Date: 20060824

Docket: T-2293-05

Citation: 2006 FC 1006

Ottawa, Ontario, the 24th day of August 2006

PRESENT: The Honourable Mr. Justice Shore

BETWEEN:

THE ATTORNEY GENERAL OF CANADA

Applicant

and

PIERRE GAUDREAULT

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

INTRODUCTION

[1] A different version of facts already known to the claimant, mere afterthoughts or the sudden realization of the consequences of acts done in the past are not "new facts". "New facts", for the purpose of the reconsideration of a decision of an umpire sought pursuant to section 86 of the Act, are facts that either happened after the decision was rendered or had happened prior to the decision but could not have been discovered by a claimant acting diligently and in both cases the facts alleged must have been decisive of the issue put to the umpire.

(*Canada (Attorney General) v. Chan*, [1994] F.C.J. No. 1916 (QL), rendered on December 13, 1994, Barry Strayer, Robert Décary and Francis McDonald JJ.A. *per* Décary J.A.)

> *Res judicata* and issue estoppel apply not only to the cause of action specifically pleaded in the prior proceeding, but to the rights, questions or facts distinctly put in issue and directly determined by the tribunal, though for a different cause of action. Where estoppel applies, it forecloses any attempt to reopen the argument on the cause of action, the right or the question decided, even if based on facts, arguments or points of law that were not raised or might properly have been raised in the previous proceeding (see *Danyluk*, *supra*; *Procter and Gamble Pharmaceuticals Canada Inc. v. Canada*, [2004] 2 F.C. 85 (FCA); *Maynard v. Maynard*, [1951] S.C.R. 346).

(As determined by Prothonotary Mireille Tabib in *Bernath v. Canada*, 2005 FC 1232, [2005] F.C.J. No. 1496 (QL), at paragraph 20.)

> The principles underlying the notion of abuse of process are the same ones that gave rise to the principles of *res judicata* and issue estoppel: the need to ensure the finality of litigation and avoid repetitive proceedings, potentially inconsistent results and inconclusive proceedings. Mr. Justice Binnie, referring to the foundations of the estoppel rule in *Danyluk*, had the following to say (*supra*, at paragraph 18):
>
> > The law rightly seeks a finality to litigation. To advance that objective, it requires litigants to put their best foot forward to establish the truth of their allegations when first called upon to do so. A litigant, to use the vernacular, is only entitled to one bite at the cherry. The appellant chose the ESA as her forum. She lost. An issue, once decided, should not generally be re-litigated to the benefit of the losing party and the harassment of the winner. A person should only be vexed once in the same cause. Duplicative litigation, potential inconsistent results, undue costs, and inconclusive proceedings are to be avoided.

(As determined by Prothonotary Tabib in *Bernath*, *supra*, at paragraph 53.)

NATURE OF JUDICIAL PROCEEDING

[2] The proceeding at bar is an application for judicial review pursuant to section 18.1 of the *Federal Courts Act*, R.S.C. 1985, c. F-7, from a decision by the Canadian Human Rights

Commission (the Commission) on December 6, 2005, in which the Commission found that it could deal with a complaint by the complainant (the respondent) but it would not do so at that time since the complainant had not exhausted the other remedies open to him.

FACTS

[3] The respondent Pierre Gaudreault, who represented himself, did not appear (despite all the efforts made and even a telephone call from the Court): he joined the Canadian Forces in 1990.

[4] On January 6, 2003, Mr. Gaudreault filed an initial complaint with the Commission in which he alleged he had been the subject of unlawful discrimination in his employment on account of his disability, namely post-traumatic shock syndrome, contrary to the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6 (the Act).

[5] Mr. Gaudreault was notified in March 2003, while the Commission's investigation was under way, that he would be discharged from the Canadian Forces. He was discharged on May 12, 2004.

[6] On July 18, 2004, the Commission investigator filed his investigation report and recommended that the Commission dismiss Mr. Gaudreault's complaint on the ground that the evidence did not support his allegations.

