Canadian Human Rights Tribunal

Tribunal canadien des droits de la personne

Citation: 2019 CHRT 5
Date: February 13, 2019
File No.: T2154/2816

[ENGLISH TRANSLATION]

Between:

Mohamed Nur

Complainant

- and -

Canadian Human Rights Commission

Commission

- and -

Canadian National Railway Company

Respondent

Ruling

Member: Gabriel Gaudreault

Table of Contents

I. Context

[1] Two motions have been brought before the Canadian Human Rights Tribunal (the Tribunal), one filed by the Canadian Human Rights Commission (the Commission) and the other originating from the Complainant, Mr. Mohamed Nur.

[2] It is not necessary, at this stage, to reiterate Mr. Nur's complaint in detail. However, we will see later that the Commission's motion raises an important issue regarding the scope of the complaint.

[3] The Commission's motion has several purposes. The Commission is seeking an order from the Tribunal requiring the Canadian National Railway Company (the Respondent or CN) to establish and disclose a detailed list of the documents for which it claims solicitor-client privilege (Schedule B). It also asks the Tribunal to issue orders for the disclosure of several documents by the Respondent. In the Commission's reply, some aspects of its requests have been refined and circumscribed, while others have been abandoned. The Commission has identified these changes clearly. The Tribunal will not address the representations and orders that have been abandoned by the Commission.

[4] This being said, it is sufficient, at this stage, to summarize the requests as follows. The Commission requests the disclosure of documents, including certain policies and procedures of the company regarding harassment, accommodation, anti-discrimination and human rights, training material, different communications of individuals who will be called as witnesses at the hearing, and certain documents concerning training, including training that certain individuals received from the Respondent. Finally, the Commission requests that the Tribunal order CN to confirm in writing that a diligent search has been conducted for the documents, that all documents that could be produced have been produced, and that where documents were not produced, this was due to their non-existence, or because CN claims solicitor-client privilege thereon, in which case the documents must be detailed in its list of privileged documents (Schedule B).

[5] Regarding the Complainant's motion, he wishes to obtain from the Tribunal an order requiring CN to search for and disclose the contact information of an individual

whom he believes worked for or still works for the Respondent, and whom he intends to call as a witness at the hearing.

[6] Let us recall that the Tribunal already rendered a decision dealing with disclosure on June 8, 2018 (see *Mohammed Nur v. Canadian National Railway Company,* 2018 CHRT 16). The present motions for disclosure were brought a few weeks before the scheduled hearings of February 19 to March 1, 2018. The hearing dates were set during the conference call of July 24, 2018.

[7] The Tribunal asked the parties to participate in a conference call on January 14, 2018. Two of the objectives of this conference call were, on the one hand, to ensure that the Tribunal was in possession of all the parties' material regarding these two motions and, on the other hand, to obtain the parties' confirmation that no other issue in dispute remained unresolved.

[8] During this call, the Respondent's representatives informed the Tribunal that there seemed to be a misunderstanding on the part of the Commission regarding certain documents that were disclosed and on which the name of a law firm appears. The Tribunal invited the parties to discuss the situation with each other in order to elucidate these misunderstandings and, if possible, to resolve the situation. The parties consented to this procedure and proposed to send the Tribunal correspondence that would clarify the situation, and the law firm's involvement. The issue was important, because the Commission was asking for more details regarding documents for which CN is claiming solicitor-client privilege. This being said, according to the new facts that were promptly raised by the Respondent, the Tribunal could not ignore them. The situation had to be clarified so that an informed decision could be rendered. On January 16, 2019, the Tribunal received a letter from the Commission updating the situation.

[9] The Tribunal received the material from all the parties concerning these two motions, including their submissions, the various documents and attached case law. Mr. Nur did not make specific submissions in relation to the Commission's motion. He simply mentioned that he supported the motion. Finally, the parties confirmed that no other

unresolved issue had to be addressed by the Tribunal at that stage. For the purposes of efficiency and celerity, the Tribunal will address these two motions in a single decision.

[10] For the following reasons, the Tribunal grants the Commission's motion in part and grants Mr. Nur's motion.

II. Issues

[11] Regarding the Commission's motion, the issues for the Tribunal to consider are:

(1) Should the Tribunal order the Respondent to disclose the following documents, based on their potential relevance to a fact, issue or form of relief? The documents sought are:

(i) Versions of the CN policies and procedures that existed in 2015 and those that currently exist in the matter of:

(a) human rights and anti-discrimination;

(b) accommodation of persons with disabilities;

(c) harassment;

(ii) Training material concerning the policies on harassment, human rights, and anti-discrimination, and on accommodation of persons with disabilities, provided to CN human resources personnel, management personnel and employees working in Edmonton, Alberta, from 2013 to date;

(iii) Training records of David Radford, Donna Poburan, Doug Ryhorchuk, Jayson Verbong and Mary Jane Morrison, in relation to their participation in training on harassment, human rights and anti-discrimination and accommodation of persons with disabilities, as well as on the Policy to Prevent Workplace Alcohol and Drug Problems;

(iv) Emails, memos, notes, minutes of meetings or any other forms of written communications of which the following persons are the authors and/or

addressees and concerning Mr. Nur, from June 30, 2015 to date: David Radford, Donna Poburan, Doug Ryhorchuk, Jayson Verbong, Mary Jane Morrison, Ken Wilson, Matthew Smith, Natalie Mark, Silvia Michaud, Robbie Kloster, Braiden Pelican, Christine Mitchell.

(2) Should the Tribunal order CN to confirm in writing to the Tribunal and to the other parties that a diligent search was conducted for the documents, that all the documents that could be produced were produced, and that where documents were not produced this was due to their non-existence or because solicitor-client privilege was claimed thereon, in which case these documents must be detailed in CN's list of privileged documents (Schedule B)?

(3) Should the Tribunal order CN to compile and disclose a more detailed list of the documents for which it claims solicitor-client privilege (Schedule B) and, more specifically, should it order CN to provide more details on its list of documents identified as *CNPVR2 – Communications and copies of communications between solicitor and client as contained in counsel's correspondence file*. These details include the date, authors, recipients, title and a brief explanation of the reasons why each document attracts solicitor-client privilege.

[12] Regarding Mr. Nur's motion, the issues in dispute are as follows:

(1) Does the Tribunal have the jurisdiction to order CN to search for and disclose the contact information of the individual described by the Complainant?

(2) If so, should the Tribunal order CN to conduct such a search and to disclose the contact information in question?

III. The Commission's motion and orders sought

A. Applicable law regarding disclosure between parties before the Tribunal

[13] Both the Commission and the Respondent cited different relevant decisions of the Tribunal, which squarely address the issue of disclosure, and which clearly summarize the guiding principles (see in particular *Guay v. Canada (Royal Canadian Mounted Police)*,

2004 CHRT 34; *Brickner v. Royal Canadian Mounted Police*, 2017 CHRT 28). The Tribunal recently reviewed these principles in its decision *Malenfant v. Vidéotron S.E.N.C.*, 2017 CHRT 11, at paras. 25 to 29 and 36, which passages refer to these decisions in particular:

> [25] Each party has a right to a full hearing. In this regard, the *CHRA* provides as follows at ss. 50(1):
>
> > 50(1) After due notice to the Commission, the complainant, the person against whom the complaint was made and, at the discretion of the member or panel conducting the inquiry, any other interested party, the member or panel shall inquire into the complaint and shall give all parties to whom notice has been given a full and ample opportunity, in person or through counsel, to appear at the inquiry, present evidence and make representations.
> >
> > [Emphasis added.]
>
> [26] This right includes the right to the disclosure of relevant evidence in the possession or care of the opposing party (*Guay v. Royal Canadian Mounted Police*, 2004 CHRT 34, para. 40). The Rules of Procedure of the Canadian Human Right Tribunal (the Rules) provide as follows in Rule 6(1), and more specifically at paras. (*d*) and (*e*):
>
> 6(1) Within the time fixed by the Panel, each party shall serve and file a Statement of Particulars setting out,
>
> > […]
> >
> > *(d)* a list of all documents in the party's possession, for which no privilege is claimed, that relate to a fact, issue, or form of relief sought in the case, including those facts, issues and forms of relief identified by other parties under this rule;
> >
> > *(e)* a list of all documents in the party's possession, for which privilege is claimed, that relate to a fact, issue or form of relief sought in the case, including those facts, issues and forms of relief identified by other parties under this rule;
> >
> > […]
> >
> > [Emphasis added]

[27] Regarding disclosure, the Tribunal has already ruled several times that the guiding principle is probable or possible relevance (*Bushey v. Sharma*, 2003 CHRT 5, and *Hughes v. Transport Canada*, 2012 CHRT 26. See in the alternative *Guay*, *supra*; *Day v. Department of National Defence and Hortie*, 2002 CanLII 61833; *Warman v. Bahr*, 2006 CHRT 18; *Seeley v. Canadian National Railway Company*, 2013 CHRT 18). The Tribunal notes that the parties have an obligation to disclose potentially relevant documents in their possession (*Gaucher v. Canadian Armed Forces*, 2005 CHRT 42, para. 17).

[28] To show that the documents or information are relevant, the moving party must demonstrate that there is a rational connection between those documents or information and the issues in the case (*Warman*, *supra*, para. 6. See for example *Guay*, *supra*, para. 42; *Hughes*, *supra*, para. 28; *Seeley*, *supra*, para. 6). Relevance is determined on a case-by-case basis, having regard to the issues raised in each case (*Warman*, *supra*, para. 9. See also *Seeley*, *supra*, para. 6). The Tribunal notes that the threshold for arguable relevance is low and the tendency is now towards more, rather than less, disclosure (*Warman*, *supra*, para. 6; see also *Rai v. Royal Canadian Mounted Police*, 2013 CHRT 36, para. 18). Of course, the disclosure must not be speculative or amount to a fishing expedition (*Guay*, *supra*, para. 43).

[29] The Tribunal notes that the production of documents stage is different from the stage of their admissibility in evidence at the hearing. Accordingly, relevance is a distinct concept. As Member Michel Doucet stated in *Telecommunications Employees Association of Manitoba Inc. v. Manitoba Telecom Services*, 2007 CHRT 28 (hereafter *TEAM*), at para. 4:

> [4] …The production of documents is subject to the test of arguable relevance, not a particularly high bar to meet. There must be some relevance between the information or document sought and the issue in dispute. There can be no doubt that it is in the public interest to ensure that all relevant evidence is available in a proceeding such as this one. A party is entitled to get information or documents that are or could be arguably relevant to the proceedings. This does not mean that these documents or this information will be admitted in evidence or that significant weight will be afforded to them.
>
> […]

[36] Finally, I would remind the parties that the duty to disclose the documents concerns documents in their possession. Accordingly, the duty does not extend to creating documents for disclosure (*Gaucher*, *supra*, para. 17). . .

[14] As the Supreme Court reiterated in its decision *Prassad v. Canada (Minister of Employment and Immigration)*, [1989] 1 SCR 560 (*Prassad*), it is well recognized that the administrative tribunals are masters in their own house. In so doing, the administrative tribunals are not necessarily guided by the same principles as the law courts concerning the administration of evidence, which depends instead on the discretionary authority of the Panel. They are responsible for determining whether evidence should be admitted or excluded. Nonetheless, these powers are not unlimited and the Panel must comply with the enabling legislation and the rules of the administrative tribunal (see *Vancouver Airport Authority v. Commissioner of Competition,* 2018 FCA 24 (*Vancouver Airport Authority*), para. 30). They will also be guided by the principles arising from the common law, the principles of natural justice and procedural fairness. The Tribunal very recently stated, in its decision *Brickner v. Royal Canadian Mounted Police, 2017 CHRT 28 (CanLII)* [Brickner] that:

> [8] This Tribunal has already recognized in its past decisions that it may deny ordering the disclosure of evidence where the probative value of such evidence would not outweigh its prejudicial effect on the proceedings. Notably, the Tribunal should be cautious about ordering searches where a party or a stranger to the litigation would be subjected to an onerous and far-reaching search for documents, especially where ordering disclosure would risk adding substantial delay to the efficiency of the inquiry or where the documents are merely related to a side issue rather than the main issues in dispute (see *Yaffa v. Air Canada*, 2014 CHRT 22 at para. 4; *Seeley* at para. 7; see also *R. v. Seaboyer* [1991] 2 S.C.R. 577 at 609-611).
>
> [9] It should also be noted that the disclosure of arguably relevant information does not mean that this information will be admitted in evidence at the hearing of the matter or that significant weight will be afforded it in the decision making process (see *Telecommunications Employees Association of Manitoba Inc. v. Manitoba Telecom Services*, 2007 CHRT 28 at para. 4).

