Canadian Human Rights Tribunal

Tribunal canadien des droits de la personne

Citation: 2024 CHRT 110
Date: October 11, 2024
File No.: T2713/8921

Between:

Sandra Heddle

Complainant

- and -

Canadian Human Rights Commission

Commission

- and -

Canada Post Corporation

Respondent

Second Interim Ruling

Member: Kathryn A. Raymond, K.C.

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I. Overview

[1] The Complainant, Sandra Heddle, brought a motion for documentary disclosure. As part of the motion, the Tribunal directed the parties to address their failure to comply with previous directions it gave the parties in case management to resolve disclosure issues. One significant omission alleged by the Complainant in her motion for disclosure concerned the failure of the Respondent, Canada Post Corporation, to produce additional electronically stored information ("ESI") such as emails and electronically created and stored files and documents. This additional interim ruling for the motion (the "Second Interim Ruling") addresses the disclosure of ESI.

[2] Thus far the hearing of the motion has taken place over two dates, July 22, 2024 and August 27, 2024. The Tribunal, in its interim ruling on the motion of July 31, 2024, (the "First Interim Ruling") directed the Respondent to provide information about its search efforts and gave it a second opportunity to file affidavit evidence (*Heddle v. Canada Post Corporation,* 2024 CHRT 93). The Tribunal provided further procedural directions to the parties, primarily to the Respondent, in a letter dated August 7, 2024, (the "Tribunal's Letter of Directions") which included topics for which affidavit evidence was appropriate. The Respondent filed affidavits, and the Complainant filed submissions in response for the second date of the hearing of the motion.

[3] The Tribunal identified several issues arising from the Respondent's additional response. These included non-compliance with some of the Tribunal orders in the First Interim Ruling and directions in the Tribunal's Letter of Directions, evidentiary problems with affidavit evidence filed by the Respondent and additional procedural problems related to disclosure and, potentially, the preservation of documentary evidence.

[4] The compliance issues included the Respondent's failure to provide the search terms it used to conduct an earlier multi-site search for ESI in February 2024, as directed in the Tribunal's Letter of Directions. The compliance issues also included that the Respondent was directed to produce all arguably relevant emails. The Complainant alleges that none of the sites the Respondent searched for ESI in February 2024 contain emails. The Respondent did not respond to this and did not provide evidence or information to indicate

that it had identified all of its storage sites and archives for arguably relevant ESI. The Respondent's additional opportunity to provide further information and affidavit evidence for the motion included that the Respondent was to address the issue of whether a litigation hold was placed upon the Respondent's records in relation to the complaint, which was filed on March 30, 2019 and, if so, when. The Respondent provided no information on this subject in advance of the resumption of the motion. [This is a partial description of the problems and issues that the Tribunal needs to ensure are resolved in this motion. The Tribunal has written the parties to provide additional procedural directions on specific topics arising from or related to this motion since the second hearing day of the motion.]

[5] At the continuation of the hearing of the motion on August 27, 2024, the Respondent requested permission to conduct a search for ESI on a unilateral basis, based on its stated commitment to do so, without being required to consult with the other parties about what would constitute a reasonable and effective search and without ongoing oversight by the Tribunal. The Respondent provided the assurance that it would produce affidavits that set out the efforts it made to find documents.

[6] While there are exceptions, the Respondent has not complied with the Tribunal's orders and directions without reasonable excuse, which will be more fully explained in the final ruling on the motion. The Respondent initially failed to file affidavit evidence for the motion. The Respondent later indicated a willingness to provide affidavit evidence to directly address issues relevant to the motion. The Respondent requested a letter from the Tribunal with its directions including relevant subject matter for affidavit evidence. The Respondent then filed limited affidavit evidence for the resumption of the motion. The Tribunal is not prepared to require the other parties to wait to see whether the Respondent proceeds properly with its search efforts and its explanations of those efforts. This approach would delay the opportunity for the other parties and Tribunal to identify any ongoing or additional issues with the Respondent's search efforts for ESI and is inefficient. The parties are to try to agree upon a plan to search for ESI before the search resumes. The Respondent is ordered to prepare a written plan for the search for arguably relevant ESI in its possession (the "Proposed Plan"). In doing so, the Respondent is to consult with the other parties, and determine whether the parties can agree on the Proposed Plan.

[7] For reasons explained below, the parties are to submit the Proposed Plan to the Tribunal for approval. This approval will be forthcoming as long as the Proposed Plan appears effective and proportional to the Tribunal. If the parties cannot agree upon a Proposed Plan, the Tribunal will resolve any issue about what the search should involve before a further search is conducted.

II. Background

[8] The Complainant made specific requests for documents missing from the Respondent's List of Documents. The Respondent agreed that the requested documents were arguably relevant and undertook to provide the requested disclosure. However, the disclosure the Respondent made appeared incomplete. For example, the Complainant expected additional emails to be produced concerning internal communications and communications with third parties. The apparent omissions led the Complainant to bring a motion for the disclosure she requested.

[9] The Tribunal directed the parties to address their lack of compliance with its previous directions as part of the motion. This was because the Tribunal had required the disclosure issues to be addressed long before the Respondent made additional disclosure in May 2024. The proceeding has been unnecessarily delayed by disclosure and compliance issues.

[10] The parties exchanged submissions for the motion. The hearing of the motion began on July 22, 2024. However, the hearing was adjourned until August 27, 2024. The primary reason for the adjournment of the hearing was that the Respondent provided insufficient information about its search efforts for the motion. The Tribunal issued the First Interim Ruling with procedural orders and provided further procedural directions to the parties, primarily to the Respondent, in the Tribunal's Letter of Directions. As explained in the First Interim Ruling, full reasons for the motion and its adjournment will be provided in the final ruling on the motion.

[11] The orders in the First Interim Ruling and the directions in the Tribunal's Letter of Directions concerned specific procedural steps that the Respondent needed to satisfy

before the hearing of the motion resumed so that the motion could be heard in an effective and efficient manner. As explained, the Tribunal's Letter of Directions also identified topics either requiring affidavit evidence, for example those related to compliance, or topics for which affidavit evidence was recommended. The Tribunal's Letter of Directions was provided at the request of Respondent counsel. The Tribunal understood that the Respondent intended to use the letter as a tool to ensure that the Respondent complied with its directions. However, the Respondent did not comply with all of the Tribunal's directions and, as noted above, filed limited affidavit evidence. The affidavits about the Respondent's search efforts raised other issues relevant to the disclosure of ESI, as explained below.

[12] For example, while the complaint was filed on March 30, 2019, it became apparent from the affidavits filed by the Respondent for the resumption of the motion that the Respondent had not attempted a specific search for ESI until February 2024. It was not clear from the information the Respondent provided that the search it initiated in February 2024 would have identified emails relevant to the subject matter included within the Complainant's requests for documents.

III. The Law

A. Documentary Disclosure

[13] Disclosure of all arguably relevant documents in proceedings before the Tribunal is a clear requirement under the *Canadian Human Rights Act* R.S.C., 1985, c.H-6 (the CHRA) and the Canadian Human Rights Tribunal's Rules of Procedure, 2021 (the "*Rules*") (see, for example, Rule 18(1)(f)). The Tribunal has repeatedly reiterated that disclosure is necessary to ensure that a party has a full and ample opportunity to present their case: see, for example, *Yaffa v. Air Canada*, 2014 CHRT 22 at paras 3-5, *Kayreen Brickner v. Royal Canadian Mounted Police,* 2017 CHRT 28 at paras 4-10; *Egan v. Canada Revenue Agency,* 2017 CHRT 33 at paras 29-33; *Nwabuikwu v. Royal Canadian Mounted Police*, 2020 CHRT 9 at paras 5-8.

[14] Disclosure in advance of the hearing is an important component of access to justice before the Tribunal. Complaints of discriminatory practices, which are defined in section 5

of the CHRA, may be brought against respondents who are employers, service providers and those who provide goods, facilities or accommodations. Employers and service providers often possess all or most of the documents that are arguably relevant to the complaint. Complainants frequently do not have access to all of the documents they need to present their case. They are reliant on the respondent's possession of known relevant evidence to support their complaint. Accordingly, to participate in the proceeding fully and effectively and to present their case, complainants need disclosure of arguably relevant documents from the respondent. The fact that the Complainant had to request her pay stubs from the Respondent in order to support her claim for loss of income illustrates the disparity in access to documents that can arise in a proceeding before the Tribunal. The fact that the Complainant requires her paystubs to particularize her loss of income claim also highlights the importance of timely disclosure by the Respondent.

