

**Canadian Human  
Rights Tribunal**



**Tribunal canadien  
des droits de la personne**

**Citation:** 2025 CHRT 104

**Date:** October 29, 2025

**File No.:** T1999/7913

**Between:**

**Donna Casler**

**Complainant**

**- and -**

**Canadian Human Rights Commission**

**Commission**

**- and -**

**Canadian National Railway Company**

**Respondent**

**Decision**

**Member:** Kirsten Mercer

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## I. OVERVIEW

[1] Ms. Donna Casler alleges Canadian National Railway (“CN”) discriminated against her in employment, on the grounds of disability and sex, pursuant to sections 7 and 10 of the *Canadian Human Rights Act*, RSC 1985, c H-6 (“the Act”). In sum, she claims CN treated her in an adverse differential manner, failed to accommodate her disability and employed discriminatory policies and/or practices (the “Complaint”). However, this ruling addresses CN’s motion to dismiss this case because the passage of time prejudices its ability to fairly present its case.

[2] Ms. Casler’s Complaint was referred to the Canadian Human Rights Tribunal (the “Tribunal”) by the Canadian Human Rights Commission (the “Commission”) in 2014, following a long procedural history at the Commission. The Commission made its referral pursuant to s. 44 of the *Canadian Human Rights Act*, despite the passage of time between the date of the events described in Ms. Casler’s Complaint and the eventual date of the Commission’s decision to refer the Complaint (the “Referral Decision”). At the time, CN applied to the Federal Court for judicial review of the Commission’s Referral Decision. Among other reasons for that review, CN argued that too much time had passed and that it was no longer possible for CN to respond properly to the Complaint. It argued that the Commission had made an error in referring the Complaint to the Tribunal, and asked the Federal Court to overturn that decision.

[3] In its decision on that review, *Canadian National Railway Company v. Casler*, 2015 FC 704 [“*Casler (FC)*”] at paras 28-9, 36 the Federal Court clearly found that the Tribunal is the best placed to rule on the issue of prejudice. As restated in a later judgment, “...the Tribunal is in the best position to make a finding on prejudice arising from faded memory since the Tribunal, not the CHRC, nor this Court hears the witnesses and decides whether the faded memory is significant enough to make a finding of prejudice.” (*Canada Post Corporation v. Canadian Postmasters and Assistants Association (CPAA)*, 2016 FC 882 at para 104). To that end, the Tribunal has conducted its inquiry into the Complaint, including holding a lengthy hearing of 23 days.

[4] As is evident from its position in the judicial review, CN has consistently raised concerns about its inability to fully respond to the Complaint due to the passage of time and has argued that the case should be dismissed since it is prejudiced in this regard. In CN's view, this prejudice precludes the conduct of a fair adjudication of Ms. Casler's Complaint. All parties and the Tribunal were alive to these concerns throughout the lengthy hearing process, and CN renewed its motion to dismiss the case due to this delay at the end of the hearing.

[5] Accordingly, this decision addresses CN's motion to dismiss the case.

[6] As a secondary matter, CN brought a motion for costs against Ms. Casler for the conduct of her counsel in relation to an expert witness during the proceeding. The Tribunal elected to reserve its decision on the costs issue for the final decision on the merits of the Complaint. However, given that there will be no final decision on the merits, this decision also addresses the outstanding CN costs motion.

## **II. DECISION**

[7] The motion to dismiss the Complaint due to the prejudice the passage of time causes CN in presenting its case is granted.

[8] CN's motion seeking costs is dismissed.

## **III. ISSUES**

[9] This decision addresses two issues:

Should Ms. Casler's Complaint be dismissed for delay?  
Should costs be awarded against Ms. Casler?

## IV. ANALYSIS

### Issue 1: Should the Complaint be Dismissed or Stayed for Delay?

[10] Yes. While dismissing a complaint for delay or an abuse of process is a final measure with serious consequences for a complainant, the passage of time since the events at issue in this case has created an obstacle to the conduct of a fair hearing that neither the Tribunal nor the parties were able to overcome.

#### Delay

[11] I want to start by apologizing to the parties on behalf of the Tribunal. This case has moved slowly throughout various branches of the legal system as the parties have sought to have the Complaint determined. Parties before the human rights system in Canada are entitled to have their human rights complaints considered and decided in an effective, timely and accessible way. And while this is not a situation where responsibility for the delay in this process lies with any one party or part of the system, all of the parties to this proceeding deserved better.

[12] We must do better by Canadians. The Tribunal has a duty to conduct an inquiry in human rights complaints that have been referred to it by the Canadian Human Rights Commission (the "Commission") and to do so in a fair and timely way. Canadians must have confidence in their public institutions and systems of justice, and this type of failure erodes that confidence.

#### (a) THE PARTIES' POSITIONS

##### *The Respondent's Position*

##### Length of Delay

[13] The Respondent argued that the Tribunal should dismiss this matter due to excessive delays which it submits have obstructed natural justice and procedural fairness. CN argued that the allegations set out in the Complaint arose between 14-20 years before the start of the hearing, and that in the intervening years evidence has been lost, memories have faded,

and witnesses have become unavailable, either because they have died or because no party was able to locate them.

[14] CN submits that the passage of time has caused it demonstrable prejudice in defending against the allegations in the Complaint.

[15] CN submitted that the Supreme Court of Canada's decision in *R. v Jordan*, 2016 SCC 27 [*Jordan*] confirms the foundational importance of timeliness to the conduct of a fair trial, stating that "the longer a trial is delayed, the more likely it is that some accused will be prejudiced in mounting a defence, owing to faded memories, unavailability of witnesses, or lost or degraded evidence" (*Jordan* at para 20).

[16] While CN acknowledges that the Supreme Court's decision in *Jordan* arises in the context of a criminal trial, it submits that the same issues have been considered by that court with respect to administrative proceedings, and that the law with respect to delay in administrative proceedings was set out in *Blencoe v. British Columbia (Human Rights Commission)*, 2000 SCC 44 [*Blencoe*], a human rights case, which confirms that these same issues animate the Tribunal's duty to safeguard natural justice and to ensure procedural fairness.

[17] CN submitted that the passage of time from when Ms. Casler alleges she initially experienced discrimination, until the start of the hearing of the Complaint in 2017, was inordinate. CN relied on the Federal Court's decision in *Motorways Direct Transport Ltd. v Canada (Human Rights Commission)*, 1991 CanLII 13186 (FC), 43 FTR 211 [*Motorways (FC)*], which found that a seven-year delay in the release of the Commission investigation report was unacceptably long and prejudicial to the respondent in that case. The Federal Court found that the duty of fairness and the principles of natural justice were not respected, in light of that seven-year delay and the resulting prejudice. CN argued that the delay in this case is more than twice as long as that which the Court found to be inordinate and prejudicial in *Motorways (FC)*.

**Cause of Delay**

[18] CN submitted that the Complainant caused the delay in this case, which exceeded the time requirements inherent in this type of litigation:

- i. by delaying the filing of her Complaint for up to four years, despite being represented by a union and having legal counsel as early as January 2002;
- ii. by failing to address her workplace discrimination concerns through the grievance process in a timely manner;
- iii. by causing various procedural delays in the judicial review process; and
- iv. by causing further delays in the Tribunal's hearing process through procedural, practical and tactical means.

[19] CN also identified institutional delays at the Commission as having added significant further delay to the process, arguing that the Commission's handling of the complaint added six years to the procedural history of this matter, which CN alleges caused it additional prejudice.

**Impact of Delay**

[20] CN argued that the passage of time has had an extremely prejudicial impact on its ability to answer the Complaint. CN specifically identified three areas of prejudice:

- i. The unavailability of witnesses;
- ii. The fading memories of the witnesses who testified; and
- iii. The loss of documentary evidence.

[21] I will review these three areas in more detail below, but I wish to summarize some of the points raised in the Respondent's submissions with respect to these issues here.

**Missing Witnesses**

[22] CN submitted that at least five witnesses were unavailable to testify, including two witnesses whom it described as "absolutely critical".

[23] CN Train Master Paul Nicoll was Ms. Casler's supervisor at the Walker Yard during the relevant period, and the primary contact regarding the return to work discussions with Ms. Casler. CN argued that his evidence was lost as Mr. Nicoll had died. CN argued that this loss was extremely prejudicial to its response to the Complaint, and submitted that Mr. Nicoll would have been CN's primary witness in this matter, were he still alive.

