Case No.: CS-001372

At the British Columbia Human Rights Tribunal

Between:

BRITISH COLUMBIA TEACHERS FEDERATION
OBO CHILLIWACK TEACHERS ASSOCIATION

Complainant

and

BARRY NEUFELD

Respondent

Written Submissions Regarding the Complainant's Proposed Expert Opinion Evidence

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James SM Kitchen
Barrister & Solicitor
203-304 Main St S, Suite 224
Airdrie, AB T4B 3C3
Phone: 587-330-0893
Email: james@jsmklaw.ca

Counsel for the Respondent

Lindsay Waddell
MOORE EDGAR LYSTER LLP
200 – 375 Water Street
Vancouver, BC V6B 0M9
Phone: 604-689-4457
Email: lindsaywaddell@mooreedgarlyster.com

Counsel for the Complainant

Overview

1. The admissibility of expert evidence is governed by *R v Mohan*,[1] later enhanced in *White Burgess Langille Inman v Abbott and Haliburton Co.*,[2] wherein Justice Cromwell added impartiality, independence and bias to the "qualified expert" threshold factor, and recently re-affirmed by the Supreme Court of Canada in *International Air Transport Assn v Canada (Transportation Agency)*.[3]

Threshold Stage

2. *Mohan* lays out the four-factor threshold for determining whether expert evidence is admissible, before expounding on each factor in some detail: "Admission of expert evidence depends on…(a) relevance; (b) necessity in assisting the trier of fact; (c) the absence of any exclusionary rule; (d) a properly qualified expert".[4]

3. The *Mohan* factors are fairly summarized as follows:

   - More is required than mere "logical" relevance; impact on the hearing process is an equally important consideration;[5]

   - "[O]therwise logically relevant" evidence will be excluded "if its probative value is overborne by its prejudicial effect";[6]

   - "[O]therwise logically relevant" evidence will be excluded "if it involves an inordinate amount of time which is not commensurate with its value";[7]

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[1] [1994] 2 SCR 9, 1994 CanLII 80 [*Mohan*].
[2] 2015 SCC 23 [*White Burgess*].
[3] 2024 SCC 30 [*IATA*].
[4] At para 17.
[5] At para 18.
[6] At para 18.
[7] At para 18.

- “[O]therwise logically relevant evidence” will be excluded “if…its effect on the trier of fact…is out of proportion to its reliability”;[8]

- To be admissible, “the evidence must be necessary to enable the trier of fact to appreciate the matters in issue due to their technical nature”;[9]

- “If on the proven facts a judge or jury can form their own conclusions without help, then the opinion of the expert is unnecessary”;[10]

- “[T]he subject-matter of the inquiry must be such that ordinary people are unlikely to form a correct judgment about it, if unassisted by persons with special knowledge”;[11]

- Impressive qualifications “[do] not by that fact alone make [the expert’s] opinion on matters of human nature and behaviour within the limits of normality any more helpful than that of the jurors themselves”;[12]

- Admissibility requires the expert witness delivering the evidence to have acquired demonstrably “peculiar” knowledge;[13]

- Compliance with all other criteria will not ensure the admissibility of expert evidence that breaches an exclusionary rule;[14]

- Proximity of the opinion to the ultimate issue increases the rigidity of the admissibility requirements;[15]

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[8] At para 18.
[9] At para 22.
[10] At para 21, 23.
[11] At para 22.
[12] At para 23.
[13] At para 27.
[14] At para 26.
[15] At para 28.

- “[T]he criteria of relevance and necessity are applied strictly, on occasion, to exclude expert evidence as to an ultimate issue”.[16]

4. The *IATA* court states:

> Under the *Mohan* test, expert evidence is admissible when it is “necessary in the sense that it provides information ‘which is likely to be outside the experience and knowledge of a judge’”…The test is as follows: At the first stage, judges must consider the threshold requirements of admissibility set out in *Mohan*. There are four threshold requirements…(1) relevance; (2) necessity in assisting the trier of fact; (3) absence of an exclusionary rule; and (4) a properly qualified expert…At the second stage -- the discretionary “gatekeeping” stage -- judges must balance the potential risks and benefits of admitting the evidence and determine whether the benefits outweigh the risks.[17]

5. The SCC goes on to explain that “*Mohan*'s ‘basic structure for the law relating to the admissibility of expert opinion evidence’ is applicable in a wide range of contexts **outside** the experience of judges (*White Burgess*, at para. 19)”,[18] further citing cases touching intellectual property,[19] medical reports[20] and linguistics and translation[21]—areas manifestly and necessarily outside the expertise of judges, whose only expertise is ***law***.

