to the proviso that they comply with the rules of fairness and, where they exercise judicial or quasi-judicial functions, the rules of natural justice.

I believe that this includes the power to remedy an abuse of process.

[73] There are many remarks in the case law that would lend support to such a contention. In *Commanda et al v. Rainbow Concrete Industries Ltd.* (January 25, 2002, Ont. Bd. Inq.), for example, at page 25, an Ontario adjudicator concludes that a Board of Inquiry:

…has jurisdiction to dismiss or stay permanently a proceeding before it where to do otherwise would constitute an abuse of process. See *SPPA* s. 23(1); *Hollis Joe v. Ontario Human Rights Commission* (1995), 25 C.H.R.R. D/472 and cases cited therein at para. 54 (Ont. Bd. Inq.); and *Ford Motor Co. of Canada Ltd. v. Ontario (Human Rights Commission)* (1995), 24 C.H.R.R. D/464 (Gen. Div.)

The matter is more straightforward in Ontario, since section 23 of the *Statutory Powers Procedure Act*, R.S.O. 1990, c. S-22, gives a Board of Inquiry the power "to make such orders or give such directions . . . as it considers proper to prevent an abuse of its processes".[(17)] The *Canadian Human Rights Act* does not contain a comparable provision.

[74] The common law provides another source of such an authority, however. In *Sawatsky v. Norris* (1992), 10 O.R. (3d) 67 (Ont. Gen. Div.), for example, a *Mental*

Health Act review board had declined to hold a hearing into the fifth application by the applicant within six months. At page 77, Justice Misener remarked that the legislative provision was unnecessary:

Indeed, I would have thought that the board did not need to invoke s. 23 [of the *Statutory Powers Procedure Act*]. I would have thought that the board has the common law right to prevent abuse of its process, absent an express statutory abrogation of that right.

This is in keeping with common sense: a board or tribunal must have some capacity to protect itself from litigants who use its process improperly.

[75] The most helpful decision may be *Kular v. Canada (Minister of Citizenship and Immigration)*, (2000), 192 F.T.R. 296 (F.C.T.D.), where the Federal Court reviewed the decision of the Immigration Appeal Division to reject a second sponsorship appeal on the grounds of *res judicata*. Justice Nadon quoted *Kaloti*, *supra*, where Décary J.A. held that the decision to file a second appeal "on essentially the same evidence" was an abuse of process. The necessary implication, in both cases, is that a body like the Appeal Division has the authority to reject a case as an abuse of process.

[76] Although I do not propose to compare the powers of the Appeal Division and the Human Rights Tribunal in any detail, it may be helpful to review the role of the Tribunal. The principal obligation of the Tribunal, like the Appeal Division, is to hear cases. The Tribunal is a statutory body, whose powers derive from the *Canadian Human Rights Act*. It has the powers of a superior court to compel evidence and, under section 50(3)(e) of the *Canadian Human Rights Act*, the power to "decide any procedural or evidentiary question arising during a hearing". The Tribunal also has the authority, under section 50(2), to decide "all questions of law or fact necessary to determining the matter".

[77] This does not appear quite so judicial as the Appeal Division, which is a court of record.[(18)] It nevertheless lends considerable credence to the argument that the Tribunal has the power to remedy an abuse of its process, which is sufficiently curial to require protection. One of the chief reasons for this is that it would harm the reputation of the human rights system to proceed with such a complaint. Another is the responsibility to use public resources wisely. The doctrine of abuse of process only comes into play in those situations where immediate interests of the litigants must give way to the interest that we all share in maintaining the legitimacy and efficacy of the system.

[78] I believe that many of the comments in the case law are of general application. Thus, in *Kaloti*, *supra*, Justice Décary stated at ¶10: "It is well recognized that superior courts have the inherent jurisdiction to prevent an abuse of their process and there is some suggestion that administrative tribunals do too". In the case of the Canadian Human Rights Tribunal, the primary issue can be framed under section 50(1) of the *Act*, which states that the Tribunal shall give all parties "a full and ample opportunity" to present evidence and make representations. This provision recognizes a substantive as well as a procedural right, much like the right to make full answer and defence. The case law

establishes that the Tribunal has a discretion not to proceed with a hearing when this right has been prejudiced.