[24] CN argued that "it is not possible to overemphasize Mr. Nicoll's key role with respect to many, if not all, of the important issues in this matter including, *inter alia*: what position the Complainant was to be returned to in 2004; what accommodations CN had offered the Complainant in 2004; what accommodation CN was prepared to offer the Complainant in 2004 and thereafter; the Complainant's failed attempt to write the Rules; CN's consideration of medical evidence; and CN's decision to dismiss the Complainant."

[25] CN further argues that Larry Rae (CN Train Master and Ms. Casler's main point of contact from 1999 to 2002), who also died before the Tribunal hearing began, would have been CN's primary witness with respect to CN's conduct during that period of time.

[26] In addition to Mr. Nicoll and Mr. Rae, CN argued that there were a number of other witnesses who were no longer available to testify, as they could not be located by CN. It submits that the unchallenged evidence provided by Ms. Blackmore confirmed that Ms. Carol Macdonald (CN Occupational Health Nurse), Ms. Lily Gallegos (CN Manager at the Crew Management Centre), and Ms. Cindy Bobowick (CN Risk Management Officer) could not be located to testify. CN submitted that each of these witnesses was involved in the handling of Ms. Casler's case, and that it could only speculate about what evidence they could have provided to the Tribunal.

### **Faded Memories**

[27] CN argued that the credibility of the witnesses who testified before the Tribunal (including its own witnesses) was severely compromised due to their faded memories, further prejudicing the Respondent. CN highlighted that witnesses before the Tribunal in this matter repeatedly testified that they had little to no independent recollection of the events in question. CN argued that Tribunal jurisprudence supports the proposition that the Tribunal

is without jurisdiction to conduct its inquiry where a fair hearing could not be assured due to the passage of time.

[28] CN cited the Tribunal's decision in *Grover v. National Research Council of Canada*, 2009 CHRT 1, affirmed by the Federal Court at 2010 FC 320 [*Grover (FC)*] and the decision of the New Brunswick Financial and Consumer Services Tribunal in *NBFCSC v. Emond and Drapeau*, 2016 NBFCST 8 [*Emond*] to argue that the passage of time in those cases (13 and 10 years respectively) was enough for witness' memories to fade and impact their credibility. The NBFCST went on to find that the greater the passage of time, the greater the probability of an impact on witness memories and the fairness of the hearing (*Emond* at para 141).

[29] CN argued that this erosion of memory and potential loss of credibility had detrimentally impacted CN's ability to respond to the Complaint, and highlighted testimony from seven witnesses, all of whom conceded to having issues with their memory:

- i. Mr. Rick Sherbo (CN Train Master, retired): testified that his memory of the relevant period was not clear, and that refreshing his memory by reviewing documents about Ms. Casler's accommodation process (including with respect to the very important allegation that he had told Ms. Casler that "CN had nothing for her"), did not assist him in recalling events from this time period. CN argued that Mr. Sherbo's inability to reliably recall these events severely impacted CN's ability to respond to Ms. Casler's allegations from the period between 1999-2003.
- ii. Dr. Aashif Esmail (Medisys Physician): testified that he did not remember Ms. Casler, and that the passage of time has affected his memory "a great deal". Dr. Esmail did not recall a meeting at which the documents suggest he and CN Labour Relations Manager David Brodie discussed Ms. Casler's medical restrictions. Dr. Esmail's inability to recall these events impacted CN's ability to respond to Ms. Casler's allegation of discrimination during her pre-placement medical evaluation in October 2004, and during the return-to-work and accommodation process.
- iii. Mr. David Brodie (CN Labour Relations Manager, retired): testified that he had no independent recollection of the events at issue in the Complaint, and that he had no

specific memories of dealing with the Complainant's employment situation, despite CN's submission that he was involved in CN's attempt to accommodate the Complainant during the period from 2005 to 2006.

- iv. Mr. Bob Ballantyne (Union Representative with the Brotherhood of Locomotive Engineers) testified that he spoke with Ms. Casler at some point about her concerns, but that he could not recall what those concerns were, nor could he recall the details of those conversations. Mr. Ballantyne further testified that his memory was diminished as a result of the passage of time. CN argued that Mr. Ballantyne's lack of memory negatively impacted its ability to respond to Ms. Casler's allegations during the period between 1999 and 2003.
- v. Dr. Bhagwathee Govender (Ms. Casler's former physician) testified that she had undergone cancer treatment since the time when she dealt with Ms. Casler, and that these treatments had impacted her memory of the events before the Tribunal. She also conceded on cross-examination that her memory had faded a lot, and that she no longer had an independent recollection of the events surrounding the Complaint. Dr. Govender also testified that she did not know what had happened to the clinical notes of her treatment of Ms. Casler, and that she had not been asked to recover them.
- vi. Dr. Matthew Morrison (Ms. Casler's physician) testified that his memory was not that good. He further testified that he had not been asked to search for his file from the early period of his treatment of Ms. Casler, which may have been lost, or may have been destroyed after 10 years as it was his practice to do so.
- vii. Ms. Susan Blackmore (CN Labour Relations Manager) testified that the passage of time had had a great effect on her memory, and that she remembered some events from this time period, but other memories of important events or documents were "blurry" or non-existent. For example, CN submitted that Ms. Blackmore had testified that she would not have had an independent recollection of the November 9, 2000 meeting with Mr. Nicoll, but she was able to refresh her memory to some degree by reviewing her contemporaneous notes. CN argued that, due to Mr.

Nicoll's death, Ms. Blackmore was CN's most important witness, and that her testimony that she no longer recalled these critical points was clear proof of prejudice.

### **Gaps in the Documentary Record**

[30] While a considerable volume of material was adduced before the Tribunal, CN argued that it had been deprived of the ability to place that documentary record in the proper context such that the Tribunal could consider those documents in light of witness accounts of the relevant events. CN referred the Tribunal to the CHRT case *Brunskill v. Canada Post Corporation* 2019 CHRT 22 [*Brunskill*] at para 64, which highlights the importance of considering the evidentiary record in its entirety, including evidence filed by both parties to the proceeding. CN argued that witness accounts provide important context for the documentary record, and, to the extent that this is a "documents case", that is only because so many of the relevant witnesses lack a clear memory of the events in issue or are no longer available to testify about what happened.

[31] CN argued that this inability to place the documentary record in its desired evidentiary context, or to address the known and unknown gaps in the documentary record, impedes its ability to fully answer the Complaint. CN suggested that it would be hard to imagine more prejudicial factual circumstances for the Respondent than those which it faced in this case. It argued that a delay of nearly 20 years would be "highly inordinate", and that it has incurred real and inherent prejudice flowing from the passage of time, faded memories, and a lack of documentation. CN asserted that to allow this matter to proceed would constitute a miscarriage of justice, and that doing so would be inconsistent with its right to make a full answer and defence at a fair hearing. Consequently, CN asked the Tribunal to dismiss the Complaint.

### ***The Complainant's Position***

[32] Ms. Casler opposed the motion. She vehemently disagreed with the Respondent's argument that the delay in this case has impaired the Tribunal's ability to conduct a fair hearing such that it would require the Tribunal to dismiss or stay the Complaint.

[33] Ms. Casler argued that granting the Respondent's motion to dismiss, or issuing a stay of proceedings, would be inconsistent with the quasi-constitutional social and policy objectives of human rights law to remedy discrimination and harassment. Furthermore it would be tantamount to a Tribunal imposed limitation period.

[34] The Complainant agreed with the Respondent that the law governing this motion is the Supreme Court's decision in *Blencoe*, which sets out the three factors to be considered in assessing the reasonableness of administrative delay: the length of delay, the cause of delay, and the impact of delay.

[35] In addition to the submissions made with regard to the *Blencoe* factors, Ms. Casler highlighted the importance of her rights under Canadian human rights law. She invoked broader public interest considerations which weigh in favour of ensuring that complaints before the Tribunal can be adjudicated on their merits.

### **Length of Delay**

[36] Ms. Casler submits that human rights complaints of this nature are necessarily complex and time consuming, and that the position being advanced by CN that the delay in this case is inordinate has no regard to the procedural steps required. This is particularly so in light of the rights of judicial review that were repeatedly exercised throughout the procedural history of the Complaint, before its referral to the Tribunal.

