

**Canadian Human
Rights Tribunal**



**Tribunal canadien
des droits de la personne**

Citation: 2024 CHRT 4
Date: January 30, 2024
File No.: T2582/13920

Between:

Ray Davidson

Complainant

- and -

Canadian Human Rights Commission

Commission

- and -

Global Affairs Canada

Respondent

Ruling

Member: Kathryn A. Raymond, K.C.

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I. Overview of Ruling During the Hearing about the Statements of Particulars

[1] The Respondent, Global Affairs Canada (GAC), brought a motion asking that a declaration be issued selecting the most recently filed Amended Statements of Particulars (the “ASOPs”), described as the Fourth ASOPs, as “the” applicable SOPs for purposes of the hearing and decision. The question at the heart of the Respondent's motion is which version of the ASOPs outlines the factual issues to be decided. The Respondent seeks to establish that the most recent Fourth ASOPs define the materiality of the facts and issues, and not previous SOPs. The motion was brought by GAC several days into the hearing of the merits of the complaint filed by the Complainant, Mr. Davidson. The Canadian Human Rights Commission (the “Commission”) provided submissions on the motion to assist the Tribunal but took no position on the matter. Mr. Davidson opposed it.

[2] The Tribunal asked the parties whether it would be possible to resolve the matter informally, citing concern about the motion delaying the hearing. GAC requested that the Tribunal issue a formal ruling before the hearing proceed further.

[3] On December 12, 2023, the Tribunal informally dismissed the motion orally with reasons to follow. The Tribunal proceeded in this manner so that the hearing could continue as expeditiously as possible. This is the formal ruling regarding GAC’s motion for a declaration about the ASOPs.

[4] The Tribunal declines to make the declaratory order that GAC has requested and dismisses the motion on the grounds that it is speculative and unnecessary. Previous directions from the Tribunal identify the applicable ASOPs for purposes of particularizing the complaint at the hearing. The relevant and applicable ASOPs are those most recently filed: the Fourth Amended SOPs. This is apparent from the Tribunal’s official record of the extensive pre-hearing case management of this complaint.

[5] The motion brought by GAC is dismissed without prejudice to the ability of any party to object to the admissibility of evidence to be given at the hearing based on the content of the most recent Fourth ASOPs or to make submissions concerning the weight of evidence admitted at the hearing in their final submissions. A party may also make the same or a similar motion again if an issue arises requiring that a motion be properly brought and

determined by the Tribunal. However, the Tribunal may require the moving party to first bring a preliminary motion to demonstrate that the issue that the party wishes to raise is of sufficient importance to the fairness and efficiency of the proceeding that a formal motion or written ruling is required.

II. The Complaint Provides Context

[6] Mr. Davidson identifies as a Black man. His case against GAC is about alleged racial discrimination in employment. Mr. Davidson wished to take a leave of absence from his employment to work as a consultant for GAC on a short-term contract beginning in November 2015. He had worked as a consultant for GAC before in 2013. However, GAC decided not to retain him again in 2015.

[7] Mr. Davidson alleges that GAC's decision not to retain him is discriminatory and that he has been adversely impacted based on the protected ground of race.

[8] GAC alleges that most of the files the Complainant worked on in 2013 needed to be redone. GAC denies the claim of discrimination and says that performance issues are the only reason that Mr. Davidson was not retained as a consultant again in 2015.

[9] Mr. Davidson claims that his performance as a consultant for GAC was satisfactory in 2013.

[10] The parties are required by the Tribunal's "Rules of Procedure, 2021" (the "Rules") to prepare and file SOPs with the Tribunal before the hearing. When Mr. Davidson filed his original SOP (the February 23, 2021 version) with the Tribunal, he explained that he had not been informed by GAC, or by the agency that offered him as a consultant to GAC, of any problems with his performance. He asserts that his initial three-month contract was extended by GAC in March 2013 to 48 weeks. Mr. Davidson says that GAC would not have extended his contract in 2013 from 15 to 48 weeks if there had been serious issues with his performance.

[11] In its original SOP (the April 9, 2021 version), GAC says it extended Mr. Davidson's contract to the maximum available contract of 48 weeks despite performance issues due to

operational concerns. At paras 48 and 49 of its SOP, GAC offered this explanation for those operational concerns:

48. The Respondent's willingness to extend the Complainant's initial contract in March 2013 through November 2013 does not contradict its perspective that the Complainant's work performance was not up to par. The Respondent was conscious of issues with the Complainant's work, but the operational needs meant the Respondent could not afford—in either time or money—to let go of the Complainant and launch another process.

49. The Respondent required continued resources to address the substantial backlog of ATIP requests. The hope was that the Complainant's work would improve after the contract was renewed in March 2013 and that the Complainant would contribute successfully to clearing the backlog. The alternative was launching another contracting process, which would have been more costly and time consuming.

[12] Mr. Davidson filed a Reply SOP dated April 15, 2021, disputing this explanation. Mr. Davidson claimed that, despite what GAC said in its SOP in response about its operational needs, GAC let go at least two other consultants, Peter Maynard and Keith Da Costa, at the end of the initial three-month contract period in March 2013. This claim made by Mr. Davidson in his original reply is highly relevant to this motion brought by the Respondent.

III. Case Management and Amendments to the SOPs Provide Context

[13] After the parties filed their original SOPs (between February and April 2021), the legal issues were discussed in a general way during case management to ensure that the parties had an equal opportunity to address the basic issues that would be relevant at the hearing. The parties were given opportunities to amend their SOPs to correct omissions of disclosure. The Rules require that material facts, issues, witnesses and witness summaries intended to be presented at the hearing and all arguably relevant documents be disclosed in the parties' SOPs (Rules 18, 19, 20 and 21, applicable respectively to the Complainant, the Commission, the Respondent and to the Reply by the Complainant).