[15] Generally, parties to proceedings before the Tribunal are legally required to make disclosure of all arguably relevant documents in their possession. As explained in *Gaucher v. Canadian Armed Forces*, 2005 CHRT 42 at para 11, "The threshold for arguable relevance is low and the tendency is now towards more, not less disclosure". If a respondent wishes to limit its disclosure in some way, it is required to make a request of the Tribunal and be granted permission by the Tribunal to do so.

[16] The procedural obligation to make disclosure has two facets: 1) the obligation to search for, identify and preserve all arguably relevant documents and 2) the obligation to disclose arguably relevant documents to the other parties whether it is in the party's interest to do so or not: *Perini Ltd. v Parking Authority of Toronto*, 1975 CanLII 761 and *Lewis v York Region Board of Education (No. 4)*, 1994 CanLII 18395 (ON HRT) [*Lewis*] at paras 80-82. The disclosure principles in *R. v Stinchcombe,* 1991 Can LII 45 (SCC) [*Stinchcombe*], which was a criminal case, are applicable to a human rights complaint: *Lewis* and *Ontario (Human Rights Comm.) v. Ontario (Human Rights Board of Inquiry)*, 1993 CanLII 16421 (ON SCDC), leave to appeal to Ontario Court of Appeal denied January 31, 1994 [*Northwestern Hospital*]. The first level decision of the Human Rights Tribunal of Ontario regarding *Northwestern Hospital* may be found at *Christian, Dillion, Edwards v. Northwestern Hospital (No. 2)*, Interim Decision (Disclosure), 1993 CanLII 16511 (ON HRT). The Divisional Court noted at

paras 15-16 in *Northwestern Hospital* that "The important principle enunciated by Mr. Justice Sopinka [in *Stinchcombe*] is that justice was better served when the element of surprise was eliminated from the trial and the parties were prepared to address the issues on the basis of complete information of the case to be met. [Emphasis added]." Since this clarification of the law in *Lewis* and *Northwestern Hospital*, parties before the Tribunal have been required to make full disclosure of all arguably relevant documents including those against their interest. The principle articulated by Justice Sopinka not only avoids surprise at the hearing for the complainant and respondent, but its application resolves any disparity in access to arguably relevant documents that exists between the parties before the hearing.

[17] Upon notice of a legal proceeding, a party acquires a legal obligation to preserve evidence including relevant documentary evidence so that it can be produced: *Jorge v. Canada Post Corporation*, 2021 CHRT 25 at para 114. Parties are expected to have exercised due diligence to preserve and maintain documents as they exist at the time, so that the party may later produce documents for the legal proceeding: *Davidson v Global Affairs Canada* 2023 CHRT 52 [*Davidson*] at para 31: "…[D]ocumentary evidence is to be preserved and is not expected to be altered by a party once that party has notice of litigation, including not in the course of review and preparation of the List of Documents."

[18] It is widely accepted in our legal system, including by other Canadian administrative tribunals, that the obligation to preserve and disclose relevant documents includes ESI: The Sedona Conference, The *Sedona Canada Principles Addressing Electronic Discovery*, Third Edition, 23 SEDONA CONF. J. 161 (2022) (the "Sedona Principles"); *Murphy et al v Bank of Nova Scotia et al*, 2013 NBQB 316; *Cameco Corporation v. The Queen*, 2014 TCC 45; *Reasons for Order and Order dismissing Reliance's motion for further and better affidavits of documents,* 2014 CanLII 149782 (CT) (Competition Tribunal, 2014 CanLII 149782); *Innovative Health Group Inc. v. Calgary Health Region*, 2008 ABCA 219. The first principle of the Sedona Principles is that electronically stored information is discoverable.

[19] None of the above fundamental legal principles are in dispute in this motion.

[20] Where there is ongoing litigation or where litigation is contemplated, the intentional destruction or concealment of evidence by a party is known as spoliation; when established,

spoliation can lead the Tribunal to draw an adverse inference against that party: see *Peters v United Parcel Service Canada Ltd. and Gordon*, 2022 CHRT 25 (CanLII) at paras 115-127.

[21] Parties that are ordered to make disclosure by the Tribunal, or directed in case management to do so, are required to make best efforts to do so: *Hemming v Oriole Media Corp*., 2021 ONSC 6748 at para 20. “Best efforts” have also been defined in the case law in the context of compliance by parties with undertakings to make disclosure: “The words mean that counsel and his/her client will make a genuine and substantial search for the requested information and/or documentation” (see *Gheslaghi v Kassis*, 2003 Can LII 7532 (ON SC) at paras 6-7 and *Re/Max, LLC v Save Max Real Estate*, Inc., 2021 CanLII 53761 (FC) at paras 44 and 45.)

[22] Because of the above principles of law, parties to legal proceedings are all but presumed to have acted in good faith and exercised due diligence to identify relevant documents and to have preserved and maintained documents as they exist at the time so that the party may later meet their legal obligation to produce documents for the legal proceeding. It is usually only when a party complains that another party has not made sufficient efforts to make disclosure that courts and tribunals will intervene (see, for example, *Mississaugas of New Credit First Nation v. Attorney General of Canada*, 2013 CHRT 32). Other situations that may require the Tribunal’s supervision of disclosure include when there is non-compliance with an order or direction, when there is a dispute about whether requested disclosure is relevant or proportional, or a party alleges that evidence has not been properly preserved. There are even fewer cases where the Tribunal will involve itself in the mechanics of what is involved in the exercise of due diligence or “best efforts” by a party in relation to satisfying an undertaking to conduct document searches or where document searches are ordered unless this is in issue: see *Wilson v. Bank of Nova Scotia,* 2022 CHRT 34 [*Wilson*].

B. E-Discovery

[23] The Rules do not contain specific content regarding e-discovery. However, the Tribunal has authority over its procedure and provides procedural directions for matters not specifically addressed in the Rules: see *Davidson* at paras 15-18. This includes that the CHRA grants the Tribunal the authority and discretion to decide matters concerning e-discovery: *Clemente v. Air Canada*, 2022 CHRT 29 at para 28:

> [28] The Tribunal notes that the *Rules of Procedure* provide for the disclosure of documents and production of documents. As stated in *Nur v Canadian Railways*, 2019 CHRT 5, at para 221 and after (*Nur*), the powers and jurisdiction of the Tribunal do not emanate from the Rules of [P]rocedure but from the CHRA.
>
> [29] The *CHRA* provides at paragraph 48.9(2)(e), that the Chairperson of the Tribunal may make rules of procedures governing the practice and procedure before the Tribunal, including but not limited to, rules governing (e)discovery proceedings. As of this day, the Chairperson of the Tribunal has not provided specific rules in the matter. As mentioned in *Nur*, "Nonetheless, this does not mean that it cannot exercise its powers and its discretion on this matter". In fact, the legislator gave the Tribunal broad discretion to create rules of practice (see *Desormeaux v Ottawa-Carleton Regional Transit*, 2002 CanLII 52584), which are not limited in the list in paragraph 48.9(2) of the CHRA.

[24] At para 99 of *Wilson,* the Tribunal noted that issues involving the production of ESI are addressed on an individual case basis by the Tribunal:

> [99] As explained above, it is usually the case that electronic searches will initially lead to the identification of a large number of documents that will need to be reviewed and sorted for arguable relevance. There are no formal rules about the conduct of electronic searches in proceedings before the Tribunal as there are in some other legal contexts. This topic is not addressed in the Tribunal's Rules of Procedure under the Act (03-05-04) (the "Rules"); rather each case involving electronic production before the Tribunal is addressed on an individual basis based on the Tribunal's authority and discretion respecting procedural issues, as is recognized in section 50(3)(e) of the Act.

