Canadian Human Rights Tribunal

Tribunal canadien des droits de la personne

Citation: 2023 CHRT 9
Date: March 7, 2023
File No.: T2459/1620

Between:

Cathy Woodgate, Richard Perry, Dorothy Williams, Ann Tom, Maurice Joseph and Emma Williams

Complainants

- and -

Canadian Human Rights Commission

Commission

- and -

Royal Canadian Mounted Police

Respondent

Ruling

Member: Colleen Harrington

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I. Introduction

[1] The Complainants are members of the Lake Babine First Nation. They allege that the Respondent RCMP discriminated against them and others by failing to properly investigate their claims that they experienced abuse while attending schools in northern British Columbia in the 1960s and 1970s. The RCMP denies that its investigation, commenced in 2012, was discriminatory.

[2] In support of their complaint, the Complainants seek to admit an expert report by Dr. David Milward, a professor of law ("Report"). The Report is dated October 29, 2021 and was prepared at the request of the Complainants. It makes conclusions about historical and ongoing distrust of the RCMP by Indigenous peoples in Canada. The Report includes references to information available to the RCMP when it commenced the investigation and suggests the RCMP knew or should have known of this distrust at that time. The Report discusses the role of the RCMP in relation to residential schools and Missing and Murdered Indigenous Women and Girls, as well as Indigenous Social Memory, particularly in northern BC.

[3] The RCMP objects to the admissibility of the Report. It seeks an order pursuant to section 50(3)(e) of the *Canadian Human Rights Act*, RSC 1985, c H-6 ["*CHRA*"] to exclude Dr. Milward's Report and any testimony by him at the hearing of this complaint. The RCMP contests the relevance and necessity of the Report and says Dr. Milward is not a properly qualified expert as he is not providing fair, objective, and non-partisan assistance to the Tribunal. The RCMP submits that the Report's "manifest prejudice outweighs any benefits it might offer" and argues that the Tribunal should exercise its gatekeeping function to exclude Dr. Milward's evidence.

[4] The Complainants disagree with the RCMP's position. They say that the evidence presented in Dr. Milward's Report is relevant, that it is of assistance to the Tribunal and therefore necessary, and that the benefits of admitting the Report outweigh any perceived prejudice to the RCMP. They further submit that Dr. Milward is fully qualified to provide evidence concerning the historical and ongoing relationship between the RCMP and Indigenous peoples in Canada. They argue that Dr. Milward's acknowledgment of his duty

as an expert provides further evidence of his commitment to provide fair, objective and non-partisan evidence.

[5] The Canadian Human Rights Commission ("CHRC"), although fully participating in the inquiry into this complaint, takes no position with respect to this Motion.

II. Decision

[6] The RCMP's Motion is denied. Dr. Milward's Report may be admitted as evidence during the hearing into this complaint, and Dr. Milward may provide testimony in relation to his Report as an expert witness at the hearing.

III. Legal Framework

[7] The RCMP has helpfully summarized the legal principles that the Tribunal often applies to determine whether expert evidence is admissible. The Complainant agrees that these principles are applicable in this Motion.

[8] The Supreme Court of Canada has established a legal framework for determining the admissibility of opinion evidence that "guards against the dangers of expert evidence", ensuring that a hearing does not "devolve into 'trial by expert' and that the trier of fact maintains the ability to critically assess the evidence" (*R v Bingley*, 2017 SCC 12 (CanLII) ["*Bingley*"] at para 13). This framework was established by the Supreme Court in *R v Mohan,* 1994 CanLII 80 (SCC), [1994] 2 SCR 9 ["*Mohan*"] and later clarified in *White Burgess Langille Inman v Abbott and Haliburton Co.*, 2015 SCC 23 (CanLII) ["*White Burgess*"]. The framework includes a two-part analysis, although the Court in *Bingley* stated that before engaging in this analysis, the trier of fact "must determine the nature and scope of the proposed expert opinion" (at para 17).

[9] Once the nature and scope of the proposed evidence is established, the first part of the analysis requires the Tribunal to determine whether the expert evidence meets the relevant *Mohan* criteria for admissibility, being relevance, necessity, absence of an exclusionary rule, and a properly qualified expert (*Mohan* at pp. 20-25; see also *White*

Burgess at para 19). In the present case, three of the *Mohan* criteria are disputed by the RCMP. As such, the Complainants must show that the proposed expert evidence is relevant, that it is necessary to assist the Tribunal, and that Dr. Milward is a properly qualified expert. If any of these threshold requirements is not met, the evidence is inadmissible and there is no need to move on to the second part of the analysis.

[10] The second "gatekeeping" part of the analysis requires a weighing of the potential risks against the benefits of admitting the evidence (*White Burgess* at para 24).

IV. Issues

[11] The main issue in this Motion is whether to exclude Dr. Milward's Report and any testimony by him in this inquiry. In deciding whether to admit or exclude his proposed evidence, the Tribunal will:

A. Determine the nature and scope of the proposed expert evidence;

B. Determine the disputed *Mohan* factors by deciding:

   i. Is the Report relevant to a fact in issue in the complaint?

   ii. Is the Report necessary in the sense that the Complainants cannot provide the evidence and/or the Tribunal requires an expert opinion to evaluate the evidence appropriately?

   iii. Is Dr. Milward a properly qualified expert in the sense of providing an impartial and independent opinion?