[15] As explained in Brickner, other considerations could be taken into consideration to limit disclosure, particularly the long delays occasioned by the request for disclosure, the costs and the scope of such a search, or when the evidence requested concerns a secondary issue in dispute.

[16] It is important to add that in disclosure matters, relevance is assessed in light of the complaint and the statement of particulars, as pointed out by my colleague Sophie

Marchildon in her decision *Lindor v. Public Works and Government Services Canada, 2012 CHRT 14* [Lindor], at para. 56. Indeed, I agree that the summary of complaint form is not a pleading and is not the one and only element to consider for the purposes of the analysis of relevance.

[17] I also subscribe to my colleague's words in her decision *Syndicat des communications de Radio-Canada v. Canadian Broadcasting Corporation* [*CBC*], 2017 CHRT 5, at para. 36, where she wrote:

> [35] For the purposes of disclosure, the complaint, the theory of the case included in the Statement of Particulars and the entire Statement of Particulars in itself, all serve as guides for identifying the potential relevance of the documents. This potential relevance will be analyzed from both the point of view of the complaining party and the respondent or the party representing the public interest, in this case, the Commission. In other words, the documents to be disclosed are not limited to those which support the position of a single party, but the positions of all the parties.

[18] Bearing this guidance in mind, the Tribunal will analyze the Commission's requests for disclosure.

B. CN policies and procedures existing in 2015 and at present

(i) Preliminary considerations

[19] The Tribunal considers it appropriate to address, in the first place, certain arguments that are present in CN's representations and that underpin its entire response.

[20] In its representations, the Respondent raises the argument that the Commission's motion is an abuse of process (see para. 4 of its representations) in that it requests the disclosure of documents that are not relevant to the dispute, that such disclosure will cause significant delays in the proceedings, and that the hearing dates established by the Tribunal will thereby be jeopardized. The Respondent adds that the Commission's representations had previously indicated its intention not to pursue its request for disclosure dated July 23, 2018 (see CMCC of September 2017).

[21] These arguments, as mentioned previously, are found throughout the Respondent's representations. It thus becomes necessary and practical to address these arguments first in order to concentrate subsequently on the parties' other arguments relating to the Commission's requests for disclosure.

[22] The abuse of process' argument made by the Respondent is a relatively broad argument that encompasses different factors, particularly the lateness of the motion, the irrelevance of the documents sought, the hearing dates that are jeopardized, and the Commission's change in position regarding whether the disclosure had been sufficient. This being said, the Respondent does not ask the Tribunal to rule directly on the question of whether the Commission committed an abuse of process in filing its motion. It does not seek any finding in this regard, it has not detailed the guiding principles in matters related to abuse of process, and it has not submitted case law on the issue. Moreover, CN does not request relief in the nature of what was ordered, for example, in the decision *Tipple v. Deputy Head (Department of Public Works and Government Services)*, 2010 PSSRB 83 (including the order for compensation of legal costs incurred subsequent to the obstruction of the arbitration proceedings, which was upheld by the Federal Court of Appeal; see *Tipple v. Canada (Attorney General)*, 2012 FCA 158, at paras. 20 to 31).

[23] The Tribunal understands the Respondent's general arguments (lateness, irrelevance, delays occasioned, possible adjournment of the hearing, change of position regarding sufficiency of the disclosure). The Tribunal finds that the Commission's request does not appear to have been made in bad faith. Nor is it frivolous, because certain elements of the request are found herein to be valid. The request is not vexatious or oppressive. As such, the Tribunal does not consider that the Commission's motion is an abuse of process.

[24] The Commission had previously stated, during the conference call of September 7, 2018, that it would not pursue a request for disclosure filed on July 23, 2018. This gave the Respondent reason to believe that the Commission was satisfied, on that date, with the disclosure it had received by that date. The fact that the Commission, following an in-depth analysis of its case, made a request on October 24, 2018, for additional disclosure on the part of CN, does not constitute an abuse of process either. The Commission never waived

its right to make other requests. The Commission found it necessary, following analysis of its case, to request additional disclosure, as it was of the view that the disclosure thus far was insufficient. This being said, disclosure is not unlimited; limits exist (in particular, see *Brickner, supra*).

[25] Apart from the key principles regarding disclosure, including arguable relevance (see Rules 6(1)(d) and (e)), it is important that motions be filed with the Tribunal on a timely basis. The *CHRA* and the Rules of the Tribunal provide that the proceedings must be conducted expeditiously and informally (in particular, see para. 48.9(1) *CHRA*, and Rules (1)(1)(b)) and Rule 3(1)(a), which provide that a motion must be filed as soon as is practicable.

[26] Regarding the issue of timeliness, and to reiterate CN's representations in relation to the lateness of the request, it must be clarified that the Commission's request was sent to the Respondent on October 24, 2018, four months before the February 2019 hearing dates. The Respondent answered this request on November 23, 2018. It took the Respondent one entire month to finally decline the Commission's request. A few days later, on November 26, 2018, the Tribunal was informed of this request during a conference call.

[27] The Commission then informed the Tribunal and the parties of its intentions to file a motion for disclosure. A tight schedule was put in place to address these requests. All the parties cooperated in order to address this motion speedily, considering the February 2019 hearing dates. The Commission's motion was filed, according to the schedule, on December 7, 2018. The complete motion materials had been received by January 4, 2018, and a conference call was held on January 14, 2018, to ensure that all the material had been filed, and that no other issue remained unresolved.

[28] This being said, the situation is what it is; a motion has been brought before the Tribunal and it must rule on this motion. Does the lateness of the motion mean that the Tribunal should dismiss the Commission's motion? I do not hold this opinion. Although, in general, time is running short, the order was issued on January 30 and it appears that the parties had sufficient time to disclose documents without this necessarily resulting in an

adjournment of the scheduled dates. The parties have shown that they were able to act expeditiously, and the Tribunal remains confident that the February 2019 hearing dates can be maintained. Thus, lateness and the possibility of adjourning the hearing dates are not determinative factors in this decision.

(ii) Policies and procedures on accommodation of persons with disabilities

[29] The Commission requests the Tribunal to order CN to disclose its policies and procedures on accommodation of persons with disabilities that existed at the time of the 2015 events, and those that exist today. It notes that the complaint alleges that Mr. Nur was dismissed due to his disability, and more specifically, due to his alcohol dependence. The Commission considers that CN's alleged failure to take accommodation measures is an important issue in its theory of the case.

[30] It adds that one of the public interest remedies it is seeking before the Tribunal consists of training regarding the duty to accommodate. Although CN has provided its Policy to Prevent Workplace Alcohol and Drug Problems, the Commission considers that if a policy on accommodation of persons with disabilities exists, it is also relevant to the case. Access to such accommodation policies and procedures would make it possible to assess whether the deficiencies that might have existed at the time of the events still exist today. The Tribunal could order relief in relation to these policies and procedures. The Commission submits that the Tribunal enjoys flexibility and discretion to fashion relief that is effective, in application of para. 53(2)(a) *CHRA*.

[31] Consequently, it considers that a link exists between the documents sought, i.e. CN's accommodation policies and procedures, and the facts and remedies in issue.

[32] The Respondent alleges that the Commission's request is vague, too broad and irrelevant to the dispute. It considers that the Commission's Statement of Particulars refers to accommodation only in relation to the application of the Policy to Prevent Workplace Alcohol and Drugs Problems. The issue is whether it failed in its duty to accommodate by dismissing Mr. Nur following the application of this policy. CN argues that the other parties do not refer to other policies in their Statement of Particulars.

[33] CN points out that the remedies sought by the Commission in its Statement of Particulars (para. 60) concerns only this Policy to Prevent Workplace Alcohol and Drugs Problems and no other corporate policy. In subparagraph ii, the Commission requests that this policy be revised in consultation with it. In subparagraph iii, the Commission requests that CN's human resources personnel receive training on human rights legislation and on the duty to accommodate, with a focus on alcohol dependence and the application of the "Policy". CN refers to para. 20 of the Commission's Statement of Particulars, which defines "Policy" as the Policy to Prevent Workplace Alcohol and Drugs Problems.

[34] CN mentions that it has already transmitted documents pertaining to the Policy to Prevent Workplace Alcohol and Drugs Problems and the related training. It specifies that this policy already provides for an accommodation process for employees suffering from drug or alcohol dependence.

[35] It adds that it is difficult to discern what the Commission means by all accommodation policies and procedures, which may include a multitude of documents. This could result in the disclosure of documents that should not be disclosed because they are immaterial to the issue. The Commission specifies, in its reply, that the request concerns all policies and procedures that CN uses to guide its employees and managers in the administration of accommodation of persons with disabilities. According to the Commission, the Policy to Prevent Workplace Alcohol and Drugs Problems provides guidance to the employees as to the employer's expectations regarding alcohol and drugs in the workplace. This policy is not a guide for determining how accommodation of persons with disabilities will be managed. Therefore, the two policies are necessary and relevant to the issue.

[36] Finally, the Respondent alleges that the Commission's request is late and that it has not provided the reasons justifying this lateness. It considers that this request should have been made much sooner, taking it for granted that the documents could be potentially relevant. Consequently, the Respondent beliefs that it undermines the Commission's representations regarding arguable relevance.

[37] Regarding this last argument, the Tribunal finds that it is not particularly convincing. The argument regarding the lateness of the request has already been addressed in Section III, B, (i) – Preliminary remarks. The Tribunal adds that it is indeed preferable that the requests for disclosure be filed as soon as is practicable. This being said, it may happen that requests are filed later in the process. Does this automatically undermine the argument of the arguable relevance of documents? The Tribunal does not hold this opinion and it would be imprudent to make a hasty correlation between lateness and relevance.

[38] This being said, the Tribunal finds that, if policies and procedures on accommodation of persons with disabilities exist, such policies and procedures are indeed arguably relevant to the disputes. If the evidence reveals the existence of discriminatory practices, it must have a fairly clear and complete picture of the situation so that it can, in particular, fashion relief that is viable, useful and effective.

[39] The Tribunal finds that the Commission's remedy, in para. 60(iii) of its Statement of Particulars, is broad enough to encompass other accommodation policies and procedures. In the Commission's words it requests the Tribunal to order that the CN's human resources personnel receive training on human rights legislation and on the duty to accommodate, with a focus on alcohol dependence as a disability, and on the application of the "Policy".

[40] The Commission not only requests that the personnel receive training on the Policy to Prevent Workplace Alcohol and Drugs Problems, but also on the duty to accommodate in general. This duty to accommodate concerns, in particular, persons with alcohol dependence as a disability. If CN has indeed created policies and procedures on accommodation of persons with disabilities and trains its personnel on this subject, this becomes relevant to the issue. The Tribunal repeats that the arguable relevance threshold is a relatively low threshold.

[41] In its representations, CN reproduced the "Prevention and Assistance" section of the Policy to Prevent Workplace Alcohol and Drugs Problems. It argues that this section provides the accommodation procedure when an employee suffers from alcohol or drug

dependence. The Tribunal agrees with the Respondent that this section provides various useful and explanatory information, but the Commission is also right when it states that this does not provide any more details on the manner in which CN and its personnel manage situations necessitating accommodation, particularly of persons with disabilities, including alcohol dependence.

[42] For these reasons, the Tribunal orders the Respondent to disclose its policies and procedures on accommodation of persons with disabilities that it has in its possession, both the version in effect in 2015 and the current version.

(iii) Human rights and discrimination policies and procedures

[43] The Commission, in its Statement of Particulars, states that Mr. Nur's complaint raises a subtle scent of discrimination based on his ethnic or national origin, colour or race. Indeed, it believes that these prohibited grounds of discrimination against which the *CHRA* protects were a factor in his dismissal and that lesser disciplinary actions could have been taken by CN.

[44] It adds that Mr. Nur said that he was the subject of inappropriate comments and behaviours during training that were race-related. A CN instructor would have witnessed this. In so doing, the Commission requests that CN disclose all policies and procedures on human rights and against discrimination, particularly based on race.