IV. The Issue

[25] In this case, the Respondent undertook to make disclosure and was directed to do so. The Respondent acknowledged at the second day of the hearing of the motion that the search for documents, including ESI, it conducted was not adequate. The Respondent offered to conduct a further search for ESI. Respondent counsel indicated that the Respondent was looking for assistance with conducting the ESI search.

[26] The issue in this Second Interim Ruling is whether the Respondent ought to be allowed to exercise its discretion about what constitutes best efforts on its part to search for and make disclosure including an effective and proportionate search for ESI.

V. The Respondent's Evidence About its Search Efforts

[27] The Respondent filed affidavits for the continuation of the motion on August 27, 2024. Two affidavits specifically concerned the Respondent's efforts to search for documents.

[28] One affidavit of approximately three pages was submitted by Adam Faries, Labour Relations Specialist on August 19, 2024 (the "Faries affidavit"). Mr. Faries identified himself as a Human Rights Advisor/Support Officer for the Respondent's human rights team. In part, Mr. Faries stated in his affidavit that he was asked to gather documents on January 30, 2024, in response to the Complainant's requests listed in her letter dated November 30, 2023.

[29] The second affidavit was deposed by Elspeth Graham, Advisor, Human Rights, Workplace Harassment and Violence of the Respondent on August 19, 2024 and is approximately six pages in length (the "Graham affidavit"). Ms. Graham provided evidence through her affidavit that she has held the position of Advisor since September 2022 and has acted in this capacity as instructing representative of the Respondent in this complaint, working with Respondent counsel, since then.

[30] In part, Ms. Graham stated in her affidavit that she received the list of requests for documents from the Complainant dated November 30, 2023 from Respondent counsel on December 21, 2023 and sent the list of requested documents to Mr. Faries on January 30,

2024. She gave evidence in her affidavit that she did so as a result of a discussion with her manager at the time who requested that the Complainant's requests for documents be sent to Mr. Faries.

[31] Mr. Faries stated in his affidavit that he looked for "information relating to Ms. Heddle" in the following places: the Respondent's paper file, iSight, the Respondent's "old" digital filing system, Sodales, the Respondent's "new" digital filing system, Sharepoint, an internal database, and the Respondent's "Employee Interaction Centre" (EIC), which is described as an internal log of interactions between human resources and other employees. Mr. Faries did not provide the search terms he used to identify arguably relevant ESI in his affidavit or otherwise explain how he conducted the search.

[32] The Graham affidavit stated that, in April 2019, a representative of the Respondent asked the Respondent's relevant Disability Management Specialist, and the Manager Deliver Operations in April 2019 to produce all the documents they had concerning the Complainant. The Graham affidavit further stated that, in July 2019, the Respondent asked the Manager Deliver Operations, a supervisor and the Shift Manager at a relevant worksite to produce specific information and documents. Any specific documents requested were unidentified in the affidavit.

[33] Ms. Graham gave evidence in her affidavit that she is not aware of any other search efforts by the Respondent after the Respondent became engaged in the complaint process until she obtained and produced attendance records for the complaint in August 2023.

VI. Delay

[34] The procedural history about documentary disclosure in this complaint is described in more detail in the First Interim Ruling; that ruling is to be considered to form part of these reasons. When the Tribunal directs that a party is to address its compliance with an order or direction, or to explain a delay, that party is required to provide a substantive and informed response. The Respondent failed to do so. As explained, the Tribunal gave the Respondent a second opportunity to address its compliance and search efforts, including the opportunity to provide an explanation for its delay. This was partly why the motion was adjourned.

[35] There was a three-week delay by Respondent counsel in sending the November 30, 2023, request from the Complainant to Ms. Graham. There was a two-month delay between the Complainant's request of November 30, 2023, and the forwarding of the request to Mr. Faries by Ms. Graham on January 30, 2024. No explanation was offered within the Graham and Faries affidavits filed by the Respondent for this delay.

[36] There is nothing in the Graham affidavit or the Faries affidavit to indicate that Ms. Graham informed Mr. Faries that the Tribunal had directed in May of 2023 that disclosure was to be made on a time-sensitive basis. The Tribunal emphasized the requirement that disclosure occur on a timely basis in written communications to the parties on October 6, 2023, and October 16, 2023.

[37] Mr. Faries stated in his affidavit that he concluded his search and provided the additional documents he had collected to Ms. Graham on May 1, 2024. Mr. Faries offered no information to explain why his search, which appears to have yielded limited results, took three months to conduct.

[38] In the Tribunal's Letter of Directions, the Tribunal stated the following in para 20(a): "On the issue of delay, at the very least, the Respondent should provide an explanation for its delay in providing the Complainant's paystubs to her and in responding to the other requests for documents that were most recently relayed in the Complainant's letter of November 30, 2023." The Tribunal infers from the lack of explanation from the Respondent in the affidavits filed on its behalf, despite a direction that the Respondent, at minimum, explain its delay in producing pay stubs and in responding to the November 30, 2023 letter, that there is no good reason for the Respondent's delay.

VII. Analysis of the Faries Search

A. Instructions for the Search

[39] In para (g) of the Tribunal's Letter of Directions, the Tribunal provided a relevant direction about producing ESI including arguably relevant emails:

> The Respondent is obligated to describe its search efforts for electronic documents both current and archived or otherwise preserved. If a search for electronic documents was conducted by someone with expertise in this area, that would be relevant and helpful to know. As well, the Respondent should indicate what its instructions for the search were and to whom the instructions were given including what search terms were used.

[40] The Respondent did not directly address all of the topics described at para (g) of the Tribunal's Letter of Directions in its further response to the motion. The Tribunal is left to infer from the affidavits that Mr. Faries likely did not have expertise in this area and was not provided with appropriate instructions by the Respondent.

[41] Mr. Faries stated in his affidavit that he received the list of document topics requested by the Complainant in her letter of November 30, 2023. There is no other reference to instructions in his affidavit. There is nothing in the Graham affidavit to indicate that Ms. Graham provided any instructions to Mr. Faries about how and where to conduct the search. Nor was an explanation provided in the Graham affidavit for the manager's decision to instruct Ms. Graham to ask Mr. Faries to conduct the search.

[42] If Mr. Faries was provided with instructions on behalf of the Respondent, such as where he was to search for ESI and paper documents or how he should conduct the search, those instructions should have been disclosed by the Respondent. This was directed in the Tribunal's Letter of Directions. It was directed because it would better enable the parties and the Tribunal to understand what Mr. Faries did and explain the results of the search he conducted. On the subject of instructions, the Faries affidavit merely repeats what disclosure was requested by the Complainant. This appears to confirm that the Respondent did not provide further instruction to Mr. Faries.

[43] There is nothing in the Faries affidavit or the Graham affidavit to suggest that Mr. Faries had ever conducted a search for ESI before. There is nothing to indicate he had experience or knowledge about searching electronic storage sites such as those he identified as having searched for this complaint. There is nothing to indicate consideration of other potentially relevant ESI storage sites such as personal computers used by witnesses for work, servers or archives. There was nothing in the Graham affidavit to explain how Mr. Faries would know or be able to inform himself where he should search for ESI relevant to this complaint. Mr. Faries did not explain how he knew which sites to search for ESI, nor did he confirm whether he had searched all known sites or arguably relevant sites.

[44] The Faries affidavit provides little to no information about the content of ESI stored on each of the sites that he did search, omitting information such as the timeframe and type of ESI stored at each site.

[45] The Respondent did not provide the search terms that were used by Mr. Faries to conduct searches for ESI relevant to each of the Complainant's requests as directed in the Tribunal's Letter of Directions. This information is necessary to facilitate the assessment of the effectiveness of the search and its results.

B. Determining Arguable Relevance

[46] There is nothing in the Faries affidavit to confirm that Mr. Faries had background knowledge of or involvement in responding to the complaint prior to January 30, 2024. The affidavit does not state when Mr. Faries began to work for the Respondent, nor does it clearly identify when he became involved in this complaint. It seems likely that Mr. Faries would need to be reasonably familiar with this complaint to fully understand what to search for concerning each category of documents that were requested by the Complainant and to analyze the results of search efforts for arguable relevance.

