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IN THE MATTER OF THE *HUMAN RIGHTS CODE,*
RSBC 1996, c. 210 (as amended)

AND IN THE MATTER of a complaint before
the British Columbia Human Rights Tribunal

BETWEEN:

British Columbia Teachers' Federation obo Chilliwack Teachers' Association

COMPLAINANTS

AND:

Barry Neufeld

RESPONDENT

AND:

BC's Office of the Human Rights Commissioner

INTERVENOR

REASONS FOR DECISION
ADMISSIBILITY OF EVIDENCE
Section 27.2

Tribunal Members:	Devyn Cousineau, Robin Dean, Laila Said Alam
Counsel for the Complainant:	Lindsay Waddell, Alanna Tom, Stefanie Quelch
Counsel for the Respondent:	James SM Kitchen
Counsel for BC's Human Rights Commissioner:	No submissions

I INTRODUCTION

[1] This complaint arises out of statements and publications made by Barry Neufeld during his tenure as an elected Trustee of the Chilliwack Board of Education, about provincial resource materials addressing sexual orientation and gender identity. The British Columbia Teachers' Federation [**BCTF**] and the Chilliwack Teachers' Association [**CTA**] bring the complaint on behalf of CTA members who identify as 2SLGBTQ+ [**the Class**]. They allege that Mr. Neufeld's statements discriminated against the Class based on their gender identity, gender expression, and/or sexual orientation in violation of ss. 7 and 13 of the *Human Rights Code*.

[2] The hearing of the complaint is underway. In support of his case, Mr. Neufeld seeks to admit evidence from three lay witnesses about their personal experiences and views of the subject matter of his impugned communications. The Complainants object to these witnesses being permitted to testify. They argue that their proposed evidence is irrelevant and/or inadmissible opinion, and, in one case, Mr. Neufeld failed to give notice of the witness as required by the Tribunal's directions and orders. Both parties made oral submissions about the objection.

[3] For the reasons that follow, we agree with the Complainants that the proposed evidence of the three witnesses is irrelevant to the issues we must decide. It is neither necessary nor appropriate to admit this evidence and we decline to do so: *Human Rights Code,* s. 27.2.

II DECISION

[4] The Tribunal has discretion to admit evidence that it considers "necessary and appropriate, whether or not the evidence or information would be admissible in a court of law": *Code*, s. 27.2. In exercising this discretion, the Tribunal aims to further the purposes of the *Code* by delivering just and timely dispute resolution services. This includes ensuring that its time and resources are not taken up to hear irrelevant evidence: *Oger v. Whatcott (No. 7),* 2019 BCHRT 58 at para. 25.

[5] Broadly, Mr. Neufeld's arguments are grounded in his view of this complaint as one about a "clash of worldviews", which seeks to answer the question of whether Mr. Neufeld is entitled to hold and express beliefs that criticize "gender ideology". His lawyer extensively cross-examined the Complainants' witnesses about their beliefs and those held by Mr. Neufeld, and has used the hearing as a platform to advance philosophical arguments about freedom of expression and tolerance for opposing views in a democratic society. While we acknowledge that this complaint arises in a broader social context where these issues are being publicly discussed, we must respectfully disagree with this expansive characterisation of the issues in the complaint.

[6] The complaint is not about a clash of worldviews. In this regard, we agree with Mr. Neufeld that the Human Rights Tribunal is not the "arbiter of public debate". In the words of the Supreme Court of Canada, "the Tribunal … is an adjudicator of the particular claim that is before it, not a Royal Commission": *Moore v. BC (Education),* 2012 SCC 61 at para. 33. Among other things, this complaint is not about the merit of the province's educational materials or approach to sexual orientation and gender identity, or about developing guidelines for how public debate about these issues should be permitted to unfold.

