Canadian Human Rights Tribunal

Tribunal canadien des droits de la personne

Citation: 2016 CHRT 14
Date: August 19, 2016
File No.: T2097/1315

Between:

Michael Christoforou

Complainant

- and -

Canadian Human Rights Commission

Commission

- and -

John Grant Haulage Ltd.

Respondent

Ruling

Member: J. Dena Bryan

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I. Introduction

[1] This is a complaint made pursuant to sections 7 and 10 of the *Canadian Human Rights Act*, RCS 1985, c. H-6 ("the *Act*"), that the Respondent employer discriminated against the Complainant based on his age and disability, by terminating his employment in response to his request to work reduced hours. The complaint alleges the Respondent employer engaged in adverse differential treatment, termination of employment and established or pursued a discriminatory policy or practice, contrary to the *Act*. The complaint was referred to the Canadian Human Rights Tribunal ("the Tribunal") by the Canadian Human Rights Commission ("the Commission") on May 28, 2015. The Commission indicated that it would be participating at the hearing of this matter.

II. Background

[2] The Complainant was initially represented by (non-lawyer) Ms. Kathy Finstad. The Respondent has been represented by Mr. Aaron Crangle throughout. This matter was scheduled for hearing June 6 to 10 and June 13 and 17, 2016, in Toronto, Ontario. Mr. Daniel Poulin is counsel for the Commission. Mr. Poulin recently advised the Commission has reconsidered its position and decided it will not participate at the hearing.

[3] On April 28, 2016, Mr. Nikolay Chsherbinin advised the Tribunal and counsel for the Respondent and the Commission that he was retained to represent the Complainant.

[4] On May 30, 2016, Respondent counsel wrote to the Tribunal and other counsel requesting an adjournment of the scheduled hearing as a result of disclosure he had received from Complainant's counsel on May 19, 2016. The Complainant opposed the adjournment request and a Case Management Conference Call ("CMCC") was arranged for June 2, 2016.

[5] At the CMCC on June 2, 2016, counsel agreed to cancel the first week of the hearing, June 6 to 10, 2016. Another CMCC was scheduled for June 9, 2016 to confirm that the exchange of witness lists, will-say statements, and disclosure was complete so that the hearing scheduled June 13 to 17, 2016 could proceed with the Complainant's and

Commission's evidence and to schedule any additional hearing days in August 2016 for the Respondent to present its case.

[6] On June 7, 2016, in anticipation of the CMCC scheduled for June 9, 2016, the Respondent sent an email to the Tribunal and other counsel noting that the Complainant's family physician, Dr. Filomena Bautista, was not on the Complainant's witness list. The Respondent stated: "The contents of the doctor['s] reports are very much in dispute and relate to a central issue in the Application. Natural Justice requires that the respondent be given the opportunity to test the reliability and veracity of the applicant's evidence by cross-examination."

[7] The Respondent requested that the Tribunal refuse to enter Dr. Bautista's medical records and reports into evidence and that it consider dismissing the Complainant's case based on his failure to call Dr. Bautista as a witness and the exclusion of Dr. Bautista's medical records and reports, which would result in no reasonable prospect of success.

[8] On June 9, 2016, I asked Respondent counsel if his concerns would be addressed if the Complainant made Dr. Bautista available for his cross-examination and he stated he would be satisfied with an opportunity to cross-examine Dr. Bautista. The Complainant agreed to co-ordinate the date for cross-examination with the Respondent and Dr. Bautista, likely to take place during the hearing dates in August 2016. I was not required to rule on the Respondent's request.

[9] On June 9, 2016, Respondent counsel advised he intended to retain Dr. Brett Belchetz, as an expert, to review and critique the medical records, findings, opinions, etc., of Dr. Bautista, the Complainant's family physician, in a written report, to be filed in accordance with Rule 6(3) of the *Canadian Human Rights Tribunal Rules of Procedure (03-05-04)* ("the Rules") and to be presented as part of the Respondent's case in August 2016.

[10] The Complainant was surprised the Respondent referred to Dr. Belchetz's evidence as "expert evidence" as the Respondent had earlier advised it was not expert evidence. Complainant counsel objected to the proposed expert report and he objected to proceeding with his case on June 13, 2016 without prior receipt and review of the expert

report. Commission counsel had no objection to the Complainant's request for an adjournment to August 2016 and he advised that since the expert report would be provided well in advance of the hearing dates scheduled in late August 2016, the expert report was provided in accordance with Rule 6(3) and he had no objection to it.

[11] At the CMCC on June 9, 2016, the June 13 to 17, 2016 hearing dates were further adjourned to August 22 to 26 and August 29 to September 2, 2016, to allow the Complainant the opportunity to review the expert report of Dr. Belchetz and decide if he plans to make a motion to exclude the expert's report and evidence. The Respondent was to provide the expert report by June 24, 2016. Pre-hearing motions, if any, were to be filed by July 8, 2016. The next CMCC was scheduled for July 11, 2016. The Tribunal provided counsel with the recent Supreme Court of Canada ("SCC") judgment in *White Burgess Langille Inman v. Abbott and Haliburton Co.,* 2015 SCC 23 ("*White Burgess*") in relation to a motion, if any, to exclude Dr. Belchetz's expert evidence.

[12] The Complainant filed a motion on July 8, 2016 and the Respondent and the Commission requested time to file a response. On July 11, 2016, a brief CMCC was held to confirm the dates for the Respondent and the Commission to respond to the motion and a CMCC was scheduled for July 20, 2016 to discuss and possibly rule on the motion.

[13] On July 20, 2016, I summarized my understanding of the motion and replies to ensure I understood the parties' arguments. Counsel confirmed my understanding and elaborated on their submissions. I explained that I required more time to review cases and to make a decision on the motion. I advised I would make my best efforts to issue the decision by August 8, 2016 and counsel were invited to forward any additional cases to my attention by July 29, 2016.

III. Motion to exclude the evidence of Dr. Belchetz ("the Motion")

[14] The Motion seeks an order to exclude the letter of Dr. Brett Belchetz dated July 21, 2016 ("the report") and his *viva voce* evidence, whether qualified as an "expert" or not.

[15] The grounds for the Motion are as follows:

1. The Respondent previously confirmed in its Amended Statement of Particulars dated November 9, 2015 that the Complainant provided sufficient medical documentation to indicate the Complainant was fit to drive, so this should no longer be an issue;

2. Contrary to the Respondent's characterization during the CMCC on June 9, 2016 of Dr. Belchetz's evidence as a critique of Dr. Bautista's diagnosis, prognosis, assessments and record keeping, Dr. Belchetz's letter went beyond critique and harshly criticized Dr. Bautista's diagnosis, prognosis, assessments and record keeping;

3. Dr. Belchetz's curriculum vitae did not list any training or experience to train or assess the standard of care of another physician;

4. Dr. Belchetz criticized Dr. Bautista's processes but did not comment on the correctness of her diagnosis of the Complainant, nor did Dr. Belchetz offer any assessment of his own regarding the Complainant's diagnosis or fitness to work, for 40 to 45 hours a week or at all;

5. Dr. Belchetz is not the Complainant's treating physician and did not perform any assessment, evaluation or investigations of his own, nor did he talk to Dr. Bautista. His report is based on assumptions, speculation and hearsay; and

6. Dr. Belchetz was engaged by the Respondent solely to provide opinion evidence for litigation purposes and is therefore a "hired gun", who tailored his report to suit the needs of the Respondent and not to assist the Tribunal.

[16] The Complainant supported his argument based with the following authorities: *White Burgess*; *Meady v. Greyhound Canada Transportation Corp.*, 2015 ONCA 6; *Westerhoff*; and, *Anderson v. Canada.*

[17] The Complainant urged the Tribunal to assess the admissibility of Dr. Belchetz's report and *viva voce* evidence before the hearing rather than to allow the report and/or evidence and determine what weight, if any, should be given to them at the conclusion of the hearing. The Complainant referred to *White Burgess* and *Meady*, to support his request for a decision on admissibility before the hearing.

[18] The Complainant referred to the admissibility criteria set out in *White Burgess*: 1) relevance; 2) necessity in assisting the trier of fact; 3) the absence of an exclusionary rule; and, 4) a properly qualified expert.

[19] Citing *Westerhoff,* the Complainant draws a distinction between Dr. Bautista, the Complainant's treating physician, and Dr. Belchetz, who is a "litigation expert." The Complainant submits Dr. Bautista is a participant expert witness who can offer fact evidence and opinion evidence based on her experience with, and assessment of, the Complainant, as his treating physician. Dr. Belchetz was engaged in June, 2016 solely for the purpose of expressing opinion evidence to assist the Respondent. Dr. Belchetz has had no direct involvement with the Complainant or the Respondent, during the period leading up to termination. The Complainant submits that Dr. Belchetz's report is clearly assuming the role of advocate for the Respondent.

[20] The Complainant questions the relevancy and necessity of Dr. Belchetz's evidence in light of his apparent advocacy for the Respondent and the lack of credentials that would permit him to offer his critical opinion of Dr. Bautista's standard of care and diagnostic processes. The Complainant requests that the Tribunal exclude Dr. Belchetz's evidence, whether as an expert or not, on the basis that his unreliable and unsubstantiated negative criticisms of Dr. Bautista are prejudicial to the Complainant.