[14] The process of amending the SOPs to correct omissions began in the spring of 2022 and continued during case management until the hearing began on November 28, 2023. The Tribunal instructed the parties to comply with its directions to complete the particulars

respecting what they wished to present at the hearing and to complete their response to each of the allegations made by the opposing party in their next amended SOP.

[15] When the SOPs were amended the first time, Mr. Davidson filed an Amended Reply SOP on May 31, 2022. At para 8 of his Amended Reply SOP, Mr. Davidson continued to allege, as he had in his original Reply SOP (the April 15, 2021 version), that two consultants had been let go after the initial three-month contract in 2013, whereas GAC had extended his contract.

[16] The parties subsequently filed Second Amended SOPs arising from discussions in case management. These SOPs included that Mr. Davidson filed a Second Amended Reply SOP on December 6, 2022. He alleged at para 13 of this document that GAC renewed his contract for the maximum time (48 weeks) and at a higher rate of compensation at the end of 15 weeks but let go three consultants, Mr. Maynard, Mr. Da Costa and Michel Barthe.

[17] The Tribunal then gave the parties a further opportunity to complete disclosure during case management by filing Third Amended SOPs. This was due to ongoing issues respecting the content of the SOPs the Tribunal attempted to resolve informally in case management. These ongoing issues primarily concerned Mr. Davidson's allegation that GAC was continuing to fail to make documentary disclosure and related to efforts to reach an agreement on how to calculate any loss of income should it be awarded to Mr. Davidson. The Tribunal encouraged the parties to resolve matters among themselves, set hearing dates and reminded the parties of the option of bringing a motion before the hearing should there still be an inability to resolve outstanding matters.

[18] Mr. Davidson filed his Third Amended Reply SOP on July 7, 2023. The content in Mr. Davidson's earlier Replies that referenced the names of the consultants and the alleged fact that they were let go after three months while Mr. Davidson was retained was gone. Instead, Mr. Davidson's Third Amended Reply SOP focused on the alleged refusal of the Respondent to make disclosure as had been discussed in case management and Mr. Davidson's claim for loss of income.

[19] The Tribunal permitted the parties to file a fourth set of amended SOPs, the Fourth ASOPs, over September-October 2023, as there were still unresolved objections about the

content of the particulars. This included a Fourth Amended Reply SOP (the October 30, 2023 version) filed by Mr. Davidson. In October 2023, the Tribunal also deemed that information Mr. Davidson provided by letter respecting the loss of income claim would be included as particulars in the most recent ASOPs to avoid the need for further amendment and the filing of a fifth set of amended SOPs.

[20] To summarize, the content Mr. Davidson included in his ASOPs about the other consultants being let go in March 2013 first appeared in his original Reply SOP filed on April 15, 2021. It remained part of the content of the Amended Reply SOPs until July 7, 2023, over three years later, when the content no longer appeared in the Complainant's Third Amended Reply SOP. The content did not appear in the Complainant's Fourth Amended Reply SOP. The Third and Fourth Amended Reply SOPs filed by Mr. Davidson, and the additional particulars provided by Mr. Davidson by letter in the fall of 2023, focused on the issues of GAC's alleged nondisclosure of performance issues and the particulars of Mr. Davidson's loss of income claim. The Complainant did not address the omitted content in case management or provide any explanation for its omission. The Respondent did not make an inquiry or otherwise respond to this development.

[21] GAC continued to state in its Amended SOPs that it could not do without Mr. Davidson for operational reasons, despite the alleged performance issues. As GAC amended its SOPs, it did not respond to Mr. Davidson's claim that other consultants had been let go at the end of the initial three-month contract in 2013.

IV. Lack of Objection by the Respondent to the Complainant's Testimony Regarding the Consultants and Its Own Cross-examination

[22] On the fourth day of the hearing, December 1, 2023, the Complainant continued his own direct examination (he is self-represented). Mr. Davidson addressed the issue of whether his alleged performance deficiencies in 2013 warranted GAC's decision to not retain him again in 2015 as a consultant. He responded to GAC's explanation of why it had not stopped using him as a consultant in 2013 if his performance had been that poor. Mr. Davidson testified that, in 2013, he witnessed two consultants, Mr. Maynard and Mr. Da Costa, be let go or not extended by GAC beyond the initial three-month contract. Mr.

Davidson disputed GAC's claim that the only reason it kept him as a consultant was to address the backlog of files and that it could not afford to lose consultants or incur the cost of replacing consultants. Mr. Davidson expressed his belief that his performance at work could not have been an issue or he would have been let go or not renewed along with Mr. Maynard and Mr. Da Costa.

[23] At that moment, GAC did not object to Mr. Davidson's testimony about the two other consultants being let go at the end of March 2013. Mr. Davidson concluded his own direct examination. The Commission proceeded with its questions of Mr. Davidson.

[24] On the fifth day of hearing, December 6, 2023, Respondent counsel began her cross-examination of Mr. Davidson. This included questions about his knowledge of the former consultant, Mr. Barthe. Mr. Barthe, it may be remembered, was the third consultant that Mr. Davidson identified in his Second Amended Reply SOP as having been let go at the end of March 2013.