[7] This complaint is about whether Mr. Neufeld violated s. 13 and/or s. 7 of the *Code* and, if so, what remedies are appropriate. The legal test governing these issues is very well established in case law from the Supreme Court of Canada. Evidence is relevant where it relates to the Complainants' claim that Mr. Neufeld discriminated against them in their employment (s. 13) and by publishing discriminatory statement (s. 7), and Mr. Neufeld's defence to those claims. Many of the relevant facts are not disputed. Mr. Neufeld's impugned communications have been admitted into the record by consent. The complaint is not about his beliefs, broadly speaking; it is about what he said in those communications while he was a School Trustee. Notably, Mr. Neufeld's counsel has spent very little time in the evidence addressing these communications. Instead, he has focused most of his time on what he broadly characterises as Mr. Neufeld's views about gender and provincial resources about sexual orientation and gender identity.

[8] We turn now to the proposed evidence of the three witnesses at issue. Mr. Neufeld has provided detailed will say statements about their anticipated evidence, which we briefly summarize here.

[9] The first witness, who we will call KLP, will testify "that she was born a girl and matured to become a woman, but decided to transition to identifying and living as a man in her 30s" – an experience she later regretted. Mr. Neufeld says that KLP will testify about her experience of "true discrimination" in health care. Finally, KLP will testify from her perspective of "having been a transgender person and as a reasonable person" about her views of Mr. Neufeld's publications.

[10] The second witness, who will we call FG, will "share her story of her journey into and out of identifying as transgender". She will testify that, as a teenager, she "came to believe in transgender ideas and that she herself was trans". She will say that that the medical system allowed her to take "hormone-altering drugs" and offered surgery to remove her breasts. She will testify that she later stopped identifying as transgender and that the "transgender movement has not been accepting of the fact she has detransitioned".

[11] The third witness, who we will call SG, is a gay man. He will testify that he has distanced himself "from this new concept and movement called 'queer'" and that he "regards the affirmation model as a type of gay conversion therapy and queer ideology … as a political and/or faith based belief system". He will testify that he has been shunned, harassed, and threatened for publicly expressing his views. Finally, he will testify about his belief that "an outcome that would prohibit or punish publicly elected officials from criticizing an alleged type of medical gay conversion therapy on same sex attracted youth would be a step back for gay rights and the ability of LGB people to be represented in public education".

[12] Mr. Neufeld argues that the proposed evidence of these three witnesses is highly relevant to the issues that Tribunal must decide under s. 7 of the *Code.* He relies on the Tribunal's website, which explains the basic principles relating to hate speech. He specifically points to the following:

> It is not enough for a publication to encourage mere disdain or dislike, or to discredit, humiliate or offend the members of the group. It is not enough that the publication is hurtful.
>
> A repugnant or offensive idea is not enough, on its own, to violate the Code. The Code does not prohibit expressions which are repugnant or offensive, unless they incite a level of abhorrence, delegitimization or rejection that risks causing discrimination or other harmful effects.
>
> The intent of the person expressing the idea does not matter. What matters is the likely effect of expressing the idea. Would a reasonable person consider that the expression has the potential to lead to discrimination or other harmful effects?
>
> This will depend on the context of a message. …
>
> Context may include:
>
> - The vulnerability of the target group
> - The degree to which the publication on its face contains hateful words or reinforces existing stereotypes
> - The content and tone of the message
> - The social and historical background for the publication
> - The credibility likely to be given to the publication
> - How the publication is presented

[13] Mr. Neufeld argues that the proposed evidence is critical context for assessing his publications. He says that it will help the Tribunal to determine whether Mr. Neufeld's communications are part of a legitimate public debate, grounded in real issues. He argues that it is the "height of hubris and intolerance" for the Complainants to object to the Tribunal hearing from his three queer witnesses simply on the basis that they offer a different perspective than the Complainants' witnesses. He argues that "detransitioners are crying out to be heard" and says that upholding this objection would turn the Tribunal into a "blasphemy court", enforcing the prohibition of any public criticism of queer "beliefs". Mr. Neufeld argues that FG's evidence is particularly necessary to contradict the expert and other evidence submitted by the Complainants that gender affirming surgery is rare for young people. Finally,

he argues that it is necessary to hear about KLP's experience of "true discrimination" to contrast with what he views as the frivolous complaint of the Class.