IV. Respondent's Submissions to the Motion to Exclude Dr. Belchetz's Evidence

[21] The Respondent submits that Dr. Bautista's notes and reports provided to the Respondent did not disclose a "disability", but rather refers to stress, fatigue and anxiety. The Respondent explains that in order to defend the complaint, it requested disclosure in 2015 of Dr. Bautista's medical records that support her notes and reports to the Respondent. The Respondent's counsel acknowledged that he received the disclosure in September 2015 and that he referred to Dr. Bautista's notes and reports when drafting the Respondent's Statement of Particulars ("SOP") and Amended Statement of Particulars ("ASOP").

[22] The Respondent states in its response to the Motion that it:

> …retained Dr. Brett Belchetz to review the clinical notes and records of Dr. Bautista to conduct a peer review. Serious concerns were raised by Dr. Belchetz in his report with respect to Dr. Bautista's failure to record any objective diagnosis in her clinical notes and records, which are the foundation for the medical notes requesting accommodation that were provided to the Respondent.

[23] The Respondent also points out that Dr. Belchetz had serious concerns that Dr. Bautista did not provide information to the Respondent or to the Ministry of Transportation indicating that the Complainant may not be fit to work or work safely.

[24] The Respondent submitted that Dr. Belchetz's evidence was "extremely relevant" and contained information that was likely to be outside the experience and knowledge of the Tribunal, and that it would assist the Tribunal to understand "…the medical notes and issues raised by the Complainant, and the Respondent's duty to accommodate or not, so that the Tribunal can have all the information necessary to objectively decide this matter."

[25] The Respondent submitted that the Rules allow evidence and information that a court may decide not to allow.

[26] The Respondent submits: "Further, an expert witness can be a doctor doing peer review. Dr. Belchetz's critique is of assistance to the Tribunal, and Rule 6(3) has been complied with. The Respondent should therefore be permitted to file its report at the hearing and defend itself fully."

[27] The Respondent cites the Tribunal's ruling in *Kelsh v. Canadian Pacific Railway*, 2016 CHRT 9 ("*Kelsh*"), at paras. 17 - 22, and the review of subsections 50(1) and (3)(c) and 48.9(1) of the *Act*, and Rule 1, as support for the Respondent's assertion that its submission of the evidence of Dr. Belchetz is consistent with its right to pursue a full and ample opportunity to appear, present evidence and make representations at the inquiry.

[28] The Respondent cited a Human Rights Tribunal of Ontario ruling in *Nassiah v. Peel Regional Police Services Board*, 2006 HRTO 18 (CanLII), at para. 354, as support for the principle that:

> Any uncertainty about whether the evidence may be relevant should be resolved in favour of admitting it and allowing it to be tested through cross-examination. Admitting the evidence does not preclude the Tribunal from subsequently determining it has no relevance or assigning no weight to it….necessity is not to be judged by too strict a standard.
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> [quoting from paras. 31 and 33 of *Radek v. Henderson Development (Canada) Ltd*. [2004] B.C.H.R.T.D. No. 364]

[29] Relying on *Kelsh,* the Respondent submits there is no prejudice to the Complainant because the Complainant had an opportunity to file a responding report but did not do so.

[30] Citing and relying on *First Nations Child and Family Caring Society v. Attorney General of Canada*, 2012 CHRT 28 ("*FNCFCS*"), at paras. 11, 14, 15, and 18, the Respondent submits that:

> issues with respect to the relevance and admissibility of the expert's testimony are more properly decided when the witness is called. The panel member can then decide on what weight ought to be given to the evidence of the respective doctors. The Complainant's motion is premature, and ought to be dismissed.

[31] In relation to the cases referred to in the Complainant's Motion, the Respondent dismissed them as not applicable given that they are decisions of a "Superior Court of Justice, which has a higher standard of admissibility than the Canadian Human Rights Tribunal."

[32] The Respondent reiterated that Dr. Belchetz's evidence is relevant and necessary since the issues raised were likely outside the experience and knowledge of the Tribunal. The Respondent pointed out that Dr. Belchetz provided a signed Acknowledgement of Expert's Duty that he will provide an unbiased opinion, and that Dr. Bautista had not signed an Acknowledgement of Expert's Duty.

V. Commission's Submissions to the Motion to Exclude Dr. Belchetz's Evidence

[33] The Commission took no position on the merits of Dr. Belchetz's evidence. The Commission noted that his report was filed as required by Rule 6. The Commission submitted the Tribunal must decide what weight to give to Dr. Belchetz's evidence.

[34] The Commission further submitted that:

> To dismiss the report[s] as requested by the Complainant would impose onerous obligations on parties before the Tribunal in future cases and would over judicialize the process before the Tribunal. Ultimately, it would be inconsistent with the necessary flexibility of the Tribunal's process and would create obstacles for unrepresented complainants in the future.

[35] The Commission submitted that expert evidence can assist the trier of fact with necessary technical or scientific terminology or issues, to assist with the proper assessment of evidence.

[36] The Commission referred to the comments of Dickson J. in *R. v. Abbey*, [1982] 2 S.C.R. 24, at para. 42, to suggest that the role of the expert is to provide the trier of fact with a ready-made inference which, due to the technical nature of the facts, the trier of fact is unable to formulate.

[37] The Commission cited *R. v. Mohan*, [1994] 2 S.C.R. 9, at para. 22, to support the submission that the expert evidence must be *necessary* for the trier of fact:

> i) to appreciate the facts due to their technical nature; or,
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> ii) to form a correct judgment on a matter if ordinary persons are unlikely to do so without the assistance of persons with special knowledge.

[38] In relation to relevance, the Commission cited *R. v. Pascoe* (1997) 32 O.R. (3d) 37 (C.A.), at para. 27, to submit that even potentially relevant evidence may be excluded if its prejudicial effect outweighs its probative value.

[39] The Commission submitted that if Dr. Belchetz's report met the criteria for admissibility set out in case law and was filed in accordance with the Tribunal's Rules, then it should be admitted. At paragraph 11, the Commission states that if Dr. Belchetz's

report does not deal with the specific issue before the Tribunal and it is not relevant or necessary, it still provides "contextual reality."

[40] The Commission submits the Tribunal has the discretion to exclude relevant evidence if the probative value is misleading or the time required to introduce the evidence is disproportionate to its evidentiary value, as per *R. v. Mohan*.

[41] The Commission submits the Complainant's motion cannot succeed without allowing for the trier of fact to weigh the evidence the witnesses will provide, and cites *FNCFCS.* The Commission submits: "the Rules do not contain a section to exclude an expert report and the Tribunal must be cautious not to resort to extraordinary measures such as striking out a large segment of a party's evidence."

[42] The Commission also submits that the Tribunal only has 10 Rules whereas the Federal Court has over 500, which the Commission submits is based on subsection 48.9(1) of the *Act*: "Proceedings before the Tribunal shall be conducted as informally and expeditiously as the requirements of natural justice and the rules of procedure allow." The Commission notes that the Superior Court Rules of provinces do not bind the Tribunal.

[43] The Commission submits that Dr. Belchetz's report may support the Respondent with respect to the issue of safety that it raised in its SOP and ASOP and cites the Federal Court of Appeal's judgment in *Canada (Human Rights* Commission) *v. Canada (Attorney General)*, 2014 FCA 131:

> [21] I agree with the Federal Court Judge that the Supreme Court of Canada was not intending to create a separate procedural right to accommodate. There is simply one question for the purposes of the third step of the test: has the employer "demonstrated that it is impossible to accommodate individual employees sharing the characteristics of the claimant without imposing undue hardship upon the employer?" Once the employer has established this, then it has satisfied the requirements of the third step. Assuming that the first two steps are also satisfied (which they were in this case), it is a *bona fide* occupational requirement and it is not a discriminatory practice.

VI. CMCC Discussions regarding Expert Evidence and Motion to Exclude

[44] During the CMCC on June 9, 2016, the Respondent expressed its belief that the Complainant did not have a disability as alleged in the complaint, and suggested that without a disability there could be no discriminatory practice. The Respondent explained that Dr. Belchetz was engaged to critique the notes and reports provided by Dr. Bautista to the Respondent, in terms of the lack of a diagnosed disability and the lack of concern about the Complainant's fitness to work or to work safely, in light of his reported symptoms. The Respondent acknowledges that its questions posed to Dr. Belchetz and Dr. Belchetz's replies are also noted in the Respondent's SOP and ASOP.

[45] During the CMCC on July 20, 2016, the Respondent expressed the view that sections 48.9 and 50 of the *Act* give discretion to the Tribunal to include evidence, but not exclude evidence. The Respondent also submitted that if Dr. Belchetz's report was prepared and filed in compliance with Rule 6(3), then its admissibility was automatic and I had no authority to exclude the report. The Respondent was unaware that it was expected to qualify Dr. Belchetz as an expert within the scope of his expert opinion, which the Respondent classified as "peer review", and Dr. Belchetz classified as "objective subject matter."