[45] The Respondent opposes this request, considering that it is vague and too broad and that these policies and procedures are not related to the issue. It alleges that neither in Mr. Nur's complaint or in the Commission's Statement of Particulars are there any allegations as to the fact that CN pursued discriminatory practices, particularly due to the Complainant's race. It adds that neither Mr. Nur nor the Commission has filed a complaint under s. 10 *CHRA* alleging that its policies or practices are discriminatory.

[46] CN submits that the only mention of racial discrimination in the complaint concerns the fact that one of the persons questioned during the investigation of Mr. Nur's conduct on June 30 and July 1, 2015, had made inappropriate remarks in relation to his ethnic origin during training and consequently, the investigation would have been compromised, tainted

by this individual's testimony. The Respondent adds that it was informed of these events only after the filing of Mr. Nur's amended complaint. It therefore considers that no rational connection exists between the requested documents, the complaint or the Commission's Statement of Particulars.

[47] Once again, CN adds that the request was made late and that the Commission could have raised these issues previously, which undermines its submissions regarding arguable relevance. The Tribunal already took a position on this argument in para. 37 of this decision.

[48] The Tribunal does not agree with the Respondent regarding s. 10 *CHRA* on discriminatory policies or practices. In fact, it is true that the complaint and the Statement of Particulars of the parties are not fashioned to include s. 10 *CHRA*. This being said, it is not mandatory for s. 10 *CHRA* to be included in the complaint for the Tribunal to be able to take cognizance of the policies or practices of an employer, an employer association or a union organization. For example, it is clear that the Tribunal has broad authority regarding the relief it may order, relief that must be practical, useful and effective.

[49] More specifically, para. 53(2)(a) *CHRA* is written in a broad and non-limiting manner, allowing the Tribunal not only to put an end to the discriminatory act, but also to order relief intended to prevent similar acts. Subparagraphs (i) and (ii) of para. 53(2)(a) *CHRA* are covered by the word "notamment" in the French version and "including" in the English version, which indicates that this list is not exhaustive in itself.

[50] As such, a company that has not put a policy against discrimination or harassment in place, for example, and has no procedure established for such matters, could be ordered by the Tribunal to implement such policies and procedures if it is proved that it is responsible for the perpetration of a discriminatory act.

[51] It is also the Tribunal's opinion that Mr. Nur's complaint and the Commission's Statement of Particulars include allegations that CN also had discriminatory practices, including based on the Complainant's race. The Commission refers to the existence of a subtle scent of discrimination based on Mr. Nur's race in that CN could have taken less drastic disciplinary actions than dismissal of the Complainant. It also expresses concerns

about the involvement of an employee in the CN investigation who possibly made inappropriate remarks based on the Complainant's race. Also in its Statement of Particulars, the Commission submits that Mr. Nur believes that the remarks made by this individual and his view of his Somali origins, combined with the feeling of this person and other employees (who also participated in the investigation) regarding his rapid advancement in the company, caused CN to treat him more severely following the events that occurred in 2015.

[52] The Tribunal also notes that the Respondent states in its summary of the testimony that the instructor Sylvie Michaud, who was present when these remarks were made, did not hear them. If she had heard these remarks during her training, she would have reported them to management so that follow-up would be done. The Tribunal finds that the Commission, in para. 10 of its Statement of Particulars, states that Mr. Nur will testify that Ms. Michaud was present when the remarks were made. At this stage, the role of the Tribunal is not to evaluate the evidence that will be presented at trial. However, there seems to be a certain divergence in the facts.

[53] If the company has adopted policies and procedures regarding human rights and anti-discrimination, it is possible to question, for example, whether the employees or the trainers receive human rights and discrimination awareness raising and training. If a person, a trainer, an employee, witnesses discriminatory remarks against a co-worker or another employee, what is the procedure to follow?

[54] The Tribunal finds that the Policy to Prevent Workplace Alcohol and Drugs Problems, in its "Prevention and Assistance" section, explains among other things the company's vision regarding alcohol and drugs in the workplace and its expectations regarding employees, encouragement between co-workers, etc. More generally, what about human rights and fighting discrimination in the workplace?

[55] On these grounds, the Tribunal considers that the Respondent's human rights/anti-discrimination policies and procedures are arguably relevant and orders it to disclose what it has in its possession, both the version in effect in 2015 and the current version.

(iv) Harassment policies and procedures

[56] The Commission, in the second paragraph of its representations, submits that Mr. Nur's complaint concerns allegations of discrimination and harassment in matters related to employment, in application of sections 7 and 14 *CHRA*. It adds that in his Statement of Particulars, Mr. Nur alleged that he was the subject of harassment based on his race when he was working for the Respondent.

[57] It mentions that CN's Statement of Particulars also raises allegations to the effect that Mr. Nur committed sexual harassment against an employee of Canad Inns Playmaker's Lounge and that this was one of the reasons leading to his dismissal. The Commission believes that CN could have imposed disciplinary actions less drastic than dismissal and is of the opinion that discriminatory factors might have been involved in the application of these measures. In so doing, it judges that a rational connection exists between the complaint and the Respondent's harassment policies and procedures.

[58] The Respondent submits that neither Mr. Nur's complaint nor the Commission's Statement of Particulars is based on s. 14 *CHRA* concerning harassment. It adds that Mr. Nur did not inform it that he was the subject of harassment, which is confirmed in the Commission's Statement of Particulars, at para. 11. It repeats that Mr. Nur's complaint does not give rise to s. 10 *CHRA* concerning discriminatory policies or practices.

[59] More significantly, the Respondent submits that it has already disclosed its harassment policy to the other parties and refers the Tribunal and the parties to its documents numbered CN00014 and CN00017.

[60] In its reply, the Commission confirms that it received a version of CN's anti-harassment policy from CN. This version dates from 2012. The Commission therefore infers that this version is the one that existed at the time of the alleged events of 2015 and that it is also the version that is applicable today. If this is not the case, the Commission requests that the current version of the harassment policy be disclosed.

[61] The Tribunal does not intend to create a major debate around the potential relevance of this harassment policy. CN has already disclosed its harassment policy

dating from 2012. The Tribunal necessarily infers that CN considered it arguably relevant to disclose it. The procedures that are also connected to this policy are just as arguably relevant.

[62] However, if this harassment policy has been amended and another version exists today, is this version arguably relevant to the dispute? This is where the Tribunal disagrees with the Commission, particularly to the effect that Mr. Nur's complaint involves harassment in matters related to employment, in application of s. 14 *CHRA*.

[63] The Tribunal repeatedly reread the Statement of Particulars drafted by Mr. John Unrau, who was the solicitor representing the Commission at the start of the proceedings before the Tribunal. The theory of the case put forward by the Commission is not based on s. 14 *CHRA*. The Commission's theory of the case, the issues in dispute, and the applicable law and test – all these elements and all its representations are articulated around s. 7 *CHRA* (for example, see paras. 1, 16, 43 of the Commission's Statement of Particulars, dated January 20, 2017).

[64] Why does the Commission claim today in its representations concerning this motion for disclosure that Mr. Nur's complaint is based on s. 14 *CHRA*?

[65] When the Commission refers a complaint to the Tribunal for an inquiry, it is common practice for it to transmit a document which is, in fact, a summary of the complaint. This document, which originates from the Commission, is attached to the original complaint of the plaintiff or plaintiffs. When the Tribunal consults this summary, it seems that Mr. Nur's complaint has been amended. This summary was filed by the Commission in support of its motion (see Exhibit A). Therefore, two summaries exist, the first referring only to s. 7 *CHRA* while the second, the amended summary, adds s. 14 *CHRA* concerning harassment.

[66] However, in its Statement of Particulars dated January 20, 2017, the Commission does not refer to harassment in matters related to employment, does not base its theory of its case on s. 14 *CHRA* and concentrates only on the application of s. 7 *CHRA*. Why does it add s. 14 *CHRA* in the representations of this motion?

[67] In its *Lindor* decision, *supra*, the Tribunal is explicit to the effect that:

> [TRANSLATION]
>
> [56] Relevance is assessed in relation to the complaint and the Statement of Particulars. I have already determined that the summary of the complaint in itself is not the only factor to consider to analyze relevance and does not constitute the procedural act that allows the period covered by the alleged discriminatory act to be determined.
>
> . . .
>
> [58] Moreover, it is **the Statements of Particulars that serve for the purposes of oral argument** in the context of proceedings before the Tribunal and "that set the more precise terms of the hearing" see Gaucher v. Canadian Armed Forces, 2005 CHRT 1 at para. 10.
>
> [Emphasis added]

[68] Moreover, Rules of the Tribunal 6(a) and 6(b) require that the party set out the material facts that it seeks to prove in support of its case and its position on the legal issues raised by the case. These elements are found in the Statement of Particulars of the parties. It appears that the Commission's Statement of Particulars, which serves the purposes of oral argument in the Tribunal's proceedings, does not refer to s. 14 *CHRA* as a condition of the hearing.

[69] The Tribunal also reviewed the letter originating from the Commission dated June 16, 2016, which was sent to the Complainant and the Respondent to inform them that the complaint was referred to the Tribunal for inquiry. This letter was filed by the Commission in support of its motion (see Exhibit B). In this letter, two reasons are invoked in support of this referral to the Tribunal: (1) the Respondent was unable to prove that the dismissal resulted from *bona fide* occupational requirements and (2) considering all the circumstances of the complaint, a hearing is required. The letter sent to the Chairperson of the Tribunal, also dated June 16, 2016, is less explicit and does not include any reason for referral of the complaint for inquiry (see Exhibit B).

[70] This being said, these three letters contain no details or specific reference on the issue of harassment.

[71] Mr. Nur, who endorsed the Commission's Statement of Particulars and provided some additional details in his correspondence dated January 24, 2017 and addressed to the parties and to the Tribunal, does not mention either that his complaint is based on s. 14 *CHRA* concerning harassment in matters related to employment.

[72] Moreover, the Respondent, in its Statement of Particulars, does not address s. 14 *CHRA* and harassment in matters related to employment as a basis of Mr. Nur's complaint either. Harassment is invoked as a ground justifying Mr. Nur's dismissal. In this context, it appears clear that the harassment policy is relevant, not from the perspective that Mr. Nur was a victim of harassment, but rather as having allegedly sexually harassed an employee at Canad Inns Playmaker's Lounge.

[73] The nuance is important, because the potential relevance of the policy is not established in the same perspective or on the same facts. The policy is not relevant in the sense that Mr. Nur was a victim of harassment in matters related to employment, but rather that he would have harassed someone, a reason justifying his dismissal.

[74] The current policy is therefore irrelevant for the purposes of determining how this 2015 alleged sexual harassment was one of the factors leading to Mr. Nur's dismissal and as alleged by the Respondent in its own theory of the case. Moreover, since harassment is not invoked as a discriminatory practice in the meaning of s. 4 *CHRA*, this does not give rise to any remedies under ss. 53(2) *CHRA*.

[75] This being said, the Tribunal is not saying that s. 14 *CHRA* could not have been invoked by the parties, more specifically regarding the fact that Mr. Nur was not a victim of harassment in matters related to employment. This is simply not what was submitted in the parties' Statements of Particulars. It is the Statement of Particulars that establishes the theory of the case of the parties and the conditions of the hearing.

[76] If the Commission or Mr. Nur considers that s. 14 *CHRA* should be included in the complaint, they are invited to file a detailed motion for the Tribunal to authorize them to amend their Statement of Particulars and request for an adjournment of the hearing dates as soon as possible.

[77] For these reasons, the Tribunal rules that the harassment policy and its procedures that were in force at the time of the alleged facts in 2015 are arguably relevant to this dispute. The Tribunal notes that the Respondent confirms that it has transmitted its policy dated 2012. If another version existed in 2015, it must also be disclosed. Finally, if proceedings are related to this harassment policy in force in 2015, they must also be disclosed.

[78] Regarding the disclosure of the current harassment policy and its procedures, the Commission's request is dismissed.

C. Training material on the above-mentioned policies and procedures from 2013 to date, in Edmonton, Alberta

[79] The Commission asks the Tribunal to order CN to disclose the training material on the policies and procedures in matters related to harassment, human rights/anti-discrimination, as well as the accommodation of persons with disabilities, from 2013 to date.

