Federal Court  Cour fédérale

**Date: 20240708**

**Docket: T-1458-20**

**Citation: 2024 FC 1064**

**Ottawa, Ontario, July 8, 2024**

**PRESENT: Case Management Judge Benoit M. Duchesne**

**PROPOSED CLASS PROCEEDING**

**BETWEEN:**

**NICHOLAS MARCUS THOMPSON, JENNIFER PHILLIPS, MICHELLE HERBERT, KATHY SAMUEL, WAGNA CELIDON, DUANE GUY GUERRA, STUART PHILP, SHALANE ROONEY, ~~YONITA PARKES~~, DANIEL MALCOLM, ALAIN BABINEAU AND BERNADETH BETCHI, CAROL SIP, MONICA AGARD, AND MARCIA BANFIELD SMITH**

**Plaintiffs**

**and**

**HIS MAJESTY THE KING**

**Defendant**

Brought pursuant to the *Federal Court Rules*, SOR/98 106

**ORDER**

[1] The Plaintiffs have brought a motion for two orders in connection with the Plaintiffs' pending certification motion.

[2] The first is for an order granting them leave to "adduce fresh evidence" for use on the Plaintiffs' underlying certification motion. The Defendants consent, on terms, to leave being granted for the Plaintiffs to adduce limited "fresh evidence", while they object to leave being granted for other documents sought to be adduced by the Plaintiffs.

[3] The second is for an order withdrawing Shalane Rooney as a Plaintiff. The Defendant does not oppose that part of the motion that seeks to have Ms. Rooney removed as a Plaintiff in the action. Ms. Rooney will therefore be removed as a party Plaintiff in this proceeding pursuant to Rule 104(1)(a) of the *Federal Courts Rules* (the "*Rules*").

[4] The remainder of this order will be concerned with that part of the first order that the Defendant contests.

## I. BACKGROUND

[5] This motion arises after the parties have completed their cross-examinations on the affidavits served in connection with the Plaintiffs' underlying certification motion.

[6] The Plaintiffs served and filed their notice of motion and affidavits in support of their certification motion on September 1, 2021. They supplemented their evidence in chief by way of additional motion records served on March 29, 2022, and on September 1, 2022. The Court notes that each of the Plaintiffs and proposed representative Plaintiffs swore affidavits on August 31, 2021, or September 1, 2021, as the case may be, in support of their certification motion.

[7] The Defendant served his affidavits in response to the certification motion on October 3, 2022.

[8] The Plaintiffs served and filed their responding/reply affidavits on November 15, 2022 while the Defendant served and filed his supplemental affidavits responding to the Plaintiffs' reply evidence on February 28, 2023 and April 11, 2023.

[9] The parties completed their cross-examinations on affidavit in the main between March 1 and July 14, 2023. Additional cross-examinations were held and were completed by November 8, 2023.

[10] The cross-examinations were extensive and time consuming. They gave rise to two (2) separate motions to compel answers on the cross-examinations pursuant to Rule 97 of the *Rules*, one in late spring of 2023 and the other in December 2023, both brought by the Plaintiffs.

[11] The fresh evidence the Plaintiffs now seek leave to include in their certification motion record are:

a) The Report of the "Employment Equity Act Review Taskforce" dated January 8, 2024;
b) The Standing Senate Committee on Human Rights' (the "Committee") report dated December 11, 2023, titled "Anti-Black Racism, Sexism and Systemic Discrimination in the Canadian Human Rights Commission" (the "Senate CHRC Report");

c) The transcripts of the public hearings conducted by the Committee on May 1, May 8, and May 15, 2023, that preceded the Senate CHRC Report and are associated with it (the "Senate Committee Transcripts"); and,

d) The Auditor General's Report on the Inclusion of Racialized Employees in the Workplace dated October, 19 2023.

[12] The Defendant consents to an order granting the Plaintiffs leave to include the Report of The Employment Equity Act Review Taskforce dated January 8, 2024, as well as the Auditor General's Report on the Inclusion of Racialized Employees in the Workplace dated October 19, 2023, in its evidence for use at the certification motion, provided that it is granted leave to introduce further evidence to respond to these two documents. The Plaintiffs do not oppose the Defendant's request for leave to introduce responding evidence addressing these two added and included reports.