[46] The submissions of the Commission and the Respondent did not address the recent Supreme Court of Canada decision, *White Burgess.* The Respondent suggested that superior court decisions were not applicable to the Tribunal and did not believe *White Burgess* was applicable to the Tribunal.

[47] The Respondent was agreeable to calling Dr. Belchetz to give *viva voce* evidence at the hearing as a non-expert. The Complainant wished to pursue the motion to exclude Dr. Belchetz's evidence, whether as a qualified expert or not, and asked the Tribunal to consider *White Burgess*.

VII. Dr. Belchetz's Report and Curriculum Vitae

[48] The Tribunal has reviewed Dr. Belchetz's report and his *curriculum vitae*. Dr. Belchetz's report consists of a letter dated June 21, 2016 that was prepared in direct response to questions posed by Respondent's counsel. Dr. Belchetz states he is asked "….as an objective subject matter expert, to answer the following questions with regard to Mr. Michael Christoforou and the clinical notes prepared by his physician, Dr. Bautista." Dr. Blechetz's answers appear in order below the questions.

[49] The Respondent acknowledged during a CMCC that the questions Respondent's counsel posed to Dr. Belchetz are issues raised in the Respondent's SOP and ASOP and that the Respondent intends to pursue these issues in cross-examination of Dr. Bautista, and in its submissions.

[50] The Respondent acknowledged that Dr. Belchetz did not examine or assess the Complainant, and that he was not retained by the Respondent in an advisory capacity during the period before and after the termination of the Complainant's employment.

[51] The Respondent acknowledged that the purpose of Dr. Belchetz's evidence is to present some of the concerns raised in the Respondent's SOP and ASOP through the opinion evidence of a medical professional.

VIII. Relevant Legislation, Caselaw and Rules

[52] The first issue I will address is the Respondent's submission that Superior Court decisions regarding expert opinion evidence do not apply to the CHRT. The Respondent asserts that because of the administrative/non-judicial nature of the Tribunal, the *Act* only empowers the Tribunal to permit evidence that may not be admissible in a court and not to exclude evidence (aside from privileged communication which is expressly prohibited in subsection 50(4) of the *Act*).

[53] The Commission's similar submission was that the Tribunal should not conduct its proceedings in a manner similar to a court, because this would make it too difficult for self-represented individuals. The Commission urged the Tribunal to admit the expert evidence

and assess its weight after the hearing, in order to protect the Respondent's right to make a full and ample presentation of its case.

[54] The Commission and the Respondent referred to the following sections of the *Act* to argue for a very low threshold of admissibility - or no threshold at all:

> **48.9** (1) Proceedings before the Tribunal shall be conducted as informally and expeditiously as the requirements of natural justice and the rules of procedure allow.
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> (2) The Chairperson may make rules of procedure governing the practice and procedure before the Tribunal, including, but not limited to, rules governing
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> (*a*) the giving of notices to parties;
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> (*b*) the addition of parties and interested persons to the proceedings;
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> (*c*) the summoning of witnesses;
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> (*d*) the production and service of documents;
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> (*e*) discovery proceedings;
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> (*f*) pre-hearing conferences;
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> (*g*) the introduction of evidence;
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> (*h*) time limits within which hearings must be held and decisions must be made; and,
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> (*i*) awards of interest.
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> [….]
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> **50.** (1) After due notice to the Commission, the complainant, the person against whom the complaint was made and, at the discretion of the member or panel conducting the inquiry, any other interested party, the member or panel shall inquire into the complaint and shall give all parties to whom notice has been given a full and ample opportunity, in person or through counsel, to appear at the inquiry, present evidence and make representations.

> (2) In the course of hearing and determining any matter under inquiry, the member or panel may decide all questions of law or fact necessary to determining the matter.
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> (3) In relation to a hearing of the inquiry, the member or panel may
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> > (*a*) in the same manner and to the same extent as a superior court of record, summon and enforce the attendance of witnesses and compel them to give oral or written evidence on oath and to produce any documents and things that the member or panel considers necessary for the full hearing and consideration of the complaint;
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> > (*b*) administer oaths;
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> > (*c*) subject to subsections (4) and (5), receive and accept any evidence and other information, whether on oath or by affidavit or otherwise, that the member or panel sees fit, whether or not that evidence or information is or would be admissible in a court of law;
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> > (*d*) lengthen or shorten any time limit established by the rules of procedure; and,
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> > (*e*) decide any procedural or evidentiary question arising during the hearing.
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> (4) The member or panel may not admit or accept as evidence anything that would be inadmissible in a court by reason of any privilege under the law of evidence.

[55] Subsection 50(2) empowers the Tribunal to decide all questions of law or fact necessary to determine the matter. Subsection 50(3)(a) states the Tribunal may act in the same manner and to the same extent as a superior court of record to compel witnesses and order production and disclosure necessary for a full hearing. Subsection 50(3)(c) empowers the Tribunal to receive and accept any evidence or other information that the member or panel sees fit.

[56] In light of Tribunal decisions and Superior Court decisions reviewed herein, I conclude there is no support for the Respondent's submission that section 50 permits the Tribunal to admit evidence, and that the Tribunal has no authority to exclude evidence.

[57] The Commission agrees that Supreme Court of Canada decisions *Abbey* and *Mohan* are applicable to the Tribunal. The Commission quoted Tribunal rulings that considered and applied *Mohan*. *White Burgess* expanded upon *Abbey* and *Mohan* and I find that it is applicable to the Tribunal.

[58] The real issue is whether the Tribunal can rule on admissibility before the hearing commences or, if the *Act* requires all arguably relevant evidence, including expert evidence, to be admitted, and at the end of the hearing, decide what weight, if any, to give such evidence.

[59] The present matter is scheduled to be heard at the end of August 2016. The expert opinion evidence of Dr. Belchetz was commissioned in June 2016, after the Respondent was granted an adjournment of the second week of the hearing in June to August 2016. The Complainant wants a ruling regarding admissibility as soon as possible so he can determine the presentation of his case.

[60] The *Act* allows the Tribunal to decide procedural and admissibility issues in a manner that is consistent with the principles of natural justice for all parties. Rulings by the Tribunal must balance the rights of all parties to a full and procedurally fair hearing.

[61] The *Act* and procedural fairness will often prompt the Tribunal to allow the ongoing introduction of issues and motions by parties, beyond the dates set for same, and the abridgement of the Rules, to ensure all parties have an opportunity to know the case they need to meet and to respond fully. All arguably relevant evidence from fact, observation and participation witnesses is usually admitted in keeping with the scheme of the *Act*, specifically subsections 50(1) and 50(3)(a). It is customary to determine weight of evidence at the conclusion of the hearing rather than limit or restrict fact evidence any party wishes to present, so long as it is arguably relevant.

[62] Expert opinion evidence, and opinion evidence in general, is different from fact evidence. The rationale for this was explained in *R. v. Abbey*, 1982 CanLII 25 (SCC), [1982] 2 S.C.R. 24, at p. 42:

> Opinion Evidence
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> Witnesses testify as to facts. The judge or jury draws inferences from the facts. "In the law of evidence 'opinion' means any inference from observed fact, and the law on the subject derives from the general rule that witnesses must speak only to that which was directly observed by them" *(Cross on Evidence, supra,* at p. 442). Where it is possible to separate fact from inference the witness may only testify as to fact. It is not always possible, however, to do so and the "law makes allowances for these borderline cases by permitting witnesses to state their opinion with regard to matters not calling for special knowledge whenever it would be virtually impossible for them to separate their inferences from the facts on which those inferences are based" *(ibid.)*
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> 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.)

[63] In some cases, the Tribunal has deferred a ruling on the admissibility of expert opinion evidence to the time the evidence is called (e.g. *FNCFCS*). If, however, the concerns regarding admissibility of expert opinion evidence can be assessed and determined by a review of the report, the ruling can be made before the expert witness is called to testify or before hearing the evidence of the expert witness: *Brooks v. Fisheries and Oceans*, 2004 CHRT 20 ("*Brooks*"); *Gaucher v. Canadian Armed Forces*, 2006 CHRT 40 ("*Gaucher*"); and, *Public Service Alliance of Canada v. Minister of Personnel for the Government of the Northwest Territories*, 2001 CanLII 25850 (CHRT) ("*PSAC*").