[25] Mr. Barthe's name appeared on Exhibit 6 which is a document submitted into evidence by the Respondent. Exhibit 6 is relied upon by GAC as evidence that Mr. Davidson was not retained as a consultant in 2015 due to performance issues in 2013. Exhibit 6 is a one-page document with notes. The Respondent says that the notes relate to the meeting where GAC made the decision not to rehire Mr. Davidson in 2015. Exhibit 6 contains the handwritten comment "most of his files needed to be redone" next to Mr. Davidson's name. Mr. Barthe had also applied to work as a consultant with GAC in 2015. A similar comment appears on Exhibit 6 beside Mr. Barthe's name. Mr. Davidson was cross-examined about whether he knew Mr. Barthe and what his race and primary language are. He testified that he knew him and identified him as a White Francophone. Respondent counsel made the point that Mr. Barthe was not rehired in 2015 (like Mr. Davidson) because most of his files needed to be redone, which is the same reason said to be recorded by GAC concerning the decision not to retain Mr. Davidson.

[26] While Respondent counsel questioned Mr. Davidson about Mr. Barthe, counsel did not cross-examine Mr. Davidson on his testimony about the other two consultants, Mr. Maynard and Mr. Da Costa.

[27] Following cross-examination by the Respondent, Mr. Davidson conducted a brief self re-examination to clarify a few points of his evidence. Mr. Davidson returned to the point made by Respondent counsel during cross-examination that Mr. Barthe was not hired in 2015 for the same reason as Mr. Davidson. Mr. Davidson testified that when Respondent counsel questioned him about Mr. Barthe during cross-examination, this triggered his recollection that Mr. Barthe was the third consultant who was let go at the end of the initial three-month contract with GAC in 2013 (as stated in his Second Amended Reply SOP of December 6, 2022). Mr. Davidson again testified, this time in the context of Mr. Barthe, that if his own performance was so poor in March 2013, his contract would not have been extended by GAC. Respondent counsel did not object to this testimony when it was given during Mr. Davidson's re-examination.

[28] The re-examination of Mr. Davidson led to a few questions from the Tribunal late in the day during the hearing. The Tribunal's inquiries included that the Tribunal had a vague (and erroneous) revived recollection that there was reference to the information about the other consultants in one of the more recent Amended SOPs filed by Mr. Davidson and perhaps additional details. The Tribunal wished to ensure that the Respondent had looked at these particulars and had a full opportunity to determine whether it wished to ask Mr. Davidson any questions about this area. The parties were asked about the content in the SOPs concerning the other consultants; based on the responses from the parties, the Tribunal directed that the content referring to the other consultants be located.

V. The Respondent's Late Objection to the Evidence Respecting the Consultants and Its Motion

[29] Late day on December 6, 2023, Respondent counsel objected to Mr. Davidson's evidence concerning the three consultants because their names did not appear in the last two reiterations of Mr. Davidson's ASOPs: the most recently filed Fourth Amended Reply SOP (the October 30, 2023 version) or the Third Amended Reply SOP (the July 2023 version). The Respondent objected to Mr. Davidson being permitted to rely upon earlier and superseded versions of his pleadings to cite material facts not pled in the final version of his Amended SOP or the final version of his Reply to the Respondent.

[30] On December 7, 2023, the Respondent spoke to its objection and advised the Tribunal that it wished to make a motion for a ruling and declaration that the most recent versions of the parties' SOPs constitute the "full and final" particulars of the facts and issues for disposition in this proceeding. There were several other objections and procedural rulings for the Tribunal to address immediately at the same time; to expedite the hearing and minimize the delays caused by this motion, the Tribunal dispensed with the formal requirements of a motion under Rule 26. Instead, the Tribunal accepted an email from GAC with the wording of its proposed declaratory order and heard oral submissions from all parties on December 7 and 11, 2023.

VI. The Parties' Arguments for the Motion and Additional Clarifications

A. The Respondent's Submissions

[31] The Respondent stated that it wishes to have clarity about what documents constitute the "pleadings". The Tribunal will refer to the terminology in its Rules which requires that parties exchange SOPs; the content of SOPs is not completely identical to pleadings in a civil court. The Respondent submits that there could be prejudice to both the Respondent and the Complainant if they must go back to extract facts from previous versions of the Amended SOPs to respond to allegations that are no longer "on the table".

[32] Respondent counsel stated that the information that three consultants were let go in 2013 was in the Complainant's Amended Reply SOP of December 6, 2022. Counsel reiterated that this information was superseded by at least two rounds of further amendments to the pleadings that did not contain this content.

[33] Respondent counsel advised the Tribunal that she prepared her cross-examination of Mr. Davidson and the questions for her own witnesses based on the allegations in the most recent set of Fourth Amended SOPs filed in the September-October 2023 period. Respondent counsel submitted that, if the Tribunal permits the evidence about the consultants now, it would defeat the purpose of having "pleadings", undermine Rule 18 and 21 of the Rules respecting SOPs and counter the Tribunal's directions to the parties about

preparation of their SOPs during case management. In support of the latter, Respondent counsel referred to a case management conference call (a "CMCC") held in March 2023.

[34] This CMCC is but one occasion in which the Tribunal made it clear that it was incumbent upon the parties to ensure that their SOPs contained all material facts upon which they intended to rely at the hearing. It was after this CMCC that the parties were given the opportunity to amend their SOPs a third time.

[35] In her submissions for the motion, Respondent counsel relied upon the Tribunal's direction at the time that, barring a motion by a party to amend their SOP, supported by evidence, the Third Amended SOPs were to be prepared with the understanding that the parties would not be allowed to add additional material facts and issues at the hearing that were discoverable with due diligence on their part. The motion for leave to amend would need to address these issues. Respondent counsel pointed out that the Tribunal subsequently afforded the parties another opportunity to address their SOPs by filing Fourth Amended SOPs.