[13] As the portion of the Plaintiffs' motion is unopposed with respect to these two documents and the Defendant's request for equivalent leave is also unopposed, an Order will be made granting leave accordingly.

[14] The remaining limited issue to be disposed of is whether the Plaintiffs should be granted leave to include the Senate CHRC Report and the Senate Committee Transcripts in their motion materials for their certification motion. As will be seen below, the Plaintiff's motion for leave to adduce the Senate CHRC Report and the Senate Committee Transcripts is dismissed because the Plaintiffs have not met their burden of proof or of persuasion for leave to be granted.

## II. LEAVE TO INTRODUCE EVIDENCE AFTER CROSS-EXAMINATIONS

### A) The parties' arguments

[15] The Plaintiffs argue that they meet the test to be granted leave to adduce fresh evidence for use on their certification motion.

[16] There is some particularity to the Plaintiffs' motion. They affirm in their written representations that they do not seek leave to tender the Senate CHRC Report or the Senate Committee Transcripts in support of their certification motion for the truth of their content. They also affirm that they do not seek leave to include the Senate CHRC Report or the Senate Committee Transcripts in their certification motion materials as the basis of material facts. Rather, they argue that they seek leave to include the Senate CHRC Report and the Senate Committee Transcripts as "additional context", and "to provide some basis in fact for extrapolating the experiences of" the representative Plaintiffs and of the members of the proposed class.

[17] They also seek to have the documents admitted as they are alleged to be "extensions of the evidence" relied upon by the Defendant as contained in the affidavits of Charles Vezina and Marie-Josée Frenette, and in the affidavits of Raj Anand, Wendy Cukier, as well as of other witnesses who speak to the question of the efficacy of the CHRC as a forum for resolving discrimination complaints.

[18] They also argue that the documents will assist "in the consideration of the final four criteria for certification". Those final certification criteria are left undescribed in the Plaintiffs' written representations, but the Court understands from the thrust of the

Plaintiffs' written representations read more generously and broadly that they seek leave to adduce the Senate CHRC Report and the Senate Committee Transcripts as documentary evidence of "some basis in fact" in support of their argument that a class proceeding is the preferable procedure for the just and efficient resolution of the common questions of fact and law to be determined and that proceedings before the CHRC are not the preferable procedure.

[19] The Plaintiffs' assertion that they do not intend to rely on the two documents to establish any facts relevant to the certification motion while at the same time asserting that they intend to rely on the documents to provide additional context and "some basis in fact" relevant to certification is problematic because its is internally contradictory and incoherent.

[20] Relying heavily on the Federal Court of Appeal's decision in *Canada v Greenwood*, 2021 FCA 186 (*"Greenwood"*), the Plaintiffs argue that evidence similar to the Senate CHRC Report and the Senate Committee Transcripts has been frequently relied upon in certification motions and that, along with other evidence adduced, can be used to support that there is some basis in fact for certification. Also relying on *Araya v Canada*, 2023 FC 1688, at para 49, ("*Araya*") the Plaintiffs argue that public reports such as the Senate CHRC Report are intended to supplement the direct fact witness and expert evidence that may be admitted for the limited purpose of providing additional context and some basis in fact for extrapolating the experiences of the representative Plaintiffs to the purported class members.

[21] The Court agrees that evidence similar to the Senate CHRC Report and the Senate Committee Transcripts has been considered by the courts on certification motions as in *Greenwood* and *Araya* as well as in other contexts, but those cases and contexts differ from the context of this motion.

[22] In *Greenwood v. Canada* 2020 FC 119 (CanLII), the decision that was appealed in *Greenwood,* Justice McDonald noted at para 11 that a number of reports by the President of the Treasury Board to the Minister of Public Safety, by the Chair of the Commission for Public Complaints against the RCMP, by the Senate's Standing Committee on National Security and Defence as well as others that addressed issues of harassment within the RCMP had been included in the motion records before her on the certification motion. How the reports made their way into the certification motion record is not revealed by any published decision. The Court did not appear to have to consider whether the reports in that proceeding could be admitted as evidence following the completion of cross-examination with leave of the Court. The *Greenwood* decision therefore stands for a proposition that is not contested, but also is not helpful on this motion.