C. If the *Mohan* threshold requirements are met, determine whether the potential benefits of admitting Dr. Milward's evidence outweigh the potential risks.

V. Analysis

[12] The Tribunal has the power to consider whether proposed expert evidence ought to be excluded and to determine its admissibility prior to a hearing *(Christoforou v. John Grant Haulage Ltd*., 2016 CHRT 14 (CanLII) at para 63; see also *CHRA* sections 48.9(2)(g) and 50(3)(e)). In the circumstances of this case, where the proposed expert has provided a lengthy and comprehensive Report, his CV, and a formal acknowledgment of his duty as an

expert witness, it is appropriate to determine the admissibility of this proposed evidence at this pre-hearing stage. This will avoid delay during the hearing.

A. The nature and scope of the proposed expert opinion evidence

[13] The RCMP objects to the entirety of Dr. Milward's Report being admitted as evidence, and to Dr. Milward testifying at the hearing. I address these objections in the sections that follow and explain why I find that his evidence is admissible.

[14] The Complainants submit that the RCMP's investigation of alleged abuse of students at schools in northern BC in the 1960s and 1970s was discriminatory because it did not recognize or adapt to their unique experiences as Indigenous people. Specifically, they argue that the RCMP failed in its obligation to modify its traditional investigative practices to meet their cultural needs, "an obligation arising from the known distrust of the RCMP by Indigenous peoples."

[15] The Complainants intend to introduce the Report and to call Dr. Milward to testify as an expert concerning the historical and ongoing relationship between the RCMP and Indigenous peoples in Canada. Specifically, they say that Dr. Milward's evidence will establish the existence of distrust of the RCMP by Indigenous peoples, including in northern BC, and that the RCMP should have been aware of this distrust at the time it conducted its investigation. Additionally, the Complainants say that Dr. Milward's Report provides background context about interactions between the RCMP and Indigenous people leading up to the investigation in question.

[16] The Complainants also submit that Dr. Milward's evidence is critical to their claim of systemic discrimination because it is important for the Tribunal to hear evidence of the RCMP's pattern of conduct over time. They say this establishes that the RCMP historically used practices that reflected a culture of systemic discrimination against Indigenous people.

[17] The complaint before the Tribunal is not about whether the RCMP have historically discriminated against Indigenous peoples in Canada generally. The focus of the inquiry is the RCMP's investigation of allegations of historical abuse against Indigenous children at schools in northern BC.

[18] I accept, however, that the Complainants and the CHRC are seeking systemic remedies related to this complaint. The CHRC takes the position in its Statement of Particulars that, if the Tribunal makes a finding of discrimination based in part on systemic evidence called during the proceeding, it would be appropriate for the Tribunal to award systemic remedies. The BC Human Rights Tribunal ("BCHRT"), relying on the Supreme Court's decision in *Moore v BC (Education)*, 2012 SCC 61 (CanLII) stated: "There is no question that an individual complaint can have a systemic impact and, indeed, that may be the outcome that Ms. Campbell is hoping for in this complaint: Moore at para. 63" (in *Campbell v Vancouver Police Board (No.2)*, 2019 BCHRT 128 (CanLII) ["*Campbell*"] at para 20).

[19] At the outset of his 83-page Report, Dr. Milward indicates that he was asked by counsel for the Complainants to provide answers to four questions. However, he has framed these "questions" as the following statements:

> 1)Historic and ongoing distrust of RCMP by Indigenous people in Canada, including reference to information available to the RCMP in 2012 regarding whether or not they knew or should have known of this distrust at that time.
>
> 2) The role of the RCMP in residential schools, particularly in British Columbia, and any lasting impact of that role.
>
> 3) Evidence of historic and ongoing systemic discrimination against Indigenous people within the RCMP.
>
> 4) The impact of discriminatory conduct by the RCMP on Indigenous people, including examples in British Columbia.

[20] The Report is not clearly organized around these four questions or statements. Rather, the main topics covered by the Report are identified by titles that, in addition to the "Questions addressed by this Report", include Dr. Milward's "Qualifications", the "Methodology" he followed to prepare the Report, his nine "Findings", as well as "History", "RCMP and Residential Schools", "Missing and Murdered Indigenous Women", "Social Memory", "Yukon RCMP", "Human Rights Watch Report", "Effects of Discrimination", "Awareness of Problems", and "Conclusions".

[21] In terms of his Methodology, Dr. Milward indicates that he did not conduct any primary research to prepare the Report. Rather, the Report "is essentially a literature review and synthesis of previous relevant research, a good deal of which did involve primary research with members of Indigenous communities affected by actions of RCMP officers, and members of the RCMP itself." In addition to academic articles, books, masters' theses, and newspaper articles, he particularly relied on the following five reports (full citations omitted):

i. A 2011 report commissioned by the RCMP called *The Role of the Royal Canadian Mounted Police during the Indian Residential School System* authored by Marcel-Eugene LeBeuf;

ii. The 2015 Final Reports of the Truth and Reconciliation Commission of Canada, particularly the volumes that focused specifically on the history of the residential schools;

iii. *Reclaiming Power and Place: The Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls* (2019);

iv. A 2014 RCMP report titled *Missing and Murdered Aboriginal Women: A National Operational Overview*; and

v. A 2013 Human Rights Watch report on the conduct of the RCMP stationed in the North District of British Columbia titled *Those Who Take Us Away: Abusive Policing and Failures in Protection of Indigenous Women and Girls in Northern British Columbia.*

[22] In his Report Dr. Milward makes general conclusions about the existence of distrust between Indigenous communities and the RCMP across Canada, including in northern BC. He states that "[t]he RCMP have acted in a number of capacities against Indigenous peoples that would have encouraged Indigenous peoples to develop a negative Social Memory of the RCMP". These include its role in the assertion of Canadian sovereignty, the enforcement of Indigenous children's attendance at residential schools, the suppression of Indigenous cultures, and the repression of Indigenous protests.