[47] There is no evidence in the Faries affidavit to establish that Mr. Faries' search focused upon custodians of relevant documents about this complaint or that he was informed or knew that this was a relevant parameter for a search of ESI. Custodians are defined as those potential witnesses who were involved in the events in the complaint and

are known to or reasonably expected to have authored, received or been copied on electronic communications, files and documents.

[48] Mr. Faries did not specify the relevant time frame he used to conduct the search for ESI in his affidavit.

C. Conclusions About the Faries Affidavit

[49] The Tribunal infers from these circumstances that, apart from Ms. Graham identifying search topics, Mr. Faries was provided with no or inadequate instructions about how to conduct the search he was tasked to begin in February 2024 on behalf of the Respondent. This most likely explains why the results of his search were limited.

[50] For a search for ESI to be effective, the relevant sites to be searched must first be identified. The Respondent is expected to have identified the sites where ESI is stored, and to have ascertained the type of ESI contained at each site, and the relevant time period for that data. The Respondent should have explained what sites the Respondent selected to search and why. As the disclosure of emails is specifically in issue, the Respondent should have confirmed whether the sites it selected for the search would reasonably be expected to contain emails about the topics in issue.

[51] If the Respondent was aware of any limitations upon the effectiveness of its search for ESI, it should have brought those to the attention of the other parties before or at the time it made disclosure from its search.

[52] Relevant custodians and the applicable time frame for the search are relevant parameters for a search of ESI, as are search terms targeting the subject matter of the content. This is the case for each category of documents to be disclosed.

[53] The search terms employed in a search for ESI need to be carefully considered. The search terms should target the issues and allegations at issue in the proceeding to ensure that the search leads to the identification of potentially relevant content, while avoiding excessive identification and inclusion of irrelevant electronic documents, files and communications. There is no evidence before the Tribunal that Mr. Faries obtained or was

provided any information about search terms that were required for the efficacy of the search.

[54] The Faries affidavit provided no evidence about how Mr. Faries searched for information relevant to Ms. Heddle. Mr. Faries stated in his affidavit that he compiled all of the information he gathered “through the above methods” without identifying the methodology he used for each of the sites he searched. Mr. Faries failed to identify how he found documents relevant to the Complainant on the sites he searched. Mr. Faries indicated only that he looked for information relating to Ms. Heddle.

[55] If Mr. Faries conducted searches using only Ms. Heddle’s name as a search term, it is reasonable to expect that many thousands, if not tens of thousands of instances of ESI would have been included in the search results because they include Ms. Heddle’s name. A broad search on a person’s name over a series of different sites of ESI can be reasonably expected to have identified a large number of not only potentially relevant documents but irrelevant documents to the complaint. The Complainant is a long-term employee of the Respondent having been employed in 2009 until she finally ceased active employment in 2021.

[56] A search using only Ms. Heddle’s name is also not likely to capture all relevant documents. Other ESI may exist that does not specifically contain the Complainant’s name but concerns the events and allegations in this complaint.

[57] If Mr. Faries used a computer program or search tool to assist with the search, he did not say so. A software program would typically generate a summary, a list or a description of the search results. In any event, Mr. Faries did not produce documentation or information in his affidavit confirming the number of initial results from his searches, nor did he provide other evidence generated by the search itself about the results to show what search terms he used and the number of initial results he obtained. There is no breakdown of the number of results obtained from his search of each of the ESI sites he selected.

[58] Several other aspects of Mr. Faries’ evidence are incongruous with typical searches conducted for ESI in the context of litigation. It seems unlikely that Mr. Faries reviewed thousands of documents containing the Complainant’s name over the three month period

of his engagement to narrow the documents to be produced down to those arguably relevant to the Complainant's specific requests, without mentioning the extensive effort this would require of him in his affidavit for the Tribunal and without seeking additional resources and assistance for this task from the Respondent. To the contrary, the Faries affidavit indicates that it was Mr. Faries alone who conducted the search and produced the limited results of the search to Ms. Graham.

[59] The Faries affidavit does not suggest that Mr. Faries was required to take any steps to cull the documents of irrelevant results from those he considered relevant. The affidavit does not describe efforts in relation to Mr. Faries' search such as removing irrelevant content or duplicates, for example.

[60] Further, the Faries affidavit states that Mr. Faries sent all the results of his search to Ms. Graham. The Faries affidavit states at paras 7-8 as follows:

> 7. I then compiled all of the information I had obtained through the above methods into Sodales.
>
> 8. On May 1, 2024, I advised Ms. Graham that the documentation that she had requested had been uploaded to Sodales and directed Ms. Graham to the folder containing new documentation that had been obtained through the process described above.

[61] The Graham affidavit indicates at para 23 that, on the same day that Mr. Faries uploaded all the documents he could find, Ms. Graham downloaded the documents which had not been previously disclosed and sent that documentation to Respondent counsel. As noted, a limited number of documents were subsequently produced. This reinforces the probability that the search that Mr. Faries conducted for ESI was ineffective.

[62] As noted above, there is no evidence before the Tribunal that Mr. Faries had sufficient knowledge of the allegations in this compliant or familiarity with the issues to be in a position to accurately assess which documents were arguably relevant to the Complainant's requests and should be provided to Ms. Graham.

[63] Counsel for the Respondent has been retained to defend the Respondent against this complaint and is expected to have detailed knowledge of the Respondent's search efforts and to advise the Respondent on the subject of which documents are arguably

relevant to the litigation and must, then, be disclosed by the Respondent. However, during the fist day of the motion hearing, Respondent counsel advised that he was not directly involved in the search for documentation to respond to the Complainant's list of requests, which was conducted by his client.

[64] Additionally, there is no specific evidence before the Tribunal to confirm the evidentiary chain connecting the results of the Faries search that were sent to Ms. Graham via an unidentified file in Sodales, and what was disclosed to the Complainant.

[65] In all the circumstances, the Tribunal does not accept the Faries affidavit sworn on August 19, 2024, as reliable evidence demonstrating that a potentially effective search for ESI was made by the Respondent in February 2024.

VIII. Analysis of the Graham Affidavit

A. Evidentiary Issue: Missing Exhibits

[66] When a witness gives evidence about a document in an affidavit, the document is to be attached as an exhibit to the affidavit. This is a standard requirement when filing affidavits as evidence. For example, Rule 80(3) of the Federal Court Rules, SOR/98-106 (the "Federal Court Rules") states: "**(3)** Where an affidavit refers to an exhibit, the exhibit shall be accurately identified by an endorsement on the exhibit or on a certificate attached to it, signed by the person before whom the affidavit is sworn." Documentary evidence that is available to be attached as an exhibit must be attached as an exhibit to the affidavit, in part, so that it can be reviewed and tested should the person who made the affidavit be cross-examined: *Split Lake Cree First Nation v Sinclair*, 2007 FC 1107 at paras 19-20.

[67] As noted, Ms. Graham stated at para 22 of her affidavit that she sent a request to Mr. Faries that the search be conducted. A copy of her request, which would have confirmed Ms. Graham's evidence, was not included as an exhibit to her affidavit. The request ought to have been attached as an exhibit to her affidavit.

[68] Para 9 of the Graham affidavit states: "Having reviewed the file, it is my understanding and belief that Mr. Jajal made the following requests for information in relation

to the Complaint…." The Graham affidavit then references two requests. Copies of these requests were not attached as exhibits to the Graham affidavit. As written communications referenced in an affidavit, they should have been attached as exhibits.

B. Evidentiary Issue: Information and Belief

(i) The Law

[69] An affidavit is presumptively inadmissible if the witness does not affirm that they have personal knowledge of the facts contained in the affidavit; it is improper to assert personal knowledge when the witness does not have personal knowledge; and, where a statement in an affidavit is based on an understanding or belief, the grounds of the belief are to be stated: *Fridman v Canada (Foreign Affairs)*, 2024 FC 1102, *Canada (Attorney General) v Bertrand*, 2021 FCA 103 at para 17, *Elliott v Canada* 2017 FCA 145 at paras 14-15. These rules about the preparation of affidavits in litigation are commonly accepted. For example, under the Federal Court Rules, affidavits are required to be based on personal knowledge except for motions. Rule 81(1) and (2) of the Federal Court Rules state:

> Content of Affidavits
>
> 81 (1) Affidavits shall be confined to facts within the deponent's personal knowledge except on motions… in which statements as to the deponent's belief, with the grounds for it, may be included. [Emphasis added]

[70] In relation to affidavit evidence based on belief, the Federal Court Rules state in Rule 81(2) that "[w]here an affidavit is made on belief, an adverse inference may be drawn from the failure of a party to provide evidence of persons having personal knowledge of material facts." The Federal Court Rules do not apply to this complaint. No adverse inference is drawn here; however, the existence of this rule underscores the importance of a witness having personal knowledge of material facts in their affidavit.