[36] Respondent counsel submitted that, if the Tribunal permits content in the earlier SOPs to be brought forward at the hearing, the Respondent will need to know what content it will need to address and have time to prepare.

B. The Commission's Submissions

[37] The Commission argued that disproving the Respondent's allegation that work performance was the only reason Mr. Davidson was not rehired was always a live issue throughout all versions of the SOPs. Commission counsel submitted that Mr. Davidson continued to raise the issue that there was no valid concern about the satisfactoriness of the work he completed in 2013 in para 6 of his Fourth Amended SOP; the Respondent continued to state in para 36 of its Fourth Amended SOP that the Complainant worked three months and that there were performance issues, but, because of operational requirements, the Complainant's consultancy was extended. Commission counsel added that the Respondent also stated in its Fourth ASOP that it thought that the extended contract was an opportunity for the Complainant to improve. Commission counsel submitted that Mr.

Davidson identifies in his final SOP that there is an alleged issue with his performance with which he disagrees. Counsel submits that the issue is with the Complainant's Reply, not his primary SOP.

C. The Complainant's Submissions

[38] Mr. Davidson argues that he should be permitted to respond to the Respondent's allegation that it only renewed his contract as a consultant in March 2013 because it could not afford the time or money to do otherwise. Mr. Davidson says it was not clear to him that there was a guideline requiring that content be carried forward in a Reply. He says it is only fair that he be allowed to refer to the evidence about the three consultants. Mr. Davidson suggests it is not fair that his content would be found to "drop off the table", so to speak, while the Respondent's allegation about his performance has remained an issue all along. Mr. Davidson submits that he ought to have an opportunity to respond to what the Respondent submits happened in relation to his complaint.

D. Clarification by the Tribunal of the Respondent's Objection, Motion and Order Sought

[39] Because the Tribunal and the other parties were notified of the Respondent's desire to bring a motion orally during the hearing, there was no written notice of motion setting out the order sought and the grounds relied upon by the Respondent, as required by Rule 26. The Tribunal asked GAC to identify the order it was requesting. The request included that GAC was asked about its objection and whether it was challenging the admissibility of Mr. Davidson's testimony about the three consultants and requesting an order that the testimony be struck from the evidentiary record. The Tribunal pointed out that there had been no objection to Mr. Davidson's testimony at the time of his direct examination or when it was given during his re-examination; Mr. Davidson had been questioned on cross-examination about one of the three consultants, Mr. Barthe, by Respondent counsel.

[40] Respondent counsel clarified that GAC is not seeking to undo any portion of the evidence already given by testimony or by documentary evidence; Respondent counsel

advised the Tribunal that she is prepared to live with the fact that she did not object to the evidence based on relevance at the time and that Mr. Davidson gave evidence on this topic.

[41] Respondent counsel says that GAC simply wishes by its motion to set a baseline for the material facts and issues in this case and that the material facts and issues for the hearing are those in the most recent Fourth Amended SOPs over the September-October 2023 period. Respondent counsel explained that, if GAC's motion respecting the pleadings is granted, Mr. Davidson's testimony about the three consultants will not be evidence about a material fact as pled in the SOPs. What is material, counsel asserts, will be determined only by the Amended SOPs as filed in September and October 2023.

[42] Respondent counsel submitted that, rather than requesting that the evidence be struck, GAC will argue in final submissions that the evidence respecting the three consultants, and, in general, testimony about allegations in earlier iterations of the SOPs should be given little to no weight because the evidence is not evidence of a material fact.

[43] The Respondent was asked to clarify what evidence would be impacted should the Tribunal issue the requested ruling. Respondent counsel identified testimony by Mr. Davidson respecting Mr. Maynard and Mr. Da Costa during his direct examination and the portion of his re-examination where he testified about Mr. Barthe. This description omits the testimony concerning Mr. Barthe obtained by the Respondent during its cross-examination of Mr. Davidson.

[44] Respondent counsel was asked to provide an email with GAC's proposed wording for the order it was requesting. GAC provided the following wording:

The Tribunal orders and declares that the current versions of the pleadings of the Parties are the full and final particulars setting out the facts and issues for determination in this proceeding, as follows:

The Amended Statement of Particulars of the Canadian Human Rights Commission: December 12, 2022
The Fourth Amended Statement of Particulars of the Complainant: September 20, 2023
The Fourth Amended Statement of Particulars of the Respondent: October 17, 2023
Complainant's Response (Initial Reply) to the Respondent's Fourth

amended Statement of Particulars: October 24, 2023
Complainant's E-mail (explanation of damages calculations): October 24, 2023
Respondent's Letter (response to Complainant's explanation of damages calculations): October 30, 2023
Complainant's response to Respondent's letter: October 30, 2023.

E. The Respondent's Questions for the Tribunal

[45] As explained, GAC's position respecting its motion is that the material facts and issues for the hearing are those in the most recent Fourth Amended SOPs over the September-October 2023 period. Nonetheless, during oral submissions, Respondent counsel asked the Tribunal questions about the Tribunal's future plans for the hearing, which the Respondent apparently considered relevant to the scope of its motion. Respondent counsel asked the Tribunal whether the parties were expected to consider just the three names of the consultants coming into evidence (which had already occurred on the record) or whether Mr. Davidson's "entire pleading" of December 6, 2022, namely his ASOP of that date, would be coming into evidence.