6. The distinction between tribunal members and judges is primarily that whereas judges **by design** lack expertise in the subject matter of the cases they adjudicate, tribunals possess the required expertise to adjudicate claims in their particular areas of specialization. The overarching rationale for deference of the courts to the decisions of tribunals is, after all, that tribunal members ***are*** **the experts.** As specialists in the matters they adjudicate, human rights tribunal members are far less likely to require other experts to assist them in divining whether or not ***discrimination*** occurred.

[16] At para 25.
[17] *IATA* at para 72.
[18] At para 72.
[19] *Masterpiece Inc. v Alavida Lifestyles Inc.*, 2011 SCC 27 at para 75.
[20] *Clayson-Martin v Martin*, 2015 ONCA 596.
[21] *R v Abdullahi*, 2021 ONCA 82 at para 34.

7. *IATA* adopts *Mohan*'s position that "[i]f on the proven facts a judge or jury can form their own conclusions without help, then the opinion of an expert is unnecessary",[22] before cautioning that "the role of an expert is 'only to assist the court in assessing complex and technical facts'",[23] and "expert opinions will be rendered inadmissible **when they are nothing more than the reworking of the argument of counsel** participating in the case".[24]

8. Dr. Saewyc's proposed evidence suffers flaws in every *Mohan* category.

Relevance

9. Dr. Saewyc's proposed evidence lacks relevance:

   - No speech connecting **LGBT people** with child abuse, pedophilia or grooming occurred. The speech in question connected **SOGI ideology**, and the **teaching** of SOGI ideology, regardless of the characteristics of the person(s) teaching it, with child abuse (Question 1a);

   - "Primarily cisgender parents, health care professionals, and social service providers" do not attract the protection of the *Code*, and are not participants in the complaint. Nor do teachers, absent possession of some protected characteristic, attract the protection of the *Code* (Question 1b);

   - Dr. Saewyc tacitly admits there is nothing of value to be gleaned from her answer to Question 2, stating: "The research about workplace related discrimination in Canada is very limited, and focuses more on discrimination based on racialized status, disability, age, or gender as a woman" and "There are very limited studies that look at sexual orientation or gender identity-related discrimination in the workplace in Canada" and "This study only included one study from Canada".

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[22] At para 77.
[23] At para 78; *Quebec (Attorney General) v Canada*, 2008 FC 713, aff'd 2009 FCA 361, aff'd 2011 SCC 11.
[24] At para 78; *Surrey Credit Union v Willson* 45 BCLR (2d) 310, 1990 CanLII 1983 at 315.

Neither does the USA enjoy “similar enough contexts to provide relevant insights” such that one mere study from Canada could be construed as adequate. As Dr. Saewyc elsewhere points out, the US context includes the “rhetoric” of “President Trump” and “Vice President Pence”, as well as a multitude of other Republican voices at the federal and state levels. There is simply no comparison to be made between Canada and a nation wherein the leader of the free world has a loudspeaker and the ability to make executive orders (Question 2);

- Again, the comparison between the rhetoric of the US President, a person with at least some lawmaking power by way of executive order, and a school trustee in Chilliwack, in terms of potential impact on any marginalized group, direct or indirect, qualifies as absurd (Question 3).

- The context of “anti-transgender” legislation and referenda are manifestly off-point; no lawmaking has resulted or will result from the Respondent’s opinions (Question 3).

- The evidence focusing on student populations is irrelevant; no student is a participant in the complaint against the Respondent (Question 4).

- No homophobic or transphobic speech occurred in an educational environment, and no reasonable teacher familiar with the structure of the school district and the dearth of power accruing to any one trustee could reasonably fear job loss for doing nothing other than using the materials the board has approved for use. Additionally, no reasonable teacher familiar with the *Code* could fail to understand that sexual orientation and gender identity are protected grounds (Question 4).

10. Even were Dr. Saewyc’s evidence logically relevant, its probative value would be overborne by its prejudicial effect.

Necessity in Assisting the Trier of Fact

11. Dr. Saewyc's proposed evidence lacks necessity.

12. It strains credulity that this Tribunal would need to hear from an expert that discrimination causes "stigma", "harms" and "risks"; were it otherwise, sexual orientation and gender identity would not be protected grounds under the *Code*. Simply put, this Tribunal's task is to determine if discrimination occurred, not if it would be harmful, which of course it is assumed it would be.