[79] The chief example is delay. In *E.C.W., Local 916 v. Atomic Energy of Canada* (1984), 5 C.H.R.R. 2066 (C.H.R.T.), for example, an amendment was refused because it would cause a further delay in the proceedings. There is little doubt, however, that this authority extends to other forms of prejudice. In *Uzoaba v. Correctional Services of Canada* (1994), 26 C.H.R.R. D/361 (C.H.R.T.), for example, the Tribunal ruled that evidence regarding events that occurred prior to the complaint would prejudice the respondent and should be excluded. Some of the case law dealing with prejudice is reviewed in *Cook v. Onion Lake* (2002), 43 C.H.R.R. D/77.

[80] The case law would suggest that the authority of the Tribunal to prevent prejudice includes the power to dismiss a complaint as an abuse of process. The leading case in the area is undoubtedly *Blencoe v. British Columbia (Human Rights Commission)*, [2000] 2 S.C.R. 307, where the Supreme Court of Canada held that the notion of prejudice cannot be confined to procedural unfairness. At ¶115, Justice Bastarache stated:

I would be prepared to recognize that unacceptable delay may amount to an abuse of process in certain circumstances even where the fairness of the hearing has not been compromised. Where inordinate delay has directly caused significant psychological harm to a person, or attached a stigma to a person's reputation, such that the human rights system would be brought into disrepute, such prejudice may be sufficient to constitute an abuse of process.

In this sense, it seems to me that the concept of abuse of process speaks to the second rationale behind the doctrine of *res judicata*, what was referred to, in *Bingley, supra*, as the right of a party not to be "hounded". This brings in an oppressive element.

[81] It follows that fairness is a broad standard, which encompasses a variety of factors. Although it is important for a Tribunal to consider the quality of the evidence at a prospective hearing, the more general question is simply: "would it be fair to proceed?" It would be naive, in this context, to think that the public does not perceive of the human rights process as an integral part of the system of justice. If the reputation of the larger system is to be preserved, its process must be subject to public scrutiny. If it is necessary to consult a particular perspective, it is the perspective of reasonable and informed but ordinary people. The doctrine of abuse of process does not require fine distinctions, however, and the view of right thinking people, everywhere, with an intuitive grasp of fair play, will suffice.

[82] In the immediate case, the Respondent has raised a number of novel factors, one being that the matter was rejected by the Commission, only to be re-instituted when it decided to deal with the second human rights complaint. In this context, the case bears some of the hallmarks of *autrefois* in the criminal process, though that is an issue that should have been raised on review. In any event, I think there are exceptional cases where the inconvenience, expense and general disruption of re-litigation may be enough

to bring the doctrine of abuse of process into operation. Although it is the Respondent who raises the issue in the present case, I do not believe that any party has an interest in living under a state of constant siege for such a prolonged period of time.

[83] Perhaps the most important observation, before leaving the subject of prejudice, is that any power to prevent an abuse of process must be exercised with a great deal of caution. As Adjudicator McKellar writes, in *Commanda, supra*, at p. 25:

The jurisdiction to dismiss or stay for abuse of process should be exercised cautiously and only in the clearest of cases, particularly in view of the serious consequences to the complainant who usually has no access to another forum in which to assert his or her claim. See *Gohm v. Domtar Inc. (No. 1)* (1989), 10 C.H.R.R. D/5968 at para. 43199 (Ont. Bd. Inq.); and *Seneca College v. Bhadauria* (1981), 2 C.H.R.R. D/104 (S.C.C.)

It would undermine the remedial character of human rights legislation, which calls for a large and liberal interpretation, to curtail the right of complainants to a hearing. This is particularly delicate in those cases where the delay is attributable to the Commission rather than the Complainant. I nevertheless see no reason to draw that conclusion in the case before me.