[46] It had not been suggested by the Tribunal, Mr. Davidson or the Commission that the entire SOP of December 6, 2022 filed by Mr. Davidson would be coming into evidence. Mr. Davidson's Amended SOP of December 6, 2022 (in its entirety) or his SOP of any other date filed before the fall of 2023 had not been mentioned or considered at the hearing.

[47] The only aspect of Mr. Davidson's evidence that was relevant to the motion concerned the three consultants. The Respondent did not identify what other aspects of the Amended SOP of December 6, 2022 were of concern to it nor did the Respondent specify what the implications of having the entire ASOP of December 6, 2022 come into evidence might entail for the proceeding.

[48] Respondent counsel expressed a concern about the potential for other matters in all older versions of the Amended SOPs to be brought up at the hearing, including by the Complainant during his cross-examination of the Respondent's witnesses. Respondent counsel submitted that her client would be prejudiced if this occurred and that she would need to further prepare for the hearing if her motion were denied.

[49] The Tribunal confirmed that the only question in issue is whether the existing evidence about the three consultants impacts the preparation of Respondent counsel's case.

F. Tribunal Requests Particulars of Alleged Prejudice to the Respondent

[50] The Tribunal indicated that if the Respondent is suggesting that it is prejudiced in some manner by the admission of the evidence respecting the three consultants or alleges prejudice for purposes of its motion, the Respondent needed to be specific so that the alleged prejudice can be assessed and remedied. Respondent counsel was given an opportunity to consult with her client; following that consultation, counsel advised the Tribunal that she had no further submissions, including no further submissions on the issue of prejudice.

VII. The Issue

[51] The issue to be decided in this motion is whether the Tribunal should allow the Respondent's request for a declaratory order that only content expressly referenced in the Fourth Amended SOPs defines the facts and issues for determination in this proceeding.

VIII. The Reasons

[52] The Tribunal will not grant a declaratory order that the content referenced in the Fourth Amended SOPs defines the facts and issues for decision. The proposed order is unnecessary and speculative. The Tribunal finds that the testimony given respecting the three consultants is connected to a relevant and live issue within the SOPs. Any other concerns have yet to arise and are purely theoretical.

[53] The case law provided by the Respondent reiterates the well-known principle that civil courts decide factual issues outlined in the most recent pleadings. However, the Tribunal is not a court of law and, as these reasons will explain, its statutory powers differ.

[54] Moreover, while the Respondent suggests that there is a need to clarify which “pleadings” are applicable, the underlying issue before me is whether oral testimony concerning the three consultants—first raised on Mr. Davidson’s direct examination—is connected to a live issue in the most recent ASOPs. The Commission has argued that the issue of disproving the Respondent’s allegations about the Complainant’s work performance was always a central issue, including in the most recent SOPs. I agree; this is a familiar issue, and the testimony about the consultants relates to an issue advanced by the Respondent that the Tribunal will need to decide.

[55] Finally, the Respondent acknowledges that it did not object to the testimony promptly and will not request to strike the evidence from the record. Rather, it seeks to pre-emptively establish that the “pleadings” define the materiality of an issue and relevance in this proceeding. The reasons below explain why this request is premature and unnecessary.

A. The Respondent’s Case Law

[56] The Respondent provided several cases which it submitted established that the issues between the parties should be determined based on the most recent Fourth Amended SOPs. Respondent counsel referred the Tribunal to *Donison v Uncle Bill Foundation Inc.* 1983 CarswellSask 369, 21 A.C.W.S. (2d) 350, 27 Sask. R. 121 (“Donison”), a decision of Justice Grotzky. In that case, which involved a civil dispute before the courts, the plaintiff filed a statement of claim that contained an admission. The plaintiff later brought a motion concerning that content, requesting leave to amend their pleading to remove the admission; the defendant failed to appear or object to the motion. The plaintiff’s motion to amend was granted, and the admission in the statement of claim was removed. The defendant then attempted to rely on the admission that had been in the pleadings but had been removed.

[57] Respondent counsel referred to para 36, where Justice Grotzky emphasized that only the most recent round of pleadings can be read into evidence:

[36] In *Daniell, Chancery Practice* (7th Ed.), p. 490, the following is stated:

The right of one party to read the pleading of another party as evidence against the latter is confined to the pleading as it stands, so that if the pleading has been amended, the original pleading cannot be read as such evidence.

[58] Justice Grotzky concluded, at para 38, that issues are defined by the latest pleadings: “the issues between the parties should be determined on the statement of claim, as amended, and the statement of defence as filed.”

[59] Respondent counsel also relied upon the subsequent decision of the Saskatchewan Court of Appeal in *Donison v Donison* 1984 CarswellSask 730 which upheld Justice Grotzky’s finding respecting the use of the former admission as evidence in the court below. Respondent counsel further referenced *Wewaykum Indian Band v R.* 1995 CarswellNat 1892, (1995) F.C. J. No. 1202, 57 A.C.W.S. (3d) 686, 99 F.T.R. 1 (“Wewaykum”). Neither case materially adds to the points which were addressed in *Donison* but rather confirm that, once the pleadings were amended, the pleadings as originally written no longer bind the party that filed them. At para 563, *Wewaykum* also stands for the general proposition that:

...the issues between the parties should be determined on the basis of the amended statement of claim and the statement of defence.... Further... the party may be cross-examined on the amended pleadings, and it is this cross examination that will form part of the totality of the evidence.

The legal authorities provided by the Respondent clearly point to the use of an amended pleading for purposes of civil trial and decision.