[64] In *PSAC,* the Tribunal considered Supreme Court of Canada decisions regarding expert opinion evidence when deciding a motion for leave to call more than the five expert witnesses permitted under the *Canada Evidence Act*, R.S.C. 1985, c. C-5. I will quote the

portions of the *PSAC* ruling that confirm the Tribunal has, despite the clear language of subsection 50(3)(c), chosen to follow superior court and appeal court decisions in civil and criminal proceedings with respect to expert witnesses:

> [2] The Respondent has also referred us to two authorities: *R. v. Mohan* [1994] S.C.J. No. 36, [1994] 2 S.C.R. 9 and *R. v. Morin* [1991] O.J. No. 2528 (Ont. Gen. Div.). These are criminal cases. The *Morin* decision merely holds that there must be a reasonable basis for calling expert witnesses. The *Mohan* case deals with the factors to be applied in deciding whether expert evidence is admissible. These factors include the relevance of the evidence and whether the trier of fact needs to hear the evidence in order to determine the facts of the case.
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> [3] Alan Mewett and Peter Sankoff have written that the general role of expert witnesses "differs from that of the ordinary lay witness in that the former gives testimony in order to assist the fact finder in coming to a conclusion from the facts before him or her, whereas the latter testifies as to those very facts." (1) Mewett and Sankoff advise that the use of expert witnesses "is as old as the trial process itself." (2) They suggest that there have been two concerns, historically, with respect to the use of such testimony. One is that it complicates the trial process, by introducing "redundant and superfluous" evidence. The other is that the weight of expert testimony is easily overstated and may undermine the role of the trier of fact. Although the courts have wavered on the issue, they "have generally attempted to restrict the use of expert evidence to instances where it is truly required." (3)
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> [4] The judgment in *Mohan* sets out some of the general principles in the area. The purpose of expert evidence is to assist an adjudicative body in deciding the facts of the case. It does so by providing the trier of facts with knowledge and "ready-made" inferences which stand outside the scope of their experience. It follows that experts have a special role in litigation which relies on statistical and scientific evidence. The issue in each instance is whether the evidence is "necessary" to decide the issues in the case. The standard of necessity is relatively relaxed, however, and should not be overstated. Mr. Justice Sopinka also remarks, at paragraph 24, that a trial should not become "a contest of experts with the trier of fact acting as referee in deciding which experts to accept."
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> [6] Counsel for the Respondent appeared to take the position that the relevant question is whether the proposed evidence would have a significant bearing on a distinct issue in the case. We agree with this view of the matter. A Tribunal is not in a position to assess the reliability of proposed witnesses at this stage of the proceeding and can merely determine whether their testimony would logically contribute to the defence. It is accordingly sufficient

> if it can be reasonably said that the expert's testimony is needed to determine one of the factual issues in the case. This excludes testimony which undermines the fairness or expeditiousness of the process*.*
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> [16] The appearance of justice is important in our law and the Tribunal must be seen as the author of its own decisions. Under section 50(2) of the *Canadian Human Rights Act*, a Tribunal has the authority to decide "all questions of law or fact necessary" to determining the matter before it. That task has been assigned to the members of this Tribunal. We have an obligation to make up our own minds on legal issues and cannot delegate that responsibility to expert witnesses, however learned they may be. The courts have always expressed concern with expert evidence that crosses into issues more properly decided by the trier of the case.
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> [17] We do not want to prevent the parties from arguing all matters of law that are relevant to a determination of the case. There is nothing to stop the Respondent from submitting a written brief on the international law, if that law is properly before us. It may also retain experts, and perhaps the experts in question, for the purpose of briefing counsel. The law is the province of counsel and the Tribunal, however, and we are firmly of the view that it should be raised in argument, rather than as expert or opinion evidence. We leave it to the Respondent to decide who will present these arguments before us.
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> [20] We accept that Mr. Weiler testified as an expert witness in *P.S.A.C. v. Canada Post*. The Respondent did not explain, however, why it needed his evidence to answer the complaint before us. It will be apparent that we do not feel it would be appropriate to elicit his opinion of the law. In our view, the Respondent has accordingly failed to demonstrate that the evidence of Mr. Weiler would assist the Tribunal in deciding the facts of the case.

[65] Expert witnesses should only assist the Tribunal with drawing inferences on technical facts beyond the knowledge of the Tribunal, and expert witnesses should not give opinion evidence on legal issues that are within the mandate of and expertise of the Tribunal. The Tribunal will consider whether the expert opinion evidence is presented for the purpose of usurping the Tribunal’s role to decide the “fundamental issue” in the case: *Brooks*, para. 13; and, *Gaucher*, para. 12.

[66] In *Keith v. Canadian Armed Forces*, 2015 CHRT 4 ("*Keith*"), the Tribunal ruled on a motion to exclude expert opinion evidence and noted that, notwithstanding s. 50(3)(c) of the *Act*, *Mohan* and *Abbey* were applicable to the Tribunal:

> [21] This motion is brought by the Respondent to exclude David Jacobs as an expert witness as part of the Complainant's case. The Respondent alleges that expert evidence should only be admitted if the matter in issue requires specialized expertise to assist the Tribunal to understand the factual matter to reach a proper conclusion.
>
> [22] The Complainant's position is that Mr. Jacob's report (the Report) is necessary to assist the Tribunal in evaluating the Respondent's claim that Royal College certification is a *bona fide* occupational requirement (BFOR) for the position sought by the Complainant; and further, that the report is of a technical subject matter not within the expertise or knowledge of the Tribunal.
>
> [23] The Complainant's Motion materials state that the Report provides detailed information about the regulation of doctors by the CPSO, its role, its powers and its duty to the public. It addresses the issue of CPSO recognition of specialists and how this relates to certification from the RCPSC.
>
> [24] The Respondent claims, at page 2 of its Motion Record, that the opinion evidence "consists primarily of a recitation of the statutory and regulatory framework for medical regulation" and that the report is "akin to calling expert evidence on domestic legal issues" which is "not outside the experience and knowledge of this CHRT."
>
> [25] The *Canadian Human Rights Act*, R.S.C., 1985, c.H-6, section (50)(3)(*c*) provides the Tribunal a more generous latitude in the admission of evidence as would otherwise be in a court of law. Nevertheless, both parties have referred to the leading case of *R. v. Mohan* 1994 CanLII 80 (SCC), which at paragraph 17 states that the admission of expert opinion evidence depends on the application of the following criteria: (a) relevance; (b) necessity in assisting the trier of fact; (c) the absence of any exclusionary rule; and (d) a properly qualified expert. The *Mohan* decision makes reference to the earlier decision of *R. v. Abbey*, 1982 CanLII 25 (SCC), [1982] 2 SCR 24, as being illustrative of the necessity requirement.

[26] I believe that the Tribunal should follow the interpretation of Dickson J., in *R. v. Abbey* that the [opinion expert] evidence must be necessary to enable the trier of fact to appreciate the matters in issue due to their technical nature. For the expert evidence to be admissible it must be such that "ordinary people are unlikely to form a correct judgment about it if unassisted by persons with special knowledge" (see *Beven on Negligence* (4th ed. 1928), cited in *Mohan* and *Rosin v. Canadian Armed Forces* 1989 CanLII 149 (CHRT), aff'd [1991] 1 F.C. 391 (C.A.)). "Mere helpfulness" is too low a standard to warrant accepting the dangers inherent in the admission of expert evidence" (see *R. v. D.D.* 2000 SCC 43, at para. 47, referring to *Mohan* and *Morin v. Canada (Attorney General),* 2003 CHRT 46 (CanLII), at para. 8.)

[27] The Complainant has suggested that the Tribunal's area of experience and knowledge is limited by being specific to interpreting whether discrimination has occurred and providing the appropriate remedy. He cites *Gaucher v. Canadian Armed Forces*, 2006 CHRT 40 (CanLII), as authority for this assertion. As a result, in the complainant's view, Dr. Jacobs' report is outside the experience and technical knowledge of the Tribunal.

[28] Section 50(2) of the *Canadian Human Rights Act*, provides that "[i]n the course of hearing and determining any matter under inquiry, the member or panel may decide all questions of law or fact necessary to determining the matter." I believe the Tribunal's determination as to the appropriateness of receiving expert opinion evidence on the law was best stated in *Public Service Alliance of Canada v. Northwest Territories (Minister of Personnel)*, [2001] C.H.R.D. No. 26., at paragraphs 16 and 17. The Tribunal is charged with deciding issues of fact and law and should not delegate this responsibility to expert witnesses: "[t]he law is the province of counsel and the Tribunal,...it should be raised in argument rather than as expert or opinion evidence."

[29] I agree with the Respondent's characterization of the Report as consisting primarily of a recitation of the statutory and regulatory frameworks. I believe that the test established in *Mohan* has not been met. Dr. Jacob's Report is not outside the knowledge and experience of the Tribunal, and the issues of law discussed therein should not be delegated to an expert witness, as was stated in *Northwest Territories* above.

[30] For the above reasons, I Order Dr. Jacob's Report not be admitted as evidence.

[67] In *Croteau v. Canadian National Railway Company,* 2014 CHRT 16 ("*Croteau*"), the Tribunal was asked to qualify an expert to give expert opinion evidence. The relevant portions of the ruling are as follows:

> [67] The Complainant sought to have Dr. AB qualified to give expert opinion evidence about the following: "anxiety disorder; PTSD; adjustment disorder; panic attacks and the impact of those on individuals and specifically Mr. Croteau; causation of these disorders; ability of people with PTSD to RTW generally and specifically Mr. Croteau; what things need to be put in place for a RTW for the Complainant; [and to] comment on Dr. Chad's IMEs."
>
> [68] CN's counsel opposed the request to have Dr. AB qualified as an expert. He did not oppose his giving testimony as the Complainant's treating psychologist, although he submits that the Tribunal should be "reluctant to rely on anything he said. CN's reasons for its position are:
>
> > i. Dr. [AB]'s diagnosis of Mr. Croteau is by his own admission at odds with the requirements of the DSM-IV[11] and with the prevailing opinion in the psychiatric/psychological [sic] professional (at least with respect to Post-Traumatic Stress Disorder);
> >
> > ii. his professional relationship with Mr. Croteau has crossed the line into an unrestricted advocacy on behalf of Mr. Croteau, and he does not have the objectivity that adjudicators require of medical professionals; and
> >
> > iii. Dr. [AB] in his evidence refused to change his view or opinion even when he became aware that the facts upon which he originally formed the opinion were different from what he understood.
>
> [69] Based on the second and third submission above, I decline to qualify Dr. AB to give expert opinion evidence on the matters requested. However, his evidence as Mr. Croteau's treating psychologist will be considered and given appropriate weight.