### **Cause of Delay**

[37] Ms. Casler argued that, in addition to the procedural requirements of the Complaint, CN's actions and conduct were central to multiple delays in this matter- a fact that Ms. Casler argues is ignored by CN in its motion. Specifically, Ms. Casler argues the following actions or conduct on the part of CN contributed to the delay in this case:

- i. Objections about the scope of the Complaint and other procedural aspects of the proceedings before the Commission and the Federal Court;
- ii. Delays arising from objections that CN raised in the course of the grievance arbitration process or the subsequent complaint that Ms. Casler made against her union for its failure to discharge its duty of fair representation;

- iii. CN's failure to address Ms. Casler's need for accommodation in a timely way prior to the filing of the Complaint; and
- iv. CN's delays in producing documents from August 2000 onward, including specific issues relating to the production of Ms. Casler's medical file at various points throughout the relevant period.

[38] Ms. Casler also argued that CN had benefited from Ms. Casler's vulnerability, which she attributed to her disability. Ms. Casler alleged that CN's actions had exacerbated her symptoms, including, stress, sleep disorder, fatigability, pain and cognitive difficulties. This made it impossible for Ms. Casler to study, concentrate, and write her Rules, and ultimately impeded her ability to return to work.

[39] Ms. Casler referred the Tribunal to the Supreme Court of Canada decision in *Moore v. British Columbia*, 2012 SCC 61 and cited the 1995 decision of the Federal Court of Appeal in *Belloni v. Canadian Airlines International*, 1995 CanLII 3546 (FCA), [1996] 1 FC 639, to support her argument that the impact of the passage of time upon fading memories is not even recognized by appellate courts when they order a new trial in a criminal case. Ms. Casler submitted that if appellate courts set such considerations aside in cases where *Charter*-protected due process rights and liberty interests are at stake, then the Tribunal ought not to consider procedural delays in considering motions such as CN's motion to strike for delay.

[40] Ms. Casler acknowledged that some of the delay incurred since the events at issue in the Complaint are attributable to the measures taken by the Tribunal to accommodate her during the hearing process, consistent with the advice of her medical team. Ms. Casler submitted that these delays were appropriate and necessary in order to ensure her safety. She also confirmed that the accommodations put in place by the Tribunal, although time consuming, were successful in enabling her to have access to the Tribunal's hearing process.

### **Impact of Delay**

[41] Ms. Casler argued that CN was not prejudiced by any delay, because it had asserted that she was either totally disabled, or, that she was capable to perform her job as a Brake/Switch Operator. Ms. Casler argued that, because it took this position, there can be no actual prejudice due to delay arising from the circumstances, or from the availability of CN's witnesses. Nor is there any reasonable explanation for why Ms. Casler was, according to her, never offered any suitable accommodated positions in a non-safety-sensitive role (particularly from 2000 to 2005).

[42] Ms. Casler made four arguments to rebut CN's assertions that it had been prejudiced by the passage of time between the events at issue and the hearing of the Complaint, and that the delay had negatively affected its right to a fair hearing, including full answer and defence. Ms. Casler's submissions related primarily to: the unavailability of the deceased witnesses, Mr. Nicoll and Mr. Rae; the availability of alternate witnesses; the inadequacy of CN's evidence with respect to the availability of other witnesses; and, the argument that faded witness memories could be offset by the documentary record. These arguments are set out below as they relate to the *Blencoe* factors.

### **Missing Witnesses**

[43] Ms. Casler asserted that CN has made false claims that it had incurred prejudice because of the delay in the hearing of the Complaint, which she submitted are not supported by the evidence.

### ***Larry Rae***

[44] Ms. Casler asserted that CN had not led evidence about the testimony that it sought to rely upon from Mr. Rae, nor explained how any such evidence would be material to its ability to respond to the Complaint. Furthermore, Ms. Casler asserted that CN could have led evidence from "other witnesses" whom she suggested would have greater knowledge and information about her situation, including Mr. Valier.

[45] Ms. Casler argued that the Tribunal should draw an adverse inference from CN's failure to call evidence from Mr. Valier to address any gap in the evidence created by Mr. Rae's death.

### ***Paul Nicoll***

[46] Ms. Casler argued that Mr. Nicoll was not involved in the facts relating to her Complaint, that he would have had no information relating to her situation between August 2000 and November 2004, and that any prejudice that CN might have incurred as a result of the loss of his evidence relating to the period following that time could have been mitigated. This could have been accomplished by calling other witnesses to whom, Ms. Casler suggested, Mr. Nicoll would have conveyed any information he had about his dealings with Ms. Casler.

### ***Other Missing Witnesses***

[47] Ms. Casler argued that CN did not provide sufficient evidence demonstrating that it had searched for other witnesses who might have been able to supplement its response to the Complaint and mitigate the loss of those witnesses that CN said were not available to testify.

[48] Ms. Casler argued that the mere fact that a witness is no longer employed by CN does not mean that the witness cannot be located. Nor can the Tribunal infer from their absence what impact their evidence might have had on CN's ability to respond to the Complaint. Ms. Casler argued that CN had failed to establish a link between the anticipated evidence of the witnesses upon which CN claimed it would have relied, and its ability to mount a defence against the Complaint.

### ***Faded Memories***

[49] Ms. Casler disputed CN's assertion that faded memories had prejudiced its ability to answer the Complaint and impeded its right to a fair hearing. Ms. Casler submitted that the mere fact that witnesses do not recall events at issue in the Complaint does not mean the Tribunal cannot reach a fair decision.

## Gaps in the Documentary Record

[50] Ms. Casler submitted that CN had not demonstrated the loss of documentary evidence that would justify a finding of prejudice. She suggested that any missing records ought to be attributed to CN's recordkeeping procedures, and not to delay in the Complaint process.

[51] Moreover, Ms. Casler argued that the voluminous documentary record should serve to supplement the Tribunal's body of evidence and mitigate against any concerns about faded memories.

## V. DECISION

### The Law Regarding the Administrative Duty of Fairness and Undue Delay

[52] There is no dispute between the parties with respect to the overarching principles of law that apply in this case. The Supreme Court's articulation of the law in *Blencoe*, and recently affirmed in *Law Society of Saskatchewan v. Abrametz*, 2022 SCC 29 [*Abrametz*], confirms:

There is no doubt that the principles of natural justice and the duty of fairness are part of every administrative proceeding. Where delay impairs a party's ability to answer the complaint against him or her, because, for example, memories have faded, essential witnesses have died or are unavailable, or evidence has been lost, then administrative delay may be invoked to impugn the validity of the administrative proceedings and provide a remedy. It is thus accepted that the principles of natural justice and the duty of fairness include the right to a fair hearing and that undue delay in the processing of an administrative proceeding that impairs the fairness of the hearing can be remedied. (*Blencoe* at para 102, citations omitted)

[53] In administrative proceedings, abuse of process is a question of procedural fairness and is a final measure with serious consequences. Decision-makers have a duty to act fairly and to safeguard the process through which complaints are heard and decided. Assessing the impact of delay on the procedural fairness of a proceeding flows from that duty (*Koke v. Corus Entertainment Inc. and Gailus*, 2024 CHRT 15 [*Koke*] at para 17, *Abrametz* at para 38, *Blencoe* at paras 105-7 and 121).

[54] The parties are agreed that the mere passage of time does not necessarily ground a finding of dismissal of a complaint. However, delay causing “significant prejudice” to hearing fairness, or which amounts to an abuse of process, is capable of grounding a finding of dismissal (*Blencoe* at paras 101 and 115; *Casler (FC)* at para 2).

[55] If the entire pre-hearing delay, from the earliest alleged discriminatory acts until the hearing, is so long that the respondent's right to a fair hearing is compromised, the Tribunal has the authority to remedy the situation (see *Desormeaux v. Ottawa Carleton Regional Transit Commission*, 2002 CanLII 78216 (CHRT) at para. 13; *Cremasco v. Canada Post Corporation*, 2002 CanLII 61852 (CHRT) at para. 71, aff'd on other grounds *Canada (Human Rights Commission) v. Canada Post Corporation*, [2004] 2 FCR. 581 (F.C.)). In fact, the Tribunal has a duty to ensure procedural fairness in the hearing process.

[56] To succeed in its request that the Complaint be dismissed for delay, CN must establish that:

- i. The passage of time has impaired its ability to make its case and thus has compromised the fairness of the hearing; or
- ii. The delay is inordinate, directly causes significant prejudice, and amounts to an abuse of process in that it is manifestly unfair to a party, or otherwise brings the administration of justice into disrepute (*Abrametz* at paras 42-43 and 101 and *Blencoe* at para 121).