(ii) Problematic Factual Assertions in the Graham Affidavit

[71] The Graham affidavit asserts that a representative of the Respondent, Mr. Jajal, a former Specialist, Human Rights of the Respondent, was primarily responsible for gathering

information from the Respondent and preparing the Respondent's response during the investigation of the complaint by the Canadian Human Rights Commission (the "Commission"), as noted at para 6 of the affidavit. This information is stated in the affidavit as if it is a fact, based on the direct, personal knowledge, of Ms. Graham. However, Ms. Graham does not verify that she has personal knowledge of the facts contained in her affidavit, including the facts in para 6. Ms. Graham cannot have personal, direct knowledge of these matters. The Respondent received notice of the complaint in 2019. Ms. Graham did not become employed by the Respondent until 2022. She explained in her affidavit that others were involved in responding to the complaint before she assumed responsibility for Ms. Heddle's file.

[72] It appears that Ms. Graham can only be expressing her belief that Mr. Jajal was primarily responsible for gathering information about the complaint for the Respondent in para 6. The grounds for this belief are required to have been identified in the affidavit. Without identification of the basis for her belief and the source of that information in the affidavit, the statements indicating that "Mr. Jajal was apparently primarily responsible for responding to the complaint" and the related implication that he was, accordingly, primarily responsible for gathering information for the complaint are not proper affidavit evidence before the Tribunal and are inadmissible.

[73] Ms. Graham stated in her affidavit at para 8 that Mr. Jajal no longer worked for the Respondent, and that she did not have access to his emails. Ms. Graham has apparently not spoken to Mr. Jajal. It is not clear whether Ms. Graham is correctly assuming that Mr. Jajal was primarily responsible for responding to the complaint for the Respondent. For example, it does not appear that Ms. Graham made inquiries with relevant management staff who had personal knowledge of the situation and who would presumably have assigned the responsibility of document collection to Mr. Jajal.

[74] Ms. Graham stated at para 7 of her affidavit that it is her understanding and belief that "Mr. Jajal requested relevant information from the applicable individuals of the Corporation and stored the information received in an internal file which is stored on the Corporations' internal data management system". The phrase "the applicable individuals" seems to imply that this group from whom Mr. Jajal requested information was the group of

individuals who would have possessed relevant information including documents concerning the complaint.

[75] Ms. Graham does not provide the source of her information and belief that Mr. Jajal would have known who “the applicable” individuals were and her related belief that he requested information from all of the applicable individuals. A statement in an affidavit based on information and belief must identify the grounds of the information and belief for the statement to be admissible evidence. The statement in para 7 that implies that Mr. Jajal made inquiries of the applicable individuals for this complaint is inadmissible.

[76] The Graham affidavit indicates at para 7 that the results of the search conducted by Mr. Jajal were put in an unidentified internal file in an unidentified data management system. The grounds for the information and belief regarding what Mr. Jajal did with the information he received from his inquiries is not specified in the Graham affidavit. This statement in the affidavit is also inadmissible.

[77] As noted above, it appears from paras 8 and 9 of the Graham affidavit that Ms. Graham found a file that she believed was created by Mr. Jajal. Within that file, she found the two requests for documents referenced above sent by Mr. Jalal that are not attached as exhibits to her affidavit. Para 9 of the Graham affidavit states as follows:

> 9. Having reviewed the file, it is my understanding and belief that Mr. Jajal made the following requests for information in relation to the Complaint:
>
> (a) On April 15, 2019, Mr. Jajal requested from… (the) Disability Management Specialist, and…(the) Manager Deliver Operations, all documentation that they had in their possession related to Ms. Heddle; and
>
> (b) On July 18, 2019, Mr. Jajal requested specific information and documentation from… (the Manager Deliver Operations),… (the) Supervisor at Canada Post, and… (the) Shift Manager..

The Graham affidavit suggests that the Respondent’s identification of relevant custodians of documents was limited to the Disability Management Specialist, the Manager Deliver Operations, a supervisor and a shift manager.

[78] The content of the Respondent’s Statement of Particulars (SOP), filed in 2022, suggests that Mr. Jajal did not contact all of the individuals employed by the Respondent

with relevant information about the complaint. The Respondent's SOP indicates that other employees, beyond those from whom Mr. Jajal requested information in 2019, were involved in the issues engaged by the complaint. It is possible that additional relevant custodians and witnesses were contacted by another representative of the Respondent or were not contacted at all or asked to provide their documentation.

[79] Due to the fundamental problems with the content of the Graham affidavit, the Tribunal declines to find as fact that Mr. Jajal was the only person or the primary person to collect information and documents for the Respondent, nor is it possible for the Tribunal to conclude, as the Graham affidavit suggests, that everything that was previously collected for the litigation about the complaint was stored in Mr. Jajal's file or that he asked all relevant witnesses to provide their documentation.

[80] The Graham affidavit further indicates at para 10 that there are no emails in the file to indicate what documents were provided to Mr. Jajal as a result of the written requests identified by Ms. Graham. Ms. Graham states that she is not aware of what information was provided to Mr. Jajal in response to the requests he made from review of the file. Without knowing what information was provided in response to Mr. Jajal's inquiries, it is not possible for Ms. Graham to determine whether everything arising from Mr. Jajal's inquiries was collected or stored in what is described as Mr. Jajal's file. The statement to this effect in para 10 is inadmissible.

[81] At para 11 of her affidavit, Ms. Graham further advises that she is not aware of any additional searches completed by Mr. Jajal or by anyone else to respond to the Commission or to respond when the complaint was referred to the Tribunal in 2022. The fact that Ms. Graham was not aware of additional searches may reflect her lack of involvement. Ms. Graham did not begin work in her role as advisor on human rights matters for the Respondent until September 27, 2022 (see para 5 of the Graham affidavit).

[82] At para 12 of the Graham affidavit, Ms. Graham asserts: "It is my understanding and belief that it was the information contained in Mr. Jajal's internal file that was ultimately used to prepare the Corporation's Statement of Particulars and List of Arguably Relevant

Documents dated June 15, 2022." The grounds of Ms. Graham's understanding and belief is not provided. The statement is inadmissible.

[83] Further, the statement that Mr. Jajal's internal file was used to prepare the Respondent's SOP implies that the Respondent has no other files with information about the complaint. Ms. Graham did not prepare or help prepare the Respondent's SOP and List of Documents. As noted above, Ms. Graham did not begin her role until September 27, 2022. The SOP was filed before her arrival in June 2022. Ms. Graham does not have direct, personal knowledge of what files existed regarding the Complainant when the SOP was prepared and what files were used to prepare the Respondent's SOP. To be clear, Ms. Graham does not indicate that she does have personal knowledge of this. However, the grounds for the implication in para 12 of the Graham affidavit that the Respondent has no other file is not identified. The implication in para 12 of the Graham affidavit is inadmissible.

[84] It has been established by reason of this motion that the Disability Case Manager also maintained a file on the Complainant, known as the WSIB file. Respondent counsel informed the Tribunal that he did not have possession of this file prior to obtaining it in the course of this motion. This illustrates the point that there was at least one other file in the Respondent's possession with relevant information concerning the Complainant's complaint which was not in its counsel's possession at the time that the Respondent filed its SOP and List of Arguably Relevant Documents dated June 15, 2022. There may be more files.