[7] On November 2, 2004, the Commission dismissed Mr. Gaudreault's initial complaint because the evidence did not support his allegation that he had been the subject of different treatment on account of his disability.

[8] On December 2, 2004, as appears from docket T-2157-04 of this Court, Mr. Gaudreault filed an application for judicial review of that decision.

[9] On January 20, 2005, the Attorney General of Canada filed in opposition to Mr. Gaudreault's application for judicial review a motion to dismiss and to vary the name of the respondent, which was allowed by a decision by Prothonotary Richard Morneau on March 1, 2005.

[10] On March 9, 2005, Mr. Gaudreault filed a motion appealing the decision of Prothonotary Morneau, and then discontinued it completely on April 4, 2005.

[11] On June 26, 2005, Mr. Gaudreault filed a second complaint with the Commission.

[12] On July 28, 2005, the Attorney General of Canada, in a letter signed by Lt. Col. Mary L. Romanow on behalf of Col. C.M. Fletcher, sent the Commission its arguments to the effect that this second complaint should be dismissed as it raised no facts which had not been drawn or could not have been drawn to the Commission's attention at the time of the investigation into the first complaint, and the matter was thus *res judicata*.

[13] Without responding to this preliminary argument, the Commission rendered the decision which is the subject of the application for judicial review at bar.

[14] By letter dated May 4, 2006, the Commission notified the Canadian Forces that the matter had been referred to the Québec regional office and that Louise Charbonneau had been designated to investigate Mr. Gaudreault's second complaint. Shortly afterwards, the Commission notified the parties that it was suspending its investigation until this Court made a decision on the application for judicial review.

[15] On the other hand, in a letter dated June 20, 2006, the Commission informed the Attorney General of Canada that Mr. Gaudreault's second complaint would be handled by the Alberta regional office and that Pascale Lagacé had been designated as investigator in the matter.

[16] On July 14, 2006, the Attorney General of Canada filed a motion in this Court to stay the proceeding before the Commission until this Court had ruled on the application for judicial review. This motion was allowed by Luc Martineau J. on August 9, 2006. (Mr. Gaudreault was also not present at this stage of the proceeding.)

IMPUGNED DECISION

[17] The Commission found that it could deal with Mr. Gaudreault's complaint since under subsection 41(1) of the Act he had contacted the Commission before the deadline specified in the Act expired.

[18] At the same time, it also decided it could not deal with the complaint at that time since under the same Act Mr. Gaudreault had not exhausted the other grievance or review procedures available to him. The Commission reserved the right to deal with the complaint at a later date when these proceedings were concluded or when they were no longer available to Mr. Gaudreault.

ISSUE

[19] There is only one issue in the application for judicial review at bar:

1. Did the Commission err in agreeing to rule on the second complaint filed by Mr. Gaudreault when it had dismissed the initial complaint dealing with the same facts for lack of evidence, which means that the *res judicata* rule applies to the second complaint?

ANALYSIS

Legislative background

[20] Subsection 3(1) of the Act sets out the grounds of unlawful discrimination, which include disability:

3. (1) For all purposes of this Act, the prohibited grounds of discrimination are race, national or ethnic origin, colour, religion, age, sex, sexual orientation, marital status, family status, disability and conviction for which a pardon has been granted.	**3.** (1) Pour l'application de la présente loi, les motifs de distinction illicite sont ceux qui sont fondés sur la race, l'origine nationale ou ethnique, la couleur, la religion, l'âge, le sexe, l'orientation sexuelle, l'état matrimonial, la situation de famille, l'état de personne graciée ou la déficience.

[21] Under section 7 of the Act, refusing to employ or continue to employ an individual or differentiating adversely in relation to an employee constitutes discrimination when it is based on a ground prohibited in subsection 3(1) of the Act:

7. It is a discriminatory practice, directly or indirectly,	**7.** Constitue un acte discriminatoire, s'il est fondé sur un motif de distinction illicite, le fait, par des moyens directs ou indirects :
(*a*) to refuse to employ or continue to employ any individual, or	*a*) de refuser d'employer ou de continuer d'employer un individu;
(*b*) in the course of employment, to differentiate adversely in relation to an employee,	*b*) de le défavoriser en cours d'emploi.
on a prohibited ground of discrimination.	