[84] I also feel obliged to comment on the issue of delay, which is a predominant factor in the present case. Like any litigants, the Complainant and the Commission have an obligation to prosecute an action with due diligence. This comes with the purview of the doctrine of abuse of process. Brown and Evans, in The Judicial Review of Administrative Action, at 9:8101, write that:

"…an administrative tribunal's power to halt a proceeding for delay, and the court's authority to review it on this ground, have been said to be analogous to the courts' inherent discretionary power to stay criminal proceedings for abuse of process, a power that should be exercised only in "the clearest of cases."

The adjudicator in *Commanda, supra*, makes the salutary point that a tribunal should rectify any unfairness in the process, if possible, without terminating the proceedings. I agree with such a principle, though it has no application in the case at bar.

[85] The courts deal with the issue of delay in two parts. The first is by considering whether the delay was unreasonable; the second is by considering whether the Respondent has been prejudiced. The second issue is the crucial consideration in the law of human rights, which holds that Complainants should not be deprived of their right to a hearing unless there is real and substantial prejudice to the Respondent. In *Commanda, supra*, at p. 26, for example, the Ontario Board of Inquiry stated that a Respondent "must demonstrate that it has suffered some actual substantial prejudice as a consequence of the delay." It is for this reason, and perhaps for others, that the kind of test employed in the context of *laches* may not be as helpful in the human rights process as it is in other areas. (19)

[86] The decision of the Tribunal in *Lee v. B.C. Maritime Employers Assoc.* (1995), 10 C.H.R.R. D/193, where a delay of five years was not sufficient to bring the doctrine into effect, suggests much the same. The latter Tribunal places particular emphasis, in paragraph 21, on the phrase "significant and actual prejudice to the Respondents", which was used in *Cluff v. Canada (Department of Agriculture) (No. 1)* (June 16, 1992, unreported) (C.H.R.T.) at p. 11f. In the latter case, the Tribunal held that a delay of 53 months was not enough to constitute "unreasonable delay" under the *Charter of Rights and Freedoms*. A Tribunal should proceed with an inquiry, if that is possible, in spite of the delay.

[87] I am nevertheless inclined to think that there is a point where the delay is so protracted that it becomes inherently prejudicial. It is impossible to say where this point is reached: it will vary from case to case and requires a careful exercise of judgement on the part of the Tribunal. The reality is that the ability of any party to prove or disprove a case dissipates over time. The expense and inconvenience associated with litigation also increases, eventually giving rise to the vexation contemplated by the doctrine of *res judicata*. It may be helpful to note, in this context, that the delay in *Blencoe* was in the order of two or three years, rather than a decade.

IV. RULING

A. The request for a transfer to Cranbrook

[88] I now come to the complaint before me. The first part of the complaint deals with the request for a transfer to Cranbrook in 1994. This is complicated by the fact that the Complainant made two requests for a transfer.

[89] The only difference between the Complainant's two requests for a transfer is that the second request was made over three years after the first request. Nothing changed over this period of time. Arbitrator Jolliffe had taken the employer's side in the dispute and the Respondent had entrenched itself in its position. The Complainant must have been aware that she was forcing the issue.

[90] The dispute between the parties in 1994 was still the same dispute. As the Human Rights Commission puts it, in its own submissions:

The Complainant has filed two complaints under the *Canadian Human Rights Act* against the Respondent; the first complaint (No. W08473), which was eventually dismissed by the Commission, and the second complaint (No. P49588), which is in essence an amendment to the first complaint and constitutes the matter now before the Tribunal.

It would be a mistake to place too much emphasis on the Commission's choice of words: still, I do not understand how a complaint can be dismissed in law, and then amended.

The point is that the material facts of the two complaints form part of the same set of legal circumstances.