[23] Dr. Milward states that social memory is "not immutable or static", as it can change over time and can be localized. He indicates that some Indigenous communities in Canada may have developed a positive social memory of the RCMP, although he concludes that the opposite is true in northern BC. He concludes that, due to the RCMP's "history of neglect

and unprofessionalism" there, in large part with respect to the crisis of Missing and Murdered Indigenous Women and Girls, Indigenous communities in the northern interior of BC may have developed a social memory of the RCMP that has become even more negative than it would otherwise have been.

[24] Dr. Milward's Report does not make specific conclusions about the Complainants' experiences with the RCMP or about the investigation that is the subject of this human rights complaint. The Complainants submit that Dr. Milward's Report is social context evidence that will assist the Tribunal to understand the relationship between the RCMP and Indigenous people in northern BC.

[25] I accept that social context evidence can be useful to the Tribunal to establish a "frame of reference or background context for deciding factual issues crucial to the resolution of a particular case" (see *Campbell, supra* at para 22, citing *R v Le,* 2019 SCC 34 (CanLII) ["*R v Le*"] at para 83 and *R v Spence*, 2005 SCC 71 (CanLII) ["*Spence*"] at para 57).

[26] I agree that the Complainants may introduce Dr. Milward's Report and call Dr. Milward as an expert witness concerning the historical and ongoing relationship between the RCMP and Indigenous peoples in Canada. The nature and scope of his evidence should be limited to this topic and may include evidence about historical and ongoing distrust of the RCMP by Indigenous peoples, including in northern BC.

[27] Dr. Milward's social context evidence will not replace the Tribunal's own fact-finding, which will be guided by the evidence that will be advanced by the parties in relation to this complaint. The Complainants may not seek Dr. Milward's opinion on the ultimate issues that the Tribunal must determine in this case, such as the existence of individual or systemic discrimination in relation to the facts of this complaint.

B. The Disputed *Mohan* Factors

(i) The proposed expert evidence is relevant

[28] In determining the relevance of the Report, I must consider whether the proposed evidence is logically relevant to a fact in issue in this complaint (*R v Abbey*, 2009 ONCA 624

(CanLII) ["*Abbey*"] at para 82). The RCMP submits that expert evidence must relate to the facts of the case and argues that the events Dr. Milward opines on bear no relevance to the present inquiry.

[29] There is some disagreement between the parties about the scope of the complaint before the Tribunal, with the RCMP defining what is at issue in the inquiry more narrowly than the Complainants and CHRC. The Tribunal has previously concluded that it is the Statements of Particulars ("SOP") filed by the parties that set the more precise terms of the hearing, as opposed to the initial complaint filed with the CHRC (*Casler v Canadian National Railway*, 2017 CHRT 6 (CanLII) at para 9).

[30] The RCMP says in its SOP and in this Motion that the only issue before the Tribunal is "whether the investigation by Corporal Mackie … was carried out in a discriminatory manner." It says it is within this narrow scope that any opinion evidence should be tendered and that Dr. Milward's Report "not only does not stay within this scope, it never enters it."

[31] Corporal Mackie's investigation involved a complaint of childhood sexual abuse by one individual who attended Immaculata school. In its SOP, the RCMP says Corporal Mackie's investigation was thorough and careful and not discriminatory. It also indicates that, in addition to Corporal Mackie's investigation, it set up a separate file, led by a different officer, to investigate more generalized statements of physical abuse suffered at Immaculata school. Neither investigation resulted in charges being laid, as the RCMP concluded that there were no reasonable and probable grounds to support charge referral to the Crown or to warrant further investigation.

[32] In their Reply to the RCMP's SOP, the Complainants dispute that their complaint is limited to Corporal Mackie's investigation into one criminal complaint or the outcome of that investigation. Rather, they say their claim concerns discrimination by the RCMP in its investigation of childhood abuse by school personnel in BC as brought to light by the six Complainants and many other witnesses.

[33] In their SOP, the Complainants state that the RCMP employed traditional investigative practices when investigating historical allegations of abuse against Indigenous children. For example, they allege that the RCMP did not obtain production orders to obtain

relevant records or notes, and that the RCMP: did not contact or interview everyone who had made affidavits or statements; required that complainants initiate contact with the RCMP rather than the other way around; did not offer support to most of the victims reporting abuse who were experiencing pain and trauma, or offer translation services to complainants who only spoke the Carrier language; categorized as uncooperative some witnesses without addressing collective or intergenerational trauma; did not follow up on information provided about abuse at Prince George College and other Diocese schools; and, did not report back to individuals it had interviewed about the outcome of its investigation.