[57] Determining prejudice is a question of fact, which means that the Tribunal has to consider the evidence that it received to adjudicate whether CN's ability to respond to the Complaint has actually been harmed by the length of time that passed between the date of incidents described in the Complaint and the Tribunal's hearing. Evidence is required to establish that an administrative delay amounts to an abuse of process, or that the principles of procedural fairness would be compromised by the length of time that has elapsed since the date of the events at issue. (*Abrametz* at para 69).

[58] The question to be determined is whether the Tribunal finds, on a balance of probabilities, that the time that passed between the events described in the Complaint and

the hearing in this case has, in fact, negatively impacted CN's ability to defend against Ms. Casler's allegations.

### **The Length of the Delay**

[59] There is no question that a delay ranging between 14-20 years between the events at issue in the Complaint and the hearing in this case is an exceptionally long delay.

### **The Cause of the Delay**

[60] Each party to this proceeding pointed to the other as the cause of the delay in this case, and CN noted that institutional delays while the Complaint was before the Commission were also a factor. Specifically, CN highlighted the length of time between the filing of the Complaint and the conclusion of the Commission's investigation, and the two-year re-investigation of the Complaint, following the January 2011 judicial review.

[61] Either party's choice to duly exercise its procedural rights in the course of a proceeding should not cost them their guarantee of a fair hearing. Indeed, the obligation to safeguard the fairness of a hearing rests with the Tribunal, regardless of the actions of any party in the events that preceded the matter being referred to it. That duty is foundational to the Tribunal's jurisdiction, and cannot be displaced by the actions of any party before it.

[62] Consideration of the "cause of the delay" in the caselaw appears to reflect the idea that a party who has unduly caused a delay in the conduct of a proceeding should not be allowed to hide behind that delay to avoid liability. This factor exists to protect the fairness of the process by removing any incentive to stall the proceedings to the point that they break down and a fair hearing is impossible.

[63] While each party to this proceeding has taken steps that have contributed to the overall delay in bringing this matter to a hearing, I do not have sufficient evidence to make a finding that either side was the primary cause of the delay within the meaning of the *Blencoe* analysis. Nor am I prepared to conclude that either Ms. Casler or CN took steps that caused a delay improperly or with the goal of obfuscating or subverting due process.

[64] While CN raised arguments or took steps that may have been unsuccessful as the Complaint proceeded through the legal system, I find that these steps were not frivolous. And in any case, the Tribunal cannot attribute a significant delay in the conduct of this proceeding to CN. Likewise, when the hearing process was disrupted by the need to consider and accommodate Ms. Casler's health and wellbeing, the steps taken by the Tribunal and by the parties were designed to ensure the conduct of a fair hearing, not to obfuscate it. Any delays arising from those steps served the process and did not abuse it.

[65] Institutional delays within the human rights system in Canada should be of concern to all of us, particularly if those delays imperil the conduct of a fair hearing. Whether those delays arise from wrongdoing, neglect, insufficient resources or the structure of the administrative system itself, when the system contributes to a delay in the conduct of a proceeding, justice suffers.

### **The Impact of the Delay**

[66] Ultimately, while the preceding factors (length and cause of delay) are necessary considerations, it is the **impact** of the delay on the conduct of the hearing that weighs most heavily in the Tribunal's analysis. The extraordinary step of dismissing or staying a proceeding ought to be avoided unless the passage of time has made a fair hearing impossible. However lengthy a delay, or unacceptable its cause, it is the impact of the delay on the quality or even existence of the evidence which can erode the Tribunal's ability to conduct a fair hearing and thus its jurisdiction to render a decision. (*Grover (FC)* at para 30.)

[67] In this case, the impact of the delay is fatal to the cause of justice. The Tribunal has been unable to hear evidence from key witnesses, including both missing witnesses and those who testified that they could no longer reliably recall material events. Furthermore, the evidence from every witness confirmed for the Tribunal that a clear and reliable picture of the events in this Complaint was impossible. Even the reliability of the documentary record has suffered, as important medical and insurance records were missing from the evidence before the Tribunal. A further, somewhat more obscure problem is that, without reliable information about the relevant events from those with direct knowledge, CN was

unable to fully prepare its response to the Complaint or assess the completeness of the evidence.

[68] As a result, and for the reasons laid out in more detail below, I find that the delay in this case has irreparably eroded the evidence available to the Tribunal and has caused material prejudice to CN's ability to respond to the Complaint.

**Missing Witnesses (Died or Could Not Be Located)**

[69] At the time of the hearing of this Complaint, two key CN witnesses, Larry Rae and Paul Nicoll, had died.

[70] Based on the evidence (albeit incomplete) that the Tribunal received, CN's inability to call evidence from the individuals most involved in the events alleged in the Complaint, and particularly regarding its efforts to accommodate Ms. Casler, and the extent of her cooperation with those efforts, stands out as a glaring gap in CN's case. This gap appears to be one which cannot be closed by reference to other available evidence. It is highly prejudicial to CN's case and to the Tribunal's efforts to fairly adjudicate the Complaint.

[71] In addition to Mr. Rae and Mr. Nicoll, Ms. Blackmore testified that she was unable to locate several other material witnesses:

- A. Carol Macdonald (CN Nurse who worked with Ms. Casler through the accommodation process);
- B. Lily Gallegos (CN Manager and Crew Management Officer who was involved in providing alternative work duties for injured or ill employees); and
- C. Cindy Bobowick (CN Risk Management Officer who was involved in Ms. Casler's potential return to work)

[72] He further testified that he had not been asked to search for his file from the early period of his treatment of Ms. Casler, which may have been lost, or may have been destroyed after 10 years as it was his practice to do so.

[73] The issue of whether adequate efforts were made to accommodate Ms. Casler upon her desired return to work is central to the determination of this Complaint, as is the question of whether Ms. Casler adequately discharged her obligation to cooperate with the accommodation process. Although Ms. Casler gave some evidence on these issues during her testimony before the Tribunal, it is clear that the body of evidence in this regard is incomplete without testimony from Mr. Nicoll (among others).

[74] The content of the evidence of these missing witnesses cannot be known, and CN correctly argues that it can only speculate as to what they knew about the events described in the Complaint. But regardless of the content of that evidence, there can be no question that CN's ability to litigate this matter has been prejudiced by the fact that it does not have access to the accounts of many staff members who had direct dealings with Ms. Casler.

[75] Ms. Casler conceded in her closing submissions, that other than Mr. Sherbo, none of CN's witnesses had ever met Ms. Casler, and that their role in her situation was limited to various emails and notes. Even without knowing the substance of the evidence that would have been provided by any of the missing witnesses, I am convinced that the absence of these witnesses altogether leaves a sizable hole in the picture that the parties are able to provide to the Tribunal of the events in question. I am also convinced that, on balance, the absence of the five CN witnesses (whose involvement in the events of the Complaint was reinforced by the documents and the testimony of other witnesses), has prejudiced CN's ability to respond to the Complaint.

### ***Adverse Inferences***

[76] Ms. Casler argued, without citing any authorities, that the Tribunal should draw an adverse inference from CN's decision not to call other witnesses to try to close the evidentiary gaps left as a result of the unavailability of Mr. Nicoll, Mr. Rae, and to a lesser extent, Ms. Macdonald, Ms. Gallegos and Ms. Bobowick. Specifically, Ms. Casler argued that the Tribunal ought to draw an adverse inference from CN's decision not to call:

- A. Ron Valier (retired CN Superintendent), whom Ms. Casler speculated may have been able to testify about some matters that CN asserted would have been the subject of Mr. Rae's evidence; and

- B. Mary-Jane Morrison (CN Human Resources Manager), whom Ms. Casler suggested would have been able to provide the best evidence about witness availability and CN's efforts to locate certain witnesses.

[77] Ms. Casler has not pointed to any evidence that was before this Tribunal to support her assertion that Mr. Valier would have been in a better position to testify about efforts made to accommodate Ms. Casler, nor did Ms. Casler herself make any effort to call Mr. Valier or any of CN's other employees. There is no evidence that Ms. Casler sought CN's assistance in locating these missing witnesses, nor was this issue raised in the case management process before the Tribunal. I note that neither party made any effort to have the Commission's investigation file placed before the Tribunal to supplement the record. Despite the fact that all parties were on notice of CN's intention to argue that the Complaint could not be fairly adjudicated due to delay, the parties were prepared for the Tribunal to proceed on the basis of the record before it.