[80] The Commission acknowledges that CN has already disclosed the training material regarding its Policy to Prevent Workplace Alcohol and Drugs Problems. It requests the training material for CN's other policies and procedures it considers arguably relevant to the issue (accommodation, human rights, anti-discrimination and harassment).

[81] It submits that a rational connection exists between the training materials and the allegations of discrimination and harassment found in its Statement of Particulars and in Mr. Nur's complaint. It adds that this material is also linked to the relief they are seeking, more specifically regarding training on human rights and public interest remedies.

[82] It believes that such training material could shed light on the Respondent's practices established in these different spheres and on the adequacy of the training measures in preventing workplace discrimination and harassment.

[83] The Respondent opposes this request. It essentially reiterates the same arguments as for its opposition to providing the policies and procedures requested by the

Commission. It considers that only the Policy to Prevent Workplace Alcohol and Drugs Problems is relevant to the dispute and that the training material related thereto has already been disclosed.

[84] It considers that policies and procedures in matters related to accommodation of persons with disabilities, on human rights and against discrimination and harassment are not relevant to the issue. The Tribunal does not intend to repeat in detail the reasons invoked by the Respondent, because this would be redundant. To this effect, the reader is invited to read the relevant paragraphs of Title III, Division B, of this decision.

[85] CN adds that the Commission alleges that this training material could be illustrative of its practices, procedures and training offered in these matters (harassment, human rights, discrimination, accommodation) and the actions taken or not taken to prevent workplace discrimination and harassment. According to CN, this is not covered by Mr. Nur's complaint, and the Commission's request seeks to extend its scope. It also reiterates the argument to the effect that the complaint is not based on s. 10 *CHRA*.

[86] Finally, it alleges that these requests should have been made sooner by the Commission, that it would have expected that such requests would be made much earlier, and that the Commission must thus have accepted that these documents were in fact irrelevant to the issue.

[87] The Commission reiterates essentially the same arguments in reply as its arguments regarding the procedures and policies sought (harassment, human rights, discrimination, accommodation). However, it adds that the summaries of the Respondent's testimony contain certain testimony, in particular, on the training offered regarding the workplace harassment policy.

[88] Obviously, the disclosures regarding the training material on CN's policies and procedures for which the Commission requests disclosure are intrinsically related to the Tribunal's decision whether or not to order disclosure of such policies and procedures. It is not possible to isolate Division B of Title III (CN policies and procedures existing in 2015 and at present) from Title IV (Training material on the above-mentioned policies and procedures from 2013 to date).

[89] The Tribunal has already determined that the harassment policies and procedures that existed at the time of the 2015 events are arguably relevant to the issue. The Respondent has already transmitted its 2012 policy on this subject. If one of its witnesses will address the training offered in relation to this policy, it appears obvious that the training material related to it becomes arguably relevant. The Tribunal has already circumscribed the scope of the disclosure of this policy and, consequently, only the training material existing on the date of the events is arguably relevant to the issue.

[90] The Tribunal has already ruled that the policies and procedures in matters related to human rights/anti-discrimination and concerning accommodation of persons with disabilities which existed at the time of the 2015 events and those existing today are arguable relevant to the issue.

[91] The Commission is seeking, as a public interest remedy, an order of the Tribunal that training on the duty to accommodate be given to CN's human resources personnel (see Commission's Statement of Particulars, para. 60(iii)). It stands to reason that the training material pertaining to the Respondent's policies and procedures on accommodation of persons with disabilities be disclosed, because it is potentially relevant to the dispute. The Tribunal recalls that para. 53(2)(a) *CHRA* confers vast authority on it concerning relief, particularly including preventing a discriminatory practice from occurring in the future, which can be achieved, in particular, by training.

[92] In the Tribunal's opinion, a company's policies and procedures in matters related to human rights, discrimination and accommodation of persons with disabilities are vehicles that a company uses to meet its legal obligations regarding human rights. These obligations arise, among others, from the legislation (federal, provincial or both). These policies and procedures are the vehicles used by a company for prevention, raising awareness, education and action in the field of human rights.

[93] The Tribunal finds that it would not make much sense for a company to adopt human rights policies and procedures and train its employees, human resources personnel and management on such policies when they would not respect the guiding

concepts, notions, rights and obligations regarding human rights. It seems logical that some consistency must exist between these policies and procedures and the legislation.

[94] As such, the training material that includes rights and obligations in matters related to human rights, discrimination, accommodation of persons with disabilities, are arguably relevant to the issue and, in particular, to the relief sought by the Commission, which requests an order for training of CN's human resources personnel on human rights legislation and the duty to accommodate.

[95] The Tribunal completely agrees with the limitations proposed by the Commission, namely that only the training material used in Edmonton, Alberta, must be disclosed. Indeed, it can be imagined that training may differ from one site to another, depending, for example, on certain specificities of the facilities, the work performed there, the trainer who provides the training, etc.

[96] One last comment is necessary: the Commission has not explained the reasons why it is requesting the training material dated 2013. Based on its reading of the representations of the parties, it is no clearer for the Tribunal why the year 2013 is relevant. No matter, because the Tribunal rules that the material potentially relevant to the issue is that which existed at the time when the events occurred, namely 2015, and for some of the material, that which exists today.

[97] For those reasons, the Tribunal orders CN to disclose the training material that existed at the time of the 2015 events and the training that exists today, in Edmonton, Alberta, and is in its possession, concerning the policies and procedures in matters related to human rights/anti-discrimination and concerning accommodation of persons with disabilities.

[98] The Tribunal orders CN to disclose the training material that existed at the time of the 2015 events, in Edmonton, Alberta, which is in its possession, concerning the harassment policy.

D. Training records of different individuals

[99] The Commission requests the Tribunal to order CN to disclose the training records of David Radford, Donna Poburan, Doug Ryhorchuk, Jayson Verbong and Mary Jane Morrison, in connection with their participation in the training on the policies on harassment, on human rights/anti-discrimination, and on accommodation of persons with disabilities, as well as on the Policy to Prevent Workplace Alcohol and Drugs Problems.

[100] The Tribunal again specifies that this Division D cannot be isolated from Divisions B and C of Title III.

[101] The Commission submits that all these individuals who, for the most part, were or are human resources or management personnel at CN, will be called as witnesses at the hearing. They will testify, in particular, on their role in the procedures that were followed and the ultimate decision to dismiss Mr. Nur.

[102] The Commission is of the opinion that a connection exists between the complaint and the relief it is seeking, particularly in matters related to human rights training. It adds that having access to the training records of these individuals could shed light on the sufficiency of the actions taken by CN to ensure that these individuals, who were involved in the 2015 events, received human rights training. This will also make it possible to determine whether these individuals were aware of their human rights obligations when they participated in the investigation and the decision leading to Mr. Nur's dismissal.

[103] The Respondent opposes the Commission's request and reiterates its argument as to the fact that neither the Commission nor the Complainant has filed a complaint under s. 10 *CHRA* regarding discriminatory policy or practice. The Respondent considers that this goes beyond the scope of the complaint and that the request is too broad. It adds that the Commission has not alleged that CN failed to offer its personnel adequate training on its policies.

[104] It is important to mention that the Commission's initial request concerned some other individuals. In its response, the Commission limited its request for disclosure to only five individuals, namely David Radford, Donna Poburan, Doug Ryhorchuk, Jayson Verbong and Mary Jane Morrison. This being said, the Respondent considers that Mr. Radford and Ms. Morrison were not involved in the decision-making process leading to the

dismissal of the Complainant or in the application of the policies. Consequently, the fact that they received or did not receive training on the policies and procedures is irrelevant to the issue.

[105] Finally, CN indicates that if the request were really relevant, the Commission would have been expected to file its request much earlier. CN believes that the Commission did not do so because it accepted that these documents were not potentially relevant to the dispute.

[106] Regarding this argument, once again, the Tribunal already took a position on this subject previously. This argument is not convincing or conclusive in this instance.

[107] When the Tribunal looks into the Statement of Particulars of the parties, the complaint and the summary of testimony filed by CN, it appears that David Radford, Donna Poburan, Doug Ryhorchuk, Jayson Verbong, Mary Jane Morrison and Jason Verbong were all involved, one way or another, in the 2015 events. The degree of involvement differs according to their position with the Respondent.

[108] It appears that Mr. Radford was Director of Operations at CN at the time of the events. It seems that Mr. Nur sent him a message saying that he had a hangover following the evening of June 30, 2015, and that he would not show up for work. M. Radford would have been involved in the investigation, would have spoken to a number of CN employees regarding M. Nur's conduct, would have meet the latter with M. Verbong to discuss the incidents, etc.

[109] Ms. Poburan was a senior human resources manager for Western Canada at CN at the time of the events. She would have been involved in the investigation conducted by Mr. Verbong leading to the Complainant's dismissal. She also attended the meeting with Mr. Ryhorchuk, General Manager, Western Canada, at CN to discuss the results of the investigation with Mr. Nur. She will also testify on the conduct of the meeting.

[110] Mr. Ryhorchuck, as mentioned previously, was the General Manager, Western Canada, at CN at the time of the events. He participated in the meeting with Mr. Nur and Ms. Poburan to discuss the results of the investigation. He will also testify on the conduct

of the meeting. He also made the decision to dismiss the Complainant. Mr. Nur also sent Mr. Ryhorchuk an email on July 13, 2015, explaining that he was going to seek help and requesting an opportunity to regain his job.

[111] Jayson Verbong was a human resources manager at CN at the time of the events. He conducted the investigation following the 2015 events. In particular, he will testify on the investigation and its conduct, content, conclusions and recommendations. It also seems that Mr. Nur communicated with Mr. Verbong and left him a message after their meeting to acknowledge his alcohol dependence.

[112] Finally, Ms. Morrison was also a human resources manager at the time of the events. Mr. Nur communicated with Ms. Morrison following his dismissal, particularly by email on July 9, 2015. In this email, Mr. Nur would have acknowledged his alcohol dependence. Ms. Morrison would also have taken steps to extend his access to employee assistance services.

[113] The Tribunal notes that in matters of disclosure, its role is not to evaluate the evidence of record. It is at the hearing, based on the evidence filed, whether testimonial or documentary, that the Tribunal can arrive at conclusions of fact. In a request for disclosure, the Tribunal must determine whether the documents are potentially relevant to the dispute. Does a rational connection exist between the documents requested and a fact, a question or relief? In the Tribunal's opinion, the answer is yes.

[114] The Commission is seeking an order for CN's human resources personnel to receive training on human rights legislation and the duty to accommodate. As explained previously, it is certainly reasonable to expect that a company's policies and procedures in matters related to human rights, discrimination, accommodation and harassment comply with the relevant legislation. These policies and procedures are, in some way, the vehicles through which a company incorporates the concepts, notions, rights and obligations arising from the legislation.

[115] This being said, it appears obvious that these five individuals were involved, each in their own way and to different degrees, in the investigation, its process, the decision-

making or the events following the dismissal. At the time of the events, all the individuals were part of the human resources or management personnel at CN.

[116] It can be expected that these persons, when they must manage the type of events leading to the complaint, apply certain corporate policies and procedures including, in particular, the Policy to Prevent Workplace Alcohol and Drugs Problems, the harassment policies, the policies on accommodation of persons with disabilities, or the policies on human rights/anti-discrimination. The company's policies and procedures exist, in particular, to guide the personnel in the management of different situations.

[117] Is an investigation necessary? How will the investigation be conducted? What types of conclusions and recommendations can be made? What is the duty to accommodate? How must an employee be accommodated? What are the penalties if someone discriminates against another person by making inappropriate remarks? What is discrimination? What are each person's rights and obligations in connection with human rights? What are harassment and sexual harassment? What are the penalties if there is harassment?

[118] These questions are not limitative and are not intended to circumscribe or broaden the dispute. Rather, The Tribunal's observations are to the effect that if CN has developed, adopted and applied policies and procedures, whether on alcohol and drugs, harassment accommodation, human rights and discrimination in general, it seems clear that its personnel must be aware of their existence. And if an employee applies policies and procedures, it is not entirely unreasonable to expect that this person, in some manner, has been trained on these policies and procedures and on how to apply them in a given situation.

[119] For these reasons, the Tribunal orders CN to disclose the training records of David Radford, Donna Poburan, Doug Ryhorchuk, Jayson Verbong and Mary Jane Morrison at the time of the 2015 events concerning the policies and procedures in matters related to workplace alcohol and drugs, harassment, human rights/anti-discrimination and accommodation of persons with disabilities, which it has in its possession.