[34] The Complainants allege that the RCMP's traditional investigative practices are discriminatory in that they fail to meet the needs of Indigenous victims of abuse. They say that their race was a factor in the adverse impact they experienced because the RCMP's stereotypes and biased attitudes toward Indigenous complainants caused deficiencies in carrying out its investigation. They allege that the discrimination was systemic and they are asking the Tribunal to order systemic remedies, including that the RCMP modify its traditional practices to meet Indigenous peoples' cultural needs.

[35] In its SOP, the CHRC states that the Tribunal must consider the social context from which this human rights complaint arose by assessing the complaint against the backdrop of the past and present effects of colonialism and historical trauma on Indigenous peoples. The CHRC states that the Complainants draw a clear link between their mistrust of the RCMP arising from Canada's colonial legacy and the way in which the RCMP's investigation was conducted and impacted them.

[36] Based on the SOPs filed by the parties, I accept that the scope of the complaint referred to the Tribunal for an inquiry is broader than whether Corporal Mackie's investigation of one individual's complaint was discriminatory.

[37] The Complainants have the onus of proving *prima facie* discrimination on a balance of probabilities. They argue that Dr. Milward's proposed expert evidence will assist them in doing so by establishing that the RCMP knew or ought to have known that Indigenous peoples in northern BC did not likely trust the RCMP at the time of its investigation. Although the Complainants and their witnesses can testify about their own distrust of the RCMP, they

cannot provide evidence about what the RCMP knew or ought to have known. The Complainants say that the RCMP has not provided its position regarding this issue yet. However, if the RCMP is going to suggest that it was unaware that Indigenous people had a negative social memory or collective distrust of the RCMP, they say that Dr. Milward's evidence will rebut that position.

[38] The Complainants also say that, even though their claim is about the RCMP's investigation into their experiences of childhood abuse in northern British Columbia, it "represents the experiences of many other Indigenous people nationwide." They say their complaint demonstrates systemic discrimination that exists in police investigative methods and shows how Indigenous victims of abuse suffer adverse impacts like being disbelieved or subjected to inadequate investigations, receiving little or no support, and being treated with a lack of respect and dignity.

[39] The Complainants say that Dr. Milward's evidence is critical to their claim of systemic discrimination because it is important for the Tribunal to hear evidence about the RCMP's pattern of conduct over time, which establishes that the RCMP historically used practices that reflected a culture of systemic discrimination against Indigenous individuals. They say that this evidence can only be established through an expert qualified to properly analyze that history, such as Dr. Milward.

[40] The RCMP says the Report provides no opinion on specific discriminatory conduct by Corporal Mackie or the RCMP on the facts of this case, nor does Dr. Milward discuss any specific shortcomings in the RCMP's investigation whatsoever or proffer any alternative investigative approaches that would have been non-discriminatory in his opinion. The RCMP argues that Dr. Milward should have set out the facts which he has assumed and then rendered an opinion on these assumptions in a manner that connected it with the historical claims in his report.

[41] There is no requirement for an expert witness to advance an opinion with respect to the specific facts of the complaint (see *McKay v Toronto Police Services Board*, 2011 HRTO 499 (CanLII) ["*McKay*"] at para 95). As previously noted, the Supreme Court of Canada has concluded that "social fact" evidence that is not specific to a case but that links to

adjudicative facts may be admitted to help explain aspects of the evidence, such as "difficulties faced by aboriginal people in both the criminal justice system and throughout society at large" (in *Spence, supra* at para 57).

[42] With regard to the RCMP's argument that Dr. Milward's Report focuses on topics not relevant to the present inquiry such as the RCMP's role in the residential school system and its failings in investigating Missing and Murdered Indigenous Women and Girls, I accept that this information has been included in the Report because it is part of the Indigenous Social Memory Dr. Milward discusses. I agree with the CHRC's position in its SOP that the Tribunal must consider the social context from which this human rights complaint arose by assessing the complaint against the backdrop of the effects of colonialism and historical trauma on Indigenous peoples. The CHRC is correct that the Complainants draw a clear link between their distrust of the RCMP arising from Canada's colonial legacy and the way in which the RCMP's investigation was conducted and impacted them.

[43] I agree that, in considering and determining the facts and issues in this case, the Tribunal will benefit from the fullest possible understanding of the background context between the parties.

[44] The RCMP also argues that, to the extent Dr. Milward's Report implies that Corporal Mackie's investigation was discriminatory or not thorough, this is irrelevant because the Civilian Review and Complaints Commission ("CRCC") concluded that similar complaints were unfounded. The Complainants say the CRCC's findings are not relevant to the Complainants' allegation of discriminatory investigative methods. I agree with the Complainants as the CRCC's report, provided by the RCMP, does not appear to consider allegations that the investigation was discriminatory.

[45] I agree that Dr. Milward's Report is logically relevant to the issue of whether the RCMP knew or ought to have known of the distrust held for the RCMP by Indigenous peoples in northern BC at the time it conducted its investigation. This is relevant to the Complainant's argument that the RCMP's investigation should have been adapted to meet the needs of the Indigenous complainants. As such, his proposed evidence passes the relevance threshold.