[23] The principles in *Araya* are similarly neither contested nor helpful on this motion. In *Araya,* one of the plaintiff's experts had delivered expert reports that cited to and relied upon existing public reports. There was no issue in that proceeding that is similar to the issue before the Court on this motion, specifically, that of determining whether leave should be granted to adduce public reports that were not cited to or relied upon in other evidence filed with the Court. *Araya* therefore finds no application to assist the Plaintiffs.

[24] The Plaintiffs submit in their written representations that parliamentary privilege, if it attaches to either the Senate CHRC Report or the Senate Committee Transcripts at all, is intended to shield witnesses participating in a parliamentary inquiry from various civil or criminal claims or obligations by imposing an immunity to protect such testimony. They add that such public reports cannot be used to make any determination of liability, and that they do not intend to use the Senate CHRC Report and the Senate Committee Transcripts as evidence available to determine liability in this case. Therefore, they argue, parliamentary privilege should find no application on this motion.

[25] The Defendant objects to the Senate CHRC Report and the Senate Committee Transcripts being included in the Plaintiffs' certification motion materials or being admitted into evidence on the certification motion because, 1) they are protected by parliamentary privilege, and 2) in any event, do not otherwise satisfy the test for leave to introduce evidence after cross-examination on affidavits has taken place.

[26] The Plaintiffs' reply position is that parliamentary privilege does not preclude them from leading the Senate CHRC Report or to the Senate Committee Transcripts as evidence in their certification motion materials, whether parliamentary privilege attaches or not.

**B) The Applicable Test**

[27] A discussion of the applicable law for leave to admit evidence after cross-examination is necessary before considering whether the Senate CHRC Report and the Senate Committee Transcripts can be adduced into evidence before turning to whether parliamentary privilege applies to prevent the documents being admitted.

[28] The Plaintiffs' motion originally came on for hearing on April 9, 2024. The Plaintiffs were granted leave from the Court to serve and file a different motion record at that time because the affidavit evidence led by them was deficient with the result that there was no admissible evidence before the Court. The Plaintiffs served and filed a second separate motion record containing different affidavits and written representations by the time the motion was heard on April 24, 2024. The Plaintiffs' first motion record contained written representations, arguments, and authorities regarding the legal test to be applied on the question of whether leave should be granted to adduce new evidence, while the second motion record omitted such representations, arguments and authorities. I shall consider the legal test for leave to introduce evidence argued by the Plaintiffs in their first motion record as if they are incorporated into their second motion record.

[29] The Plaintiffs first rely upon *Palmer v R.,* 1979 CanLII 8 (SCC), [1980] 1 SCR 759, 106 DLR (3d) 212, at para. 22, and the criteria set out there for the admission of new evidence:

> 1) The evidence should generally not be admitted if, by due diligence, it could have been adduced at trial, although this general principle is applied less strictly in a criminal case.
>
> 2) The evidence must be relevant in the sense that it bears upon a decisive or potentially decisive issue.
>
> 3) The evidence must be credible in the sense that it is reasonably capable of belief, and
>
> 4) It must be such that if believed it could reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result.

[30] *Palmer v R* was an appeal from the British Columbia Court of Appeal's refusal to admit fresh evidence in an appeal from criminal convictions in the Supreme Court of British Columbia on an indictment charging a conspiracy to traffic in heroin. The decision deals with the criteria to apply to admit fresh evidence on appeal after the evidence was not presented or adduced during trial. It has nothing to do with leave to adduce additional evidence on a motion after cross-examinations have been completed. *Palmer v R* is of no application here and is of no assistance to the Plaintiffs.

[31] The Plaintiffs then rely on Rule 312 of the *Rules* and the jurisprudence that interprets and applies the Rule. Rule 312 is of no application on this motion. Rule 312 is found within Part 5 of the *Rules* with respect to applications. It does not apply in the context of actions like the one in this proceeding. Actions are governed by Part 4 of the *Rules* as is plain from Rule 300 and its description of the application of the Rules contained in Part 5.

[32] Rule 312 also does not apply with respect to certification motions that are governed by Rules 334.15 and 334.16 found in Part 5.1 of the *Rules*, or with respect to motions that are governed by Rules 358 to 369 found in Part 7 of the *Rules* for the same reason (*Parkdale Community Legal Services v Canada*, 2024 CanLII 28848 (FC), at para 21).

