T. D. 1/98
Interim Decision rendered on February 18, 1998

CANADIAN HUMAN RIGHTS ACT
R.S.C., 1985, c.H-6 (as amended)
HUMAN RIGHTS TRIBUNAL

BETWEEN: JOHN MILLS

Complainant

and

CANADIAN HUMAN RIGHTS COMMISSION

Commission

and

VIA RAIL CANADA INC.

Respondent

INTERIM DECISION ON PRELIMINARY OBJECTION

TRIBUNAL: Allen M. Ruben, Q. C. Chairperson
Hendrika M. Adams, Member
Jane Armstrong, Member

APPEARANCES: Patricia Lawrence Counsel for the Canadian Human Rights Commission
Lewis Gottheil, CAW CANADA Representing the Complainant, John Mills

Dominique Monet Counsel for VIA Rail Canada Inc.

DATES & LOCATION
OF HEARING: December 16 & 17, 1997
Montreal, Quebec

INTERIM DECISION ON PRELIMINARY OBJECTION

In accordance with the judgment of the Federal Court, Trial Division rendered on August 19, 1997, this Tribunal was appointed pursuant to subsection 49(1.1) of the Canadian Human Rights Act to inquire into the complaint of John Mills dated October 2, 1992 against VIA Rail Canada Inc. and to determine whether the action complained of constituted a discriminatory practice on the ground of disability in a matter related to employment under section 7of the Act.

The complaint filed by Mr. Mills with the Canadian Human Rights Commission alleged, inter alia, that he had been discriminated against in employment on the ground that VIA Rail refused to continue to employ him due to a disability, namely a back injury. This, he further alleged, was contrary to Section 7of the Act.

Section 7 of the Act provides that:

It Is a discriminatory practice directly or indirectly,
(a) to refuse to employ ... any individual ... on a prohibited ground of discrimination.

Section 3(l) of the Act provides that "...disability..." is a prohibited ground of discrimination.

The complaint was originally heard before a Human Rights Tribunal in 1995 with a decision being rendered in favour of Mr. Mills on May 16, 1996. VIA Rail Canada Inc. applied to the Federal Court of Canada, Trial Division for a judicial review of the Tribunal decision which resulted in the May 16, 1996 decision of the Tribunal being quashed and the matter being referred back for a new hearing before a differently constituted Tribunal.

By Appointment dated December 11, 1997, which Appointment superceded an earlier Appointment dated August 22, 1997, this Tribunal was appointed to conduct a fresh inquiry into the complaint of John Mills.

At the Case Planning Meeting held on October 30, 1997, Counsel for VIA Rail advised the Tribunal that he intended to challenge the Tribunal's jurisdiction to hear the complaint and render a decision, on the grounds that such decision would be res judicata. Counsel for VIA Rail advised the Tribunal that a CROA (Canadian Railway Office of Arbitration) Arbitration Board, sitting pursuant to the Canada Labour Code, rendered a decision in a grievance where the issues, the facts and the circumstances involved were "...similar and identical to..." the circumstances that are presently before this Tribunal.

The Tribunal convened a special hearing to provide Counsel for VIA Rail the opportunity to present and argue his preliminary objection as well as providing an opportunity for Counsel for Mr. Mills and for the Canadian Human Rights Commission to respond.
Counsel for VIA Rail, the respondent, argued that this Tribunal lacks the authority to consider Mr. Mills' complaint pursuant to the Act as this complaint represents the same dispute that had

already been decided by the CROA Arbitrator. As such, VIA Rail submits, the dispute is res judicata and cannot be considered by this Tribunal.

It is the objective of this Tribunal in rendering this interim decision to restrict itself to, and address only, the issue of its jurisdiction and the extent to which it is, or could be limited by virtue of the doctrine of res judicata as suggested by the Respondent.

Res Judicata

To paraphrase Mr. Justice Gonthier in Rocois Construction Inc. v. Quebec Ready Mix Inc., et al, (1990) 2 S.C.R, 440, res judicata is governed by principles designed to avoid a multiplicity of court proceedings and the possibility of contradictory judgments. Its ultimate purpose is one of public interest which is to protect the security and stability of social relationships. At the private interest level, res judicata protects acquired rights and shields the defendant from the hardships that would result from multiple proceedings. This Tribunal recognizes res judicata as a fundamental principle of our system of law.

At page 448 of Rocois Mr. Justice Gonthier outlines three basic elements required to constitute res judicata. For res judicata to prevail there must be an identity of parties, an identity of object and an identity of cause. It is clear from the authorities that the failure of any one of these three identities is sufficient to vitiate res judicata as a defence or in this matter to be raised as a valid preliminary objection.

In order for the Respondent to succeed with its preliminary objection, this Tribunal must be satisfied that the CROA Arbitrator, in arriving at his determination and award, dealt with the same parties, the same object and the same cause as are currently before this Tribunal.