[78] The evidence before the Tribunal is that CN looked for the witnesses that it felt had relevant evidence. Ms. Blackmore testified about CN's efforts, and while it cannot be said that CN left no stone unturned in its search, there is no basis for me to conclude that they did not make a valid effort to locate the relevant witnesses, or that other individuals would have been able to provide better evidence than that which was before me, either due to the passage of time or the level of their involvement in the material events at issue.

[79] CN could not have known how the Tribunal would rule on its motion for delay, so it was in CN's interest to put its best case forward at the hearing. Had I denied CN's motion, the evidentiary record before the Tribunal would have formed the basis of my adjudication on the merits. Further, I have found Ms. Blackmore, who testified about CN's efforts to obtain the evidence of the missing witnesses, to be a reliable and knowledgeable witness, and there is nothing in her testimony to suggest that she was not being truthful when she told the Tribunal about CN's efforts.

[80] Without being satisfied, based on the record before me, that another witness (such as Mr. Valier) would have provided superior evidence, the Tribunal should not draw inferences about what might have been. As stated in *Wigmore*:

... there is a general limitation (depending for its application on the facts of each case) that the inference cannot fairly be drawn except from the non-production of witnesses whose testimony would be superior in respect to the fact to be proved. (*Wigmore's Evidence in Trials at Common Law*, Chadbourne Rev. (Toronto & Boston: Little Brown & Company: 1979) vol. II, s. 287, at 202-3.)

[81] I therefore decline to draw an adverse inference from CN's decision not to call Mr. Valier, or take other measures to close the evidentiary gap in the record.

### **Unreliable Evidence Due to Faded Memories**

[82] In order to assess the impact of faded memories on the quality of the evidence provided by the witnesses who appeared before the Tribunal, I have reviewed the evidence of each witness below. In summary, the Tribunal finds that there is no witness who testified at this hearing whose evidence was not negatively impacted by the long delay between the events at issue in this case and the hearing of the Complaint.

[83] While Ms. Casler was able to provide extensive testimony, I am unable to rely on it to determine this Complaint. The other witnesses were unable to provide relevant evidence, due to their lack of involvement or the passage of time, and consistently indicated so in their testimony.

### ***Ms. Donna Casler (Complainant):***

[84] During her testimony, which lasted almost ten days, spread over several months, it was obvious that Ms. Casler desperately wanted to provide her evidence to the Tribunal. She had waited almost two decades to testify in this hearing, and whatever else was to occur during the proceeding, it was clearly important to Ms. Casler to have her day in court and to be heard.

[85] It was also clear that testifying in this kind of proceeding came at a great cost to Ms. Casler, who very clearly struggled to tell her story. In fact, on the evening following the third day of the hearing, a day and a half into Ms. Casler's direct evidence, Ms. Casler suffered a medical emergency and was unable to continue her testimony.

[86] Out of concern for Ms. Casler's well-being, but nonetheless wanting to afford her the opportunity to provide her account of the events outlined in her Complaint, the Tribunal conducted an investigation into Ms. Casler's capacity to testify. The Tribunal was furnished with a detailed report from Ms. Casler's neurologist, who was examined under oath. Based on the medical evidence, the Tribunal concluded that the hearing could proceed with a number of safeguards in place to ensure Ms. Casler's wellbeing.

[87] Over the course of six further days of evidence, the Tribunal and the parties went to great lengths to afford Ms. Casler every opportunity to tell the Tribunal about what happened to her. She concluded her evidence on August 27, 2018, the eleventh day of the hearing. I commend all the parties for providing Ms. Casler the best opportunity to present her evidence. And I commend Ms. Casler for persevering with what was clearly a very challenging personal experience, spanning more than two decades at this stage. Notwithstanding my findings about the reliability of her evidence, or the decision that I have made on this motion, I believe that Ms. Casler made every effort to bring her case forward. Where I have found her evidence to be unreliable, I do not attribute those gaps to malice or wrongdoing on Ms. Casler's part.

[88] However, there are two problems with Ms. Casler's evidence. First, I am unable to accept that her evidence is reliable and reflects her independent recollection of the events at issue. Second, the frailties in her evidence demonstrated through the cross-examination leave me unable to accept that her testimony presents a sufficiently accurate narrative of the events at issue on which to base a decision.

[89] Starting first with my assessment of Ms. Casler's recollection of the events at issue, we know that credibility and reliability are not one in the same. As Member Gaudreault stated in the Tribunal's decision in *Willcott v. Freeway Transportation Inc.*, 2019 CHRT 29 at para. 29, "[a] witness can testify in a credible manner about facts that he or she believes to be true, but some of the information may not be reliable for various reasons (for example, the time elapsed, memory loss, stress and anxiety)."

[90] And as Chairperson Khurana recently wrote in *White v. Canadian Nuclear Laboratories*, 2025 CHRT 67 at para 48:

Where credibility is concerned with a witness's sincerity, reliability is concerned with the accuracy of a witness's testimony. The accuracy of a witness's testimony involves considering issues such as their ability to accurately observe, interpret and recount events (*McWilliam v. Toronto Police Services Board* at para. 51).

While a witness may provide credible evidence, which reflects their sincerely held belief about the events at issue, the evidence may not be reliable due to the passage of time, intervening bias, physical, cognitive or psychological impairment, trauma, or stress and anxiety.

[91] In considering Ms. Casler's evidence, I believe that a number of factors made it difficult to rely upon her testimony when considering the degree to which her evidence had been degraded by the passage of time. At some points in her evidence-in-chief, Ms. Casler confirmed that she had poor independent recollection of some of the events she was describing. Moreover, she had great difficulty providing evidence without prompting, that frequently veered into leading questions or reference to her handwritten notes. Despite her repeated assertions that she recalled the events about which she was testifying, Ms. Casler appeared to be reading from the notes in front of her at many points during her evidence. At one point, on cross-examination, Ms. Casler appeared to suggest that her notes were more accurate than her memory, but then quickly corrected herself and suggested that the Tribunal should disregard that statement when counsel for CN asked her to repeat it. It appeared that Ms. Casler realized that she had made an admission about an issue with her recollection of events, and that she was making a conscious effort to deny any issues with her memory. Ms. Casler appeared very uncomfortable in that moment, and it appeared to me that she thought she had done something "wrong", despite her initial answer being quite reasonable.

[92] At times during her testimony, Ms. Casler appeared to be struggling to answer questions, sometimes appearing to be speaking negatively to herself in a low voice that was not always captured on the recording of the hearing. I was concerned about this conduct and was worried about Ms. Casler's well being.

[93] There is no way for the Tribunal to determine with any certainty whether Ms. Casler did in fact recall the events she was describing, as she maintained, because she continued

to refer to her notes, even when the Tribunal cautioned her and her counsel about the impact that doing so might have on the Tribunal's assessment of her evidence.

[94] Ms. Casler's insistence that she clearly recalled the events she was testifying about in detail was at times contradicted by her own words, by her reliance on her notes, and, given the passage of time, by common sense and basic logic. It would be understandable for a witness to forget some details about events that transpired more than a decade earlier, even when the events were of such significant importance to her. An inability to recall peripheral details after such a long time would have, in itself, been unlikely to undermine the Tribunal's willingness to rely on Ms. Casler's evidence. The problem, however, arises because Ms. Casler maintained that she did recall the details of the events at issue. Given the passage of time, Ms. Casler's instance she had a full and unwavering recollection of the events at issue undermined, rather than bolstered, her credibility. Particularly where the Tribunal plainly observed Ms. Casler struggling to provide that evidence, and turning consistently to her notes. The inconsistency between what she said in her evidence about her memory of the events at issue, and what was plain and obvious to the Tribunal about her ability to recall, presents a credibility issue for the Tribunal which is impossible to ignore. At the very least, it leaves the Tribunal unable to reliably assess the limits of what, if anything, Ms. Casler was able to accurately recall from events twenty years ago.