[60] *Donison* is distinguishable from the circumstances of this case for several reasons. *Donison* deals with pleadings in a civil case before the court where the procedural rules and the law on this topic provide that where a pleading constitutes an admission by a party against their own interest, that pleading can be relied upon by the opposing party as evidence of the content and truth of the admission in the proceeding. Because of the legal significance of an admission by a party against their own interests, certain conditions must be met before an admission in a pleading can be withdrawn: “...the party seeking to withdraw the same must satisfy the court that the submissions were inadvertently made and were not correct” (See *Donison*, at para 31.) Withdrawal of an admission is not permitted without the approval of the court. In *Donison*, the plaintiff had made a motion earlier to

remove the admission from the pleading; the motion was made on notice to the defendant; however, the defendant failed to appear or object; the removal of the admission by the plaintiff was approved and permitted by the court.

[61] Here, the motion involves a component of Mr. Davidson's response to GAC's defence to the complaint and, therefore, concerns matters to be determined by the Tribunal, not an admission by a party. The facts of this motion do not engage the procedural rules and the law respecting the removal of an admission against interest from the official record, the approval of which is supervised by the court. Unlike *Donison*, there was no motion by a party to have any content added or removed from an SOP; there is no order removing the relevant content upon which Mr. Davidson's evidence is based from his Amended Reply SOP.

[62] While *Donison* may be distinguished, the case is relevant to the limited extent that it provides an example of where the court held a party (the defendant) to its failure to object on a timely basis (in *Donison*, the failure to object concerned the removal of the admission during the plaintiff's motion). This is similar to this case as GAC did not object to Mr. Davidson's testimony when it was given.

[63] *Donison* is also relevant to the extent that it underscores the guiding principle to be applied in resolving disputes about what should be considered in the course of a hearing and what should not. In his reasons, Justice Grotsky made a point of stating that he had assured himself (at para 35) that the motions judge, who granted the motion to permit the plaintiff's admission to be removed, did so "in order to determine the real question in issue between the parties." Likewise, there is a need to determine the real question in issue between the parties in this case.

B. Lack of Prejudice to the Respondent

[64] Respondent counsel suggested that the Respondent would be prejudiced if the Tribunal did not make the declaratory order it requests in its motion. Respondent counsel expressed concern about having to remain alert to a party bringing forward a fact from an earlier SOP.

[65] While the necessity to remain alert to matters requiring objection may be a concern, it is not a form of prejudice or a basis to grant this motion. A concern about possible future events does not qualify as prejudice.

[66] The Respondent was afforded an opportunity to articulate and identify the extent of any prejudice to it in presenting its case by reason of its failure to object to the testimony. The Respondent took the position that it would not be making further submissions on the issue of prejudice. GAC failed to identify any difficulty or obstacle to its ability to address the evidence to which it did not object.

[67] After it was clarified by Respondent counsel that the Respondent was not seeking to have the late-objected-to evidence expunged from the record, Respondent counsel submitted that she would not want her client prejudiced by her failure to object to the relevance of the evidence. As indicated above, the nature of any prejudice to the Respondent was not articulated beyond Respondent counsel's assertion that she had not prepared to address the issue covered by Mr. Davidson's testimony at the hearing. Respondent counsel asserted, without specifics, that she would need more time to prepare her case.

[68] Respondent counsel stated several times that, if the Respondent's motion was denied, she would need more time to prepare apparently to address any other facts or issues raised by Mr. Davidson in other SOPs that were not in his most recent Amended SOPs. Respondent counsel submitted that the Respondent would be prejudiced if it had to go back to extract facts from earlier versions of the ASOPs. What those facts or issues were and how they would impact the Respondent's ability to prepare to address them at the hearing were not indicated by GAC.

[69] It was not obvious, without the Respondent identifying and explaining the alleged problems, what the prejudice to the Respondent, if any, would be if the Respondent did have to address facts previously included in earlier ASOPs. Identification and explanation of any alleged prejudice is required.

[70] Respondent counsel will have time to address Mr. Davidson's evidence about the three consultants in the presentation of the Respondent's case if counsel wishes to respond

to that evidence. Since Respondent counsel will have more time to prepare to address this issue at the hearing, and no specific allegations of prejudice have been raised, the Tribunal is not persuaded that the Respondent is prejudiced.

C. The Materiality and Relevance of Mr. Davidson's Evidence Goes to Its Admissibility

[71] GAC took the position that the material facts in this case must be closely confined to the most recent Amended SOPs. As explained, GAC asserts that this impacts the assessment of Mr. Davidson's evidence at the point the Tribunal decides the merits of the complaint. Respondent counsel advised the Tribunal that GAC intends to argue in final submissions that no or little weight should be given to the evidence; counsel indicated that she intended to argue that because of the omission of any reference to this evidence in the Fourth ASOP, the evidence does not go to a material fact, by which she means it is not a relevant fact in this case.

[72] The materiality and relevance of evidence goes to its admissibility. The testimony was admitted without objection to its admissibility; Respondent counsel acknowledges that she did not object to its relevance at the time. The Respondent did not ask to have the testimony expunged. As the Respondent did not object to the evidence when it was given, rescinded its late objection and did not ask that the evidence Mr. Davidson gave be expunged from the record, admissibility arguments respecting this issue are moot.

[73] The Tribunal sought further clarification regarding the Respondent's position respecting its lack of objection. Respondent counsel clarified that the Respondent intended to submit that the testimony should be given no or little weight in the context of the totality of the evidence at the hearing. The Respondent may, in closing arguments, still speak to the weight and any weakness of this type of evidence.