CROA Arbitration

The CROA Arbitration is the final stage of a grievance process. It is governed by the Canada Labour Code and is likewise governed and fettered by the collective agreement between the parties. The grievance arbitrator lacks jurisdiction to deal with issues in a dispute that are not specifically within the terms of the collective agreement. The principal objective of the Canada Labour Code is to provide the environment and mechanisms for free collective bargaining and the constructive settlement of disputes.

The CROA Arbitration is the process and forum for resolving railway labour disputes. The parties to the Arbitration were the parties to the collective agreement, namely, the Employer, VIA Rail, and the Union, The Canadian Brotherhood of Railway, Transport and General Workers.

It is of some significance that neither Mr. Mills personally nor the Canadian Human Rights Commission were parties at the CROA Arbitration.

The nature of the issue before the CROA Arbitrator is one of a "dispute" between the parties. Exhibit V-5 submitted into evidence by the Respondent identifies the dispute as follows:

> The Corporation (VIA Rail Canada Inc.) is denying Mr. Mills access to employment under Agreement No. 2 (the Collective Agreement) which is considered unjust, discriminatory and contrary to Article 24 of Agreement No. 2 and the Canadian Human Rights Act.

Human Rights Tribunal

The primary distinguishing feature of the Human Rights Tribunal from the CROA Arbitration is the fact that the Human Rights Tribunal hearing is an "inquiry" whereas the CROA Arbitration is a dispute adjudication. Pursuant to Section 50 of the Act, the Tribunal is charged with the task of inquiring into a complaint founded on a prohibited ground of discrimination and, upon finding that such complaint is well founded, the Tribunal is charged with the task of providing relief for the discriminatory acts. The Tribunal employs an inquiry mechanism to ferret out discriminatory practices and, if found, eradicate same. The role of the Tribunal is one of remediation.

The nature of the issue before this Tribunal is one of a "complaint" by Mr. Mills against the Respondent, VIA Rail. Exhibit HR1 submitted into evidence by the Commission identifies the complaint as follows:

> I (John Mills) allege that I am being discriminated against in employment because the Respondent has refused to continue to employ me because of my disability (back injury) contrary to Section 7 of the C.H.R.A.

It is of significance that the parties to this Inquiry are John Mills, the Commission, and VIA Rail. The Canadian Brotherhood of Railway, Transport and General Workers Union is not a party.

Identity of Cause

With respect to the issue of identity of cause, Mr. Justice Gonthier sets out at page 455 of Rocois:

> First, it is clear that a body of facts cannot in itself constitute a cause of action. It is the legal characterization given to it which makes it, in certain cases, a source of obligations. A fact taken by itself apart from any notion of legal obligations has no meaning in itself and cannot be a cause; it only becomes a legal fact when it is characterized in accordance with some rule of law. The same body of facts may well be characterized in a number of ways and give rise to completely separate causes. For example, the same act may be characterized as murder in one case and a civil assault in another.

At page 456, Gonthier J. states,

> Of course, the existence of two rules of law applicable to a fact situation in practice gives rise to a duality of causes in the vast majority of cases, because separate rules generally require different legal characterizations. However, it is not the fact that there are two applicable rules which is conclusive in itself; it is the duality of legal characterizations which may result there from.

Thus it is incumbent upon VIA Rail to establish that the same legal principle is being considered by the Tribunal that was before the CROA arbitrator. With respect, we do not agree that the same legal principle is being considered by both tribunals. The task of the CROA arbitrator was to consider whether the provisions of the Collective Agreement had been followed and to enforce the provisions of the Collective Agreement. Section 57(l) of the Canada Labour Code provides:

> Every collective agreement shall contain a provision for final settlement without stoppage of work, by arbitration or otherwise, of all differences between the parties to or employees bound by the collective agreement, concerning its interpretation, application, administration or alleged contravention.

The jurisdiction of a Human Rights Tribunal pursuant to S. 50(l) of the Act is to inquire into a complaint made under the Act and to determine whether such complaint has been substantiated. Thus, the two tasks are not the same. One is to determine whether VIA Rail has complied with the provisions of the Collective Agreement. The second is to determine whether VIA Rail has engaged in a discriminatory practice and whether the complainant has substantiated the complaint made under the Act.

> There will be an identity of cause when the substance of each provision by the same legal principle produces an identical effect on the rights and obligations of the parties. (Rocois, supra, p 458.)

VIA Rail relied upon the decision in St. Anne Nackawic Pulp and Paper Co. Ltd. v. Canadian Pacer Workers Union, Local 219, [1986] 1 S.C.R. 704 to submit that the CROA Arbitrator had the "...right to apply and enforce the Canadian Human Riqhts Act as against VIA, Mr. Mills and his Union." (Transcript, Vol. 2, Page 30, line 20).

