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Much Ado About Nothing: Procedural "Unfairness" in *Via Rail v. Cannon*

Is it procedurally unfair for a party to be required to proceed to a hearing if it believes, erroneously, that a deadline to file a complaint has not been met, but later learns that in fact it had been all along?

The answer to this question would seem self-evidently to be "no". But the Federal Court recently answered "yes" in *Via Rail Canada Inc. v. Marcia Cannon* (2015 FC 989). The case concerned a judicial review of a decision of the Canadian Human Rights Commission, and represents a detour from a focus on deference owed to administrative tribunals when an issue of procedure is raised.

Section 41 of the *Canada Human Rights Act* provides that the Commission shall hear a complaint if it is filed within one year of the events complained of. However, the Commission retains discretion to hear complaints filed past the one-year mark.

In this case, the complainant, who identifies as transgendered, contacted the Commission in April 2012, and alleged that a VIA Rail Canada employee had discriminated against her during an incident in a VIA washroom on April 22, 2012.

The decision is silent on how VIA became aware of the complaint. VIA contacted the Commission in October 2012 and stated that although it had not been served with a complaint, it wished to engage in preventative mediation. In December 2012, both parties signed a Preventive Mediation Agreement. Its recitals provided that "the parties understood that no complaint had been filed with the Commission" and that "under section 41(e) of the Act, the Commission can refuse to deal with complaints filed more than one year after the alleged discrimination".

By April 15, 2013, two rounds of mediation had proved unsuccessful. The expiration of the one year period would occur one week later. VIA agreed not to object to the timeliness of a complaint provided it was filed before June 30, 2013.

On August 6, 2013 the Commission served VIA with a copy of a complaint and said that the complaint had been received on August 1, 2013.

VIA objected, noting that the complaint was filed after the

extended deadline of June 30, 2013. On May 7, 2014 the Commission issued a report stating:

The complaint had in fact been received and date-stamped on August 1, 2012 and the Commission's August 6, 2013 statement was incorrect; and

- Even if the complaint had been filed late, the Commission would exercise its discretion to deal with the complaint.
- This decision was the subject of VIA's application for judicial review to the Federal Court of the Commission's decision.

The first argument VIA advanced was that the Commission breached its obligations of procedural fairness by accepting the plaintiff's complaint, despite what it called "assurances" that no such complaint had been accepted. The Federal Court allowed the application on this first ground and remitted back to the Commission for redetermination.

The Court did not deal with VIA's second argument, that the Commission had failed to apply what VIA said was the "proper test" in deciding whether to deal with a complaint brought out of time, namely whether the claim is "worth investigating".

In relation to the first ground, the Court accepted VIA's characterization of the issue as one of procedural fairness, and applied the standard of correctness, meaning that no deference was granted to the Commission. It found that "it was procedurally unfair for the Commission to have indicated that it had not accepted a complaint, which understandably led VIA to act in accordance with this position, and then subsequently turn around and assert a diametrically opposed position". The Court's characterization of the Commission's correction of an apparent administrative (or typographical) error as a violation of procedural fairness is novel.

First, it is not clear that VIA suffered any actual unfairness. The Court did not say how VIA would have conducted itself any differently if it had known the complaint had been filed on August 1, 2012. The Court did not address the issue of how VIA came to contact the Commission in the first place. Nor was the issue of whether, in the circumstances, VIA reasonably relied on the recital in the Preventive Mediation Agreement. Those recitals made clear the decision to proceed is ultimately one within the Commission's discretion, regardless of when a complaint is filed.

Curiously, the Court seemed to recognize that there had been no unfairness, finding that "having rectified the breach of procedural fairness" the Commission could now revisit the

decision as to whether to move forward with the complaint.

The preferable approach in future cases maybe to avoid the tortured application of the doctrine of procedural fairness and apply a reasonableness standard of review to central issue – the discretionary decision of the Commission to hear the matter irrespective of the date the complaint was received.