[91] It seems to me that any distinction between Canada Post's rejection of the request for a transfer in 1992 and 1994 is highly artificial. The nexus between the two arbitrations and the two complaints is more than enough to bring in the doctrine of abuse of process and the more informal principle of *res judicata*. The concern is that the second complaint served primarily as a means of re-litigating the first complaint. They share the same gravamen and must stand or fall together.

[92] This explains the significance of the investigator's report on the first complaint. I was impressed by Ms. Chambers' brief assessment of the case, which is thoroughly and resolutely neutral. When she investigated the complaint, she formed the opinion that the Respondent could not accommodate the Complainant in Cranbrook without undue hardship. This is not the place for equivocation: the reality is that the Commission agreed with that assessment when the complaint was dismissed.

[93] It is not my role to review the Commission's decisions. But how can it be fair to proceed in these circumstances? The reality is that the request for a transfer has been visited four or five times: twice at arbitration, at least once by an investigator, and twice by the Commission. The Commission actually went with the arbitrators, only to open the matter up for further inquiry when it decided to refer the present complaint to the Tribunal. It strikes me as an abuse of process to take the matter any further.

[94] When I add in the issue of delay, and the history between the parties, I feel that I have no choice but to dismiss this part of the complaint without a hearing. Ms. Cremasco made a request for a transfer in 1991, some 11 years ago. Although the Commission proceeded with more dispatch after the grievances were resolved in 1998, this was years after the issue arose. The complaint before me was not laid until 1999, five years after the case ostensibly arose. There was a further delay before the matter reached the Tribunal.

[95] I realize that the Respondent must share some of the responsibility for the delay in the case. There comes a point, however, where the mere passage of time renders a hearing unfair. Although it is not for me to advise the parties, the problem for the Commission and the Complainant is that they chose not to press the complaint. The parties have been living in a continual state of negotiation, arbitration, investigation and more formal litigation - I think it is fair to call it a state of combat - for too long. It is time to bring an end to the matter.

[96] My first concern is with the fairness of the process before the Tribunal, which must reflect the laudable goals of the legislation. This is not possible when the Respondent has endured the kind of prejudice that comes with such a protracted dispute. I believe that an ordinary person, of reasonable judgement and apprised of all the facts, would be offended by the idea that any further time and effort would be expended in trying to resolve this matter. It would be wrong to have a hearing, with all its accompanying inconvenience and expense, when the hearing itself would constitute an abuse of process.

[97] Donald Lange writes that one of the reasons for the doctrine of *res judicata* is simply that life is short. The finality of legal proceedings has a sound philosophical basis: there comes a point in human society, where any further use of scarce public resources cannot be justified. An end must be drawn, somewhere, and the business of life must continue without the disruptions that inevitably accompany legal proceedings. I do not believe it would fair to the Respondent, the potential witnesses in the case, or indeed counsel, to proceed any further with an inquiry into the request for a transfer to Cranbrook.

[98] The Complainant and the Commission may take the position that any prejudice to the Respondent may be dealt with at the hearing. I cannot accept this line of reasoning. If the doctrine of abuse of process applies in the immediate case, it is for the same kind of reasons that a doctrine like *res judicata* would apply. The problem with dealing with these concerns at a hearing is that such a course of action would permit exactly what the principles of *res judicata* are intended to prevent: a further re-litigation of the matter, at considerable expense and inconvenience to all sides. How does this protect a respondent from further vexation?

[99] There will obviously be cases where it is not evident that the doctrine of abuse of process applies until after the hearing has begun. I nevertheless feel that the present Respondent is entitled to relief. It is significant that the *Canadian Human Rights Act* gives the Respondent no remedy if the matter goes to a hearing, since it is not entitled to costs. There are policy reasons for this, which must be respected. It must nevertheless be taken into consideration, in the rare cases where doctrines like abuse of process come into play.