Specifically, the Respondent relied upon Mr. Justice Estey's dictum that once a subject is addressed in a collective agreement, the Arbitrator has Jurisdiction to deal with that issue and that the arbitration process and not the court is the proper forum for the resolution of the issues in dispute arising under the collective agreement.

The Respondent further relies on Appendix 7 in Exhibit V-2, being a letter incorporated in the collective agreement, which letter is designed to accommodate employees who have become physically disabled during the course of their employment.

In our view, while we agree with the Respondent that St. Anne dives the Arbitrator exclusive jurisdiction to deal with matters arising out of the collective agreement, it is also our view that

Appendix 7 to Exhibit V-2 does not incorporate the Act into the collective agreement. The letter merely reinforces what is already an implied term of all collective agreements, namely, that an employee who has been justifiably absent due to illness, injury, or other medical incapacity, is, as a general matter, entitled to return to work when he or she is medically fit to do so. (Ex. V-5, pg 6)

It is our view that not only did the CROA Arbitrator not substantively deal with issues with regard to alleged violations of the Act but, furthermore, that he lacked the jurisdiction to do so, on the ground that the collective agreement is silent on the matter.

The case of Shawna Dennis v. Family and Children's Services of London and Middlesex (1990), 12 C.H.R.R. D/285 wrestled with issues similar to the matter before us and we concur and adopt the reasoning of the Tribunal set out in paragraph 18 when it stated that it was

> ... persuaded by the arguments of Commission counsel that even if all of the elements had been present, this doctrine ought not to be utilized to stay human rights proceedings on the basis of prior arbitration rulings. The systems differ dramatically in their function, purpose and process. A ruling in one should not preclude or bar a proceeding in the other.

Likewise, similar issues were dealt with in the case of Edwin Erickson v. Canadian Pacific Express and Transport Ltd. (1987), 8 C. H. R. R. D/3942 and again we concur with and adopt the reasoning of that Tribunal when it stated at page D/3946

> I cannot agree that the question before the arbitrator in the proceedings before him is the same question before this Tribunal. It is true as counsel has argued that there is identity of subject matter namely, the complainant's (... back injury ...). But the question remains unresolved because there must be in my opinion not only identity of subject matter in a physical sense but identity of subject matter in a juridical sense.

The Tribunal goes on to say:

> Whatever the determination which is found to have been made in the arbitration proceedings the 'same question' must arise in these proceedings.

As with the Tribunal in Erickson, we have no hesitation in finding that the question to be decided by this Tribunal is not the same question that was decided by the CROA Arbitrator.

It is clear to this Tribunal that:

> Two statutory provisions based on different legal principles cannot give rise to identical causes since the fact regarded as the source of liability will necessarily be different; the legal characterization of the factual situation will similarly be different. (Rocois, supra p 456)

We are additionally reinforced in our opinion by a recent decision of the Supreme Court of Canada stressing the pre-eminent, quasi-constitutional stature of human rights legislation in the face of conflicting tribunals. In BC Tel v. Shaw Cable Systems (B.C.) Ltd. (1995) 183 N.R. 184 Madame Justice L'Heureux-Dubé set out the test for reconciling such conflicting jurisdictions when, at page 218, she stated:

> First, the courts should consider the legislative purpose behind the establishment of each administrative tribunal. The more important a tribunal's purpose, the more likely the government would have intended that tribunal's decision to take precedence over that of another tribunal. For example, human rights legislation is considered quasi-constitutional. Consequently, all other factors being equal, decisions of human rights tribunals would generally take precedence over conflicting decisions based on other, less fundamental, administrative schemes.

In summary VIA Rail failed to satisfy us that the CROA Arbitrator had jurisdiction to hear a complaint under the Act. As the Arbitrator had no jurisdiction to hear a complaint under the Act, the argument of res judicata must fail. Secondly, VIA Rail has further failed to prove identity of cause, one of the three elements necessary to establish res judicata. In our view, the cause before the Arbitrator and the cause before this Tribunal are not the same. The legal principles underlying the issues before the Arbitrator and before this Tribunal are not identical, likewise resulting in the failure of the res judicata argument. Thirdly, this Tribunal is of the opinion that in the event of a conflict or inconsistency with other types of legislation, the human rights legislation prevails, and accordingly res judicata may not be employed in such circumstances to prevent a duly constituted Human Rights Tribunal from proceeding with its inquiry. In conclusion, this Tribunal finds that it has the jurisdiction to proceed with the inquiry into the complaint in respect of which it was appointed.

Signed in Fredericton, New Brunswick, February 11, 1998.

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ALLEN M. RUBEN, Q.C.
Chairperson

Signed in Halifax, Nova Scotia, February 16, 1998.

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HENDRIKA M ADAMS
Member

Signed in Guelph, Ontario, February 13, 1998.

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S. JANE F. ARMSTRONG
Member