C. Conclusions About the Graham Affidavit and Its Admissibility

[85] The Tribunal has the discretion under section 50(3)(c) and (e) of the CHRA to accept any evidence or information, whether by affidavit or otherwise, that the Tribunal wishes to admit "whether or not that evidence or information is or would be admissible in a court of law". In *Tahmourpour v. Canada (Attorney General*), 2010 FCA 192 the Federal Court of Appeal stated:

> [29] Even if the raw data from the Rannie/Bell report was inadmissible under the applicable principles of the law of evidence, it would not necessarily follow that the Tribunal was not entitled to rely on it. By virtue of subsection 50(3) of the *Canadian Human Rights Act* (quoted above), the Tribunal is entitled to receive and accept any evidence as it sees fit, whether or not that evidence is or would be admissible in a court of law, subject only to two exceptions that have no application in this case (evidence protected by any privilege and evidence from a conciliator appointed to settle the complaint).

[86] In *Murray v. Immigration and Refugee Board*, 2012 CHRT 25 [*Murray*], affidavits were objected to on the basis that the affidavits contained irrelevant information and opinion evidence from an unqualified witness. At para 5, the Commission argued that "…there has not been an opportunity for the Commission to challenge the Respondent as to her *bona fides* to give opinion evidence." The Tribunal stated this at para 12:

> [12] Given the informality of Tribunal proceedings and the broad powers to accept information and evidence in subsection 50(3)(c), I am not inclined to strike the affidavits completely. Rather, I will consider the objections of the Commission and Complainant in weighing the value of the information presented in the affidavits.

[87] For purposes of this motion, the Tribunal took an informal approach to affidavit evidence in the case of the self-represented Complainant, given her personal circumstances. The Complainant, who alleges functional limitations by reason of her health, was excused from filing a proper affidavit for the motion. She was allowed to rely, instead, on the content of letters that she wrote as her evidence for the motion, subject to instruction with caveats from the Tribunal about truth-telling. The Commission and Respondent, quite appropriately, did not object to the informality permitted for the Complainant. The Commission and Respondent, on the other hand, who are represented by counsel, were

expected by direction of the Tribunal to file proper affidavits when dates were set for the motion.

[88] While the Tribunal accepted the Complainant's letters as evidence for the motion, it is not necessarily or always fair, efficient and effective from a procedural perspective to admit evidence and address objections later, as was the approach taken in *Murray*. Depending on the circumstances, it can be more efficient to decide whether to admit evidence at the time it is submitted by the party. There are also cases where a ruling is required about whether information should be accepted as evidence by the Tribunal prior to the hearing of the merits of the complaint for reasons of procedural fairness or because the prejudicial effect of the information may outweigh its probative value, or because the information is not proper evidence because it is clearly not relevant. Courts do not admit evidence that is inadmissible based on the rules of evidence for reasons of prejudice, relevance and procedural unfairness. These are all valid reasons for the Tribunal to not admit evidence as well. The informality of Tribunal proceedings is not, on its own, a stand-alone reason to admit evidence that would ordinarily not be admitted as evidence by a court because it is prejudicial in some way or too unreliable or cannot be tested when an opportunity to test the evidence is required. The nature of the inadmissible evidence and any prejudicial impact on the proceeding is to be considered.

[89] In this case, the Tribunal will not accept those statements and paragraphs of the Graham affidavit, stated to be based upon Ms. Graham's understanding or belief, where the grounds of that understanding and belief is not identified. The paragraphs in question are paragraphs 6, 7, the second sentence in para 10 and para 12. This content does not qualify as admissible evidence of the truth of the facts asserted in the paragraphs for the motion or at the hearing.

[90] The Tribunal is not prepared to exercise its evidentiary discretion under section 50(3)(c) and (e) of the CHRA to admit into evidence the portions of the affidavit where the witness has no personal and direct knowledge of the statements they made or where the grounds of the information and belief stated by the witness is not identified. There is a risk of procedural unfairness. Evidence based on information and belief cannot be tested in the same way as evidence based on personal knowledge because the source of the information

and belief is not before the Tribunal. It is, therefore, not available to be challenged, reviewed or to be potentially the subject of cross-examination by the other parties.

[91] In part, the Tribunal is not prepared to admit the paragraphs in question in the Graham affidavit as evidence of their truth because the Respondent is represented by counsel. The Respondent was directed to file affidavit evidence before the hearing of the motion began. It did not do so. The Respondent was given a second opportunity to file affidavit evidence, including about its search efforts, as explained in the First Interim Ruling. In response, the Respondent has filed affidavits that failed to provide all of the information that was required by the Tribunal and that contained improper content in certain respects.

[92] The disregarded paragraphs in the Graham affidavit referenced above are, however, relevant evidence for the purpose of explaining this interim ruling and possibly the final ruling on the motion. For that reason, the Tribunal is not striking the content in question in the Graham affidavit from the Tribunal's motion record. However, the Respondent is not entitled to rely upon these paragraphs of the Graham affidavit, should it wish to do so, at the hearing of this complaint without prior leave of the Tribunal. In the event that further evidence is required from this witness in advance of the hearing, the witness is to file an affidavit based on personal knowledge or submit an affidavit with the sources and grounds of belief identified or is to offer oral testimony. Further, any documents referenced in an affidavit are to be attached to the affidavit properly as exhibits.

[93] Not all of the Graham affidavit is addressed here. The Tribunal's findings about the Faries and Graham affidavits are not restricted to those made in this ruling. They will be addressed in the final ruling on the motion.

VIII. Conclusion About the Respondent's Search Efforts To-Date

[94] The Respondent acknowledged that it has failed to conduct a thorough and proper search for arguably relevant documents for its SOP. For example, Respondent counsel was not in a position to confirm that all of the Respondent's witnesses, identified in the List of Witnesses filed with the Respondent's SOP, had been instructed to provide relevant documents for purposes of the proceeding.

[95] The Respondent did not correct the initial omissions in its search efforts, despite the Tribunal's earlier directions given during case management, which will be further explained in the final ruling on the motion. The Respondent did not comply with all of the Tribunal's orders and directions arising from this motion, also to be further described in the final ruling on the motion.

[96] The evidence made available by the Respondent for the second hearing day of the motion leads the Tribunal to conclude that Mr. Faries is the only known employee of the Respondent who attempted to conduct a broad search for ESI of arguable relevance to the complaint. As noted above, this did not happen until February 2024.

[97] When the Tribunal brought forward several concerns about the preparation and content of the affidavits at the continuation of the motion on August 27, 2024, Respondent counsel agreed that the Respondent's search efforts had not been sufficient. The Respondent offered to conduct a further search.

[98] The Respondent should have advised the other parties and the Tribunal in advance of the resumption of the hearing that it was prepared to conduct a further search. It appeared from what was filed by the Respondent for the resumption of the motion that the Respondent likely intended to take a different position.

[99] Strictly speaking, it is not necessary for the Tribunal to decide whether the Respondent's search efforts to date have met the standard of "best efforts" to satisfy its undertaking and the Tribunal's directions or more generally "due diligence" in respect of documentary disclosure because the Respondent agreed that further search efforts were required. However, the Tribunal is issuing an order requiring the Respondent to make best

efforts to make the disclosure it agreed to provide to the Complainant. Those efforts directed at the disclosure of electronic documents must include an effective, while proportionate, search for arguably relevant ESI.

[100] Respondent counsel indicated that the Respondent was trying to find a person with the expertise to assist with the search for ESI. However, the Respondent had not identified such a person by August 27, 2024. There was no information before the Tribunal that any one responsible for the Respondent's information technology with expertise and knowledge about its ESI had been consulted for the earlier search in February 2024 or for the motion. As noted above, Respondent counsel requested that the Respondent be permitted to proceed to conduct a unilateral search for ESI without being required to consult with the other parties and without ongoing oversight by the Tribunal.

[101] The Respondent's request to proceed with a search for ESI without the engagement of the other parties and the Tribunal's oversight is denied. The Respondent has had the opportunity since the complaint was filed to conduct a proper search for ESI. Instead, the Respondent delayed taking action to secure ESI disclosure and did not do so before it filed its SOP. The Respondent continued to delay taking action while disclosure was discussed during case management conferences. The Respondent continued to delay after it undertook to provide the documents and the Tribunal directed that it do so on a time-sensitive basis in May 2023. The search for ESI conducted by Mr. Faries on the storage sites in early 2024 will need to be redone.