[46] The parties will be permitted to make their arguments about the relevance of Dr. Milward's evidence to other facts or issues raised in the case, including the allegations of systemic discrimination, as well as to the weight the Tribunal should give to Dr. Milward's evidence.

(ii) The proposed expert evidence is necessary

[47] The necessity criteria is met if the proposed expert evidence enables the Tribunal to appreciate the matters in issue by providing information outside of its experience and knowledge (*Bingley, supra* at para 15; *Mohan, supra* at p.23).

[48] The RCMP argues that Dr. Milward's Report is unnecessary to assist the Tribunal, as much of his opinion is founded on other published reports or research. It suggests that Dr. Milward appears to take the opinions set out in the Human Rights Watch Report as fact, which he then uses to bolster the position of the Complainants. As it cannot cross examine Human Rights Watch or otherwise challenge their findings, the RCMP argues that it would be contrary to procedural fairness to allow expert testimony based on these findings.

[49] A similar argument was made in *Campbell*, *supra* and the BCHRT dismissed this argument as follows:

> Finally, the VPB objects to Dr. Miller's reliance on secondary sources, which cannot be tested through cross-examination. It does not cite any legal authority for this objection and I am not aware of any. The nature of expert social science evidence, surely, is that it is reasonable to expect an expert to rely on and incorporate the work of others. I do not find this argument warrants a ruling that all or part of the Report is inadmissible (para 29).

[50] I agree with the BCHRT in this respect. Expert witnesses are permitted to provide a foundation for their opinion through reference to reports and studies. In *McWilliam v Toronto Police Services Board*, 2017 HRTO 19 (CanLII) ["*McWilliam*"], the Human Rights Tribunal of Ontario ("HRTO") allowed an expert to testify about the social context relating to gender in policing and disagreed that the expert's reference to various studies amounted to hearsay or "oath helping" (at paras 48-50).

[51] The RCMP also argues that, to the extent the Report attempts to justify the Complainants' testimony, it is oath helping and therefore inadmissible. It says that four of Dr. Milward's nine "Findings" in particular run afoul of the ban on oath helping, as they seek to augment the Complainants' evidence about their relationship with the RCMP. These findings relate to the RCMP's reported conduct in the North District of British Columbia (for example, actions consistent with racial profiling and mishandling complaints made by Indigenous people, as well as criminally victimizing Indigenous persons). Dr. Milward concludes these actions would have negatively affected the Indigenous Social Memory of the RCMP in that region and had "tangible social effects", including a lack of confidence in the RCMP's ability or willingness to treat Indigenous people fairly or protect them, and may have compounded the lingering effects of intergenerational trauma.

[52] The rule against oath helping "holds that evidence adduced solely for the purpose of proving that a witness is truthful is inadmissible" (*R v Burns*, 1994 CanLII 127 (SCC) at para 28). I do not agree with the RCMP that Dr. Milward's opinion evidence, either in relation to these four Findings or generally, will violate the rule against oath helping, as this evidence is not being called solely to prove that the Complainants or their witnesses are being truthful.

[53] So long as Dr. Milward remains objective, the fact that his evidence supports the Complainants' case is not fatal to its admission. As the Court in *Peart v Peel (Regional Municipality) Police Services Board,* 2003 CanLII 42339 (ON SC) ["*Peart*"] stated:

> That is the classic role of the expert: to provide the court with a ready-made inference based on scientific, medical, psychiatric, engineering or similar learning, which the court can draw if certain identified underlying facts are demonstrated to exist. … But the inference is one that the court draws (para 23).

[54] Dr. Milward's opinion is not a substitute for the Tribunal's own analysis of the evidence. In considering the evidence before it, the Tribunal may take into account the relationship between the RCMP and Indigenous people in northern BC in its historical and racial context, as provided by Dr. Milward. At the same time, the Tribunal does not have to accept the opinion or inference of an expert witness. It is available for the Tribunal to accept

if it is “persuaded on the balance of probabilities that it is the more probable explanation for the events in question” (*Peart* at para 23).

[55] Justice Sopinka in *Mohan* stated: "I would not judge necessity by too strict a standard. What is required is that the opinion be necessary in the sense that it provide information ‘which is likely to be outside the experience and knowledge of a judge or jury’" (at p.23). The HRTO has stated that “there is a lower threshold for showing that the evidence is necessary to assist the trier of fact in discrimination cases as compared to criminal cases. This is because of the nature of human rights proceedings and the often subtle nature of discrimination” (*McWilliam, supra* at para 46; *Nassiah v Peel Regional Police Services Board*, 2006 HRTO 18 (CanLII) [“*Nassiah*”] at paras 36 to 37).

[56] I agree with the Complainants that Dr. Milward’s ability to review and critique the relevant voluminous reports, as a result of his knowledge of the subject-matter and his expertise in assessing the validity of social science studies, is valuable to the Tribunal, as that is beyond the Tribunal’s ability and expertise. As the Nova Scotia Human Rights Board of Inquiry stated, human rights tribunals are:

> presumed to possess a certain expertise in the law of discrimination and human rights, but do not necessarily possess expert knowledge in the practices and impact of racism beyond a basic understanding of their dynamics. … Racism takes many guises, exists in many different environments and it is studied by a great variety of social scientists using various methodologies. A given board of inquiry is unlikely to be up to date on all this literature…One method of providing this evidence to a board is of course simply to submit published works on the relevant matters, but works cannot be cross-examined (*Johnson v Halifax Regional Police Service*, 2003 CanLII 89397 (NS HRC) at para 85).