[100] I would also dismiss the complaint on the basis of delay, if the doctrine of abuse of process does not apply. In my view, there is no sensible distinction to be made between the request for a transfer in 1991 and the request in 1994. This is evident in the fact that the Respondent would not be able to defend itself on the second human rights complaint without providing the Tribunal with a full history of the case and, in particular, the first request for a transfer. One can assume that much of the evidence from the employer and the Complainant would duplicate the evidence called during the first arbitration.

[101] For all practical purposes, the delay in the present case runs from 1991 rather than 1994. This is a period of over ten years and is inherently prejudicial to the Respondent. The passage of such a period of time is sufficient in itself to make it difficult to assemble the necessary evidence for a defence. The reconstruction of events is always imperfect, and any attempt to locate the relevant documents will be difficult and incomplete. Relevant witnesses may have died, retired or moved to other locations. Facilities will inevitably have changed, and even the way in which the work is done at the Corporation's sorting plants may have evolved in the intervening time. This is not the place for speculation, but I have seen enough of litigation to recognize the kind of challenge that this presents.

B. The removal of accommodation in 1994

[102] The second part of the complaint relates to the removal of accommodation in 1994. Although I have some concerns with respect to this aspect of the case, I do not believe that it would be an abuse of process to hear this part of the complaint. On the contrary, I feel there is a triable issue between the parties, which requires the Tribunal's consideration.

[103] I have taken some direction in this context from *Bleszynski v. Admann International Trade Inc.*, (1993), 66 O.A.C. 74 (Ont. Gen. Div.), where three judges of the Ontario Divisional Court seemed willing to recognize that administrative decisions from competing authorities may give rise to *res judicata* or estoppel. The important feature of the case is that the facts were not in issue between the parties. This seems to be the decisive consideration in the case.

[104] The situation before me on the second part of the present complaint is significantly different. At paragraph 43 of the Commission's submissions, for example, counsel submits as follows:

It is respectfully submitted that the events in 1994 which brought about the second complaint were never dealt with by an Arbitrator. At the time of the alleged events, three years subsequent to the events of the first complaint, the Complainant's circumstances had changed, the Respondent had an ongoing duty to accommodate her, and Arbitrator Jolliffe only ruled on the events of 1990-1991.

The Respondent has contested this position.

[105] I think the issues that arise in this context must be left for the hearing. There is a serious disagreement on the evidence, since Ms. Cremasco and her supervisor seem to have taken different positions with respect to the conditions of her employment. There are also a variety of taxing legal issues that need to be considered. One is the significance of the arbitration; another is the scope of the settlement, the effect of which is unclear to me.

[106] In my view, this part of the complaint comes within the principle of caution enunciated in *Commanda, supra*, and other cases. This principle holds that a Tribunal should be reluctant to dismiss a complaint without a hearing. In *P.S.A.C. v. Minister of Personnel G.N.W.T (No. 3)* (June 10, 1999, unreported), at p. 70, for example, the Tribunal followed *Bader v. Dept. of National Health and Welfare* (Jan. 17, 1994) T356/0393 (C.H.R.T.) at p. 9, where the Chairperson stated that a Tribunal "must not refuse to hear the merits of a case except in the very clearest of circumstances".

[107] I realize that there is still a question of delay. But this is where the quasi-constitutional character of the human rights process must take precedence: although I am of the view that the delay of six years is inordinately long and takes the Tribunal to the limits of what is fair, I do not feel it is sufficient to outweigh the Complainant's right to a hearing. There are real concerns here, since the Respondent has provided me with an

affidavit from Ms. Cremasco's supervisor, who no longer remembers how she was accommodated.

[108] The matter must nevertheless be dealt with at the hearing. I am not prepared to invoke the case law without giving the other parties the opportunity to call evidence and cross-examine the supervisor. If the evidence at the hearing establishes that the delay in prosecuting the complaint has prejudiced the Respondent's right to make full answer and defence, the Respondent is entitled to raise that issue at the hearing. It may also raise the issue of *res judicata*, if the evidence supports it. The rest of the complaint, as I have stated, is dismissed.