[14] We do not agree that the proposed evidence is relevant to any of the issues we must decide under s. 7 of the *Code.* The information on the Tribunal's website is a plain language summary of legal principles set out by the Supreme Court of Canada in *Saskatchewan (Human Rights Commission) v. Whatcott*, 2013 SCC 11. In that case, the Court defined the test for hate speech as "whether, in the view of a reasonable person aware of the context and circumstances, the representation exposes or tends to expose any person or class of persons to detestation and vilification on the basis of a prohibited ground of discrimination": *Whatcott* at para. 95. This is an objective test. The reasonable person is a legal fiction, not a person who may come and testify about their subjective views. The direction to consider "context" is not an open call for individuals unrelated to the case to share their experiences and views. Among other things, this proposition is simply unworkable. As the Complainants point out, it would turn s. 7 complaints into a contest of which party can call the most members of the public who share their view.

[15] The relevant context for an impugned publication is largely inherent in the publication itself. The examples the Court gave in *Whatcott* included: whether the publication was satire or in a news report, was made in a private setting, contained a singular remark or repeated delegitimizing attacks: paras. 52-53. The Court also considered a history of discrimination against the targeted group, public policy debates, and "ongoing religious and public interest debates about the morality of same-sex conduct": para. 169. We understand that these are the types of issues which Mr. Neufeld seeks to address through the evidence of KLP, KG, and SG.

[16] We accept that the social context of Mr. Neufeld's communications will be relevant. Without attempting to be exhaustive, we anticipate that this may include the context of public debate about the province's resources for teaching about sexual orientation and gender identity, as well as the history of discrimination against 2SLGBTQ+ people, and especially trans people. Some evidence about this context may be admissible and some has been admitted. This does not, however, mean that the personal experiences of all members of the targeted group

are relevant to the social context. No group in society is a monolith. There will always be differing views. Broad social context about the historic and current circumstances of a protected group would generally be the subject of judicial notice or expert evidence. Mr. Neufeld had ample opportunity to call expert evidence and has chosen not to.

[17] To the extent that social context may be informed by the individual experiences of witnesses, those witnesses should have some relation to the facts in the case aside from simply their identity as a member of the targeted group. Here, the evidence of Mr. Neufeld's proposed witnesses does not become relevant simply because the three proposed witnesses are gay or once identified as transgender. The proposed witnesses are not members of the Class and have no direct knowledge of any of the facts at issue in the complaint. Their personal experiences and views are no more relevant than any person off the street or, more specifically, any 2SLGBTQ+ person off the street.

[18] In this case, the Complainants have called evidence from members of the Class about how Mr. Neufeld's communications affected them. This evidence is relevant to two issues: (1) whether they experienced an adverse impact in employment under s. 13 of the *Code,* and (2) the remedies they are seeking, including compensation for injury to dignity, feelings, and self-respect. Their views of whether Mr. Neufeld's comments violated s. 7 – which were almost entirely elicited in cross-examination – will not be determinative of that analysis. This is a decision for the Tribunal not a witness. It is, therefore, not necessary or appropriate to introduce "rebuttal" evidence on that issue.

[19] In our view, Mr. Neufeld is essentially seeking to introduce evidence whose sole purpose is to establish the truth of his statements. As the Supreme Court of Canada has said, truth is not a defence to hate speech. The Court explained:

> I agree with the argument that the quest for truth is an essential component of the "marketplace of ideas" which is, itself, central to a strong democracy. The search for truth is also an important part of self-fulfillment. However, I do not think it is inconsistent with these views to find that not all truthful statements must be free from restriction.

> Truthful statements can be interlaced with harmful ones or otherwise presented in a manner that would meet the definition of hate speech.
>
> As Dickson C.J. stated in *Keegstra*, at p. 763, there is "very little chance that statements intended to promote hatred against an identifiable group are true, or that their vision of society will lead to a better world". To the extent that truthful statements are used in a manner or context that exposes a vulnerable group to hatred, their use risks the same potential harmful effects on the vulnerable groups that false statements can provoke. The vulnerable group is no less worthy of protection because the publisher has succeeded in turning true statements into a hateful message. In not providing for a defence of truth, the legislature has said that even truthful statements may be expressed in language or context that exposes a vulnerable group to hatred. [*Whatcott* at paras. 140–41]

The s. 7 issue in this case does not turn on whether Mr. Neufeld's publications contain information that is true – it is whether, viewed objectively, they indicate discrimination against the Class (s.7(1)(a)) or expose the Class to hatred (s. 7(1)(b)).