[95] The other issue with the reliability of Ms. Casler's evidence is that her cross-examination demonstrated that her testimony had significant frailties; it could not be relied on as it could not be appropriately tested. Because CN did not have access to the accounts and testimony of its own key employees to counter Ms. Casler's allegations, either because those employees were no longer available or no longer recalled the events alleged, CN was prejudiced in its ability to test Ms. Casler's evidence through cross-examination. The Tribunal cannot know how Ms. Casler would have responded to the anticipated evidence of CN's witnesses, who may have been able to contradict Ms. Casler's testimony. During cross-examination, Ms. Casler seemed, on occasion, to struggle to provide answers when it appeared she thought it would paint her evidence in an unfavourable light, and she was repeatedly required to revise her testimony when confronted with contradictory evidence. As the trier of fact, I believe that the inability to hear and weigh competing accounts (to the

extent that contradictory evidence was provided) has had a deleterious impact on the Tribunal's ability to adjudicate the Complaints on its merits.

[96] An example of Ms. Casler struggling to respond when the answer she had to provide did not paint her in a positive light was when Ms. Casler testified that she called her supervisor, Mr. Nicoll, to advise him that she would be missing the test in December 2004 whereby she could requalify for safety sensitive work, insisting that she never "didn't just [not] show up". (Evidence of Donna Casler, May 30, 2018, p 197). This alleged conversation was important to assessing whether Ms. Casler was cooperating with CN's efforts to return her to work. Her counterpart in the discussion was Mr. Nicoll, who was no longer able to dispute her account with his testimony, as he had died. However, when confronted with her own notes, Ms. Casler was forced to change her evidence and concede that, even by her own account, she had not called CN to advise them that she would not be able to attend to write the recertification test.

[97] Another example of Ms. Casler having to revise her testimony when confronted with contradictory evidence arose when Ms. Casler provided specific and detailed testimony during her direct examination about a 2001 conversation that she claimed to have had with Mr. Ballantyne about the CN accommodation process (Casler, May 14, 2018 p. 76). She alleged he had relayed to her CN's unwillingness to accommodate Ms. Casler "in any way, shape or form." This alleged conversation pertained to an important issue before the Tribunal, and Ms. Casler testified in some detail about it, including reference to specific language she said Mr. Ballantyne used about CN's willingness or ability to accommodate her. On cross-examination, however, Ms. Casler admitted that CN management had not actually said that it was unwilling to accommodate her, but that Mr. Ballantyne had been left with that impression. And then still later on in her cross-examination, Ms. Casler was forced to correct herself again, confirming that she had not actually had a conversation about this with Mr. Ballantyne, but rather that she became aware of the alleged conversation when she reviewed her union's submissions before another proceeding (Casler August 27, 2018, p. 82).

[98] Ms. Casler repeatedly made statements during her evidence that, upon cross-examination or confrontation with documents that contradicted her testimony, appear to

have been exaggerated or inaccurate. The mere fact that there were weaknesses in Ms. Casler's evidence that came out in cross-examination was not itself a fatal problem. The problem, however, arises because CN was unable to muster its own evidence to contest Ms. Casler's narrative. It was unable to subject her evidence to a proper and rigorous cross-examination that would enable the Tribunal to have confidence that those portions of her testimony that withstood cross-examination were reliable.

[99] This is not really a case where one side's version of events is pitted against the other side's account in a She Said/He Said dispute. For the most part, CN has not been able to call witnesses to provide direct evidence contradicting Ms. Casler's assertions, as the relevant witnesses are no longer alive, could not be located, or do not recall the relevant events. This is the problem at the core of the Respondent's motion.

[100] It is against this hole in the evidence that the Tribunal must weigh Ms. Casler's testimony. While my ability to make findings about the credibility of Ms. Casler's evidence is strained by overlapping factors that I believe may be in part related to her medical condition, I have no such reservations in determining that her evidence is not sufficiently reliable to be the sole source for the Tribunal's determination of the Complaint.

***Mr. Bill Selby:***

[101] Mr. Selby was a co-worker of Ms. Casler's who became disabled during his employment at CN. Mr. Selby and Ms. Casler knew each other as colleagues in the rail yard, and they worked together for a brief period in an accommodated position. Mr. Selby was called to testify about his experience of medical accommodation at CN and his recollection of the events at issue in the Complaint.

[102] Mr. Selby had some ability to recall the details of his own medical restrictions, but did not have a reliable independent recollection of most of the events relating to Ms. Casler's Complaint. On cross-examination, Mr. Selby acknowledged that the passage of time (17 years) since the events described in the Complaint may have negatively impacted his ability to provide a reliable account of what happened. Furthermore, Mr. Selby's evidence was that his knowledge of what was happening at CN ended by December 2000.

[103] Overall, Mr. Selby was not able to provide relevant evidence, due to the passage of time and the limited nature of his involvement in the issues in this case.

***Mr. Robert Ballantyne:***

[104] Mr. Ballantyne was the Local Chairman of the Brotherhood of Locomotive Engineers (the “Union”), and was called to testify about his recollection of the events at issue in the Complaint. Mr. Ballantyne testified that he could not recall first meeting Ms. Casler, nor did he have an independent recollection of what he described as “her issues at the time” (Ballantyne, August 28, 1028 at page 80). Further, Mr. Ballantyne was not aware of whether Ms. Casler was provided with an accommodated position at CN, from the time that the Complaint arose, up to the date of his testimony (Ballantyne at page 98).

[105] On cross-examination, Mr. Ballantyne testified that he did not remember specific events during the relevant time period (Ballantyne at page 119). Nor did he recall many of the specific details relating to various conversations between him and Ms. Casler about her medical condition, her requests for accommodation, or her cooperation with the accommodation process. Mr. Ballantyne testified that although he recalled having had several conversations with Ms. Casler, he could not recall the specifics of the majority of those conversations, nor when they occurred (Ballantyne at page 127-9).

[106] It is unclear whether Mr. Ballantyne would ever have had a detailed recollection of his interactions with Ms. Casler. But to the extent that he ever had such evidence to provide to the Tribunal, any memory he had of the details of the majority of his interactions with Ms. Casler had faded with time. Mr. Ballantyne readily conceded the limits of his recollection, and the Tribunal finds no reason to doubt his credibility, even if his ability to provide relevant and reliable evidence was severely limited by his inability to recall the details of the events at issue.

***Dr. Matthew Morrison***

[107] Dr. Morrison was Ms. Casler’s family physician at the time of the hearing. He was called to testify as a treating physician. Dr. Morrison had an ongoing treatment relationship with Ms. Casler at the time of the hearing, so unlike many of the other witnesses, at the time

of the hearing he had current active knowledge of Ms. Casler's condition and medical needs. As is typical with a treating physician, Dr. Morrison used his notes to refresh his recollection of the events at issue in the Complaint, and testified on numerous occasions that he did not independently recall various details about Ms. Casler's experience at CN or her medical needs.

[108] On cross-examination, Dr. Morrison conceded that there are various details that he did not recall, and that Ms. Casler's original medical files may have been lost when the records were digitized in 2004.

[109] Dr. Morrison appeared to be a knowledgeable and compassionate physician, who was deeply invested in advocating for his patient. While Dr. Morrison was not a "neutral expert" in the traditional sense, he was not called to provide an expert opinion to the Tribunal. Rather, he was called to provide evidence about the facts surrounding his care and advocacy for his patient. Given Dr. Morrison's reliance on his notes for the specifics of Ms. Casler's treatments and medical needs, his inability to locate the notes from the period prior to 2004, and his limited involvement in the events at issue, his evidence is unable to provide material assistance with the central issues in the hearing.

***Dr. Bhagwathee Govender***

[110] Dr. Govender was Ms. Casler's family physician during the time period at issue and was called to testify about her treatment of Ms. Casler at the time. Dr. Govender testified that she does not have an independent recollection of the events in issue, and that she "can only go by what all these letters are in front of her" (Dr. Govender, September 13, 2018 at page 96). Dr. Govender conceded on cross-examination that her own medical condition has impacted her memory of the events at issue in this Complaint, in addition to the normal impact of the passage of time (Dr. Govender at page 126).

[111] Dr. Govender appeared to the Tribunal to be a caring and diligent physician, who readily conceded the limits to her own recollection of the events at issue. The Tribunal found Dr. Govender to be a credible witness, albeit one who does not appear to have any relevant and reliable evidence to assist in determining the Complaint.

***Dr. Aashif Esmail***

[112] Dr. Esmail was a physician with Medisys, who examined Ms. Casler in the context of the events at issue in the Complaint. CN called Dr. Esmail to testify about his recollection of these events.