[33] The Plaintiffs rely on *Berenguer v SATA Internacional - Azores Airlines, S.A.*, 2021 FCA 217 (CanLII) ("Berenguer"), at para 38, for the proposition that they may bring a motion at any time to submit new evidence that is relevant to the suitability of another forum as an alternative to a class action.

[34] The issue in *Berenguer* was whether, in the context of a motion to determine the contents of an appeal book pursuant to Rule 343(3) of the *Rules*, a party could introduce evidence as to the suitability of one forum – the Portuguese ANAC over the Canadian Transportation Agency – in the appeal book. The focus of the Court's attention was whether there was a procedural mechanism for the party to have brought the evidence it sought to include in the appeal book before the certification motion judge after oral argument on the motion had concluded but before the decision on the certification motion was issued. Justice Monaghan's comments at paragraph 38 of *Berenguer* are directed to the fact the appellants in that proceeding could have brought a motion to submit new evidence at that time but did not. The reference to Rule 312 in her reasons is, in my view, *obiter* and is not binding upon me for the purposes of this motion. In any event, *Berenguer* is distinguishable on its facts. It finds no application on this motion.

[35] The Plaintiffs rely upon *Airia Brands Inc. v Air Canada*, 2014 ONSC 3933 (*"Airia"*). This decision concerned a proposed class proceeding before the Ontario Superior Court of Justice. The decision dealt with the issue of whether leave should be granted for the defendants to file supplementary foreign law affidavits as part of the certification record, and whether the plaintiffs should be granted leave to file a supplementary affidavit for the certification motion. The decision does not provide guidance regarding any applicable jurisprudence or considerations other than a reference to Rule 39.02(2) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194. Despite the similarities between Rule 39.02(2) of Ontario's *Rules of Civil Procedure* and Rule 84(2) of the *Rules*, the Rule contained in the *Rules* that applies to motions for leave to file affidavit evidence after cross-

examinations on affidavits are completed, I must apply the jurisprudence developed pursuant to Rule 84(2) of the *Rules* as Ontario's *Rules of Civil Procedure* do not apply to this proceeding (see Rule 1.1 of the *Rules*). *Airia* is therefore is of no assistance to the Plaintiffs on this motion.

[36] The applicable test for leave to file affidavit evidence after cross-examinations are completed in connection with a pending motion, as contemplated by Rule 84(2), was reiterated by Justice Lafrenière in *Gemak Trust v Jempak Corporation*, 2020 FC 644 (CanLII), at para 74, as follows:

> The test for granting leave to file additional evidence after having cross-examined the opposite parties' deponents is summarized in *Janssen-Ortho Inc v Canada (Health)*, 2009 FC 1179 at paragraph 9. The moving party must establish (1) that the proposed evidence could not have been adduced at an earlier date, (2) the relevance of the proposed evidence, (3) the absence of prejudice to the opposing party, and (4) how the proposed evidence would be of assistance to the Court in disposing of the motion. None of the criteria have been met in this case.

[37] The same test was reiterated by Justice Aylen in *Canada (National Revenue) v ASB Holdings Limited*, 2024 FC 494 (CanLII), at para. 39. Her Honour also noted that the proposed evidence to be adduced pursuant to Rule 84(2) must serve the interests of justice, particularly where a claim of privilege is advanced against its inclusion:

> The most important here is the interests of justice in the sense that the interests of justice are not served if the Plaintiffs are permitted to introduce evidence that is covered by privilege. The interests of justice, that of applying the law equally and with predictability to all, must be held paramount were claims of privilege are advanced and made out. The privilege must be respected and the documents will be inadmissible, and therefore not relevant.

[38] Determining whether leave should be granted to the Plaintiffs to admit the Senate CHRC Report and the Senate Committee Transcripts as evidence therefore turns on whether the Plaintiffs have established on the basis of evidence filed on this motion:

1) that the proposed evidence could not have been adduced at an earlier date;

2) that the proposed evidence is relevant to the underlying certification motion;

3) that there is no prejudice to the Defendant if the evidence is admitted after cross-examination; and,

4) how the proposed evidence would be of assistance to the Court in disposing of the certification motion; and,

5) if the Plaintiffs satisfy requirements of items 1 to 4, above, whether privilege attaches and prevents the admissibility of the evidence.