E. Emails, memos, notes, minutes of meetings or any other forms of written communications

[120] The Commission is asking the Tribunal to order CN to disclose all emails, memos, notes, minutes of meetings or any other forms of written communications of which David Radford, Donna Poburan, Doug Ryhorchuk, Jayson Verbong, Mary Jane Morrison, Ken Wilson, Matthew Smith, Natalie Mark, Silvia Michaud, Robbie Kloster, Braiden Pelican and Christine Mitchell are the authors or recipients and which concern Mr. Nur, from June 30, 2015 to date.

[121] It argues that these documents have a rational connection to a fact, issue or form of relief. These individuals will be called as witnesses by CN and will testify, in particular, on their observations and their involvement in connection with the events that are the basis of Mr. Nur's complaint, including the investigation and the dismissal.

[122] The Commission alleges that these documents should be disclosed, because they will allow it and the Complainant to prepare for cross-examination of these individuals. This will allow them to present their case fully and amply.

[123] CN states that it has transmitted all the potentially relevant documents in connection with this request of the Commission. This being said, the Commission finds that too few internal communications within the company, between Human Resources and management concerning Mr. Nur, have been disclosed.

[124] It formally requests that CN write to the Tribunal and to the parties that all the documents that can be disclosed have been disclosed, or that these documents simply do not exist, or finally, that they exist but are covered by solicitor-client privilege.

[125] The Respondent argues that the Commission's request is unreasonable and unfounded. According to the Respondent, this request has already been addressed by the Tribunal more than once.

[126] In the Commission's motion for disclosure of September 2017, leading to the Tribunal's decision dated June 8, 2018, it requested an order seeking to obtain all CN's

emails referring to Mr. Nur, from June 30, 2015 to date (see para. 1(d) of the Commission's representations, drafted by Mr. John Unrau, dated September 27, 2017).

[127] The Respondent, in its reply, had stated that it had disclosed all the documents potentially relevant to this request and that those that had not been transmitted were protected by solicitor-client privilege. The Commission had not considered it necessary, in its response, to elaborate further on this request.

[128] Therefore, in its decision of June 8, 2018, the Tribunal noted that the Respondent had sent the potentially relevant documents following the Commission's request and that it was unnecessary for the Tribunal to order a disclosure that had been completed.

[129] On July 23, 2018, the Commission, now represented by Ms. Sasha Hart, sent correspondence to CN, particularly in order to request again that it disclose all the emails or communications in its possession concerning Mr. Nur, since June 30, 2015. Although the Commission acknowledged that emails had been disclosed to it, it stated the fact that there seemed to be a lack of internal communications or communications between CN's human resources employees and management. The Commission requested that, if this type of emails exists, they must be disclosed. It also requested that all the meeting notes pertaining to the situation regarding Mr. Nur since June 30, 2015 be disclosed as well. Finally, it requested that the communications between CN employees, including management personnel, and Shepell concerning Mr. Nur since June 30, 2015, be disclosed.

[130] This subject was discussed during a conference call on July 24, 2018. The Tribunal invited the parties to discuss the situation between them and see if it was possible to agree. The parties had to provide the Tribunal with a follow-up of their discussion during the next conference call on September 7, 2018. During this conference, Ms. Hart mentioned that the Commission was not pursuing its request for disclosure previously sent to CN on July 23, 2018.

[131] This being said, in correspondence dated October 24, 2018, the Commission made another attempt and again asked the Respondent to disclose all the emails, memos, notes, minutes of meeting or any other forms of written communications of which David

Radford, Donna Poburan, Doug Ryhorchuk, Jayson Verbong, Mary Jane Morrison, Ken Wilson, Matthew Smith, Natalie Mark, Silvia Michaud, Robbie Kloster, Braiden Pelican and Christine Mitchell were the authors or recipients concerning Mr. Nur, from June 30, 2015 to date.

[132] Although formulated differently, it seems that the request of July 23, 2018 and the request of October 24, 2018 seek, to some extent, to obtain the same documents. In the request of July 23, 2018, the Commission requested all emails or internal communications between CN's employees or its management. The Commission does not detail, apart from the emails, the specific forms of communications it is seeking. The request of October 24, 2018 is more specific: the Commission refers to memos, minutes of meeting, notes, emails or any other forms of communications. It also refers to very specific individuals.

[133] At first glance, we might think that the requests are different and do not concern the same forms of communications. The request of July 23, 2018, is broad and less specific. However, it also concerns all internal communications between CN's employees or its management. In the request of October 24, 2018, the forms of communications sought are detailed. This being said, the Commission reiterates that it is seeking all other forms of communication.

[134] Despite the fact that specific persons are concerned, the persons who are named by the Commission (David Radford, Donna Poburan, Doug Ryhorchuk, Jayson Verbong, Mary Jane Morrison, Ken Wilson, Matthew Smith, Silvia Michaud, Robbie Kloster, Braiden Pelican), except for Natalie Mark and Christine Mitchell, were all employees of the Respondent at the time of the events. Ms. Mark and Ms. Mitchell were employees of Canad Inns Playmaker's Lounge at the time of the events.

[135] Consequently, when the Commission, on July 23, 2018, requested the emails and all internal communications between CN's employees or its management, the individuals specifically named in the correspondence of October 24, 2018 were necessarily concerned. These persons were all CN employees and some of them were also management personnel.

[136] The addition of Ms. Mark and Ms. Mitchell to the request of October 24, 2018, does not substantially change the request. We can easily imagine that the Commission is seeking correspondence CN's employees or management might have had with Ms. Mark or Ms. Mitchell. Thus, this is necessarily included in the general request for emails and all forms of correspondence of CN's employees or management, whether in the request of July 23 or of October 24, 2018. It would be surprising if the Commission asked the Respondent to disclose emails or any other forms of communications Ms. Mark and Ms. Mitchell might have had between them, which the Respondent surely does not have in its possession.

[137] In its reply, the Commission alleges that its request is different because it does not only concern emails and, moreover, it concerns very specific persons. With all due respect, the request of July 23, 2018 is extremely broad and concerns, on the one hand, the email of CN's employees or management, but also all other forms of communications of CN's employees or management. It seems that the request of July 23 covers that of October 24, 2018. This being said, and if the Commission intended to refer to other documents, the Respondent responded specifically, on November 23, 2018, to the Commission's request, indicating that it had disclosed all emails, memos, notes, minutes and other forms of written communications concerning Mr. Nur that are potentially relevant to the dispute.

[138] The Tribunal reminds that it is not enough to raise doubts regarding another party's disclosure to be granted a disclosure order. It is not enough to say that an insufficiency seems to exist in the documents transmitted by the opposing parties. Nor is it enough to allege that, considering that CN is a large and sophisticated corporation, there is reason to believe that it necessarily operates by internal communications and that, consequently, there necessarily would have to be more of this type of communications in its disclosure.

[139] It is unnecessary to reiterate that there is a presumption of good faith (see *Valenti v. CPR,* 2017 CHRT 25, para. 26 (table)). Especially when the submissions come from a solicitor, a member of a bar and an officer of the court, whose profession is governed by a code of ethics, this person is subject to high standards as regards responsibilities and obligations, which include integrity, honesty and responsible conduct, to name only a few.

[140] The Respondent, through its legal representatives, has clearly stated that it has disclosed all emails, memos, notes, minutes or any other forms of communications concerning Mr. Nur. Nowhere in the Commission's representations or in the evidence filed in support of its motion can the Tribunal find any basis for calling this statement into question.

[141] On these grounds, the Tribunal is satisfied that the Respondent has met its disclosure obligation and the Commission's request is dismissed. The Tribunal will not order the Respondent to confirm in writing to the Tribunal and to the parties that a diligent search of these documents was conducted, that all the documents that could be produced have been produced, and that the documents that have not been produced have not been produced due to their non-existence or because it claims solicitor-client privilege, in which case these documents must be detailed on the list of privileged documents (Schedule B).

F. Creation and disclosure of a detailed list of documents for which solicitor-client privilege is claimed (Schedule B)

[142] The Commission requests the Tribunal to order the Respondent to compile and disclose a detailed list of the documents for which it claims solicitor-client privilege (Schedule B) and, more specifically, that CN provide more details on its list of identified documents *CNPWV2 – Communications and copies of communications between solicitor and client as contained on counsel's correspondence file*. The Commission requests that the following details be provided: the date, the authors, the recipients, the title and a brief explanation of the reasons why each document is protected by solicitor-client privilege.

[143] Following the conference call between the Tribunal and the parties on January 14, 2019, the Respondent raised the issue, on the first opportunity, that a misunderstanding had slipped into the representations of the parties, more specifically regarding the involvement of a law firm, Filmore Riley LLP, at the time of the events. The Tribunal invited the parties to discuss the situation and clarify it to the Tribunal, if necessary. Following discussions between the parties and without the Tribunal's involvement in said discussions, the Commission sent correspondence to withdraw para. 14 from its reply,

filed on January 4, 2019. Since this paragraph has been withdrawn by the Commission, the Tribunal will ignore its contents in this decision.

[144] The Commission argues that CN's description of the documents protected by solicitor-client privilege, which is referenced in its Schedule B "Communications and copies of communications between solicitor and client", is too broad. This description could potentially include communications which should not be protected by this privilege. Considering that the description is broad and that it does not contain enough details, it is not possible for it and the Complainant to evaluate the possibility of contesting the privilege claimed on these documents.

[145] More specifically, the Commission alleges that under Rule 6(1)(e) of the Rules, a party is under the obligation to provide enough information to allow the other parties to understand the reasons why a document is not disclosed. According to the Commission, a party must provide at least a brief description of each document and a brief explanation of the reasons leading to a privilege being claimed. A mere mention that a document is protected by a privilege would not be sufficient. The Commission relies, in particular, on the Tribunal's decision in *Hughes v. Transport Canada*, 2012 CHRT 26 (*Hughes*).

[146] It adds that in *Hughes,* the Tribunal ordered the respondent to produce the documents or to file a detailed affidavit indicating, for each document, a valid reason proving a confidentiality privilege. In this same decision, the Tribunal had to consider whether the description of the documents, on its face, is enough to enable the other parties to make the decision whether or not to contest the privilege claimed.

[147] The Commission argues that the Tribunal has already ordered parties to detail their lists of documents (see, in particular, *Syndicat des communications de Radio-Canada v. Canadian Broadcasting Corporation*, 2017 CHRT 5, and *Chief Stan Louttit et al v. Attorney General of Canada*, 2013 CHRT 3). It also bases its position on the decision of the Federal Court of Canada, Trial Division, in *Poitras v. Twinn*, 2001 FCTD 456, which determined that the Crown's claim of privileges to different documents was too broad and vague.

[148] The Respondent opposes the Commission's request and also bases its position on the *Hughes* decision to support its arguments. Moreover, it considers that the Commission

is intruding on communications CN considered protected by solicitor-client privilege, a fundamental principle of justice. It adds that solicitor-client privilege allows a client to discuss candidly with its solicitor in complete confidence, knowing that these communications are protected, which constitutes a substantive right central to the effective functioning of the justice system. The solicitor-client privilege must be practically absolute and the expectation of privacy is high. The Respondent refers to two Supreme Court of Canada decisions that reiterate these principles, namely *Solosky v. The Queen*, [1980] 1 SCR 821 (*Solosky*), and *Lavallee, Rackel & Heintz v. Canada (Attorney General); White, Ottenheimer & Baker v. Canada (Attorney General); R. v. Fink*, [2002] 3 SCR 209.

[149] Both CN and the Commission base their positions on the *Solosky* decision, which sets out the three criteria that must be met for a communication to be protected by solicitor-client privilege: (i) a communication between a solicitor and his client; (ii) made during the course of seeking or giving legal advice; and (iii) that the parties intended to be confidential.

[150] In its representations, the Respondent's representatives, the firm Dentons Canada LLP (Dentons), explains that their legal services were retained by CN on December 14, 2016, after a complaint was referred to the Tribunal for inquiry. This assertion is supported by a sworn statement by Ms. Patricia Armstrong, legal assistant at Dentons, dated December 19, 2018. Consequently, CN considers that the documents described in its Schedule B necessarily fall into the category of documents protected by solicitor-client privilege: the communications are between Dentons and CN, which involves a legal consultation or opinion that is intended to be confidential.