[113] Dr. Esmail testified that he does not remember Ms. Casler and would not have recognized her in a crowd. Although Dr. Esmail was able to testify about various documents in the Tribunal record, he did not have an independent recollection of the facts relating to the Complaint.

[114] On cross-examination, counsel to Ms. Casler took Dr. Esmail through various details of the record, and he responded at least 17 times that he did not recall the information he was being asked about. The Tribunal is not in a position to make any finding about the credibility of Dr. Esmail's evidence, but it was clear from his testimony that he did not have any independent recollection of the events.

***Ms. Susan Blackmore***

[115] Ms. Blackmore was a Labour Relations Manager at CN. The record before the Tribunal indicates that Ms. Blackmore was minimally involved in the events at issue in the Complaint. She was called to testify as CN's corporate representative. Ms. Blackmore testified that she did not recall her involvement in Ms. Casler's case in or around May 2003. It did not appear from her testimony that she had an independent recollection of the details of Ms. Casler's case.

[116] On cross-examination, Ms. Blackmore was pressed about her recollection of several details pertaining to her involvement with Ms. Casler's case, including the details of CN's efforts to accommodate Ms. Casler. On 23 occasions, she testified that she did not recall the relevant details, if she ever knew them. The Tribunal finds that while Ms. Blackmore appears to be a reliable and knowledgeable individual in general, her recollection of the events at issue in this case is not reliable due to her faded memory.

***Mr. Kerry Morris***

[117] Mr. Morris was a CN Labour Relations Manager at the relevant time, and was called by CN to testify about his recollection of the events at issue in the Complaint. Mr. Morris testified that his recollection of Ms. Casler's case "is nil" (Morris, April 11, 2019 at page 145), and that he has no independent recollection of the details beyond what appears in the documents. Mr. Morris stated that he would have difficulty recalling details going back five years, much less going as far back as the events at issue in the Complaint (Morris, at page 146).

[118] Mr. Morris appeared to the Tribunal to be forthright and genuinely concerned about his inability to provide reliable evidence about the events dating back fifteen years. The Tribunal found Mr. Morris to be a credible witness, who had virtually no relevant or reliable evidence to provide about the material issues, due to the passage of time.

***Mr. Rick Sherbo***

[119] Mr. Sherbo was a retired CN Train Master and was called to testify about his recollection of the events at issue in the Complaint. Mr. Sherbo's recollection of the specific events at issue was extremely limited, and he repeatedly testified that he did not recall the events about which he was questioned.

***Mr. David Brodie***

[120] Mr. Brodie was a retired CN Labour Relations Manager and was called to testify about his recollection of the events at issue in the Complaint. Mr. Brodie testified that he has no specific recollection of interacting with Ms. Casler's case. (David Brodie, May 30, 2019 at page 9). Despite being copied on correspondence about Ms. Casler's requalification testing, he testified that he did not recall any efforts to have Ms. Casler requalify for safety-sensitive work.

[121] Mr. Brodie did not recall the key medical personnel involved in Ms. Casler's case, nor did he recall taking various steps relating to her case, although he did not dispute having done so, based on the record.

[122] It is clear from the record that Mr. Brodie was involved, to some degree, in the events relating to Ms. Casler's illness and CN's efforts to return her to work. Were he to recall these events, Mr. Brodie's evidence may have assisted CN in its response to the Complaint, or assisted the Tribunal in its determination of the Complaint. However, his ability to recall the events many years later had clearly faded. While I do not impugn Mr. Brodie's credibility in any way, on balance, I find that his inability to recall the details of CN's efforts to accommodate Ms. Casler prejudices CN's ability to provide a full answer and defence to the Complaint.

[123] Taken together, the overall quality of the evidence before the Tribunal is poor. There are many witnesses who would certainly have had valuable evidence to provide, but whose recollection of the events has been damaged by the passage of time. Besides Ms. Casler, no witness indicated a recollection of details of this case that went beyond the documentary evidence. It is impossible to draw any conclusion other than that CN's right to provide full answer and defence has been deeply prejudiced by the impact of the passage of time on the quality of the witnesses' memories.

[124] The Tribunal's determination on this factor in the *Blencoe* analysis is clear and unsurprising, given that nearly two decades had passed between some of the events at issue and the conclusion of the evidence: the passage of time has deeply eroded the quality of evidence available to the Tribunal in this case. While some evidence was reliably put before the Tribunal by the testimony of various witnesses, the picture that evidence paints is incomplete, and the image is obscured by the passage of time. Whatever happened to Ms. Casler, the totality of the evidence available from the witnesses who testified renders the search for justice illusive, and the truth of these events unattainable.

### **Gaps in the Documentary Record**

[125] The Complainant has rightly pointed out that the Tribunal had the benefit of several binders of documentary evidence to support its decision making in this case, including voluminous notes that the Complainant testified were made contemporaneously with the events in question. It is easy to understand why the Complainant might feel that the Tribunal had enough information to make a decision based on the documents alone.

[126] It is tempting to default to the documentary record, in an effort to render justice in this case, albeit imperfectly. And if the gaps in the documentary record were the only defect in the evidence, perhaps the Tribunal would have been able to proceed with the hearing, filling in those gaps when and where possible by drawing from the witness testimony. However, the Tribunal's ability to repair the gaps in the record is impeded by four important problems:

- i. Despite its volume, we know that the documentary record is missing information from Ms. Casler's insurance file, and is also missing medical records from Ms. Casler's physician at the relevant time, Dr. Govender. While we don't know what would have been reflected in these documents, I am convinced that their contents would be relevant to this proceeding, and to the assessment of Ms. Casler's ability to work at the material times (which is part of CN's defence to the Complaint). Ms. Casler's medical limitations are central to establishing what CN might have been able to offer her by way of an accommodated position. Both her insurance file and Dr. Govender's notes are important sources of information on this issue, and neither is available to the Tribunal. The Tribunal therefore lacks key documentary evidence that would be germane to adjudicating one of CN's defences in this proceeding.
- ii. We don't know what we don't know: in other words, because of the overall poor quality of evidence from the witnesses who testified in this case, the Tribunal does not have a reliable picture of what the complete documentary record ought to include, and therefore it does not know what is missing. This uncertainty undermines the Tribunal's ability to confidently rely on the documents as a substitute for other forms of evidence;
- iii. The documents do not provide an adequate picture of important issues in this case, including CN's efforts to accommodate Ms. Casler, and the extent to which Ms. Casler co-operated with CN's efforts to accommodate her. While there are references to these factors in the existing record, and some evidence on these issues, the evidence that the Tribunal heard at the hearing points to the fact that the events being described were not all captured in a document – particularly the

conversations that CN asserts were held between Ms. Casler and her supervisors, both of whom are now deceased. The Tribunal lacks any reliable way to discern the contents of those conversations, and the evidence that does exist is either unreliable or circumstantial. Overall, the documentary record is not sufficient for the Tribunal to make a reliable determination regarding important elements of the Complaint, including CN's defence; and

- iv. The testimony about the events at issue is not reliable. Given these gaps in the documentary record and the Tribunal's findings about the unreliability of the testimony provided at the hearing, I am left with no way to make credible findings about important aspects of the Complaint and CN's defence.

[127] Importantly, in addition to the serious harm that has been done to the Tribunal's ability to conduct a fair hearing into the Complaint, the erosion of the evidentiary record, particularly with respect to the unavailability of key witnesses and the poor quality of witness recollections, also prevents CN from fully understanding the events surrounding the Complaint. There is no way to know, for example, what Mr. Nicoll would have told CN about his conversations with Ms. Casler, or what Mr. Sherbo would have described about his interactions with Ms. Casler, were he to remember them. And of course, there is no way to know with certainty what documents might have existed but have now been lost, nor can we know what facts those records might have substantiated or refuted.

### **Concluding Reflections on the Granting of an Extraordinary Remedy**

[128] It is important that Canadians who have brought human rights complaints to the Tribunal have those complaints decided on their merits. There is a strong public interest that militates against dismissing or staying a complaint on the basis of delay, and doing so should only occur when the Tribunal's duty and the public interest in a fair process outweigh the public interest in having complaints determined on their merits (*Abrametz* at para 84).

[129] When a complaint is dismissed or stayed because a fair process can no longer be afforded to all parties due to the passage of time, that result reflects a failure of our system to deliver justice to the parties, whatever the outcome ought to have been. Even when the

responsibility for that delay does not lie with any one party or institution, it is important to acknowledge that justice delayed is, in fact, justice denied.