> [70] In coming to this conclusion, I have reviewed the leading Supreme Court of Canada Judgment dealing with the nature and admissibility of expert evidence – *R. v. Mohan*, 1994 CanLII 80 (SCC), [1994] 2 S.C.R. 9 – and its four criteria. Interestingly, the criteria do not include a stand-alone requirement of independence and impartiality. However, Canadian courts have inferred the same: see for example *R. v. Abbey*, 2009 ONCA 624 (CanLII), at para. 87, footnote 8, leave to appeal denied [2010], S.C.C.A. No. 125; and *Es-Sayyid v. Canada (Public Safety and Emergency Preparedness)*, 2012 FCA 59 (CanLII), at para. 43, leave to appeal denied [2012] S.C.C.A. No. 116.

[68] The review of Tribunal decisions *Brooks, Gaucher, PSAC, Keith* and *Croteau* that apply *Abbey* and *Mohan*, confirms that, notwithstanding s. 50(3)(c) of the *Act*, the following principles apply to expert opinion evidence under the CHRT:

i. *White Burgess* applies to the Tribunal as an elaboration of the Supreme Court of Canada decisions in *Abbey* and *Mohan*;

ii. The Tribunal must assess whether the purported expert opinion evidence is necessary, due to the technical or scientific nature of the facts, for the Tribunal to draw the inference regarding the facts or to make the legal determination required. If the factual evidence presented is sufficient for the Tribunal to draw its own inferences and conclusions, without the expert's opinion evidence, then the expert opinion evidence is unnecessary;

iii. The Tribunal is not obligated to allow all expert opinion evidence proffered by the parties and then decide later on weight and acceptance. If the issues and concerns regarding admissibility are apparent with a simple reading of the report then the criteria for admissibility can be assessed without hearing the evidence of the proposed expert to determine admissibility;

iv. The Tribunal must decide whether the proposed expert opinion evidence meets the preconditions to admissibility set out in *Mohan*, *Abbey* and *White Burgess*; and

v. The Tribunal must also consider the cost-benefit analysis of whether allowing the evidence outweighs any risk of harm to the integrity of the hearing by 1) unfairness to the other party, i.e., is the other party able to cross-examine the expert or introduce evidence to address adverse expert opinion evidence?; 2) does the expert opinion evidence purport to usurp the adjudicator function to assess credibility, find facts and determine the factual and legal issues; and, 3) will the expert evidence lengthen the hearing, cause delay and increase legal and other costs?

[69] I reviewed several superior court decisions rendered subsequent to *White Burgess* to understand the court's interpretation and application of *White Burgess*. I note several informative decisions below.

[70] *Kon Construction Ltd. v. Terranova Developments Ltd*., 2015 ABCA 249 (CanLII) ("*Kon Construction*"), illustrates the application of *White Burgess* at paras. 21, 30, and 35-38:

> [21] Opinion evidence is presumptively inadmissible, [subsection 50(3)(c) and (4) of the Act means there is no presumptively inadmissible evidence except for privileged communication at the CHRT] subject to a few exceptions. The most important exception is for expert opinion evidence on matters requiring specialized knowledge: ***White Burgess Langille Inman v Abbott and Haliburton Co.*** [2015] 2 S.C.R. 182, at paras. 14-5, 470 NR 324. In the case of an opinion based on novel or contested science or science used for a novel purpose, the reliability of the underlying science for that purpose must also be shown: ***White Burgess*** at para. 23. At the other end of the spectrum, there are "opinions" that are merely compilations of ordinary observations, and they are admissible even through a lay witness: ***Graat v The Queen***, 1982 CanLII 33 (SCC), [1982] 2 S.C.R. 819. The law of evidence performs an overall cost/benefit analysis of the opinion evidence, comparing it to the potential harm to the trial process that may flow from the admission of the evidence: ***White Burgess*** at para. 24.
>
> […]
>
> Evidence from Witnesses with Expertise
>
> [30] When expert evidence is to be used, the Rules of Court require that the parties give notice to their opponents. When the witness is called, the trial judge will hear submissions and apply the test in ***R. v Mohan***, 1994 CanLII 80 (SCC), [1994] 2 S.C.R 9 to determine if the witness is qualified to give expert opinion evidence. The proposed evidence must be necessary to assist the trier of fact. The trial judge must also decide if the witness qualifies as having the necessary special knowledge. Once qualified, the expert witness will be permitted to give opinion evidence.
>
> […]
>
> [35] Thus, there would appear to be at least three categories of "witnesses with expertise", who in some respects are witnesses of fact, and in other respects opinion witnesses:

> (a) Independent experts who are retained to provide opinions about issues in the litigation, but were not otherwise involved in the underlying events. This is the category of expert witness contemplated by ***White Burgess*** and ***Mohan.***
>
> (b) Witnesses with expertise who were involved in the events underlying the litigation, but are not themselves litigants. An example is the family physician in a personal injury case who is called upon to testify about his or her observations of the plaintiff, and the treatment provided.
>
> (c) Litigants (including the officers and employees of corporate litigants) who have expertise, and who were actually involved in the events underlying the litigation. Marinus Scheffer and Klaver fall into this category.

The rules of evidence and civil procedure relating to expert witnesses are primarily designed to deal with the first category of expert witness.

[36] The first category of "independent experts" must always be qualified by the trial judge under the ***Mohan*** procedure, and advance notice of their opinions must be given under the *Rules of Court*. External witnesses who are not so qualified are not permitted to give opinion evidence requiring specialized expertise. External expert witnesses are expected to display a basic level of independence and objectivity.

[37] It is sometimes argued that the evidence of witnesses in the second category is not "opinion" evidence: ***Westerhof*** at paras. 60-1. To some extent they are testifying about what they observed, and what they actually did. In that sense, they are not opinion witnesses. On the other hand, it is challenging for them to explain why they acted as they did without engaging their professional expertise. For example, the family doctor cannot explain why he or she endorsed any particular treatment without expressing a medical opinion about it. It is difficult to set the boundary between what they did and their expert opinions about what should have been done. Where witnesses with expertise (who are not litigants) are to testify about events within the scope of their expertise, it is generally prudent to have them formally qualified as expert witnesses, particularly when they propose to express opinions on collateral issues like the employment prospects of the patient. Further, the overall objective of comprehensive disclosure found in R. 5.1(1)(c & d) supports the pre-trial disclosure of the opinions of participating experts.

> [38] The final category of litigant-witnesses with expertise does not fall neatly into the ***White Burgess*** and ***Mohan*** analysis. First of all, it is unnecessary to prove that such a witness is "impartial, independent, and unbiased" as discussed in ***White Burgess***. Litigants are no longer disqualified as witnesses because of their obvious interest in the case.

[71] In *Allard v. Canada*, 2016 FC 236 (CanLII) ("*Allard*"), at paras. 102 and 103, the Federal Court considered the evolution of the Supreme Court of Canada rulings on expert opinion evidence, culminating with *White Burgess*:

> [102] It is important to recognize the standard necessary for admission of expert opinion evidence:
>
> > 50 Courts must be vigilant to guard against such impermissible evidence. It is trite law that expert witnesses should not give opinion evidence on matters for which they possess no special skill, knowledge or training, nor on matters that are commonplace, for which no special skill, knowledge or training is required.
> >
> > (*Johnson v Milton (Town)*, 2008 ONCA 440 (CanLII))
>
> [103] In the leading case, *R v Mohan*, 1994 CanLII 80 (SCC), [1994] 2 SCR 9 [*Mohan*], the Supreme Court provided criteria on the admission of expert evidence that advances a novel scientific theory. Although the experts in the present trial did not advance a novel scientific theory, and the expert qualifications were not objected to during the course of the trial, it is still necessary to evaluate their probative value. Since *Mohan*, the courts have provided guidance on this evaluation.

[72] In *Anderson v. Pieters*, 2016 BCSC 889 (CanLII), at paras. 42-44 and 49, the Court referred to the leading cases regarding admissibility of expert evidence and summarized the evolution up to and including *White Burgess:*

> [42] Finally, in *White Burgess*, *supra*, the Court advanced the law governing admissibility of expert opinion in two respects. First, the Court articulated a new initial threshold test, aimed at ensuring an expert's independence and impartiality. An expert's attestation in a written report to having understood their duty to the court, or their testifying on oath to that effect, will shift to the opposing party the burden of demonstrating realistic concern that the opinion should not be admitted because the expert witness is unable or unwilling to comply with that duty. If the opposing party does so, the burden of establishing independence and impartiality will remain on

the party proposing to tender the opinion evidence. Exclusion at this threshold stage, however, will only occur:

> … in very clear cases in which the proposed expert is unable or unwilling to provide the court with fair, objective and non-partisan evidence.
>
> (*White Burgess* at para. 49).

