CANADIAN HUMAN RIGHTS TRIBUNAL TRIBUNAL CANADIEN DES DROITS DE LA PERSONNE

JEAN-LUC MORIN

Complainant

- and -

CANADIAN HUMAN RIGHTS COMMISSION

Commission

- and -

ATTORNEY GENERAL OF CANADA

Respondent

RULING

MEMBER: Athanasios D. Hadjis 2003 CHRT 46
2003/10/29

[1] The Complainant wishes to call upon Dr. Harish C. Jain, Professor Emeritus, Human Resources and Labour Relations at the MGD School of Business of McMaster University, to testify in the present case as an expert. The Complainant proposes to qualify Prof. Jain as "an expert in the field of systemic discrimination, discrimination in the large sense and racial prejudice in the workplace, from the perspective of a social scientist".

[2] The Respondent has taken issue with Prof. Jain's proposed qualification for the purpose of this expert testimony. In addition, the Respondent questions the relevance and necessity of this proposed evidence.

[3] The Respondent presented its objection after Prof. Jain had completed his testimony with regard solely to the matter of his qualification as an expert. On the consent of the parties, a copy of Prof. Jain's report detailing his intended evidence was provided to me to assist in my deliberations.

[4] An analysis regarding the admissibility of expert evidence should be conducted in accordance with the leading decision of the Supreme Court of Canada on this subject, in

the case of *R. v. Mohan*, [1994] 2 S.C.R. 9. The Court pointed out that the admission of expert evidence depends upon the application of the following criteria:

1. Relevance;
2. Necessity in assisting the trier of fact;
3. The absence of any exclusionary rule;
4. A properly qualified expert.

[5] Accordingly, the first two questions for me to consider are the following: Is the proposed evidence of Prof. Jain relevant, and if so, is it necessary in assisting the Tribunal?

[6] On the question of relevance, the Court in *Mohan* noted the following, at paragraph 18:

Relevance is a threshold requirement for the admission of expert evidence as with all other evidence. Relevance is a matter to be decided by a judge as question of law. Although *prima facie* admissible if so related to a fact in issue that it tends to establish it, that does not end the inquiry. This merely determines the logical relevance of the evidence. Other considerations enter into the decision as to admissibility. This further inquiry may be described as a cost benefit analysis, that is "whether its value is worth what it costs." See McCormick on Evidence (3rd ed. 1984), at p. 544. Cost in this context is not used in its traditional economic sense but rather in terms of its impact on the trial process. Evidence that is otherwise logically relevant may be excluded on this basis, if its probative value is overborne by its prejudicial effect, if it involves an inordinate amount of time which is not commensurate with its value or if it is misleading in the sense that its effect on the trier of fact, particularly a jury, is out of proportion to its reliability.

[7] On the issue of necessity, the Court in *Mohan* cites, at paragraph 21, from its prior decision in the case of *R. v. Abbey*, [1982] 2 S.C.R. 24:

With respect to matters calling for special knowledge, an expert in the field may draw inferences and state his opinion. An expert's function is precisely this: to provide the judge and jury with a ready-made inference which the judge and jury, due to the technical nature of the facts, are unable to formulate. "An expert's opinion is admissible to furnish the Court with scientific information which is likely to be outside the experience and knowledge of a judge or jury. If on the proven facts a judge or jury can form their own conclusions without help, then the opinion of the expert is unnecessary" (*Turner* (1974), 60 Crim. App. R. 80, at p. 83, *per* Lawton L.J.)

[8] The Supreme Court goes on to say, in *Mohan*, at paragraph 22:

This pre-condition is often expressed in terms as to whether the evidence would be helpful to the trier of fact. The word "helpful" is not quite appropriate and sets too low a standard. However, 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 "<u>which is likely to be outside the experience and knowledge of a judge or jury</u>": as quoted by Dickson J. in *R. v. Abbey*, *supra*. As stated by Dickson J., the evidence must be necessary to enable the trier of fact to appreciate the matters in issue due to their technical nature.

[emphasis added]

[9] There are essentially two parts to the proposed evidence of Prof. Jain, as advanced in his report. The first is in the form of an introductory explanation of some of the causes of racial discrimination in the workplace. There is no explicit reference, within this aspect of the evidence, to the RCMP or to the specific facts alleged in the complaint.

[10] The second portion of the proposed expert evidence is described as "a quantitative analysis of the scope, nature and trends of racial discrimination in employment in Canada over the last two decades", based on a "sample" of 119 cases published by the *Canadian Human Rights Reporter* between 1980 and 1999. This is followed up with a "qualitative analysis", based upon selected cases, with respect to "patterns of behaviour and employment conditions that lead to discriminatory treatment of racial minorities in the workplace", that the witness points out is meant to be "illustrative". These analyses are occasionally interspersed with comments by Prof. Jain to the effect that in his opinion, many of the incidents alleged in the complaint reflect some of the patterns of discrimination documented in Canadian human rights case law.

[11] I find that the first part of the proposed evidence is of minimal probative value to this case. While knowledge of the root causes of racism in the workplace is vital to our society's ongoing quest to eradicate all forms of discrimination, I fail to see how general evidence relating thereto can be of assistance in determining whether the specific discriminatory conduct alleged in the complaint occurred in fact. The time to be expended to receive this evidence will not be commensurate with its probative value.

[12] With respect to the second aspect of the proposed evidence, I have no doubt that a review of the relevant jurisprudence in the area of racial discrimination will be of assistance to me when it comes down to making my findings and issuing my decision, once all of the evidence of the Complainant and the Respondent will have been led. I fully expect each party's learned and able counsel to apprise me of all the relevant case law and other authorities, and to bring up any analogous facts on the basis of which I will be urged to reach similar findings and conclusions. Conducting this form of analysis falls squarely within the scope of the Tribunal's functions. The Supreme Court of Canada has observed on several occasions that the Canadian Human Rights Tribunal has a superior expertise as it relates to fact finding and adjudication in the human rights context. (See, for instance, R v. *Mossop*, [1993] 1 S.C.R. 554).The Tribunal is thus able to draw the very inferences and conclusions that Prof. Jain has made in his report. I am not persuaded, therefore, that the second facet of his proposed evidence will fall outside the experience and knowledge of the Tribunal. The condition of necessity articulated in *Mohan* has not been satisfied.

[13] For these reasons alone, the Respondent's objection is maintained and the proposed evidence of Prof. Jain is not admitted. The question of his qualifications for the purposes of his testimony in this case thus becomes moot and need not be explored.

I hereby certify that the foregoing is a true and accurate representation of my ruling given to the parties in the above-noted matter on October 29, 2003.

"*Signed by*"

Athanasios D. Hadjis

OTTAWA, Ontario

October 29, 2003

PARTIES OF RECORD

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APPEARANCES:	
Ian Abugov	For the Complainant
Alain Préfontaine	For the Respondent