[22] Subsection 40(1) of the Act explains who may file a complaint with the Commission:

40. (1) Subject to subsections (5) and (7), any individual or group of individuals having reasonable grounds for believing that a person is engaging or has engaged in a discriminatory practice may file with the Commission a complaint in a form acceptable to the Commission.	**40.** (1) Sous réserve des paragraphes (5) et (7), un individu ou un groupe d'individus ayant des motifs raisonnables de croire qu'une personne a commis un acte discriminatoire peut déposer une plainte devant la Commission en la forme acceptable pour cette dernière.

[23] Subsection 41(1) of the Act explains the grounds on which a complaint is inadmissible, including the grounds for which the Commission must refuse to deal with a complaint. Paragraph 41(1)(*a*) discusses grievance or review procedures which must be exhausted before a complaint is filed with the Commission, while paragraph 41(1)(*e*) deals with the one-year deadline after the last of the acts on which the complaint is based occurred:

41. (1) Subject to section 40, the Commission shall deal with any complaint filed with it unless in respect of that complaint it appears to the Commission that	**41.** (1) Sous réserve de l'article 40, la Commission statue sur toute plainte dont elle est saisie à moins qu'elle estime celle-ci irrecevable pour un des motifs suivants :
(*a*) the alleged victim of the discriminatory practice to which the complaint relates ought to exhaust grievance or review procedures otherwise reasonably available;	*a*) la victime présumée de l'acte discriminatoire devrait épuiser d'abord les recours internes ou les procédures d'appel ou de règlement des griefs qui lui sont normalement ouverts;
(*b*) the complaint is one that could more appropriately be dealt with, initially or completely, according to a	*b*) la plainte pourrait avantageusement être instruite, dans un premier temps ou à toutes les étapes,

procedure provided for under an Act of Parliament other than this Act;	selon des procédures prévues par une autre loi fédérale;
(*c*) the complaint is beyond the jurisdiction of the Commission;	*c*) la plainte n'est pas de sa compétence;
(*d*) the complaint is trivial, frivolous, vexatious or made in bad faith; or	*d*) la plainte est frivole, vexatoire ou entachée de mauvaise foi;
(*e*) the complaint is based on acts or omissions the last of which occurred more than one year, or such longer period of time as the Commission considers appropriate in the circumstances, before receipt of the complaint.	*e*) la plainte a été déposée après l'expiration d'un délai après le dernier des faits sur lesquels elle est fondée, ou de tout délai supérieur que la Commission estime indiqué dans les circonstances.

[24] Under subsection 42(1) of the Act, the Commission must give reasons for its decision in writing when it decides that a complaint is inadmissible on the grounds mentioned in subsection 41(1):

42. (1) Subject to subsection (2), when the Commission decides not to deal with a complaint, it shall send a written notice of its decision to the complainant setting out the reason for its decision.	**42.** (1) Sous réserve du paragraphe (2), la Commission motive par écrit sa décision auprès du plaignant dans les cas où elle décide que la plainte est irrecevable.
(2) Before deciding that a complaint will not be dealt with because a procedure referred to in paragraph 41(*a*) has not been exhausted, the Commission shall satisfy itself that the failure to exhaust the	(2) Avant de décider qu'une plainte est irrecevable pour le motif que les recours ou procédures mentionnés à l'alinéa 41 *a*) n'ont pas été épuisées, la Commission s'assure que le défaut est

procedure was attributable to the complainant and not to another.	exclusivement imputable au plaignant.

[25] Subsection 43(1) of the Act authorizes the Commission to designate a person to investigate a complaint:

43. (1) The Commission may designate a person, in this Part referred to as an "investigator", to investigate a complaint.	**43.** (1) La Commission peut charger une personne, appelée, dans la présente loi, « l'enquêteur », d'enquêter sur une plainte.