[39] This requires some consideration of the contested documents and the additional evidence to be adduced.

## C) The Senate CHRC Report

[40] The Senate CHRC Report was released on December 11, 2023. Its full title is "Anti-Black Racism, Sexism and Systemic Discrimination in the Canadian Human Rights Commission". The report itself is no more than 49 pages in length, including its recommendations and appendices.

[41] The report includes 11 recommendations including a call for the implementation of a direct access model at the CHRC, the establishment of a Black Equity Commissioner and the modernization of the *Employment Equity Act* to include a separate category for Black

employees. The report is published on the Senate's website and is readily available to the public as are the transcripts and audio recordings of the hearings that led to it.

[42] The Committee's study was prompted by a set of grievances filed against the CHRC about its treatment of Black and racialized employees. Those grievances raised serious concerns with the Committee about the CHRC's decision-making processes when dealing with human rights complaints. The study also followed the commencement of this proceeding by some 30 months, and followed the Plaintiffs' service and filing of their certification motion evidence.

[43] The Senate CHRC Report arose from the Order of Reference adopted by the Senate on March 3, 2022. The Committee describes its report at its page 10 as follows:

> This report briefly discusses the issue of systemic racism in the federal public service, explains the role of the CHRC, outlines recent criticism and allegations against it, summarizes steps that the CHRC has taken in response, and sets out some of the possible reforms **that were discussed by witnesses**. The report concludes with a list of 11 recommendations." (The emphasis is mine)

[44] The Senate CHRC Report summarizes the testimony, personal stories, anecdotes, and opinions of many of the witnesses who testified before the Committee and then discusses the various recommendations those witnesses suggested or proposed. The Report sets out the Committee's agreement with some of the witnesses' recommendations as the springboard for the recommendation it formulates.

[45] Recommendations 1 to 5 are preceded by the following:

> The committee agrees that federal leadership is needed to combat racism and foster a culture of rights in Canada. However, for that

> leadership to be effective, systemic racism must be eradicated from the federal public service itself.

[46] Recommendations 6 and 7 are preceded by the following:

> The committee agrees that the CHRC must do more to change its workplace culture and practices to regain the trust of its own Black and racialized employees, as well as the trust of communities that rely upon it for justice.

[47] Recommendations 8 to 11 are preceded by a summary of salient proposals for solutions advocated for by various witnesses who appeared before the Committee.

[48] Despite the Plaintiffs' argument that the hearings and Report were an "investigation" by the Committee, it is apparent that there was no "investigation" as argued by the Plaintiffs. The Committee's own description of its work and report found at page 8 of the Report properly qualifies its work as a "short study": "In May 2023, the Standing Senate Committee on Human Rights (the committee) undertook a short study on allegations of anti-Black racism, sexism, and systemic discrimination in the Canadian Human Rights Commission (CHRC)".

[49] The Senate CHRC Report is based on the testimony the Committee heard from 24 witnesses in early May 2023, as well as from additional written briefs from persons who did not appear as witnesses. The witness who appeared before it in the context of its study include:

a) Mr. Scher, one of the Plaintiffs' lead solicitors of record in this proceeding, who offered his personal opinions about anti-black discrimination at the CHRC, his appreciation of the CHRC's complaints process and his critique

of it, his concerns about the CHRC's structure, and his thoughts on other topics;

b) Nicholas Marcus Thompson, one of the proposed representative Plaintiffs in this proceeding, the deponent of an affidavit dated August 31, 2021, that is included in the Plaintiffs' certification motion evidence, who testified before the Committee about his personal observations regarding anti-black racism and what he understood from unnamed public service employees who spoke with him regarding their experiences with the CHRC, as well as other topics; and,

c) Bernadette Betchi, also one of the proposed representative Plaintiffs in this proceeding, and the deponent of an affidavit dated August 31, 2021, that is included in the Plaintiffs' certification motion evidence, who testified before the Committee about her personal experiences and her opinions regarding the CHRC and its internal processes, among other topics.

[50] The Senate CHRC Report notes that neither the Minister of Justice nor the Attorney General of Canada appeared before the Committee despite being invited to attend. There is no suggestion that the Committee sought to compel the attendance of any witness or of any potential witness.