Absence of Any Exclusionary Rule

13. While strict applications of relevance and necessity now generally stand in for the rule which once excluded ultimate issue evidence, it bears noting that Dr. Saewyc's evidence indeed crosses the line of deciding an ultimate issue. ***Dr. Saewyc's evidence concludes that any opinion dissenting from her own is hate***. Put another way, nowhere in Dr. Saewyc's answers did she make any delineation between respectful disagreement and hate speech. Since whether the Respondent engaged in hate speech is an ultimate issue of this case, Dr. Saewyc's report characterizing any and all speech tending to disagree with Dr. Saewyc's position as "hateful" disqualifies the opinion from consideration.

14. Whether excluded on the basis of ultimate issue or by virtue of its lack of relevance and lack of necessity, the point is that excluding Dr. Saewyc's evidence is the only appropriate measure.

Properly Qualified Expert

15. Dr. Saewyc's knowledge, expertise and scholarship are largely focused on adolescents, but adolescents are not the focus of the inquiry; rather, adults—many of them not themselves LGBT—are the complainants in the present matter.

16. Additionally, Dr. Saewyc's evidence contains markers of bias or lack of impartiality. The duty of the expert is to give fair, objective and non-partisan opinion evidence, as Justice Cromwell stated in *White Burgess*:

> [10] In my view, expert witnesses have a duty to the court to give fair, objective and non-partisan opinion evidence. They must be aware of this duty and able and willing to carry it out. If they do not meet this threshold requirement, their evidence should not be admitted. Once this threshold is met, however, concerns about an expert witness's independence or impartiality should be considered as part of the overall weighing of the costs and benefits of admitting the evidence.

17. Dr. Saewyc's opinions, which were based on "the factual assumption that the materials provided to me labeled Chilliwack Teachers' Association v Neufeld, 2021 BCHRT 6 provide an accurate factual account of statements that Mr. Neufeld made" betray that Dr. Saewyc has already decided the Respondent engaged in "hate"—a word that appears two dozen times in Dr. Saewyc's report.

18. The inherent comparison of the Respondent and the Respondent's rhetoric to that of the US President—a person himself widely compared with famous fascists and Nazis—suggests the expert has taken it upon herself to decide the ultimate issue, that is, to decide that the Respondent has engaged in hate speech.

Gatekeeping Stage

19. The *White Burgess* court states:

> At the second discretionary gatekeeping step, the judge balances the potential risks and benefits of admitting the evidence in order to decide whether the potential benefits justify the risks…the "trial judge must decide whether expert evidence that meets the preconditions to admissibility is sufficiently beneficial to the trial process to warrant its admission despite the potential harm to the trial process that may flow from the admission of the expert evidence.[25]

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[25] At para 24.

20. *White Burgess* affirms that "[a]n expert witness should provide independent assistance to the Court by way of objective unbiased opinion in relation to matters within his [or her] expertise" and "should never assume the role of an advocate".[26] These duties of the expert go to admissibility at both the threshold stage and the gatekeeping stage.[27]

21. Even were the Tribunal to find that the proposed expert evidence may meet the initial threshold, it must, as the Supreme Court of Canada has ruled, perform a final "gatekeeping" analysis, which involves

> tak[ing] concerns about the expert's independence and impartiality into account in weighing the evidence at the gatekeeping stage. At this point, relevance, necessity, reliability and absence of bias can helpfully be seen as part of a sliding scale where a basic level must first be achieved in order to meet the admissibility threshold and thereafter continue to play a role in weighing the overall competing considerations in admitting the evidence. At the end of the day, the judge must be satisfied that the potential helpfulness of the evidence is not outweighed by the risk of the dangers materializing that are associated with expert evidence.[28]

22. Whatever limited helpfulness the Tribunal may believe Dr. Saewyc's opinion evidence may bring, it is outweighed by the risks her testimony will serve more to add confusion, to distract from the true legal issues arising from the claims and facts, and to sensationalize a hearing that is already vulnerable to being sensationalized. The Tribunal should exercise its discretion to exclude the proposed expert evidence. In doing so, the Tribunal will ensure the hearing remains focused—as it should—on the extensive testimony of the fact witnesses and whether the elements of the test for discrimination have been made out based on that evidence.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 22nd day of November, 2024.

James SM Kitchen

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[26] At para 27.
[27] *White Burgess* at para 34.
[28] *White Burgess* at para 54.