[26] Section 44 of the Act sets out the options available to the Commission when the investigator files his or her investigation report once it is complete:

44. (1) An investigator shall, as soon as possible after the conclusion of an investigation, submit to the Commission a report of the findings of the investigation.	**44.** (1) L'enquêteur présente son rapport à la Commission le plus tôt possible après la fin de l'enquête.
(2) If, on receipt of a report referred to in subsection (1), the Commission is satisfied	(2) La Commission renvoie le plaignant à l'autorité compétente dans les cas où, sur réception du rapport, elle est convaincue, selon le cas :
(*a*) that the complainant ought to exhaust grievance or review procedures otherwise reasonably available, or	*a*) que le plaignant devrait épuiser les recours internes ou les procédures d'appel ou de règlement des griefs qui lui sont normalement ouverts;

(*b*) that the complaint could more appropriately be dealt with, initially or completely, by means of a procedure provided for under an Act of Parliament other than this Act,

b) que la plainte pourrait avantageusement être instruite, dans un premier temps ou à toutes les étapes, selon des procédures prévues par une autre loi fédérale.

it shall refer the complainant to the appropriate authority.

(3) On receipt of a report referred to in subsection 9(1), the Commission

(3) Sur réception du rapport d'enquête prévu au paragraphe (1), la Commission :

(*a*) may request the Chairperson of the Tribunal to institute an inquiry under section 49 into the complaint to which the report relates if the Commission is satisfied

a) peut demander au président du Tribunal de désigner, en application de l'article 49, un membre pour instruire la plainte visée par le rapport, si elle est convaincue :

(i) that, having regard to all the circumstances of the complaint, an inquiry into the complaint is warranted, and

(i) d'une part, que, compte tenu des circonstances relatives à la plainte, l'examen de celle-ci est justifié,

(ii) that the complaint to which the report relates should not be referred pursuant to subsection (2) or dismissed on any ground mentioned in paragraphs 41(*c*) to (*e*); or

(ii) d'autre part, qu'il n'y a pas lieu de renvoyer la plainte en application du paragraphe (2) ni de la rejeter aux termes des alinéas 41*c*) à *e*);

(*b*) shall dismiss the complaint to which the report relates if it is satisfied

b) rejette la plainte, si elle est convaincue :

(i) that, having regard to

(i) soit que, compte tenu

all the circumstances of the complaint, an inquiry into the complaint is not warranted, or	des circonstances relatives à la plainte, l'examen de celle-ci n'est pas justifié,
(ii) that the complaint should be dismissed on any ground mentioned in paragraphs 41(*c*) to (*e*).	(ii) soit que la plainte doit être rejetée pour l'un des motifs énoncés aux alinéas 41*c*) à *e*).
(4) After receipt of a report referred to in subsection (1), the Commission	(4) Après réception du rapport, la Commission :
(*a*) shall notify in writing the complainant and the person against whom the complaint was made of its action under subsection (2) or (3); and	*a*) informe par écrit les parties à la plainte de la décision qu'elle a prise en vertu des paragraphes (2) ou (3);
(*b*) may, in such manner as it sees fit, notify any other person whom it considers necessary to notify of its action under subsection (2) or (3).	*b*) peut informer toute autre personne, de la manière qu'elle juge indiquée, de la décision qu'elle a prise en vertu des paragraphes (2) ou (3).

[27] Section 64 of the Act states the following:

64. For the purposes of this Part and Parts I and II, members of the Canadian Forces and the Royal Canadian Mounted Police are deemed to be employed by the Crown.	**64.** Pour l'application de la présente partie et des parties I et II, les personnels des Forces canadiennes et de la Gendarmerie royale du Canada sont réputés être employés par la Couronne.

Standard of review

[28] The issue in the case at bar is one of law. The Court must determine whether the Commission had jurisdiction over the complaint in question, since if the *res judicata* rule applies to the second complaint the Commission did not in fact have jurisdiction to deal with the complaint and erred in agreeing to do so. Accordingly, the applicable standard of review is that of correctness (*Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982, [1998] F.C.J. No. 46 (QL), at paragraph 28; *Haji v. Canada (Minister of Citizenship and Immigration)*, 2003 FCTD 528, [2003] F.C.J. No. 682 (QL), at paragraph 7).