[20] Regarding KLP, we do not agree with Mr. Neufeld that it is either necessary or appropriate to admit her evidence about discrimination in health care for the purpose of contrasting this complaint from an instance of "true discrimination". This complaint is not about alleged discrimination that KLP faced. The legal test for discrimination is very well established and does not turn on a comparison of different experiences that people have had in their lives, for the purpose – presumably – of reserving protection for only the "worst" cases. As Mr. Neufeld has pointed out elsewhere, the Tribunal has expertise in discrimination and does not need this type of comparative evidence.

[21] Regarding SG, we agree with the Complainants that, in addition to being irrelevant, most of his proposed evidence is inadmissible opinion. SG is not an expert; he is a gay man with opinions about "queer ideology". It is the Tribunal's job to draw inferences and conclusions from the evidence and not the witnesses': *White Burgess Langille Inman v. Abbott and Haliburton Co.,* 2015 SCC 23 at para. 14. SG's opinions about "queer ideology" and/or Mr. Neufeld's publications are neither necessary nor appropriate.

[22] Finally, Mr. Neufeld argues that, if the Tribunal declines to admit his proposed evidence, it will be demonstrating a "double standard" and "doing whatever the queer community wants". He points to our decision to admit the Complainants' proposed expert evidence, which he says demonstrates that the Tribunal has set a very low bar for admissibility, which is easily passed by his proposed witnesses: *Chilliwack Teachers' Association v. Neufeld (No. 5),* 2024 BCHRT 332. Respectfully, we cannot accept this argument. Each evidentiary issue is addressed on its own merits. The parties are not entitled to an equal amount of "wins" in the course of the hearing. Our reasons for accepting the expert evidence are set out in our decision and are distinct from our reasons for not accepting the proposed evidence of FG, KLP, and SG. We further note that Mr. Neufeld's counsel has been allowed to spend considerable hearing time eliciting evidence from witnesses which is irrelevant, hypothetical, and opinion. To the extent he is seeking the benefit of the Tribunal's low bar for admissibility, he has had it.

[23] In our view, the proposed evidence of KLP, SG, and FG is irrelevant to the issues the Tribunal must decide. As in *Oger,* their evidence is "no more relevant to our analysis than the views of any individual on the street": para. 25. It is neither necessary nor appropriate to use the Tribunal's limited resources to admit the evidence. We decline to admit it.

[24] Given this conclusion, it is not necessary to fully address the Complainants' procedural objection to SG. We will simply say that we agree with the Complainants that a party who seeks to add a new witness to their list in the midst of a hearing (in this case, on the day when the Complainants were calling their last witness) bears the burden of persuading the Tribunal that allowing the evidence furthers the just and timely resolution of the complaint: Rule 22(b). The Tribunal sets deadlines for parties to exchange witness lists well in advance of the hearing, to avoid surprises and allow for the fair and orderly presentation of their cases. A party's failure to comply with those deadlines affects the fairness and efficiency of the process: *Platz v. BC (Ministry for Children and Families),* 2002 BCHRT 2 at para. 89. Mr. Neufeld did not offer any explanation for why he presented this surprise witness halfway through the hearing, other than to say he did not realize what the teachers were going to say in their evidence and that any prejudice is fully addressed by the Complainants' opportunity to cross-examine SG. In our

respectful view, this is not a reasonable explanation. SG's proposed evidence is not responsive to "new" evidence that Mr. Neufeld could not have anticipated. The Complainants were entitled to know the case to meet before the hearing began, including which witnesses were being called to testify. Aside from being irrelevant, SG's evidence would be inadmissible because of Mr. Neufeld's failure to give proper notice of it.

III CONCLUSION

[25] In sum, we find that the proposed evidence of FG, KLP, and SG is irrelevant to the issues we must decide. It is not necessary or appropriate. It is not admissible.

Devyn Cousineau
Vice Chair
Human Rights Tribunal

I AGREE: Robin Dean, Tribunal Member
I AGREE: Laila Said Alam, Tribunal Member