[43] If the opinion passes this initial threshold test, the trial judge is then to determine admissibility under a reformulated analytical framework, in which the gatekeeper function has two steps. The first step is the application of the four *Mohan* criteria of relevance – relevance, necessity, the absence of any exclusionary rule, and a properly qualified expert – supplemented by a fifth criterion, applied in the case of novel or contested science, of reliability of the underlying science.

[44] The second step entails the balancing exercise or cost-benefit analysis. Justice Cromwell endorsed the description of the process formulated by Doherty J.A. in *R. v. Abbey*, 2009 ONCA 624 (CanLII), at para. 76:

> … 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.

[45] Justice Cromwell described the weighing of evidence at this stage in the following terms:

> … 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.

It is at this second stage of the gatekeeper function that any residual concerns as to independence and impartiality – those which have arisen out of anything less than clear unwillingness or inability – are to be addressed (*White Burgess* at paras. 49, 54).

[49] To summarize, the first step of the gatekeeping analysis involves consideration of four factors - relevance, necessity, the absence of any exclusionary rule, and a properly qualified expert – and a fifth factor applied to opinions relying upon novel or contested science, reliability. An expert

> opinion that raises sufficiently strong concerns with respect to any one of those factors – e.g. that the opinion is clearly not relevant, or that it is clearly not necessary in order for the jurors, equipped with their own experience, to draw appropriate inferences from the evidence – is to be excluded. The second step then involves consideration of not only all of those factors, but also any other concerns with respect to the weight of the evidence that potentially put at risk the ability of the jury to discharge its function in a proper manner, when consideration is given to the potential costs or prejudicial effects. These other concerns include matters such as reliability, qualifications, independence and bias. The point of the analysis is not to usurp the jury's function of weighing the evidence, but to assist the jury by ensuring, to the greatest possible extent, that the evidence that comes before them may be properly weighed in the course of the jury appropriately and efficiently discharging its duty.

[73] In addition, I will quote paragraphs below from *White Burgess* that, in my view, are relevant to this analysis:

> (2) <u>The Current Legal Framework for Expert Opinion Evidence</u>
>
> [16] Since at least the mid-1990s, the Court has responded to a number of concerns about the impact on the litigation process of expert evidence of dubious value. The jurisprudence has clarified and tightened the threshold requirements for admissibility, added new requirements in order to assure reliability, particularly of novel scientific evidence, and emphasized the important role that judges should play as "gatekeepers" to screen out proposed evidence whose value does not justify the risk of confusion, time and expense that may result from its admission. [1] Expert opinion evidence can be a key element in the search for truth, but it may also pose special dangers. To guard against them, the Court over the last 20 years or so has progressively tightened the rules of admissibility and enhanced the trial judge's gatekeeping role. These developments seek to ensure that expert opinion evidence meets certain basic standards before it is admitted. …..
>
> [17] We can take as the starting point for these developments the Court's decision in *R. v. Mohan*, [1994] 2 S.C.R. 9. That case described the potential dangers of expert evidence and established a fourpart threshold test for admissibility. The dangers are well known. One is that the trier of fact will inappropriately defer to the expert's opinion rather than carefully evaluate it. …..
>
> [18] The point is to preserve trial by judge and jury, not devolve to trial by expert. There is a risk that the jury "will be unable to make an effective and critical assessment of the evidence": *R. v. Abbey*, 2009 ONCA 624, 97 O.R. (3d) 330, at para. 90, leave to appeal refused, [2010] 2 S.C.R. v. The trier of

fact must be able to use its "informed judgment", not simply decide on the basis of an "act of faith" in the expert's opinion: *J.-L.J.*, at para. 56. The risk of "attornment to the opinion of the expert" is also exacerbated by the fact that expert evidence is resistant to effective cross-examination by counsel who are not experts in that field: *D.D.*, at para. 54. The cases address a number of other related concerns: the potential prejudice created by the expert's reliance on unproven material not subject to cross examination (*D.D.*, at para. 55); the risk of admitting "junk science" (*J.-L.J.*, at para. 25); and the risk that a "contest of experts" distracts rather than assists the trier of fact (*Mohan*, at p. 24). Another well known danger associated with the admissibility of expert evidence is that it may lead to an inordinate expenditure of time and money: *Mohan*, at p. 21; *D.D.*, at para. 56; *Masterpiece Inc. v. Alavida Lifestyles Inc.*, 2011 SCC 27, [2011] 2 S.C.R. 387, at para. 76.

[19] To address these dangers, *Mohan* established a basic structure for the law relating to the admissibility of expert opinion evidence. That structure has two main components. First, there are four threshold requirements that the proponent of the evidence must establish in order for proposed expert opinion evidence to be admissible: (1) relevance; (2) necessity in assisting the trier of fact; (3) absence of an exclusionary rule; and (4) a properly qualified expert (*Mohan*, at pp. 20-25; see also *Sekhon*, at para. 43). *Mohan* also underlined the important role of trial judges in assessing whether otherwise admissible expert evidence should be excluded because its probative value was overborne by its prejudicial effect — a residual discretion to exclude evidence based on a cost-benefit analysis: p. 21. This is the second component, which the subsequent jurisprudence has further emphasized: Lederman, Bryant and Fuerst, at pp. 789-90; *J.-L.J.*, at para. 28.

[20] *Mohan* and the jurisprudence since, however, have not explicitly addressed how this "cost benefit" component fits into the overall analysis. The reasons in *Mohan* engaged in a cost-benefit analysis with respect to particular elements of the four threshold requirements, but they also noted that the cost-benefit analysis could be an aspect of exercising the overall discretion to exclude evidence whose probative value does not justify its admission in light of its potentially prejudicial effects: p. 21. The jurisprudence since *Mohan* has also focused on particular aspects of expert opinion evidence, but again without always being explicit about where additional concerns fit into the analysis. The unmistakable overall trend of the jurisprudence, however, has been to tighten the admissibility requirements and to enhance the judge's gatekeeping role.

[21] So, for example, the necessity threshold criterion was emphasized in cases such as *D.D.* The majority underlined that the necessity requirement exists "to ensure that the dangers associated with expert evidence are not

lightly tolerated" and that "[m]ere relevance or 'helpfulness' is not enough": para. 46. Other cases have addressed the reliability of the science underlying an opinion and indeed technical evidence in general: *J.-L.J.*; *R. v. Trochym*, 2007 SCC 6, [2007] 1 S.C.R. 239. The question remains, however, as to where the cost-benefit analysis and concerns such as those about reliability fit into the overall analysis.

[22] *Abbey* (ONCA) introduced helpful analytical clarity by dividing the inquiry into two steps. With minor adjustments, I would adopt that approach.

[23] At the first step, the proponent of the evidence must establish the threshold requirements of admissibility. These are the four *Mohan* factors (relevance, necessity, absence of an exclusionary rule and a properly qualified expert) and in addition, in the case of an opinion based on novel or contested science or science used for a novel purpose, the reliability of the underlying science for that purpose: *J.-L.J.*, at paras. 33, 35-36 and 47; *Trochym*, at para. 27; Lederman, Bryant and Fuerst, at pp. 788-89 and 800-801. Relevance at this threshold stage refers to logical relevance: *Abbey* (ONCA), at para. 82; *J.-L.J.*, at para. 47. Evidence that does not meet these threshold requirements should be excluded. Note that I would retain necessity as a threshold requirement: *D.D.*, at para. 57; see D. M. Paciocco and L. Stuesser, *The Law of Evidence* (7th ed. 2015), at pp. 209-10; *R. v. Boswell*, 2011 ONCA 283, 85 C.R. (6th) 290, at para. 13; *R. v. C. (M.)*, 2014 ONCA 611, 13 C.R. (7th) 396, at para. 72.

[24] 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 required balancing exercise has been described in various ways. In *Mohan*, Sopinka J. spoke of the "reliability versus effect factor" (p. 21), while in *J.-L.J.*, Binnie J. spoke about "relevance, reliability and necessity" being "measured against the counterweights of consumption of time, prejudice and confusion": para. 47. Doherty J.A. summed it up well in *Abbey*, stating that 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": para. 76.

[25] With this delineation of the analytical framework, we can turn to the nature of an expert's duty to the court and where it fits into that framework.

[32] Underlying the various formulations of the duty are three related concepts: impartiality, independence and absence of bias. The expert's opinion must be impartial in the sense that it reflects an objective assessment of the questions at hand. It must be independent in the sense that it is the product of the expert's independent judgment, uninfluenced by

who has retained him or her or the outcome of the litigation. It must be unbiased in the sense that it does not unfairly favour one party's position over another. The acid test is whether the expert's opinion would not change regardless of which party retained him or her: P. Michell and R. Mandhane, "The Uncertain Duty of the Expert Witness" (2005), 42 *Alta. L. Rev.* 635, at pp. 638-39. These concepts, of course, must be applied to the realities of adversary litigation. Experts are generally retained, instructed and paid by one of the adversaries. These facts alone do not undermine the expert's independence, impartiality and freedom from bias.