Preliminary comments: limitation period applicable to second complaint

[29] Paragraph 41(1)(*e*) of the Act provides that the Commission may not deal with a complaint when it is based on acts or omissions the last of which occurred more than one year, or such longer period of time as the Commission considers appropriate in the circumstances, before receipt of the complaint.

[30] The Commission indicated that the second complaint was filed on May 3, 2005, but amended and filed on June 26, 2005. The last act relied on by Mr. Gaudreault was his discharge from the Canadian Forces on May 12, 2004. Accordingly, there was over a year before the complete complaint was filed. Nevertheless, the Commission agreed to deal with the complaint since Mr. Gaudreault had contacted it before the deadline set in the Act expired.

[31] The Attorney General of Canada argued that mere contact with the Commission does not meet the requirements of paragraph 41(1)(*e*) of the Act and the Commission accordingly agreed to hear a complaint barred by limitation.

[32] However, not only did Mr. Gaudreault contact the Commission before the deadline expired but he first filed his second complaint on May 3, 2005, which is before the deadline expired. He then made alterations to his complaint and filed the completed complaint after the deadline expired.

[33] It is clear that the Commission considered this deadline to be reasonable and acceptable in the circumstances and agreed to hear the complaint despite the delay, though it had not allowed any official extension for filing the complaint. This is not contrary to the wording of paragraph 41(1)(*e*) of the Act.

Res judicata rule

[34] The acts relied on in the complaint dated May 3, 2005, and filed on June 26, 2005, are not new facts or facts which could not have been brought to the Commission's attention in the investigation into the initial complaint.

[35] As appears from Mr. Gaudreault's complaints, the acts involved in the first complaint occurred between March 2002 and June 6, 2003, the date of the complaint. On that date Mr. Gaudreault had already been notified that he would shortly be discharged from the Canadian Forces.

However, his complaint did not relate directly to his discharge, although he said he disagreed with his discharge from the Canadian Forces.

[36] The investigator's report was filed on July 18, 2004, at which date Mr. Gaudreault had already been discharged from the Canadian Forces.

[37] As appears from the Commission's file, Mr. Gaudreault, who at that time was represented by counsel, filed no further application for an investigation or application to amend his complaint.

[38] On November 2, 2004, the Commission dismissed this initial complaint for lack of evidence.

[39] On June 26, 2005, Mr. Gaudreault filed a second complaint dated May 3, 2005, for acts which, according to the wording of his complaint, occurred between 2003 and the date of the second complaint, although he was discharged on May 12, 2004.

[40] None of the acts alleged in this second complaint is a new fact or even a fact that was unknown to Mr. Gaudreault at the time of the investigation into his initial complaint. For facts to be described as new they must have occurred after the decision was rendered or before if they could not have been discovered by a claimant acting diligently, and in both cases the new facts must have been decisive of the issue.

[41] *Res judicata* applies not only to decisions of the courts but also to decisions of administrative bodies and tribunals (*Danyluk v. Ainsworth Technologies Inc.*, [2001] 2 S.C.R. 460, 2001 SCC 44, [2001] S.C.J. No. 46 (QL), at paragraph 36; *Bernath, supra,* at paragraph 19; *Canada (Canadian Human Rights Commission) v. Canada Post Corporation (F.C.),* 2004 FC 81, [2004] 2 F.C.R. 581, [2004] F.C.J. No. 439 (QL), at paragraph 37).

[42] As determined by Prothonotary Mireille Tabib in *Bernath, supra*, at paragraph 20:

> A different version of facts already known to the claimant, mere afterthoughts or the sudden realization of the consequences of acts done in the past are not "new facts". "New facts", for the purpose of the reconsideration of a decision of an umpire sought pursuant to section 86 of the Act, are facts that either happened after the decision was rendered or had happened prior to the decision but could not have been discovered by a claimant acting diligently and in both cases the facts alleged must have been decisive of the issue put to the umpire. (see *Danyluk, supra*; *Procter and Gamble Pharmaceuticals Canada Inc. v. Canada*, [2004] 2 F.C. 85 (FCA); *Maynard v. Maynard*, [1951] S.C.R. 346).