[102] The Respondent did not respond to the Complainant's questions about the search it conducted during this motion. The Respondent attended the resumption of the motion without confirming to the Complainant whether emails would have been included in the search of the sites conducted by Mr. Faries. The Respondent has not disclosed its internal policies about document management as requested by the Complainant. The Respondent has not answered the Complainant's inquiries about what happens to documents (in terms of document transfer and accessibility) when employees leave their position and a new employee takes over, which is the case here. Ensuring that the Respondent makes appropriate disclosure of its search efforts to the Complainant, who is self-represented, is an important reason why the Tribunal's oversight will continue.

[103] The Respondent complied with some of the orders and directions given in the First Interim Order and the Tribunal's Letter of Directions but not all. Lack of compliance is another salient reason for continuing the Tribunal's oversight of a party's search efforts.

[104] The Tribunal is issuing additional procedural orders to provide a procedural framework to facilitate the efficacy and effectiveness of the Respondent's search. The Respondent's further search efforts for ESI will 1) be subject to prior disclosure to the other parties, allowing them the opportunity to identify issues before the search resumes, and 2) require the Respondent to have a Proposed Plan for search efforts for ESI that is, if possible, agreed to by the other parties, and 3) the Respondent is to submit the Proposed Plan to the Tribunal for approval, after ascertaining whether the parties can reach an agreement.

[105] The Tribunal stated at para 27 of the First Interim Ruling that it will make its own best efforts to ensure that the Respondent has properly searched its documentary holdings, in both paper and electronic format, in these circumstances. The Tribunal is requiring that it approve the Proposed Plan agreed to by the parties as part of the Tribunal's oversight and exercise of discretion concerning its procedure for disclosure. The Complainant is not likely to have access to expertise concerning IT and is not in a position to fully identify the sites where the Respondent's ESI is stored. There is potential for even greater delay if the Proposed Plan is ineffective. The Tribunal intends to do its best to ensure that this motion is resolved without additional issues and further interim rulings. Approving the Proposed Plan is a step towards doing so.

[106] The Tribunal's approval of the Proposed Plan will be forthcoming, as long as the Proposed Plan appears to be effective and proportional to the Tribunal. If the parties do not agree upon the Proposed Plan, the Tribunal will decide what the plan will involve before a further search is conducted, after hearing from the parties.

[107] The interim procedural order, set out below, prescribes the basic requirements of the Proposed Plan to be developed by the Respondent in consultation with the other parties.

[108] The second interim procedural order below is subject to reconsideration by any party upon request. Such a request must be received by the Tribunal within 10 days of receipt of

the Second Interim Ruling and be accompanied by submissions and any evidence to support the request for reconsideration. Dates will be set for responses, as applicable.

IX. The Lack of a Litigation Hold

[109] Another procedural issue that may potentially complicate the Respondent's disclosure of arguably relevant documents for this complaint is that, upon receiving notification of the complaint, the Respondent apparently did not place a litigation hold on documentary evidence including ESI. Respondent counsel advised the Tribunal that he has not yet been able to identify efforts made by the Respondent to put a litigation hold in effect to preserve paper documents and ESI. Because of the uncertainty around this issue, counsel indicated his belief that a litigation hold had not been put in place. As explained above, parties are required to consider whether a litigation hold should be applied. Where documentary evidence relevant to the legal proceeding exists, a litigation hold is to be implemented to identify and preserve the documentary evidence.

[110] The Respondent should have confirmed in advance of the resumption of the hearing of the motion its belief that there may have been no litigation hold put into effect. This would have provided the other parties an opportunity to consider the issues this raised for the motion and the proceeding as a whole, allowing them to prepare accordingly for the resumption of the motion.

[111] Further, as explained above, the Respondent's lack of responsiveness and transparency about its search efforts during this motion includes that the Respondent did not provide the Complainant with copies of its internal policies about the retention of documents despite her request.

[112] In addition, before the resumption of the motion, the Complainant asked the Respondent a series of questions:

> I am requesting Canada Post's Official Policy to be disclosed on how the emails and files are dealt with after an office employee leaves.
> a) Do they have a forwarding process for the new people that have taken over the job?
> b) Who has access to files and emails that have taken over the job and cases?

> c) What is the name of Canada Post's email system?
> d) Does Canada Post archive emails to keep for the long term?
> e) Was the email files searched for long term storage?
> g) Were the email files searched at all?
> h) What is the retention policy with Canada Post emails and files
> i) Why was the email system not included in the affidavit as something that was searched?
> Isight
> Sodeles
> SharePoint
> These were mentioned as searched but these databases are all for holding files not emails.
> I have asked for the emails for several things and yet there is no mention of the database used to search for emails.

[113] These questions are relevant and reasonable in the circumstances. The Respondent is ordered to answer the Complainant's questions.

[114] The Respondent will be required to make best efforts to ascertain what happened to any documentary evidence that could be reasonably expected to have existed in the ordinary course of its activities or which is known to have existed, but which has not been produced in this proceeding. This is for the purpose of either finding and disclosing ESI and paper documents to the other parties or ascertaining what happened to the documents. Should any arguably relevant documents have been lost or destroyed, particularly if they would probably constitute relevant evidence at the hearing, the other parties are entitled to have disclosure of this and an opportunity to address any issues that may arise from the loss or destruction of potential evidence.

X. Sources of Information About ESI

[115] It is important that all parties have an opportunity to participate in discussions of the issues raised by the motion on somewhat of a level playing field, with foreknowledge of where to find information about the procedural issues that sometimes arise in relation to ESI and how these issues can be potentially managed and resolved. The Tribunal is providing the parties with a copy of the Sedona Principles so that they have general information about this topic. In the interim, a statement of the core Sedona Principles is attached as an annex to this ruling.

[116] Canadian civil courts usually have civil procedure rules that address this topic and can be consulted for information (see, for example, the Ontario Rules of Civil Procedure's Discovery Plan provisions in Rule 29.1 which contain content about electronic discovery). Typically, civil procedure rules employed by the courts include a process for reasonable and proportionate disclosure of ESI and a means to resolve any disputes about what ESI needs to be produced and the search efforts to be employed to ensure that disclosure is complete.

[117] The parties may also wish to review case law from the courts available on CanLII on the subject of 1) the disclosure of ESI, 2) reasonable and proportionate search efforts for ESI and 3) litigation holds in legal proceedings and, if applicable, case law respecting the loss or destruction of documentary evidence.

XI. The Tribunal's Procedural Discretion

[118] The Sedona Principles and civil procedure rules in Canada on this topic are not binding upon this Tribunal. These are suggested as general, subject-matter educational materials. They may provide the parties with better insight into the general kinds of issues that are relevant for the parties to consider. As noted above, the Tribunal exercises its discretion over procedural matters pursuant to section 50(3) of the CHRA as confirmed in Rule 26(3) of the *Rules* and will determine its own procedural path forward for this complaint.

XII. The Need for Proportional Use of the Tribunal's Resources

[119] The motion has taken more time than what should have been required. The Respondent initially took the position on the motion that it had made proper disclosure when it had not done so, leading to the need for the First Interim Ruling and the Tribunal's Letter of Directions. Partial compliance by the Respondent with orders and directions and its failure to respond to reasonable inquiries from the Complainant led to this Second Interim Ruling to order the Respondent to develop a proposed plan for its search efforts to be considered by the other parties. As explained previously, the Respondent should have engaged with the other parties respecting its search efforts for arguably relevant documents.

[120] There will be unavoidable delay in the availability of written reasons for the final ruling concerning this motion given the additional procedural issues to-date and because there are further issues which may need to be resolved before the motion can be fully decided. However, the Tribunal intends to ensure that this proceeding advances in the meantime and that the parties comply with the Tribunal's orders and directions.

XIII. Second Interim Order

[121] The Tribunal issues a second interim order with various terms. Certain terms of the order include dates for compliance; others do not yet have dates set. The Tribunal will set additional filing dates with the parties in due course in case management.