[151] The Respondent adds that in its correspondence of November 23, 2018, in response to the Commission's request for disclosure of October 24, 2018, it explained that the communications referenced in Schedule B and numbered CNPVR2 refer to the communications between CN and Dentons. These are communications by CN, which is consulting the Dentons firm for legal opinions in connection with the Tribunal's present case.

[152] In its reply, the Commission specifies that it is not requesting that CN produce a list of each communication that involves a legal opinion and that would have been made after the case was referred to the Tribunal. It acknowledges that the claim of solicitor-client privilege to such communications is clearly admissible. It simply requests that the range of dates of these communications be indicated on the list and that these documents be clearly identified as legal opinions concerning the Tribunal's case.

[153] The Commission considers that the submissions made previously by the Respondent and the deficiencies present in the disclosure of internal communications at the time of the events suggest that the Respondent claims solicitor-client privilege to documents that were generated at the time of the events in 2015. It therefore requests enough details in order to evaluate whether the privilege should be contested for certain documents.

[154] The Tribunal is well aware of the importance of solicitor-client privilege in our justice system. It is unnecessary to recall that this substantive right is fundamental and almost absolute. This being said, and as was recognized, for example, by the Federal Court in *Poitras*, it is possible to describe sufficiently a document for which a privilege is claimed without eradicating the privilege itself. The mere indication of a date, a name, a title, and the initials of the author and the recipients, generally does not eradicate the claim of solicitor-client privilege, unless special circumstances dictate otherwise.

[155] Considering the circumstances, the Tribunal agrees with CN and finds that Schedule B, as described, is sufficient in itself.

[156] CN, in its correspondence of November 23, 2018, in response to the Commission's request that a more detailed list of documents covered by solicitor-client privilege (Schedule B) be transmitted, mentions that the document entitled *CNPVR2 – Communications and copies of communications between solicitor and client as contained on counsel's correspondence file*, concerns communications between Dentons and CN. It is important to mention that the affidavit filed in support of CN's submissions in this motion states that CN retained Dentons on December 14, 2016, after the complaint was referred

to the Tribunal, for the firm to represent it in the Tribunal's case (see the affidavit of Ms. Patricia Armstrong, para. 2, dated December 19, 2018).

[157] Perhaps the Commission had doubts considering the fact that the description of the CNPVR2 document was relatively broad and that another law firm, Filmore Riley LL, appeared in different documents. Following the intervention of CN's solicitors during the conference call of January 14, 2019, and following the Commission's correspondence dated January 16, 2019 requesting that para. 14 of its response be expunged, the Tribunal finds that no doubt remains.

[158] The Dentons law firm was retained by CN on December 14, 2016, after the complaint was referred to the Tribunal on June 16, 2016, specifically to represent it in this dispute. There is no doubt that any correspondence between Dentons and CN constitute (i) communications between a solicitor and his client; (ii) made during the course of seeking or giving legal advice; and (iii) that the parties intended to be confidential. In the circumstances, it is unnecessary for the list of documents for which CN claims solicitor-client privilege (Schedule B) to be particularly detailed.

[159] The Tribunal's remarks are not to the effect that a list of documents for which a party claims a privilege must never contain a minimum amount of detail. The Commission, in its list, indeed includes a minimum amount of detail without, it seems, thereby considering that this constitutes an infringement of its privilege. This will depend on the circumstances.

[160] The Tribunal adds that the presence of a solicitor in correspondence does not automatically attract solicitor-client privilege. A solicitor who is included in correspondence who does not act as a solicitor giving a legal opinion is not necessarily privileged.

[161] But in the circumstances, the Tribunal finds that the situation is clear, that the Respondent's solicitors were unequivocal in their letter of November 23, 2018, in their submissions and in Ms. Armstrong's affidavit, and the Tribunal holds that the document CNPVR2 – *Communications and copies of communications between solicitor and client as contained on counsel's correspondence file* does not necessitate more details.

[162] For these reasons, the Tribunal dismisses the Commission's request.

G. Written confirmation of the searches conducted, disclosure or non-existence of documents and privilege claimed

[163] In its representations, the Commission requested several times that CN confirm to the Tribunal and to the parties that a diligent search of the documents was conducted, that all the documents that could be produced have been produced, and that the documents that have not been produced have not been produced due to their non-existence or because CN claims solicitor-client privilege, in which case these documents must be detailed in its list of privileged documents (Schedule B).

[164] The Commission does this in para. 44 of its representations concerning this motion regarding the emails, memos, notes, minutes of meeting or any other forms of written communications. It also clearly makes this request in the orders it seeks, in para. 62 c), of its representations. It maintains its request in its response, in Division C, paras. 19 to 23.

[165] The Commission submits that even though the Rules of the Tribunal do not specify that a party must confirm that it has conducted a diligent search of the documents potentially relevant to the dispute, it is of the opinion that the Respondent and its solicitors have the obligation to ensure that diligent searches were conducted, that the potentially relevant documents have been disclosed and that Schedule B is detailed enough. It adds that it simply requests that CN and its solicitors confirm that actions they have already taken as obligations have indeed been taken.

[166] It specifies that it is seeking this order because the Respondent's disclosure seems deficient on certain aspects and due to the lack of detail of its Schedule B. It considers that the Tribunal holds broad authority under the *CHRA,* particularly in light of ss. 50(1), (2), (3) and 48.9(1), (2) *CHRA*.

[167] Finally, the Commission relies on *Mississaugas of New Credit First Nation v. Attorney General of Canada* [*Mississaugas*], 2013 CHRT 32, in that my colleague Edward P. Lustig, Member of the Tribunal, has already ordered a respondent to conduct diligent

searches and to write to the Tribunal and to the other parties regarding the documents that can and cannot be found and describe the searches that were conducted.

[168] The Respondent opposes the Commission's request. It considers that Rule 6(1)(d) and (e) of the Rules provides for the conditions of disclosure of potentially relevant documents. No other rule provides that a party must produce a letter to the other parties in order to confirm any questions related to the disclosure.

[169] The Respondent considers that it has met its obligation according to the rules, has provided its lists of documents and is not required to write to the Tribunal or to the other parties that a diligent search has been conducted, that it has produced all documents arguably relevant to the dispute, and that those that have not been produced do not exist or are privileged. It concludes by mentioning that disclosure does not extend to the creation of documents.

[170] The Tribunal hears the Respondent. However, it disagrees with some of its arguments. The Rules of Procedure must be interpreted broadly, in order to favour the purposes set out in Rule 1(1), namely the full and ample opportunity to be heard, that arguments and evidence be disclosed and presented in a timely and efficient manner, and that proceedings be held as informally and expeditiously as possible (see Rule 1(1) of the Rules).

[171] The Rules of the Tribunal are not limitative of the powers the Tribunal may hold during its inquiry and the orders it may issue. It is the *CHRA*, its enabling statute, which determines the powers of the Tribunal, and not the Rules. The Rules are established because the *CHRA* provides that the Chairperson of the Tribunal may establish rules, in application of ss. 48.9(2) *CHRA*. The Rules do not supplant the powers of the Tribunal set out in its enabling statute. Added to this, obviously, are the powers that the Tribunal may have arising from the common law itself.

[172] This being said, the Tribunal finds that it is unnecessary to engage in a major interpretation of ss. 48.9(2) *CHRA* and the scope of the Tribunal's powers to decide on this request.

[173] Must the Tribunal order the Respondent to confirm specifically that it has conducted a diligent search? The Tribunal finds that it is unnecessary to order the Respondent to confirm that a diligent search of the documents was done.

[174] The Tribunal rules, in this decision, that CN must disclose certain documents that are arguably relevant to the issue. According to the orders, CN will have to conduct a search and disclose what it has in its possession. Its list of documents will also have to be amended. If documents are not in its possession or do not exist, there simply will be no disclosure. The Respondent can be expected to inform the parties that certain documents are not in its possession or do not exist. It can also be expected that if certain documents are privileged, the Respondent will amend its list of privileged documents and inform the other parties.

[175] Moreover, the Tribunal ruled that the list of documents for which CN claims solicitor-client privilege is detailed enough in the circumstances. The Tribunal also dismissed the Commission's request regarding the emails, memos, notes, minutes of meeting or any other forms of written communications, finding that the Respondent has met its disclosure obligation. As such, the doubts raised by the Commission regarding the insufficiency of the list of privileged documents (Schedule B) and the insufficiency of the emails, memos, notes, minutes of meeting or any other forms of written communications become moot.

[176] The Tribunal considers that nothing in the evidence supports the idea that CN has not conducted diligent searches to date in relation to disclosure of documents arguably relevant to the dispute that it has in its possession. In its correspondence of November 23, 2018, CN is also fairly explicit regarding certain requests by the Commission and clearly states that it has transmitted everything arguably relevant that it has in its possession. And the fact that it refuses to transmit some documents requested by the other parties because it opposes this, based, in particular, on irrelevance or lateness, does not necessarily lead to the conclusion that it is not or has not been diligent in its searches.

[177] The Tribunal adds that differences exist between this situation and that in *Mississaugas,* particularly the fact that the respondent had stated in a letter that it was going to produce the documents requested by the other parties and that, several months

later, this disclosure had still not been made. Nor did the respondent contest the relevance of the documents requested, but claimed a privilege for certain documents. It also seems that the disclosure process took a lot of time in that case and that the respondent did not comply with its disclosure obligations. Member Lustig also wrote that he wanted to avoid ending up in the same situation as in *Grand Chief Stan Louttit et al. v. AGC* [*Louttit*], 2013 CHRT 27, a case in which the respondent did not comply with the Tribunal's disclosure orders.

[178] The Tribunal does not consider that it is in a situation similar to that in the *Mississaugas* and *Louttit* decisions. The Respondent has cooperated throughout the proceedings, answered the disclosure questions of the other parties, responded promptly to the Tribunal's requests for particulars and complied with the Tribunal's orders to date.

[179] Thus, it is inappropriate to order the Respondent to confirm that a diligent search of the documents has been conducted, that all the documents that could be produced have been produced and that the documents that have not been produced have not been produced due to their non-existence or because it claims solicitor-client privilege, in which case these documents must be detailed in its list of privileged documents (Schedule B).

[180] For these reasons, the Tribunal dismisses the Commission's request.

IV. Mr. Nur's motion regarding search and disclosure of the contact information of a potential witness

[181] During the conference call of November 26, 2018, Mr. Nur notified the Tribunal and the other parties that he intended to call two witnesses for the hearing. He requested CN's assistance to identify one of his witnesses and provide him with this person's contact information. CN immediately opposed this request.

[182] On December 13, 2018, the Tribunal informed the parties that Mr. Nur's request will have to be addressed by way of a motion. In this correspondence, the Tribunal requested the parties to address three questions, in particular, namely the jurisdiction of the Tribunal to order the Respondent to conduct an internal search in order to identify the witness in question (if it is possible to identify the witness), the relevance of this person's testimony, and the reasons why this witness was not identified previously.

[183] A per the Tribunal's instructions, on December 19, 2018, Mr. Nur filed a motion with the Tribunal for CN to search for and disclose the contact information of this individual, whose first name is Neil. He intended to call this individual as a witness at the hearing. The Commission submitted its submissions on December 28, 2018, and supported Mr. Nur's request. The Respondent responded to the submissions of the other parties on January 4, 2018 and opposed the request. Finally, Mr. Nur submitted his reply on January 9, 2018. The Tribunal will address all these issues, the positions of the parties, and its analysis and decision, in a single division (Division IV).

[184] In his representations. Mr. Nur mentions that he now understands better the questions in issue in his complaint and the evidence that he must put forward to support his arguments. He thus apologizes for his lateness in filing his request.

[185] He explains that he intends to call Neil as a witness to testify regarding an event that occurred in November 2014, at Canad Inns Health Science Center in Winnipeg. This incident involved Chris Straight, a fellow driver, and himself.

[186] He adds that Neil will confirm his alcohol dependence when they were both drivers. The relevance of his testimony also concerns the fact that CN management has discretion in the manner in which disciplinary actions are applied and to whom they are applied. He mentions that Neil will also testify regarding a video recording that was shown at the CN campus, in Winnipeg, following an incident involving alcohol and violence, as well as CN's wish to confirm that no racial discrimination existed. He indicates that as far as he knows, the last place where Neil worked as a driver was between Smith and Peace River, Alberta, around May to July 2015.