[43] Thus, after deciding that Mr. Gaudreault's complaint was without foundation, the Commission could not agree to hear his second complaint based on facts which occurred even before its decision on the initial complaint.

[44] Following receipt of the Commission's first decision dated November 2, 2004, dismissing Mr. Gaudreault's complaint, Mr. Gaudreault's former counsel, in a letter dated July 29, 2004, asked the Commission for leave to file additional documents and tape recordings, which were allegedly in Mr. Gaudreault's possession at the time of the investigation.

[45] A party may not by the filing of a second complaint seek to complete evidence or to correct deficiencies identified in the first decision: this would certainly constitute an abuse of process. In the

case at bar, Mr. Gaudreault tried to put before the Commission tape recordings which were apparently in his possession at the time of the investigation into his initial complaint but which, for reasons known only to himself, he did not see fit to file.

[46] As Prothonotary Tabib ruled in *Bernath, supra*, at paragraph 53:

> The principles underlying the notion of abuse of process are the same ones that gave rise to the principles of *res judicata* and issue estoppel: the need to ensure the finality of litigation and avoid repetitive proceedings, potentially inconsistent results and inconclusive proceedings. Mr. Justice Binnie, referring to the foundations of the estoppel rule in *Danyluk*, had the following to say (*supra*, at paragraph 18):
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[47] A party cannot make the same claim *ad infinitum* as this would be a wrongful use of the courts (*Canada (Attorney General) v. Canada (Canadian Human Rights Commission)*, [1991] F.C.J. No. 334 (QL); *Kaloti v. Canada (Minister of Citizenship and Immigration)*, [1998] F.C.J. No. 1281 (QL), at paragraph 12, aff. by the Federal Court of Appeal in *Kaloti v. Canada (Minister of Citizenship and Immigration)*, [2000] 3 F.C. 390 (C.A.), [2000] F.C.J. No. 365 (QL); *O'Brien v. Canada (Attorney General)*, [1993] F.C.J. No. 333 (F.C.A.) (QL)).

CONCLUSION

[48] By hearing a complaint which it had initially dismissed, the Commission was sanctioning an abuse of process. By hearing a complaint with which it had already dealt, the Commission acted without jurisdiction and rendered a decision that was wrong in law.

[49] By his letters of July 28 and November 9, 2005, Col. C.M. Fletcher raised a preliminary objection and, citing the *res judicata* rule, asked that Mr. Gaudreault's second complaint be dismissed.

[50] The Commission never ruled on this preliminary objection whether on an interlocutory basis or at the conclusion of its decision of December 6, 2005, simply rendering the decision which is the subject of the application for judicial review at bar.

[51] By failing to dispose of the preliminary objection made by the Attorney General of Canada, the Commission acted without jurisdiction or refused to exercise its jurisdiction, which is a ground for judicial review as such under subsection 18.1(4) of the *Federal Courts Act*.

[52] This application for judicial review is allowed. The Commission's decision is quashed based on the authority of *res judicata*.

JUDGMENT

THE COURT ORDERS that

(1) The application for judicial review is allowed;

(2) The Commission's decision dated December 6, 2005 is quashed based on the authority of *res judicata*;

(3) Without costs.

"Michel M.J. Shore"
Judge

Certified true translation

Brian McCordick, Translator

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-2293-05
STYLE OF CAUSE:	THE ATTORNEY GENERAL OF CANADA v. PIERRE GAUDREAULT
PLACE OF HEARING:	Montréal, Quebec
DATE OF HEARING:	August 16, 2006
REASONS FOR JUDGMENT AND JUDGMENT BY:	THE HONOURABLE MR. JUSTICE SHORE
DATED:	August 24, 2006

APPEARANCES:

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Absent	FOR THE RESPONDENT

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