[57] The BCHRT in *Radek v Henderson Development (Canada) Ltd. and others (No.2),* 2004 BCHRT 340 (CanLII) stated that “evidence may be necessary which serves the function of clarifying or contextualizing the issues in dispute” (para 33). I find that Dr. Milward’s Report is necessary to assist the Tribunal to fully appreciate the social context underlying the complaint, being the historical and ongoing relationship between the RCMP and Indigenous peoples in Canada, including in northern BC.

[58] While the Tribunal can read the publicly-available reports referred to by Dr. Milward in his Report, these reports themselves cannot be cross-examined. However, the RCMP may cross-examine Dr. Milward if they wish to challenge the basis of his opinions or to seek clarification regarding his methodology and analysis. In that respect, Dr. Milward has identified aspects of the studies and reports about which he was critical in terms of methodology or interpretations. This is expertise the Tribunal does not have. As the Complainants note, it is Dr. Milward's professional and academic experience, discussed in detail in the next section, that permits an analysis of these documents that is outside of the Tribunal's experience and knowledge.

(iii) Dr. Milward is a properly qualified expert

[59] A properly qualified expert is one who is "shown to have acquired special or peculiar knowledge through study or experience in respect of the matters on which he or she undertakes to testify" (*Mohan, supra* at p. 27). An expert "must not only be qualified generally but must also be qualified to express the specific opinion proffered" (*R v Orr,* 2015 BCCA 88 at para 67).

[60] The Complainants argue that Dr. Milward is fully qualified to provide evidence concerning the historical and ongoing relationship between the RCMP and Indigenous peoples in Canada. They state that he "possesses specialized knowledge and skill by virtue of his academic background in the subject-matter of interactions between Indigenous people and the police, and he has expertise in assessing the validity of social science studies."

[61] At the outset of his Report, Dr. Milward indicates that he is an Associate Professor of Law at the University of Victoria and the Acting Director of the Joint Indigenous Law Degree Program of the University. His "scholarly research focuses on the interactions of Indigenous peoples with the Canadian criminal justice system … [including] historical interactions between Indigenous peoples and the Canadian state". He indicates that his research has had a pronounced interdisciplinary emphasis, drawing upon fields such anthropology, history, ethnohistory, criminology and sociology, in addition to law.

[62] According to Dr. Milward's CV, he has a PhD in Law from the University of British Columbia and he has written a book titled *Aboriginal Justice and the Charter: Realizing a Culturally Sensitive Interpretation of Legal Rights in Canada* (Vancouver: UBC Press, 2012), as well as a book chapter and several peer-reviewed articles.

[63] Dr. Milward indicates in his Report that some of his work has focused on the interactions between the police and Indigenous peoples. For example, several sections of his 2012 book deal with this subject, as well as his 2012 article in the *Criminal Law Quarterly* that focuses specifically on the RCMP and police profiling of Indigenous peoples as potential security threats in the context of suppressing Indigenous protests.

[64] I accept that, through his academic studies and work as a professor and interdisciplinary researcher, Dr. Milward has acquired the specialized knowledge of the matters on which he undertakes to testify. In my view, he is qualified to provide evidence on the issue of the relationship between the RCMP and Indigenous people, including in northern BC.

[65] The RCMP has not raised an objection to Professor Milward's qualifications. Rather, it says that a proposed expert's primary duty is to provide fair, non-partisan and objective assistance, and argues that Dr. Milward falls well short of that standard. It says his Report is not neutral but crosses over into advocacy by expressing views critical of the RCMP's conduct. The RCMP submit that Dr. Milward refers to events that are irrelevant to the facts of the complaint and he appears to "accept as fact unproven testimonials from unrelated investigations", "pronounces judgment on other events", "strays into periods well after the investigation", relies on "vague, unattributed, or generalized negative sentiments against the RCMP, many of which are hearsay", and "casually cites inflammatory and prejudicial statements".

[66] The RCMP cites examples that it says support Dr. Milward's view that the RCMP engaged in egregious conduct in northern BC, including his reliance on the Human Rights Watch Report and his statement that the behaviour of RCMP officers in the Northern District "may have introduced communities-wide trauma into Indigenous communities in the northern interior that originates squarely with the RCMP instead of residential schools." The

RCMP submits that, as he is unable to fulfil an expert's duty, he is not properly qualified to be one.

[67] The Complainants disagree that Dr. Milward's Report amounts to advocacy and rely on his exceptional qualifications and his signed "Acknowledgment of Expert's Duty" provided along with his Report and CV. Dr. Milward acknowledges his duty to provide opinion evidence that is fair, objective and non-partisan and within his area of expertise, and that this duty prevails over any obligation he may owe to the Complainants, on whose behalf he is engaged.

[68] The RCMP disputes that Dr. Milward's acknowledgment of an expert's duty is evidence of his ability to provide "fair, objective and non-partisan evidence". It argues that, if experts could "self-certify", there would be no role for the Tribunal in screening their testimony.