[122] The second interim order is as follows:

1. The Respondent is required to make best efforts to produce the documentary disclosure the Complainant requested in her letter of November 30, 2024 and that the Respondent undertook to provide. These best efforts must include identifying where arguably relevant documents are stored so that they may be produced and a reasonable, effective and proportionate search for arguably relevant ESI on ESI sites. This includes that the Respondent is to make inquiries of employees who have direct knowledge of the events relevant to the complaint and knowledge of the contents of the storage sites used for documents and ESI.

2. The Respondent is to produce all documents relevant to the Respondent's practices and policies about the access, transfer, retention, storage and destruction of documents, files and ESI during the period relevant to the complaint and identify the relevant time period for each policy or practice to the best of its knowledge. This includes but is not limited to the Respondent making best efforts to answer the questions asked by the Complainant in her written response to the Faries and Graham affidavits of August 23, 2024. This is to be completed and filed by the Respondent by November 8, 2024.

3. The Respondent is to confirm in writing whether a litigation hold was put in place and, if so, identify the nature and extent of the litigation hold and file that information by November 8, 2024.

4. The Respondent is to make best efforts to complete its investigation and inquiries about its prior search efforts. The Respondent is to file affidavit evidence concerning its additional efforts to make documentary disclosure in the past for this complaint. If the Respondent is able to confirm that its prior search efforts are limited to those described in the Faries and Graham affidavits, the Respondent is to confirm this. If additional efforts were made, those efforts are to be described and the Respondent

is to advise the Tribunal whether those documents have been disclosed in this proceeding, and, if not, make that disclosure. This is to be filed by the Respondent by November 8, 2024.

5. The SOPs filed by the parties with the Tribunal identify various employees of the Respondent who were allegedly involved in the events that occurred that are relevant to this complaint (and potentially a retaliation complaint should the Complainant be permitted to amend her complaint, which is being addressed as a separate matter). The Respondent is to provide a list to the other parties and the Tribunal of potentially relevant employees of the Respondent taken from all of the parties' SOPs and a list of the names of any known involved representatives of the third parties [WSIB, Canada Life, Morneau Shepell]. The Respondent is to identify the nature of the involvement of each of its employees and the period of time of their involvement that is relevant to the complaint. The purpose is to identify those persons to be potentially included or excluded as custodians of documents in the search for documents and ESI. This list is to be filed by the Respondent by November 8, 2024.

6. The Complainant and Commission are to advise the Tribunal of any relevant omission from the list of potential custodians employed by the Respondent forthwith upon the filing of the list by the Respondent.

7. The Respondent is to identify servers or other sites where electronic information was stored during the period 2012-2021, including where arguably relevant emails between the Respondent's employees and emails sent to and from the Respondent and the relevant third parties (WSIB, Canada Life, Morneau Shepell) and arguably relevant electronic files and documents may be stored. The nature of the purpose and content of the storage places and the time frame of the ESI contained within them are to be described. This includes the Respondent making reasonable inquiries of its information technology support personnel and obtaining information from relevant custodians/witnesses including former employees, where possible, who are reasonably anticipated to have or to have had documents to ascertain whether their documents and electronic records, including emails, are or were stored on computers, servers or storage sites other than those identified in the Faries affidavit. The purpose is to provide relevant background information to facilitate the selection of the most likely relevant sites for the search for ESI. The Respondent is to provide this information to the parties and the Tribunal by December 12, 2024.

8. The Respondent is to file affidavit evidence to identify any additional search efforts it makes for purposes of complying with this order.

9. The Respondent is to file affidavit evidence to identify any arguably relevant documentation that it discovers has been lost or destroyed that used to exist and explain the circumstances and reasons why the loss or destruction occurred.

10. The Respondent advised the Tribunal of its intent to find a person properly qualified to conduct the search (the "qualified person"). The Respondent is to disclose that

person's name, qualifications, skills and experience to the other parties by November 8, 2024.

11. The Respondent is to prepare the Proposed Plan to secure and identify arguably relevant ESI including files, documents and emails. This plan is to identify the proposed potential custodians/witnesses to be included in the search, the proposed storage sites to be searched and the proposed search terms to be used for each category of documents the Complainant requested and the relevant time periods. The Respondent is to include in the Proposed Plan what steps the qualified person and/or the Respondent intends to take to implement the search, to identify the initial results of the search and to narrow the results of the search to what is arguably relevant. The Respondent is to advise the Tribunal what software, if any, will be used to facilitate the search. The Proposed Plan is to include the removal of duplicates and any irrelevant records produced by the search and address the identification of any privileged content. The Proposed Plan is to include proposed dates for the relevant steps to be taken.

12. The parties are to make good faith efforts to try to agree on what specific searches the Proposed Plan should include to address the disclosure requested by the Complainant based on the list of potential witnesses, the electronic storage sites and the search terms most likely to yield relevant results and try to agree upon a reasonable time frame for the implementation of the Proposed Plan.

13. A copy of the Proposed Plan or another plan agreed upon by the parties is to be filed with the Tribunal, along with an explanation of the parties' positions.

14. The Tribunal will make arrangements to hear from the parties should there be any disagreement about the Proposed Plan they are unable to resolve. If necessary, the Tribunal will place reasonable limits upon the search to secure a more effective or efficient and proportional search for documents.

15. Should there be a problem with the proposed timing for the procedural steps for which dates have been set in this order, the parties are to notify the Tribunal within five days of this order.

16. Should any party wish to request a reconsideration of this order, they are to make that request and provide any submissions and affidavit evidence in support of such a request within 10 days of this order.

17. The hearing of the motion will remain adjourned without a specific date set for resumption until further direction of the Tribunal.

Signed by

Kathryn A. Raymond, K.C.
Tribunal Member

Ottawa, Ontario
October 11, 2024

Annex to the Second Interim Ruling

The Sedona Conference, *The Sedona Canada Principles Addressing Electronic Discovery*, Third Edition, 23 SEDONA CONF. J. 161 (2022)

Principle 1: Electronically stored information is discoverable.

Principle 2: In any proceeding, steps taken in the discovery process should be proportionate, taking into account: (i) the nature and scope of the litigation; (ii) the importance and complexity of the issues and interests at stake and the amounts in controversy; (iii) the relevance of the available ESI; (iv) the importance of the ESI to the court's adjudication in a given case; and (v) the costs, burden, and delay that the discovery of the ESI may impose on the parties.

Principle 3: As soon as litigation or investigation is anticipated, parties must consider their obligation to take reasonable and good-faith steps to preserve potentially relevant electronically stored information.

Principle 4: Counsel and parties should cooperate in developing a joint discovery plan to address all aspects of discovery and should continue to cooperate throughout the discovery process, including the identification, preservation, collection, processing, review, and production of electronically stored information.

Principle 5: The parties should be prepared to produce relevant electronically stored information that is reasonably accessible in terms of cost and burden.

Principle 6: A party should not be required, absent agreement or a court order based on demonstrated need and relevance, to search for or collect deleted or residual electronically stored information that has been deleted in the ordinary course of business or within the framework of a reasonable information governance structure.

Principle 7: A party may use electronic tools and processes to satisfy its discovery obligations.

Principle 8: The parties should agree as early as possible in the litigation process on the scope, format, and organization of information to be exchanged.

Principle 9: During the discovery process, the parties should agree to or seek judicial direction as necessary on measures to protect privileges, privacy, trade secrets, and other confidential information relating to the production of electronically stored information.

Principle 10: During the discovery process, the parties should anticipate and respect the rules of the forum or jurisdiction in which the litigation takes place, while appreciating the impact any decisions may have in related proceedings in other forums or jurisdictions.

Principle 11: Sanctions may be appropriate where a party will be materially prejudiced by another party's failure to meet its discovery obligations with respect to electronically stored information.

Principle 12: The reasonable costs of all phases of discovery of electronically stored information should generally be borne by the party producing it. In limited circumstances, it may be appropriate for the parties to arrive at a different allocation of costs on an interim basis, by either agreement or court order.

Canadian Human Rights Tribunal

Parties of Record

Tribunal File: T2713/8921

Style of Cause: Sandra Heddle v. Canada Post Corporation

Second Interim Ruling of the Tribunal Dated: October 11, 2024

Written and oral representations by:

Sandra Heddle, for herself

Christine Singh, for the Canadian Human Rights Commission

Joseph Cohen-Lyons, for the Respondent