[34] In this section, I will explain my view that the answer to both questions is yes: a proposed expert's independence and impartiality go to admissibility and not simply to weight and there is a threshold admissibility requirement in relation to this duty. Once that threshold is met, remaining concerns about the expert's compliance with his or her duty should be considered as part of the overall cost-benefit analysis which the judge conducts to carry out his or her gatekeeping role.

[…]

[45] Following what I take to be the dominant view in the Canadian cases, I would hold that an expert's lack of independence and impartiality goes to the admissibility of the evidence in addition to being considered in relation to the weight to be given to the evidence if admitted. That approach seems to me to be more in line with the basic structure of our law relating to expert evidence and with the importance our jurisprudence has attached to the gatekeeping role of trial judges. Binnie J. summed up the Canadian approach well in *J.-L.J.*: "The admissibility of the expert evidence should be scrutinized at the time it is proffered, and not allowed too easy an entry on the basis that all of the frailties could go at the end of the day to weight rather than admissibility" (para. 28).

[…]

[49] This threshold requirement is not particularly onerous and it will likely be quite rare that a proposed expert's evidence would be ruled inadmissible for failing to me of the proposed expert and the substance of the proposed evidence, whether the expert is able and willing to carry out his or her primary duty to the court. For example, it is the nature and extent of the interest or connection with the litigation or a party thereto which matters, not the mere fact of the interest or connection; the existence of some interest or a relationship does not automatically render the evidence of the proposed expert inadmissible. In most cases, a mere employment relationship with the party calling the evidence will be insufficient to do so. On the other hand, a direct financial interest in the outcome of the litigation will be of more concern. The same can be said in the case of a very close familial

> relationship with one of the parties or situations in which the proposed expert will probably incur professional liability if his or her opinion is not accepted by the court. Similarly, an expert who, in his or her proposed evidence or otherwise, assumes the role of an advocate for a party is clearly unwilling and/or unable to carry out the primary duty to the court. I emphasize that exclusion at the threshold stage of the analysis should occur only in very clear cases in which the proposed expert is unable or unwilling to provide the court with fair, objective and non-partisan evidence. Anything less than clear unwillingness or inability to do so should not lead to exclusion, but be taken into account in the overall weighing of costs and benefits of receiving the evidence.
>
> […]
>
> (2) The Gatekeeping Exclusionary Discretion
>
> [54] Finding that expert evidence meets the basic threshold does not end the inquiry. Consistent with the structure of the analysis developed following *Mohan* which I have discussed earlier, the judge must still take 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 w 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.

IX. Analysis

[74] I confirm the analysis set out in *White Burgess* is applicable to the Tribunal in the context of the *Act.* Previous Tribunal adjudicators balanced *Mohan* and *Abbey* with the *Act* and I am informed and guided by those rulings in this *White Burgess* analysis. It is my obligation under the *Act* to thoroughly analyze Dr. Belchetz's report and qualifications presented in his curriculum vitae, in accordance with *White Burgess*, to determine whether Dr. Belchetz should give expert opinion evidence or any evidence at the hearing.

A. Independence and Impartiality

[75] Dr. Belchetz signed an Acknowledgement of Expert's Duty, acknowledging his duty to provide fair, objective, non-partisan opinion evidence, and to provide opinion evidence

that is related only to matters that are within his area of expertise. The Complainant submits that notwithstanding the Acknowledgement is signed, Dr. Belchetz's report is not independent or impartial.

[76] Dr. Belchetz is a medical doctor retained by the Respondent solely for the purpose of this hearing which, pursuant to para. 35 of *Kon Construction*, is the type of expert opinion evidence to which *White Burgess* applies, given that the risk of harm to the proceeding is greater with "litigation experts."

[77] Dr. Belchetz acknowledges he has not met or talked to the Complainant or Dr. Bautista. Dr. Belchetz's comments in his letter dated June 21, 2016 are in direct response to Respondent counsel's pointed, leading questions, which the Respondent acknowledges suggest the same criticisms of Dr. Bautista as stated in its SOP and ASOP. Dr. Belchetz agrees with and supports the Respondent's questions regarding deficiencies in Dr. Bautista's standard of care, diagnostic process, notes, reports and record keeping.

[78] Dr. Belchetz offers no spontaneous, independent observations or opinions. His evidence does not appear to be "…the product of the expert's independent judgment, uninfluenced by who has retained him…." Dr. Belchetz's agreement with the Respondent's criticisms of Dr. Bautista seems to be self-serving and advocates for the Respondent's position.

B. Relevance and Necessity in assisting the Trier of Fact

[79] The Respondent and the Commission submit Dr. Belchetz's expert opinion evidence may be relevant and necessary for the Respondent to fully respond to the complaint and to advance any explanation or justification for its employment practices.

[80] I will consider Dr. Belchetz's report and the relevant legislation and case law to determine if Dr. Belchetz's opinion evidence is arguably relevant to either issue and can help advance the Respondent's case without usurping my role as the adjudicator of this case.

[81] This complaint is made under sections 3, 7 and 10 of the *Act*:

> **3.** (1) For all purposes of this Act, the prohibited grounds of discrimination are race, national or ethnic origin, colour, religion, age, sex, sexual orientation, marital status, family status, disability and conviction for an offence for which a pardon has been granted or in respect of which a record suspension has been ordered.
>
> […]
>
> **3.1** For greater certainty, a discriminatory practice includes a practice based on one or more prohibited grounds of discrimination or on the effect of a combination of prohibited grounds.
>
> […]
>
> **7.** It is a discriminatory practice, directly or indirectly,
>
> (a) to refuse to employ or continue to employ any individual, or
>
> (*b*) in the course of employment, to differentiate adversely in relation to an employee,
>
> on a prohibited ground of discrimination.
>
> […]
>
> **10.** It is a discriminatory practice for an employer, employee organization or employer organization
>
> (*a*) to establish or pursue a policy or practice, or
>
> (*b*) to enter into an agreement affecting recruitment, referral, hiring, promotion, training, apprenticeship, transfer or any other matter relating to employment or prospective employment, that deprives or tends to deprive an individual or class of individuals of any employment opportunities on a prohibited ground of discrimination.

[82] **“**Disability” is defined in section 25 of the *Act*:

> “disability” means any previous or existing mental or physical disability and includes disfigurement and previous or existing dependence on alcohol or a drug;

[83] In its SOP and ASOP, the Respondent refers to the Complainant's "stress" disability, implying it did not think Dr. Bautista had properly or thoroughly diagnosed the Complainant and that perhaps the Complainant did not have a legitimate disability. In the CMCCs, the Respondent confirmed that it does not believe the Complainant had a disability within the meaning of the *Act*, and asserts it could not have engaged in any employment practices that were discriminatory based on disability.

[84] The Tribunal must determine if the Complainant establishes a *prima facie* case based on the evidence presented. This includes the determination by the Tribunal as to whether the Complainant has a disability within the meaning of the *Act*.

[85] In *Audet v. Canadian National Railway*, 2006 CHRT 25, the definition of disability under section 25 of the *Act* has been interpreted to mean "any physical or mental impairment that results in a functional limitation, or that is associated with the perception of impairment." In this case, the employer perceived that Mr. Audet's epilepsy and resulting seizures impaired his ability to function in a safety-critical position. His condition was found to be a disability within the meaning of the *Act*.

[86] The decision in *Desormeaux c. Ottawa-Carleton Regional Transit Commission,* 2005 CarswellNat 2005 FCA 311, leave to appeal refused 2006 CarswellNat 621, 2006 CarswellNat 620 (S.C.C.), involved an appeal from the Federal Court of Canada, which quashed a decision of the Tribunal upholding a complaint of discrimination on the grounds of disability. The complaint arose after OC Transpo dismissed Ms. Desormeaux for innocent absenteeism arising from her migraine headaches. The Tribunal found that Ms. Desormeaux's headaches constituted a disability for the purpose of the *Act*, and upon judicial review, the Federal Court found the Tribunal's finding on disability was unreasonable.

[87] The Federal Court of Appeal allowed the appeal and noted that the Tribunal was entitled to considerable deference based on the evidence it had before it related to the complainant's headaches, and found that the Tribunal could reasonably have found that there was a disability because of the headaches, whether they were migraine headaches, migraine/tension headaches, or some other type of severe headache condition.

[88] In *Dupuis v. Canada* (*Attorney General*), 2010 FC 511, the Court confirmed that mental illness, in its many forms and varying degrees, or the employer's perception thereof, is a disability within section 25 of the *Act*. The Court noted the employee may be unaware that he or she is suffering from a mental illness so it is possible that the employee never sees a doctor or notifies the employer of their need for accommodation. The Court stated that if a manager can detect a change of behaviour that could be attributable to a mental disorder, it is the manager's responsibility to determine whether accommodation is necessary.