D. Fairness and Truth Seeking

[74] The Tribunal is responsible to ensure that any objection and related motion is framed properly in the context of the proceeding. The difficulty here is that the parties are talking past each other in their submissions.

[75] The Respondent's present motion and the proposed wording of its requested order focuses its concern on the enforcement of the rules about SOPs and does so in advance of any new issue respecting enforcement, given that the Respondent rescinded its objection to Mr. Davidson's testimony. However, when the Respondent initially objected to Mr. Davidson's testimony at the hearing, the framing of the objection was that his testimony was outside the scope of the relevant issues as pled in the most recent ASOPs.

[76] While the Respondent argues by its motion that there is a need to clarify which "pleadings" are applicable, there is an underlying issue that gave rise to the Respondent's late objection and motion: whether the oral testimony concerning the three consultants is connected to an issue to be decided by the Tribunal in the most recent ASOPs.

[77] Mr. Davidson and the Commission framed their responses to the motion as an argument that the testimony does fall within the scope of the disputed issues in the complaint as the evidence replies to the Respondent's response to the complaint and to the issue of whether the explanation provided is a pretext. Both parties also argue that Mr. Davidson should be able to respond in the interests of procedural fairness to the Respondent's explanation.

[78] The Respondent did not directly respond to these submissions. The Respondent simply maintains that it needs to have clarity around what constitutes the "pleadings".

[79] It is not necessary to decide the admissibility of Mr. Davidson's testimony which is already on record. However, it is appropriate to address the submissions of Mr. Davidson and the Commission. There is an underlying issue of fairness to Mr. Davidson and respecting the Tribunal's obligation to engage in a truth-seeking process during its inquiry. The testimony is connected to the Respondent's defence because it responds to the Respondent's assertion that operational concerns outweighed or prevented the termination

or non-renewal of Mr. Davidson's consultancy in 2013 and that poor performance, and not discrimination, led to its ultimate decision to not retain him again as a consultant in 2015. Admission of the testimony is in the interests of truth-seeking; that the testimony was admitted is in the interests of procedural fairness.

E. The Motion is Speculative and Pre-emptive

[80] The Tribunal concludes that GAC's motion is speculative and pre-emptive. GAC's submission that it could face additional facts being brought forward from past ASOPs filed by Mr. Davidson that were not in his most recent ASOP is speculative. GAC's request for a declaration was made when Mr. Davidson had almost completed his re-examination. Mr. Davidson had not sought to return to any other content from a prior ASOP. At the time the motion was made, it addressed a theoretical procedural complaint.

[81] The only subject matter that has been "re-introduced" in this proceeding concerned the three consultants. The Respondent's lack of objection to the evidence means that there is no issue to be determined respecting the admissibility of that evidence now. No party had sought to introduce any other evidence related to content formerly contained in an SOP but removed. The Tribunal concludes that there is no issue to be determined.

[82] GAC's motion for a declaration is pre-emptive. There is no issue concerning which a motion can be brought. Motions are required to be brought to cure a problem, not a theoretical concern raised by a party without foundation in a factual situation.

F. The Requested Order Would Impose Limits on the Tribunal's Authority and Discretion

[83] The order requested by the Respondent would unduly fetter the Tribunal's procedural discretion. The proposed order could also potentially prejudice all parties.

[84] The procedural discretion of the Tribunal during an inquiry into a complaint was recently highlighted in an earlier ruling involving these parties, *Davidson v The Canadian Human Rights Commission and Global Affairs Canada* 2023 CHRT 52, at para 15:

The Tribunal has discretion, pursuant to section 48.9 of the... Act, concerning matters of procedure. Section 48.9(1) provides that “proceedings before the Tribunal shall be conducted as informally and expeditiously as the requirements of natural justice and the rules of procedure allow.” The Tribunal is further required by section 5 of the Rules to interpret and apply the Rules in a manner to secure “the informal, expeditious and fair determination of every inquiry on its merits.”

[85] The applicable law respecting the Tribunal’s obligation to conduct an inquiry can be found in section 50(1) of the *Canadian Human Rights Act* (R.S.C., 1985, c.H-6), as amended, which provides that the “...member...shall inquire into the complaint and shall give all parties... a full and ample opportunity... to appear at the inquiry, present evidence, and make representations.” The Tribunal’s authority and procedural discretion can be found in section 50(2) of the Act: (2) “In the course of hearing and determining any matter under inquiry, the member... may decide all questions of law or fact necessary to determining the matter.” Section 50(3)(c) enhances the Tribunal’s discretion respecting evidence as it allows the Tribunal to accept any information as evidence at a hearing regardless of its admissibility in a court of law, while section 50 (3)(e) authorizes the Tribunal to decide any procedural or evidentiary question arising during a hearing.

[86] SOPs are the vehicle by which disclosure occurs. The Rules require that content not be presented at the hearing if not first disclosed in an SOP. The Rules also provide that permission must be obtained from the Tribunal to do so. In other words, the Rules permit motions to be brought during a hearing concerning the content of SOPs and respecting their potential amendment.

[87] The Respondent asks that the Tribunal order and declare that the current versions of the pleadings of the parties are the full and final particulars setting out the facts and issues for determination in this proceeding. The proposed wording “the current versions... are the full and final particulars setting out the facts and issues for determination in this proceeding” extends beyond what the Rules state about SOPs.

[88] If the Tribunal granted the motion sought by the Respondent, the Tribunal would fetter its own statutory discretion to make procedural decisions in this case at the hearing. The requested order is clearly inconsistent with the Tribunal’s statutory authority and discretion.