[69] In *White Burgess, supra* the Supreme Court of Canada stated that, once the expert attests to their duty to provide impartial, independent and unbiased evidence, there is an evidential burden on the party opposing admission to show a realistic concern that the expert is unable or unwilling to comply with this duty (at para 48). While agreeing that an expert who assumes the role of an advocate for a party "is clearly unwilling and/or unable to carry out the primary duty to the court", the Court stated that exclusion at this stage will be quite rare and only in the clearest of cases. Anything less than clear unwillingness or inability to provide the Tribunal with fair, objective and non-partisan evidence should not lead to exclusion, but should be considered in the overall weighing of the costs and benefits of receiving the evidence (*White Burgess* at para 49).

[70] The RCMP submits that Dr. Milward's Report is a "full throated critique of the RCMP", that it surveys recent events unconnected to the investigation at issue in this complaint, and that he says little, if anything, about the good the RCMP has done in Indigenous communities and Northern BC. The RCMP argues that these all illustrate the one-sidedness of the report and, as he is acting as an advocate for the Complainants, he is not a properly qualified expert.

[71] I agree with the Complainants that the examples or statements used by the RCMP to argue that Dr. Milward is acting as an advocate are provided outside of the full context of the Report and that they are clarified by reading the Report in its entirety. I accept that Dr. Milward's Report, which includes his reliance on past reports, provides social context for the historical and ongoing relationship between the RCMP and Indigenous peoples in Canada, including in northern British Columbia.

[72] The RCMP is free to call evidence to contradict some or all of Dr. Milward's Report, or that addresses areas not covered in detail by the Report, for example evidence of the good the RCMP has done in northern BC. Presumably its own witnesses who have worked in northern BC would be in a position to provide such evidence. Dr. Milward acknowledges that he did not conduct any primary research to prepare his Report but instead reviewed previous studies and reports, much of which did involve primary research with both Indigenous communities and members of the RCMP. If there are studies or reports that provide contradictory information or a different analysis of the information provided by Dr. Milward, the RCMP can seek to introduce them as evidence at the hearing.

[73] I do not view Dr. Milward's Report as being a "full throated critique of the RCMP". I note that the Report does speak about the history of Indigenous people and the RCMP as being nuanced, and that he states more than once that the RCMP can and has overcome the "default negative Social Memory held by Indigenous peoples". He says that, in some Indigenous communities, the social memory of the RCMP has become more positive with "consistent positive action over time".

[74] I agree with the Complainants that, simply because the RCMP does not like or agree with Dr. Milward's opinions, this does not make them unfair or partisan.

[75] In terms of the RCMP's concern that Dr. Milward's Report is not "neutral" but is instead advocacy, I note that there is no requirement for expert evidence to be neutral. Rather, expert evidence must be "impartial in the sense that it reflects an objective assessment of the questions at hand" (*White Burgess, supra* at para 32). As the HRTO helpfully stated in *McKay, supra*:

> Objectivity does not mean that an expert is devoid of community connections and/or derives opinions in abstraction absent any familiarity with the parties or their counsel. Experts are proffered precisely because they have expansive or deep knowledge of the field and respected reputations and affiliations … . Further, in the human rights context, I am sensitive to the access to justice concerns for marginalized and equity seeking groups that may arise if rules of evidence are rigidly applied to exclude potential experts that have worked within or on behalf of such groups. A Tribunal's inquiry with respect to (im)partiality should focus on whether, considering the nature and degree of association, the expert is able and willing to provide independent, objective and authoritative evidence, not argument, to assist the decision-maker regardless of which side the information favours (at para 99).

[76] Human rights tribunals have recognized that criticism by an expert does not necessarily equate to advocacy. In *McWilliam, supra* the HRTO assessed the expert's objectivity following an objection by the respondent that she was a feminist advocate. In that case, the Tribunal held:

> [T]he fact that Professor Corsianos has been critical of the treatment of women in policing does not, in and of itself, make her incapable of providing fair, objective and non-partisan evidence. It also does not make her a partisan advocate. One may well be critical of certain phenomena while also being fair, objective and non-partisan. This would be the case, for example, if there are things to legitimately be critical about in relation to the phenomena, institutions or social entities being studied (para 54).

[77] The Complainants argue that Dr. Milward's critiques of the RCMP do not render him incapable of providing fair, objective, non-partisan evidence or make him a partisan advocate. Further, they submit that there is a legitimate basis upon which Dr. Milward is critical of the RCMP's conduct concerning Indigenous people, which he explains in detail in his Report and includes findings from reliable reports and studies. In particular, the Complainants note that the Truth and Reconciliation Commission Final Report and the Missing and Murdered Indigenous Women and Girls Final Report have been relied upon by other decision makers, including criminal courts, for the truth of their contents as social context (see *R v A.(M.),* 2020 NUCJ 4 (CanLII) at para 19 and *Campbell v Vancouver Police Board (No.4)*, 2019 BCHRT 275 (CanLII) at paras 111-112).

[78] I do not find that the RCMP has met its burden of establishing that there is a realistic concern that Dr. Milward is unable or unwilling to comply with his duty to provide the Tribunal with impartial, independent and unbiased evidence. As discussed in the "necessity" section

above, the fact that Dr. Milward relies on and incorporates the works of others in his Report does not make it inadmissible.