[130] In making the decision to dismiss the Complaint in this case, the Tribunal is deeply conscious of the fact that this outcome reflects the system's failure to the parties in this case. Ms. Casler and CN, like all those who turn to our administrative human rights system for justice in cases where discrimination is alleged, deserved a better outcome than the one they have received. While all actors in the system strive to make our human rights adjudication process the best it can be, it is important to acknowledge when we have failed to do so, as we have in this case. On a personal level, I thank the parties for the trust that they have placed in the Tribunal, and I am sorry that this outcome is as close as I have been able to bring this matter to justice.

### **Conclusion**

[131] Whatever the truth in this case may be, and regardless of what the outcome of the Complaint would have or should have been, it is with great regret that I have determined that both the truth and any appropriate remedy are now beyond the Tribunal's jurisdiction. Because I have found that the Respondent's ability to respond to the Complaint has been significantly prejudiced by the passage of time (and, in particular, by the loss of material witnesses and the significantly impaired memory of the majority of the witnesses who were called to testify), I have no choice but to grant the Respondent's motion and dismiss the Complaint.

### **VI. COSTS MOTION**

[132] On December 18, 2018, CN filed a motion with the Tribunal seeking an Order directing Ms. Casler or her legal counsel, Mr. Hugh Scher, to reimburse CN for costs thrown away on a dispute that arose in relation to the expert testimony of Dr. Pierre Flor-Henry, Ms. Casler's neurologist.

[133] I accept that the Tribunal has the authority to order costs for an abuse of its process, and I do not wish to minimize the seriousness of the Tribunal's concerns about the conduct

alleged in this case. However, I note that the Disclosure Motion was withdrawn, and that there were no factual findings made. In light of the lack of evidentiary foundation to ground the serious finding that an abuse of the Tribunal's process had occurred, I decline to exercise the Tribunal's discretion to make an award of costs against Ms. Casler or her counsel in this case.

**ISSUE:**

**Should the Tribunal exercise its discretion to award costs against Ms. Casler or her counsel for an abuse of the Tribunal's process?**

[134] Following a medical emergency arising in connection with the start of Ms. Casler's testimony before the Tribunal, I asked for medical guidance from Ms. Casler's doctors about her ability to continue safely with the hearing, and I sought their guidance about how the Tribunal might accommodate Ms. Casler's medical needs if she was found to be well enough to proceed.

[135] In response to the Tribunal's request, Ms. Casler provided a report from her neurologist, Dr. Flor-Henry, responding to the specific questions that the Tribunal had posed regarding Ms. Casler's ability to continue with the proceeding (the "Expert Report"). The Expert Report concluded that she could participate in the proceeding with some safeguards in place, and Dr. Flor-Henry testified before the Tribunal. This expert direction about Ms. Casler's ability to participate in the hearing was central to the purpose of the Expert Report.

[136] Subsequently, an issue arose with respect to the notes of Dr. Morrison, Ms. Casler's treating physician, which appeared to include content that had previously been redacted (the "Redacted Information"). Ms. Casler initially claimed that the Redacted Information was protected by privilege and refused to produce it. CN challenged the privilege claim (the "Privilege Motion").

[137] Following a brief oral hearing on the motion, the Tribunal ordered the production of the unredacted clinical notes of Dr. Morrison, which referenced a discussion with Ms. Casler about a draft expert report of Dr. Flor-Henry, the existence of which had been previously denied (the Draft Expert Report).

[138] CN then sought disclosure of the Draft Expert Report, which was initially opposed by Ms. Casler. CN brought a written motion asking the Tribunal to order the disclosure of the Draft Expert Report (the “Disclosure Motion”). Ms. Casler then produced the Draft Expert Report to CN.

[139] Dr. Flor-Henry’s Draft Expert Report directly contradicted the opinion he had provided to the Tribunal (both in the Expert Report and in his testimony before the Tribunal) regarding Ms. Casler’s ability to continue with the hearing process following the medical emergency that had interrupted her testimony. The Draft Expert Report indicated that Ms. Casler’s continued testimony would be detrimental to her health and that she would be unable to tolerate the stress of any future appearances before the Tribunal.

[140] In light of the fact that the Draft Expert Report had been produced, the Disclosure Motion was withdrawn, and no decision or findings were made by the Tribunal about the series of events leading up to its production, or about the conduct surrounding Dr. Flor-Henry’s expert opinion. However, CN requested that the Tribunal order Ms. Casler or her counsel to reimburse CN for costs thrown away on the Disclosure Motion (“the Costs Motion”).

[141] In its motion for costs thrown away, CN alleged that Ms. Casler or her counsel had conducted themselves in an improper manner by: (i) failing to disclose the existence of a Draft Expert Report as required by the Tribunal’s Rules; (ii) improperly interfering with or influencing an independent expert with respect to the expert’s opinion; and (iii) suborning perjury on the part of Dr. Flor-Henry when he denied the existence of a Draft Expert Report in testimony before the Tribunal.

[142] Ms. Casler opposed the Costs Motion, CN’s characterization of the underlying facts, and CN’s position on the Tribunal’s capacity to award costs. The Tribunal reserved its decision until the conclusion of the hearing and Final Decision.

[143] CN relies on *Tipple v. Canada (Attorney General)*, 2012 FCA 158 [*Tipple*] for the proposition that the Tribunal has the authority to award costs for an abuse of process, which is an exception to the general principle established in *Canada (C.H.R.C.) v. Canada (Attorney General)*, 2011 SCC 53 [*Mowaf*] that the Tribunal cannot award costs. On the facts

of this case, it is not necessary to determine whether the Tribunal can order costs for an abuse of process after *Mowat*. What is relevant is that the threshold to award costs under *Tipple* has been described as very high: *Sheet Metal Workers' International Association Local Union #8 v. Dr. Cool Industrial Inc*, 2014 CanLII 67645 (AB GAA).

[144] The Tribunal has granted costs on the basis of *Tipple* once, on consent: *First Nations Child and Family Caring Society of Canada et al. v. Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada)*, 2019 CHRT 1 [*FNCFCSC Tipple Order*]. The factual basis leading to this decision is set out in an earlier ruling in that case, 2013 CHRT 16 [*FNCFCSC Disclosure Order*].

[145] Both *Tipple* and *FNCFCSC Disclosure Order* are distinguishable from the instant case by the fact that, in those cases, the relevant disclosure was never provided. The requesting party only received the information through an access to information request. Those facts are markedly different from the circumstances of this case, where Ms. Casler ultimately disclosed all the information she was ordered to provide. Both of those previous cases also involved a significantly larger volume of documents than the single Draft Expert Report at issue here. Though I note the significance of the Draft Expert Report and the concerns raised about an attempt to obscure the truth from the other party and the Tribunal.

[146] The conduct alleged in CN's motion for costs is extremely serious, and were it to be substantiated, this might be a case where costs could appropriately be awarded. However, in the totality of the circumstances of this case, and based on the evidence available to me on this motion, I do not find that the evidentiary foundation is sufficient to make the findings necessary to ground the relief that CN is seeking.

[147] In addition, Ms. Casler's Complaint is being dismissed due to delay. Given the extraordinary nature of *Tipple* damages, it is difficult to justify exercising the Tribunal's discretion to award damages against Ms. Casler or her counsel when she is already losing the ability to have her case determined on its merits.

[148] In conclusion, the circumstances of this case and the evidence available on this motion do not meet the high threshold required to order costs in accordance with *Tipple*. CN's motion for costs is accordingly dismissed.

**VII. ORDER**

[149] For the foregoing reasons, the Complaint is dismissed.

[150] CN's motion for costs is also dismissed.

*Signed by*

Kirsten Mercer  
Tribunal Member

Toronto, Ontario  
October 29, 2025

# Canadian Human Rights Tribunal

## Parties of Record

**Tribunal File:** T1999/7913

**Style of Cause:** Donna Casler v. Canadian National Railway Company

**Ruling of the Tribunal Dated:** October 29, 2025

**Date and Place of Hearing:** Edmonton, Alberta  
September 11-14, 2017  
April 16, 2018  
May 14-16, 2018  
May 29-30, 2018  
August 27-29, 2018  
September 12-13, 2018  
April 8-12, 2019  
May 29-30, 2019

Toronto, Ontario  
October 3-4, 2019

### **Appearances:**

Hugh Scher, for the Complainant

Russell Groves, for the Respondent