[89] The requested order could also be prejudicial to the parties. The Respondent's proposed order contains no recognition of the need for flexibility where warranted. The order sought fails to include any language that would allow for further ruling by the Tribunal to respond to events in this hearing. It would be a clear error in law for the Tribunal to grant the requested order.

[90] On this point, the Federal Court of Appeal held in *Turner v Canada*, 2012 FCA 159 (CanLII) that the Tribunal must consider an important point raised by a complainant, and failure to do so amounts to a breach of procedural fairness: "Consequently, whether the point or argument made before an administrative tribunal was of such importance as to require the tribunal to consider it is a matter to be dealt with on a standard of correctness" (at para 43). It follows that if the Tribunal finds a point to be relevant, it has the discretion to hear arguments, even when introduced at the hearing stage.

[91] In addition, the Tribunal has already given directions that recognize that additional evidence may not be provided at the hearing and that proceeding otherwise will require a motion so that the issues related to any new evidence are supervised and subject to the Tribunal's discretion. The motion is unnecessary for this reason as well. In fact, granting this motion would arguably contradict the Tribunal's previous direction requiring a motion.

[92] The Tribunal concludes that the requested declaratory order would negate the Tribunal's procedural discretion and tie the Tribunal's hands; the declaration requested would contradict the Rules that allow the Tribunal flexibility to ensure that its inquiry into the complaint is fair; for this reason, it could inflict an injustice to all parties.

[93] The Tribunal will not predetermine that the existing SOPs cast the materiality of facts and issues in this matter in stone. The Tribunal may be presented with a specific issue to address during the hearing about content in a SOP or what is relevant to the scope of the complaint. In the interests of fairness, the Tribunal may need to respond to that issue by ruling upon a motion or by issuing an appropriate direction to the parties without the need for a formal motion. In fact, since deciding this ruling, the Respondent has been permitted to add a witness to its case to respond to a position taken by Mr. Davidson in his most recent ASOPs without the need for a motion to determine whether the Respondent exercised due

diligence in respect of including this evidence in its SOPs. In the context of that other issue, it was obvious that the interests of fairness required that the Respondent be permitted to add a witness and new will-say.

[94] Granting the declaration sought by GAC could prejudice all parties and be unfair. Mr. Davidson would be trapped by any mistakes he made as a self-represented complainant when he filed his most recent ASOP. GAC and the Commission would be trapped by any omissions they made in their ASOPs. The parameters of this proceeding are already sufficiently protected by the Rules and the Tribunal's previous directions. The Tribunal will not fetter its discretion to decide issues as they arise.

G. The Scope of Complaint Does not Require Clarification

[95] The Tribunal is not persuaded by the argument that the scope of the complaint needs to be clarified for the Respondent. No specific examples of ambiguity were provided by the Respondent in any event, which is required.

[96] The parties know that the most recently filed ASOPs are the relevant ASOPs for purposes of the scope of the hearing. This has been made clear by the Rules and the discussions in case management over eight or more CMCC's and by the Tribunal's summaries and letters of direction. The content of discussions at the CMCC's will not be detailed here considering the length of these reasons nor will the Tribunal's letters of direction be detailed; they are a matter of official record. Suffice it to say that the motion for an order as stated by the Respondent is not necessary. The Tribunal will not order an additional "declaration" concerning matters for which directions were given in case management in these circumstances. If the Tribunal determines in the future course of this proceeding that non-compliance is sufficiently problematic, it has the authority to make any order pursuant to Rule 5 or Rule 10 to achieve the principle that the Rules are to be applied to secure the informal, expeditious and fair determination of every inquiry on its merits.

H. The Motion and Formal Ruling Were not Necessary

[97] For these reasons, the Tribunal is not persuaded that this motion is necessary and that a formal ruling is required in these circumstances, as submitted by the Respondent. The testimony in issue in this motion was ultimately not objected to and has been admitted. There is no foundation in fact for a motion to restrict the evidence or to restrict unidentified evidence. There is no existing need for this motion.

[98] The Tribunal's mandate is to secure "the informal, expeditious and fair determination of every inquiry on its merits." Accordingly, in the event the same or a similar motion concerning the content of the ASOPs arises at the hearing, the Tribunal will provide procedural directions which expressly recognize its discretion to determine the most informal, expeditious and fair means of the Tribunal resolving any such issue.

IX. Orders and Directions

[99] The Tribunal hereby orders that:

- (a) The motion by GAC for a declaration that the current versions of the pleadings of the parties are the full and final particulars setting out the facts and issues for determination in this proceeding is dismissed;
- (b) The motion is dismissed without prejudice to the ability of any party to object to the materiality and relevance of proposed evidence at the hearing based on the content of the most recent ASOPs filed with the Tribunal or to make submissions concerning the evidence admitted at the hearing in final submissions;
- (c) Any party may make the same or a similar motion respecting the content of the SOPs at the hearing if an issue arises that requires that a motion be brought to have the issue properly determined by the Tribunal. In that event, the Tribunal may require the moving party to first bring a preliminary motion to demonstrate that the issue that the party wishes to raise is of sufficient importance to the fairness and efficiency of the proceeding that a formal motion and written ruling is required.

Kathryn A. Raymond, K.C.
Tribunal Member

Ottawa, Ontario
January 30, 2024

Canadian Human Rights Tribunal

Parties of Record

Tribunal File: T2582/13920

Style of Cause: Ray Davidson v. Global Affairs Canada

Ruling of the Tribunal Dated: January 30, 2024

Appearances:

Ray Davidson, for the Complainant

Christine Singh, for the Canadian Human Rights Commission

Helen Gray and Jennifer Francis, for the Respondent