"Original signed by"

Paul Groarke

OTTAWA, Ontario

September 30, 2002

CANADIAN HUMAN RIGHTS TRIBUNAL

COUNSEL OF RECORD

TRIBUNAL FILE NO.: T702/0702

STYLE OF CAUSE: Colleen Cremasco v. Canada Post Corporation

DECISION OF THE TRIBUNAL DATED: September 30, 2002

APPEARANCES:

Colleen Cremasco On her own behalf

Monette Maillet For the Canadian Human Rights Commission

Zygmunt Machelak For the Canada Post Corporation

1. [1] These words are taken from her second complaint.

2. [2] See Albert Maynard, le Dictionnaire de maximes et d'élocutions Latines utilisés en droit, 3e édition (Cowansville: Yvon Blais, 1994)

3. [3] Black's Law Dictionary (St. Paul, Minn.: West 1979)

4. [4] Edited by K.R. Handley. (Butterworth: London, 1996)

5. [5] Bower, ¶2

6. [6] see Bower, ¶392

7. [7] See Bower, ¶182. Higgins was apparently upheld on appeal, at [1926] A.C. 155.

8. [8] Donald J. Lange, The Doctrine of *Res Judicata* in Canada (Markham: Butterworths, 2000), p. 9. On the same page, Lange cites *Bennett v. British Columbia (Securities Commissions)* (1992), 94 D.L.R. (4th) 339 (B.C.C.A.) at 353, *Skibinsky v. Skibinsky* (1956), 18 W.W.R. 497 (Sask. C.A.) at 499, and *MacNeil v. MacNeil* (1967), 53 M.P.R. 353 (N.S.S.C.) at 363 as authorities for this proposition.

9. [9] Bower, ¶9

10. [10] See Lange, ch. 7

11. [11] The character of the Tribunal has changed with the passage of time and the introduction of section 50(2) of the *Canadian Human Rights Act*, which gives the Tribunal the authority to decide questions of law.

12. [12] David J. Mullan, Administrative Law, 3d (3 C.E.D.) (N.P.: Carswell, 1996)

13. [13] Donald J.M. Brown and John M. Evans, *Judicial Review of Administrative Action in Canada* (Toronto: Canvasback, 1998). And see *Bleszynski v. Admann International Trade Inc.*, (1993), 66 O.A.C. 74 (Ont. Gen. Div.), cited *infra*.

14. [14] The Supreme Court of Canada denied leave to appeal in both the *Saggers* and *Cadillac Fairview* cases. Leave to Appeal has apparently been sought in the *Ford* case.

15. [15] The appeal of this decision, at 2001 F.C.A. 93, is of no assistance in the immediate context.

16. [16] At ¶57, Justice Muldoon expressed the rationale behind the use of issue estoppel in the context of human rights proceedings as follows: "The underlying notion of issue estoppel is to prohibit one party to previous litigation from putting a concluded issue finally determined therein, into contention again in newly instituted proceedings taken against the same opponent before the same, or another, tribunal having jurisdiction to

adjudicate and determine that issue anew. Although expressed in different words the above summation has its several origins in: Re *Bullen*, (1972) 21 D.L.R. (3d) 628 at p. 631 (B.C.S.C.), *Morin v. National SHU Review Committee*, [1875] 1 F.C. 3 at pp. 20 to 25, *Spencer-Bower and Turner: The Doctrine of Res Judicata* (2nd ed.) pp. 9 to 19, *Sopinka and Lederman: The Law of Evidence in Civil Cases*, Butterworths, Toronto, 1974, pp. 365-66."

17. [17] Section 4.6 of the same *Act* also gives a Board the power to "dismiss a proceeding without a hearing".

18. [18] See s. 69.4 of the *Immigration Act*, R.S.C. 1985, c. I-2, now rep. by *Immigration and Refugee Protection Act*, S.C. 2001, c.27, s.274.

19. [19] This was applied, with some modification, by the Tribunal in *Vermette, supra*.