[187] The Commission considers that the Tribunal has jurisdiction to order CN to search for and disclose the contact information of this potential witness and considers that the Tribunal should exercise its discretion to this effect.

[188] The Commission considers that the Tribunal's jurisdiction to order CN to search for and disclose the contact information of the potential witness arises from the discretion conferred on it by its enabling statute, the *CHRA*, and the common law. It recalls that the Tribunal is the master of its own procedure and holds broad discretion in the determination

of its procedures (it refers, in particular, to the decision *Prassad v. Canada (Minister of Employment and Immigration)*, [1989] 1 SCR 560).

[189] The Commission adds that ss. 50(2) *CHRA* also provides that the Panel of the Tribunal conducting the inquiry into the complaint may decide on all questions of law or fact referred to the Tribunal and that its subsection 50(1) provides that each party must have the full and ample opportunity to present evidence and make representations. Paragraph 48.9(1) provides that proceedings before the Tribunal must be expeditious and informal, as the requirements of natural justice allow.

[190] The Commission considers that the vast discretion of Tribunal regarding its procedures is further recognized in para. 48.9(2) *CHRA*. This paragraph allows the Tribunal to establish its rules of practice, including the production of documents, found in Rule 6 of the Rules of the Tribunal. It refers more specifically to Rule 6(1)(d) and (4), which requires the parties to disclose a copy of the documents in their possession that relate to a fact, issue or form or relief for which no privilege is claimed.

[191] The Commission also bases its position on two decisions, *Malenfant v. Videotron S.E.N.C., 2017 CHRT 11* [*Malenfant*] and *Jones v. Munsee-Delaware Nation*, 2018 CHRT 3 [*Jones*], in which the Tribunal has already ordered the disclosure of contact information of potential witnesses. It adds that in these decisions, the Tribunal specified that the contact information was relevant to the facts and issues raised in these complaints and that their disclosure was important to allow the plaintiff and the Commission to present their evidence. The Commission considers that the same comments apply in Mr. Nur's complaint.

[192] The Commission continues by stating that Mr. Nur's request is potentially relevant and necessary so that he can benefit from the full and ample opportunity to present his case and reiterates the key principles in matters related to disclosure, recently summarized in *Turner v. Canada Border Services Agency*, 2018 CHRT 9. It states that the analysis of arguable relevance is articulated around the complaint, the Statement of Particulars of each party and the theory of the case contained in their statements (it refers, in particular, to *CBC*, *supra*).

[193] The Commission mentions that this individual's testimony is arguably relevant to the issue. It states that the complaint concerns, among other things, the fact that Mr. Nur was dismissed on the basis of disability, namely his alcohol dependence. It considers that the existence of this disability is contested and that the Tribunal will have to determine whether Mr. Nur had a disability. The Tribunal should also decide whether CN was or should have been aware of the existence of this disability or whether CN perceived that Mr. Nur had a disability at the time of the events. It adds that Mr. Nur intends to have Neil testify about the difficulties he experienced in relation to alcohol at the time of the events leading to the complaint.

[194] The Commission adds that Neil's testimony is arguably relevant in order to determine whether Mr. Nur was treated adversely on the basis of his race or national or ethnic origin, in comparison to other individuals who might have infringed CN's policies in relation to alcohol or harassment. It specifies that Mr. Nur said that he wanted to have this individual testify about an event concerning another employee whose first name is Chris, who allegedly acted violently with him when he was intoxicated and whose employment CN decided not to terminate. The Commission's Statement of Particulars also provides that Mr. Nur will testify about this incident and the differential treatment he received in the application of the policy in connection with alcohol, and that this constitutes circumstantial evidence that may lead to a determination by the Tribunal of the existence of a subtle scent of discrimination.

[195] The Commission mentions that Mr. Nur's request does not cause any significant harm to the Respondent. It acknowledges that the Tribunal's case law does not concern the creation of documents, but specifies that CN is not asked to create a document. Instead it is asked to provide some documents in its possession that would contain this individual's latest known contact information. This is no different from the other requests in which a party asks another party to search in its internal databases for documents that correspond to a given description.

[196] The Commission states that CN has previously provided information on the operation of its unified central system of its employees in North America, which contains data on its employees. Searches can be run in this system based, in particular, on an

individual's name and workplace. Consequently, it considers that the search CN should conduct, according to the information provided by Mr. Nur, will be based on the name of the employee, whose first name is Neil, who was a driver, either at Smith or Peace River in Alberta, or at Winnipeg in Manitoba, the place where he received training.

[197] The Commission considers that, contrary to the Tribunal's order of June 8, 2018, in this case, such a search to identify this individual is clearly less onerous and long. The search concerns an individual's name, his job title and the last known places where he worked, and the disclosure of a document containing his last known contact information.

[198] The Commission states that Mr. Nur mentioned his intention to call this individual as a witness on November 26, 2018, approximately 3 months before the hearing and that, although he perhaps should have notified the parties earlier, the testimony this individual could provide supplants the harm caused to the Respondent. The Commission adds that Mr. Nur is not represented and that Mr. Nur now seems to have a better understanding of the issues and the evidence required in his case. These factors work in favour of more flexibility in his regard, while accounting for the absence of harm that this disclosure would cause CN. For its part, the Respondent disclosed very recently, on December 14, 2018, summaries of more detailed testimony following a request from the Commission.

[199] Finally, the Commission mentions that Mr. Nur does not intend to call this witness to testify about new facts. It reiterates that this witness will testify about facts found in its Statement of Particulars. Therefore, CN has already been notified of these facts a long time ago. Consequently, this request for disclosure causes no significant harm to the Respondent.

[200] Regarding CN's concerns about the confidentiality and privacy of this individual and his contact information, the Commission bases again its position on *Malenfant* and submits that this type of concern does not supplant the public interest in ensuring that all the evidence relevant to the dispute is disclosed. It is possible for CN to request a confidentiality order or ask that other measures be taken to protect this contact information.

[201] The Respondent opposes Mr. Nur's request. It considers that this potential witness has no central relevance to the issue. It adds that despite the fact that the Complainant considers this witness to be a close friend, he does not know his family name or any contact information in order to reach him and does not know if this individual is still employed by CN.

[202] The Respondent reiterated essentially the same principles in matters of disclosure as the Commission in its representations. It adds that the Tribunal will not order a request for disclosure if this requires a party to play an active role in the preparation of the opposing party. It submits that the same type of question has already been settled by the Tribunal in *Day v. Canada (National Defence)*, 2002 CanLII 61833 [*Day*].

[203] Mr. Nur's request seeking to order CN to search in order to identify the witness would oblige it to play an active role in the preparation of his and the Commission's case. Moreover, CN alleges that this witness was not involved in the events between June 30 and July 9, 2015, and would not have been involved in an event dating from 2014 when Mr. Nur allegedly had an altercation with a co-worker. CN also submits that this potential witness cannot give an opinion on Mr. Nur's alleged disability since he is not qualified to give an opinion. It mentions that Mr. Nur has not explained the steps he took to trace this individual and has not justified the reasons why this witness was not identified earlier.

[204] CN bases its position on the Tribunal's Rules of Procedure, which does not expressly provide for the obligation for a party to play an active role in preparing the case of the opposing parties, and submits that it is up to Mr. Nur and the Commission to ensure they meet the burden of their case and present sufficient evidence.

[205] CN considers that it has the right, like any litigant, to enjoy its autonomy and decide whether or not it wishes to assist the Complainant. The Tribunal's role in matters of disclosure is one of supervision and does not extend to managing the relationship between the parties. As such, CN argues that the Complainant may make the request to it, but that it is up to CN to decide voluntarily whether it will lend assistance to the Complainant in searching for his witness. Ordering CN to assist Mr. Nur sweeps away its

right to autonomy and infringes the principles of procedural fairness by obliging it to incriminate itself.

[206] Mr. Nur, in his reply, explained that he took different steps to trace this individual, particularly by using Facebook and LinkedIn and also through two other persons who might have had information on him. This was in vain. He considers that it is not impossible for CN to assist him in his request, given that he has provided several details allowing him to be identified.

[207] This being said, this is not the first time that the undersigned has been in a similar situation. The Commission fittingly referred the Tribunal to two of its decisions, *Malenfant* and *Jones*, which were rendered by the undersigned. The Tribunal finds that although these decisions have similarities, they also involve some important and decisive factors that distinguish them from this instance.

[208] Without going into all the details, it is sufficient to explain that in *Malenfant*, the Commission and the plaintiff, Mr. Malenfant, wished to have access to the contact information of candidates who applied for the same competition as the plaintiff and who were, in particular, hired by the respondent. This contact information would allow them to call these candidates as witnesses to discuss their CVs, experience, interview, etc. It must be remembered that in the disclosure of the documents, Mr. Malenfant and the Commission received the CVs of these candidates. However, the respondent had redacted on its own initiative various information it considered private and confidential, particularly the individuals' contact information. Since the Tribunal had ruled that the testimony of these persons was potentially relevant, it did not order the Respondent to disclose these candidates' contact information, but rather to retransmit the candidates' CVs, without redacting them.

[209] This is where the distinction is major: the Commission and Mr. Malenfant had the CVs of these candidates in their possession, but in a redacted version. They had the occupational description of various candidates in front of them on paper (CV), and could scrutinize these CVs, compare them with Mr. Malenfant's CV, make inferences and draw certain conclusions. These individuals, although personally unknown, were occupationally

known and identifiable. Everyone knew that these individuals' contact information was present in the documents, but it was redacted. The Tribunal did not order the respondent to conduct a search to identify and trace these witnesses. The information sought was clearly existing and accessible.

[210] With *Jones*, the distinction is even more obvious. Mr. Jones wanted to call certain community members as witnesses but did not have the contact information of these persons in his possession. The respondent clearly stated that it possessed a list of community members with the contact information of several individuals sought by the plaintiff. It consented to transmit the requested information, but asked for guarantees regarding its confidentiality and use.

[211] In this instance, we are not in the same situation as in *Malenfant* and *Jones*. We are not in a situation where Mr. Nur or the Commission is in possession of the CV of the individual whose first name is Neil. The CV is a document that is a specific occupational profile of a clearly identified person and on which the contact information is evidently present. We are not in a situation where CN voluntarily admitted that it had the contact information of the individual whose first name is Neil on a list and consented to transmitting the contact information in exchange for certain guarantees.

[212] CN firmly opposes Mr. Nur's request. It did not voluntarily transmit information on this person. It did not communicate a document concerning this individual to the Commission or to Mr. Nur, for example his CV. Mr. Nur's request is more defined, more burdensome; it calls for actions to be taken so that a potential witness be identified and, if this witness is identified, that his last known contact information be transmitted.

[213] The Tribunal adds that although the Commission articulates part of its arguments around the fact that the Respondent is not asked to create a document, but to disclose any document in its possession that would contain the last known contact information of the individual in question, it requests, in its conclusions, that the Tribunal order CN to search for the individual identified by Mr. Nur and disclose his contact information. There seems to be an inconsistency in the submissions made and the conclusions sought.

[214] That being said, the issue seems relatively specific: does the Tribunal have jurisdiction to order CN to search for and disclose the contact information of the individual as described by Mr. Nur?

[215] The question is not whether the Tribunal must order CN to search for this individual and disclose any document in its possession in which his contact information is found.

[216] The Tribunal seems to understand the Commission's arguments in that this in fact involves finding an alternative, namely ordering the disclosure of a document containing the information sought and not the contact information itself. This would be consistent with the principles developed by the Tribunal in matters of disclosure, in that the disclosure must concern documents and not information or contact information. Is this not a way to get around the real issue? Can the Tribunal order a party to disclose the contact information of a potential witness? This is the perspective in which the Tribunal will address the question.

[217] Although the Respondent has also referred to the decision of Member Paul Groarke in *Day*, *supra*, who specifically expressed that, in his opinion, a party who requests disclosure of the contact information of potential witnesses goes beyond the scope of disclosure, I do not share my colleague's opinion on this subject, with all due respect.

[218] Instead, it is my opinion that the Tribunal has jurisdiction to order a party to conduct a search in order to identify such potential witness and to disclose his last known contact information, on the following grounds.