[89] In *Desrosiers v. Canada Post Corp*., 2003 CHRT 26, the complainant's back ailment was found to be a disability within the meaning of the *Act*. The Tribunal stated at para. 34:

> …..'disability' may be the result of a physical limitation, a perceived limitation, or a combination of the two. [See *Québec (Commission des droits de la personne & des droits de la jeunesse) c. Montréal (Ville)*, [2000] 1 S.C.R. 665 (S.C.C.), para. 79.]. The Tribunal must therefore consider in its determination not only the complainant's medical condition, but also the circumstances in which a distinction is made. In other words, in the context of the impugned practice of an employer, the Tribunal must determine, *inter alia*, whether an actual or perceived ailment causes the complainant to experience the loss or limitation of opportunities to take part in the life of the community to the same extent as others…

[90] Based on the above-noted decisions, The determination whether the Complainant in this case suffered from a disability or whether the Respondent perceived him to suffer from a disability, within the meaning of section 25 of the *Act*, is a finding of fact to be made by the Tribunal based on the witnesses who provide evidence regarding the Complainant's limitations, if any, and the Respondent's perception of the Complainant's limitations, if any.

[91] The determination as to whether the Complainant had a disability requires a legal analysis within the jurisdiction of the Tribunal. The Tribunal will not delegate the determination of disability to the witnesses. Pursuant to Tribunal decisions in *Brooks*, *Gaucher* and *PSAC,* evidence which purports to usurp the fact finding/legal analysis function of the Tribunal is inadmissible.

[92] If the Complainant establishes a *prima facie* case, the Respondent may be able to establish that its employment practices were based on a *bona fide* occupational requirement and were therefore not discriminatory as per s. 15 of the *Act*:

> **15.** (1) It is not a discriminatory practice if
>
> (*a*) any refusal, exclusion, expulsion, suspension, limitation, specification or preference in relation to any employment is established by an employer to be based on a *bona fide* occupational requirement;
>
> […]
>
> (2) For any practice mentioned in paragraph (1)(*a*) to be considered to be based on a *bona fide* occupational requirement and for any practice mentioned in paragraph (1)(*g*) to be considered to have a *bona fide* justification, it must be established that accommodation of the needs of an individual or a class of individuals affected would impose undue hardship on the person who would have to accommodate those needs, considering health, safety and cost.

[93] The Commission has suggested that the issue of whether the Complainant could safely work is relevant to the Respondent's defence of *bona fide* occupational requirement.

[94] The Respondent acknowledges Dr. Belchetz did not play any advisory or consultant role in the events that led up to and resulted in the Complainant's termination. There is no apparent relevance of Dr. Belchetz's report to s. 15 and the Respondent has not indicated any relevance to s. 15 in its SOP, ASOP or submissions.

[95] According to the Respondent's SOP and ASOP, and Dr. Belchetz's report, the Respondent will lead evidence and/or cross-examine Dr. Bautista in relation to her diagnosis of the Complainant and the basis for his request to work a specified number of hours. Prior to 2010, it was a ceiling of 45 hours a week, and in 2010, a range of 40 to 42 hours.

[96] The Respondent's SOP and ASOP claim the lack of medical assessment and evidence to support Dr. Bautista's opinion the Complainant required a weekly limit of 40 to 42 hours caused the Respondent concern as to whether the Complainant could safely

work at all. The Respondent will lead evidence of its reaction to Dr. Bautista's notes and reports and its resulting actions, which is relevant to s. 15.

[97] Based on the Respondent's SOP and ASOP and its submissions, the purpose of Dr. Belchetz's report appears to be to discredit Dr. Bautista by criticizing her diagnosis of the Complainant, or lack thereof, and/or to question to basis for Dr. Bautista's opinion that the Complainant required reduced hours at the material time, and/or to question whether the Complainant was safe to work at all. The Respondent will cross-examine Dr. Bautista on these points. The Tribunal will exercise its function to assess Dr. Bautista's reliability and credibility and determine the weight to give to her evidence, in so far as it is relevant to the Tribunal's determination of the issues in this case.

[98] In his report, Dr. Belchetz agreed with Respondent counsel that Dr. Bautista's notes and reports caused him concern that the Complainant could not safely perform his job, even with reduced hours. Dr. Belchetz's evidence is to support, in a self-serving way, the Respondent's cross-examination of Dr. Bautista and other Complainant witnesses and the evidence the Respondent will present. This may be relevant and helpful to the Respondent but it is self-serving evidence advocating for the Respondent under the guise of expert opinion evidence.

[99] Dr. Batista's report does not contain scientific or technical information that requires the evidence of an expert to inform the Tribunal. Dr. Belchetz's report is not based on objective assessment or research - his observations could be made by a lay person. The critique of Dr. Bautista can be advanced by the Respondent by the evidence of its witnesses, its cross-examination of the Complainant's witnesses, and the submissions of its counsel.

[100] I conclude that the evidence is not relevant or necessary for the Respondent to advance its case and that it is not required by the Tribunal to assess Dr. Bautista's credibility and reliability. Dr. Bechetz's report is not necessary for the Tribunal to make inferences and findings of fact to decide the issues in this case. I view the introduction of Dr. Belchetz's ready-made inferences based on submissions by the Respondent as an attempt to usurp the role of the Tribunal as the trier of fact.

C. Absence of any Exclusionary Rule

[101] There is no exclusionary rule. Dr. Belchetz's report complies with the form required by Rule 6(3).

D. Properly Qualified Expert

[102] Respondent counsel characterizes Dr. Belchetz's evidence as "expert peer review" and Dr. Belchetz states he is retained as "an objective subject matter expert." These terms are too broad and vague to be described as "areas of expertise."

[103] Dr. Belchetz's *curriculum vitae* indicates he graduated from medical school in 2000 and completed a residency in family medicine and was certified by the Royal College of Family Physicians of Canada in 2004. Since 2004, he has worked as an Emergency Physician and undertaken additional emergency medicine training in trauma and cardiac life support.

[104] Dr. Belchetz indicates he is an "on air expert" for Global News and CTV/Bell Media and lists his articles that have been published in newspapers. Dr. Belchetz does not list any research, academic papers or teaching experience in family physician peer review. Dr. Belchetz does not list any training in or experience with family physician peer review.

[105] I do not view Dr. Belchetz as a properly qualified expert to give the opinion evidence included in his report, mostly because I do not view his opinion as anything more than a ready-made inference of doubt regarding the credibility and reliability of Dr. Bautista's notes and reports, based on the criticisms of her medical practice. I believe an informed lay person could make the same criticisms and draw the same conclusions, especially if the Respondent suggested the concerns as it did with Dr. Belchetz.

E. Cost-Benefit Analysis

[106] After regular case management in 2015 and 2016, in April 2016, the hearing was scheduled for two weeks starting June 6, 2016. On June 2, 2016, the Respondent sought and was granted an adjournment until August 2016. At the CMCC on June 9, 2016, the

Respondent advised it retained Dr. Belchetz to critique Dr. Bautista's reports and medical records disclosed in September 2015. In response, the Complainant requested an adjournment of his case from June 13 to August 2016, which was granted.

[107] The Respondent has not explained why it requisitioned the report of Dr. Belchetz in such close proximity to the hearing or explained how the report is relevant and necessary to its case. Dr. Belchetz's new report had the effect of delaying the hearing until at least August 2016 and increased legal costs for all with this interim motion by the Complainant.

[108] The Respondent submits that pursuant to subsection 50(3)(c), I should allow Dr. Belchetz to give evidence anyway, even if he is not qualified as an expert, and decide what weight, if any, to give his evidence later.

[109] *White Burgess* imposes a "gate keeper" function with respect to expert opinion evidence. After the factors of independence and impartiality, relevance, necessity and expert qualifications are considered, the benefits of the evidence, including probative value, compared to the risks of harm to the hearing or prejudice to the other parties is considered. At this stage, Dr. Belchetz's independence and impartiality are considered again as part of the cost-benefit analysis (para. 34 of *White Burgess*). Paragraph 18 of *White Burgess* lists possible risks to the hearing, including delayed hearings, adjournments, increased cost, longer hearings, improper deference to the expert, junk science and battle of the experts.

[110] I have already identified my concern that Dr. Belchetz's evidence is an attempt to usurp the inference and fact finding function of the Tribunal by asking the Tribunal to accept Dr. Belchetz's criticisms of Dr. Bautista, that in reality, are the Respondent's criticisms of Dr. Bautista.

[111] Subsection 48.9(1) requires the hearing proceed as expeditiously as the principles of natural justice will allow. If I allow Dr. Belchetz's evidence, the Complainant may require another adjournment. The Complainant may incur more expense to provide responding evidence, possibly from a third doctor, to address the credibility and reliability of Dr. Belchetz's evidence. This would be a battle of the experts addressing the credibility and

reliability of each doctor, which has no apparent relevance to the issues to be determined by the Tribunal.

[112] In my view, the resulting lengthening, delay and increased cost of the hearing as a result of allowing Dr. Belchetz's evidence and allowing the Complainant the opportunity to respond, is an unnecessary risk to the integrity of the hearing process and prejudice to the Complainant, given the limited utility of Dr. Belchetz's evidence.

X. Conclusion

[113] The Complainant's motion to exclude the report and *viva voce* evidence of Dr. Brett Belchetz is granted.

Signed by

J. Dena Bryan
Tribunal Member

Ottawa, Ontario
August 19, 2016