[79] In my view, Dr. Milward is qualified to provide evidence on the historical and ongoing relationship between the RCMP and Indigenous peoples in Canada, which comprises evidence about historical and ongoing distrust of the RCMP by Indigenous peoples, including in northern BC. Dr. Milward's academic studies and work experience provide him with the specialized knowledge and skills to review and critique the voluminous reports referred to in his Report. I agree with the Complainants that he possesses both knowledge of the subject-matter and expertise in assessing the validity of social science studies.

C. The potential benefits of admitting Dr. Milward's evidence outweigh the risks

[80] As I have concluded that Dr. Milward's proposed evidence meets the threshold *Mohan* requirements for admissibility, I move on to the second stage of the analysis. At this gatekeeping stage, the Tribunal is to determine whether the potential benefits of admitting the proposed expert evidence outweigh any potential harm to the hearing process or prejudice to another party. The Supreme Court in *White Burgess, supra* indicated that, at this stage, relevance, necessity, reliability and the absence of bias play a role in weighing the overall competing considerations in admitting the evidence. The Court stated that, at the end of the day, the trier of fact must be satisfied that the potential helpfulness of the evidence is not outweighed by the risks associated with expert evidence (at para 54). Possible risks include delay and longer hearings, adjournments, increased cost, improper deference to the expert, junk science and competing experts (*White Burgess* at para 18).

[81] The RCMP argues that, even if the Tribunal finds that the Report meets all of the *Mohan* thresholds, the combined effect of all of the defects in the Report renders the dangers of its admission far greater than any conceivable benefit it could provide. It submits that Dr. Milward makes broad generalizations about RCMP investigations in Northern BC even while admitting he has limited information for assessing discriminatory conduct. The RCMP argues that the "sweeping overbreadth" of the Report, which introduces facts and opinions on matters such as residential schools and the Missing and Murdered Indigenous Women

and Girls inquiry, is a distraction from the specific discrimination claim before the Tribunal, which it says is Corporal Mackie's investigation. It says that the "history and conduct of the RCMP since its inception are not before this Tribunal."

[82] The Complainants say that the "defects" in the Report that the RCMP refers to are in fact admissible context evidence.

[83] I acknowledge that the Report covers topics that may initially seem unrelated to the alleged discriminatory investigation at issue in this complaint. However, I accept that the Report covers these various topics because they are part of the context of the relationship between the RCMP and Indigenous peoples in Canada, including in northern BC. The Supreme Court of Canada has affirmed the importance of understanding the social context of interactions between police and racialized groups when adjudicating the circumstances of a specific encounter (see *R v Le, supra* at para 86). I accept that the same understanding of the background context is important when considering allegations of discrimination, both individual and systemic.

[84] I understand that Dr. Milward's evidence is being proffered by the Complainants in order to situate the relationship between the RCMP and Indigenous people in its historical and racial context. They assert that this is relevant to the social context underlying their complaint of discrimination. I am of the view that the potential benefits of this evidence outweigh any possible harm to the hearing process. This is not a case where the proposed expert evidence relates to a subject completely unfamiliar to a human rights tribunal. There is no risk of admitting "junk science" that could result in a miscarriage of justice. There is also no reason to believe that Dr. Milward's evidence will unduly delay the hearing or lead to adjournments.

[85] The RCMP also argues that the Report is entirely prejudicial to it as the Respondent. It says that, by listing the many wrongs that Dr. Milward feels the RCMP has committed, "the report implies it must follow they committed wrongs here too" and so opines on the ultimate issue for the Tribunal to determine. It alleges that seeking to colour the facts of the present complaint in light of alleged past wrongs is prejudicial.

[86] The Complainants submit that an unfavourable report is not the same as a prejudicial report. They state that Dr. Milward's evidence does not address the ultimate issue regarding whether the investigative practices in question demonstrate individual or systemic discrimination against Indigenous people, or whether alternate investigative methods to meet the needs of the Indigenous complainants should have been used.

[87] I agree that simply because Dr. Milward's Report presents information that the RCMP may disagree with does not necessarily make it prejudicial. The RCMP will be able to cross-examine Dr. Milward and call its own evidence and make submissions about the relevance and appropriate weight of his evidence.

[88] In terms of any concern that Dr. Milward's opinion could be given undue deference, the Tribunal understands that Dr. Milward's opinion evidence does not usurp the Tribunal's role of assessing credibility, finding facts and determining the factual and legal issues in this complaint. The Tribunal is well aware that it must make the determination about whether discrimination has occurred in this matter and will decide, after a full hearing of the evidence and submissions from the parties, what weight, if any, to give to Dr. Milward's evidence.

[89] I do not find that the RCMP has established that the potential harm to the hearing process or the risk of prejudice to the RCMP outweigh the potential benefits of admitting Dr. Milward's proposed evidence. Rather, I find that his expected evidence has the possibility to be sufficiently beneficial to this proceeding to warrant its admission, while the likelihood of harm or prejudice in doing so is minimal. Dr. Milward's Report is admissible and he may testify as an expert witness at the hearing into this complaint.

Signed by

Colleen Harrington
Tribunal Member

Ottawa, Ontario
March 7, 2023

Canadian Human Rights Tribunal

Parties of Record

Tribunal File: T2459/1620

Style of Cause: Woodgate et al. v RCMP

Ruling of the Tribunal Dated: March 7, 2023

Motion dealt with in writing without appearance of parties

Written representations by:

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