[219] First of all, it must be mentioned that the Rules of Procedure provide for the disclosure and production of documents, more specifically in Rule 6(1)(d) and (4) of the Rules. It is provided that:

> **6(1)** Within the time fixed by the Panel, each party shall serve and file a Statement of Particulars setting out,
>
> […]

> *d*) a list of all documents in the party's possession, for which no privilege is claimed, that relate to a fact, issue, or form of relief sought in the case, including those facts, issues and forms of relief identified by other parties under this rule;
>
> […]
>
> **6(4)** Where a party has identified a document under 6(1)(*d*), it shall provide a copy of the document to all other parties. It shall not file the document with the Registry.
>
> [Emphasis added]

[220] It is important to recall that the Rules of Procedure do not constitute the jurisdiction of the Tribunal. Nor do the Rules give rise to the powers of the Panel of the Tribunal regarding the inquiry into complaints.

[221] This is reiterated in the first division of the Rules "PURPOSE, INTERPRETATION", in Rule 1(6), which specifies that the Panel retains the jurisdiction to decide any matter of procedure not provided for by these Rules. Consequently, the Rules are not exhaustive or limitative. The Panel enjoys discretion to decide on questions of procedure that would not have been provided for. The Panel may even, on its own initiative, dispense with compliance with the Rules of Procedure, in application of Rule 1(4) of the Rules.

[222] Since the Rules do not constitute powers and jurisdiction, it is the Tribunal's enabling statute, the *CHRA*, which is the source of its jurisdiction. Added to this, quite obviously, are the rules of common law. As such, to determine whether the Tribunal has the power to order a party to search for a potential witness and disclose his last known contact information, the wording of the *CHRA* itself must be consulted.

[223] The *CHRA* provides, in its para. 48.9(2),

(2) The Chairperson may make rules of procedure governing the practice and procedure before the Tribunal, including, but not limited to, rules governing (a) the giving of notices to parties; (b) the addition of parties and interested persons to the proceedings; (c) the summoning of witnesses;	(2) Le président du Tribunal peut établir des règles de pratique régissant, notamment : a) l'envoi des avis aux parties; b) l'adjonction de parties ou d'intervenants à l'affaire; c) l'assignation des témoins; d) la production et la signification de documents; e) les enquêtes préalables;

(d) the production and service of documents; (e) discovery proceedings; (f) pre-hearing conferences; (g) the introduction of evidence; (h) time limits within which hearings must be held and decisions must be made; and (i) awards of interest.	f) les conférences préparatoires; g) la présentation des éléments de preuve; h) le délai d'audition et le délai pour rendre les décisions; i) l'adjudication des intérêts.

[224] In both the French and English versions, the legislator sought to give the Tribunal discretion in making its rules of practice by using the words "may" and "peut", as well as "including, but not limited to" and "notamment". Therefore, the list established by the legislator is not exhaustive, which suggests that the Tribunal may establish rules on other matters related to procedure.

[225] This being said, in subparagraph 48.9(2)(e) *CHRA*, the legislator specifically vested the Tribunal with the power to draw up rules in matters related to discovery proceedings. Discovery proceedings include, without limitation, examinations on discovery. It must be noted that the Tribunal has not provided specific rules in the matter. Nonetheless, this does not mean that it cannot exercise its powers and its discretion on this matter.

[226] The legislator gave the Tribunal broad discretion to create rules of practice, which are not limited by the list in para. 48.9(2) *CHRA*. As such, the Panel enjoys discretion to decide on an issue of procedure.

[227] Although the issue was different and concerned the joinder of a party, this interpretation of para. 48.9(2) *CHRA* and the legislator's intention in granting the Tribunal's powers in connection with its rules of practice has already been used by the Honourable Anne Mactavish in *Desormeaux v. Ottawa-Carleton Regional Transit*, 2002 CanLII 52584 (CHRT) at para. 8. A similar analysis has also been performed by the British Columbia Human Rights Tribunal in *Heffell v. Crescent Beach Veterinary Clinic and Andrews*, 2005 BCHRT 233.

[228] The type of information sought by Mr. Nur, namely the contact information of the person whose first name is Neil, for which he has provided several details allowing him to

be identified, is information that can be disclosed in the ordinary course of discovering proceedings, and more specifically during an examination for discovery.

[229] For example, Rule 240(b) of the *Federal Court Rules*, SOR/98-106, provides that:

> **Scope of examination**
>
> **240** A person being examined for discovery shall answer, to the best of the person's knowledge, information and belief, any question that
>
> **(a)** is relevant to any unadmitted allegation of fact in a pleading filed by the party being examined or by the examining party; or
>
> **(b)** concerns the name or address of any person, other than an expert witness, who might reasonably be expected to have knowledge relating to a matter in question in the action.
>
> [Emphasis added]

[230] Another example is the Supreme Court of British Columbia, in its *Supreme Court Civil Rules*, B.C. Reg. 168/2009, Rule 7-2 Examinations for discovery, para. 18, which provides that:

> **Scope of examination**
>
> (18)Unless the court otherwise orders, a person being examined for discovery
>
> (a) must answer any question within his or her knowledge or means of knowledge regarding any matter, not privileged, relating to a matter in question in the action, and
>
> (b) is compellable to give the names and addresses of all persons who reasonably might be expected to have knowledge relating to any matter in question in the action.
>
> [Emphasis added]

[231] Before these Courts, it is therefore possible, during an examination for discovery, to ask a witness to provide the names and addresses of any person who reasonably might be expected to have knowledge relating to any matter in question in the action. These rules are explicit in this regard.

[232] The Tribunal adds that it is imperative to bear in mind that the inquiry into the complaints must be conducted as informally and expeditiously as the requirements of natural justice and the rules of procedure allow (para. 48.9(1) *CHRA*). Each party has the right to have a full and ample opportunity to present its case in accordance with ss. 50(1) *CHRA*. Finally, the Panel must decide all questions of law or fact in the cases referred to it, in application of ss. 50(2) *CHRA*.

[233] Considering the broad provisions of the *CHRA*, the Tribunal finds that it indeed has the power to order the Respondent to search for the individual who worked for it and disclose his last known contact information, as applicable.

[234] Now, should the Tribunal order CN to do so?

[235] Mr. Nur expressed the wish to call this witness during the conference call of November 26, 2018. This is when he explained that he needed CN's assistance. On December 13, 2018, the Tribunal requested the parties to submit their submissions on this matter according to relatively strict deadlines in the filing of representations.

[236] Mr. Nur is not represented by counsel and must prepare his case on his own. The Tribunal must show flexibility and avoid excessive formalism as much as possible (para. 48.9(1) *CHRA*). The request was made approximately three months before the scheduled hearing, which is a relatively reasonable period. The time factor in itself is not particularly conclusive in the circumstances.

[237] This individual is called to testify on the facts that have been part of the Commission's Statement of Particulars since the start of the proceedings. This individual will testify, among other things, on the alleged event concerning an altercation between Mr. Nur and a co-worker whose first name is Chris, the involvement of alcohol, and a video recording that allegedly was given to Mr. Radford, who is also called as a witness at the hearing. There are also allegations to the effect the Mr. Radford mentioned that management has discretion in the application of its policies. All this is found in the Commission's Statement of Particulars. As such, if this witness whose first name is Neil has information on all these matters, this is potentially relevant to the dispute.

[238] Moreover, the Respondent has been aware of these facts for months because it is in possession of the Commission's Statement of Particulars and the information provided by Mr. Nur. Even the Tribunal referred to these events in its previous decision of June 8, 2018, and mentioned that if the Commission or the Complainant want to submit evidence on this incident at the hearing, by testimony, for example, it will be permissible for them to do so (see para. 44 of the decision of June 8, 2018).

[239] The Tribunal agrees with the Respondent on the fact that this individual cannot give his opinion on whether Mr. Nur's alleged disability exists. This witness is not an expert and cannot give his opinion on this matter. That being said, Mr. Nur is not a lawyer and, in his submissions of December 19, 2018, a different interpretation can be given when he writes that Neil will confirm his alcohol dependence at the time that they were drivers. Indeed, there is reason to believe that Mr. Nur was not referring to the fact that Neil will give his opinion on the existence of a disability, but will confirm the dependence in the sense that he could testify about events, observations, etc. in relation to Mr. Nur's alcohol consumption which, according to Mr. Nur, can support and prove the fact he had an alcohol dependence. From this perspective, his testimony is potentially relevant to the case.

[240] The Tribunal adds that the Respondent has made several submissions about its database holdings, which include centralized information about its employees. This database allows identification of the employees, particularly by name or by workplace. The Tribunal believes that the steps to be taken and the time necessary to accomplish them are not such that the probative value of this testimony and the evidence that could be presented does not outweigh their prejudicial effect on the Respondent and the proceedings. The Tribunal finds that this search will be relatively targeted and succinct and that it can be done without compromising the hearing dates.

[241] For all these reasons, the Tribunal orders the Respondent to search for a person whose first name is Neil, whom it employed as a driver in 2015, between Smith and Peace River, Alberta. He also participated in training at Canad Inn Health Sciences Centre in Winnipeg, in November 2014. If this individual is identified, the Tribunal orders the Respondent to send Mr. Nur this individual's full name and his last known contact

information. This individual's contact information must be given to Mr. Nur no later than February 5, 2019, 5 p.m., Alberta time. The Tribunal specifies that this contact information shall be disclosed only for the purposes of this case, and shall not be used for any other purpose, and shall not be published or distributed for any reason.

V. Orders

[242] For the reasons above, the Tribunal grants the Commission's motion in part, and hereby orders the Respondent to produce the following documents, by no later than February 8, 2019:

1. The Respondent's policies and procedures related to the accommodation of persons with disabilities, and in particular,

    a) the version of these instruments in effect in 2015; and
    b) the current version;

2. The Respondent's policies and procedures related to human rights or in respect of anti-discrimination, and in particular,

    a) the version of these instruments in effect in 2015; and
    b) the current version;

3. The version of the Respondent's harassment policies and related procedures that were in effect in 2015, provided that the 2015 version of these instruments differs from a 2012 version that has already been disclosed in the present inquiry;

4. The Respondent's training materials that were being used in 2015 at the Respondent's locations of operation in Edmonton, Alberta in respect of the Respondent's harassment policy;

5. The Respondent's training materials that were being used at the Respondent's locations of operation in Edmonton, Alberta, concerning policies and procedures in respect of human rights or anti-discrimination as well as in respect of the accommodation of persons with disabilities, and in particular,

    a) the version of these materials used in 2015;
    b) the version of these materials being used currently;

6. The training records, up to and including 2015, of David Radford, Donna Poburan, Doug Ryhorchuk, Jayson Verbong and Mary Jane Morrison, with respect to their participation in training related to the following policies and related procedures:

    a) Workplace Alcohol/Drug Policy

b) Accommodation Policy
c) Human Rights/Anti-discrimination Policy
d) Harassment Policy

[243] For the reasons above, the Tribunal grants Mr. Nur's motion and issues the following order:

1. The Respondent shall search its employee records or information holdings for an individual who falls within the following search parameters:

    a) First name "Neil";
    b) Employed by the Respondent as a conductor in 2015, in particular in May and July of 2015;
    c) Employed by the Respondent on routes between Smith and Peace River, Alberta;
    d) Participated in a training activity at the Canad Inn Health Sciences Center in Winnipeg, Manitoba in November, 2014;

2. In the event the Respondent is able to identify an individual pursuant to the search described in para. 1 above, the Respondent shall provide Mr. Nur, by no later than February 6, 2019, 5:00 pm local time (Alberta), the following information in relation to the individual:

    a) The individual's full name;
    b) The last known contact information of the individual (address and telephone number);

3. Disclosure of the information set out in para. 2 above is being ordered strictly for the purposes of the present inquiry, and in particular:

    a) The information shall not be used for any other purpose;
    b) The information shall not be published or distributed for any reason.

Signed by

Gabriel Gaudreault
Tribunal Member

Ottawa, Ontario
February 13, 2019

Canadian Human Rights Tribunal

Parties to the case

Tribunal File: T2154/2816

Style of Cause: Mohamed Nur v. Canadian National Railway Company

Ruling of the Tribunal Dated: February 13, 2019

Motion dealt with in writing without appearance of parties

Written representations by:

Mohamed Nur, for himself

Sasha Hart, for the Canadian Human Rights Commission

Adrian Elmslie and Alison Walsh, for the Respondent