[51] It is clear from reading the Senate CHRC Report that the Committee's short study did not have the purpose of collecting evidence that is constrained by any of the rules of evidence that would prevail in a courtroom. A review of the transcripts of that led to the Senate CHRC Report confirms this.

**D) The Senate Committee Transcripts**

[52] The Committee heard from witnesses *viva voce* on May 1, May 8 and May 15, 2023. The transcripts themselves and the minutes of the hearings are publicly available. The transcripts were produced by the Plaintiffs on this motion.

[53] The transcripts reflect that none of the witnesses who appeared before the Senate Committee gave any solemn affirmation or oath as would be required in a legal proceeding. None of the witnesses were cross-examined, and none had their statements challenged in a manner consistent with cross-examination in a legal proceeding.

[54] The witnesses were provided with 10 minutes each to tell the Committee members of their experiences, opinions, comments, and recommendations based on what they have experienced and have heard of or been told by others who are not named. Many of the witnesses were advocating for their preferred solution to the issues they observed or had heard of and wished to bring to the fore without having led the foundational evidentiary basis that would be required in a court of law for such arguments to be made. The Committee members could then ask the witnesses questions about aspects of discrimination and anti-discrimination efforts that are of interest to them and then seek their comments and opinions.

[55] Neither the transcripts nor the Senate CHRC Report were intended to be used in any court, their contents contain anecdotal and opinion remarks from non-experts, there was no cross-examination, and none of the hallmarks associated with a process that seeks to gather reliable evidence.

[56] Having reviewed the Senate CHRC Report and the Senate Committee Transcripts that inform its content, I find that their content and purpose are consistent with Justice McVeigh's description of similar reports in *Bigeagle v. Canada*, 2021 FC 504 (CanLII), at para 39 (*"Bigeagle"*):

> [39] It is without question that the information in reports is given without the same evidentiary rules as required by a court. The information from the reports is not taken under oath, can be hearsay, there is no opportunity for cross-examination, and no due process or procedural fairness necessary. The report contains anecdotal and opinion remarks from non-experts. The findings are based on information that would not be evidence at a trial and given without judicial scrutiny regarding possible exceptions to the rules of evidence. This is not surprising given that the reports are not intended for use in courts, but rather for, among other things, healing, reconciliation, and to encourage government to action.

[57] Taken as a whole, the Senate CHRC Report and the Senate Committee Transcripts are best described as an encouragement to government action in light of the short study carried out by the Committee.

**E) Applying the Test:**

**(1) Could the proposed evidence have been adduced at an earlier date?**

[58] Neither the Senate CHRC Report nor the Senate Transcripts themselves could have been available to the Plaintiffs prior to the date on which they were produced as a result of the Committee's work commencing in May 2022, culminating with the publication of the Senate CHRC Report in December 2023.

[59] One must be careful, however, not to conflate the form in which the evidence sought to be adduced after cross-examination was recorded with the evidence sought to be

produced after cross-examination. They are separate matters. The Court is concerned at this juncture only with whether the evidence contained in the Senate CHRC Report, or the Senate Committee Transcripts could have been adduced by the Plaintiffs at an earlier date.

[60] No evidence has been led by the Plaintiffs on this motion that the witnesses who appeared before the Committee to provide their testimony in May 2023 could not have been available to provide affidavit evidence for the purposes of the certification motion that is consistent with their testimony before the Committee in advance of their May 2023 attendances before the Committee. No evidence was led that any of the witnesses could not have sworn affidavits at any time between the commencement of this proceeding and the completion of cross-examinations. The Plaintiffs have led no evidence that the evidence could not have been adduced at an earlier date.

[61] Indeed, at least two of the witnesses before the Committee in May 2023 were deponents for the purposes of the underlying certification motion more than 18 months prior to their attendance before the Committee. There is no evidence offered as to why the evidence they gave before the Committee could not have been adduced prior to the end of cross-examinations in December 2023.

[62] Given the Plaintiffs' failure to lead evidence that the evidence of the 24 witnesses referred to in the Senate CHRC Report and reflected in the Senate Transcripts could not have been adduced at an earlier date, I must conclude that the Plaintiffs have not met the first branch of the applicable test for leave to adduce new evidence after cross-examinations on affidavit have been completed.

**(2) The relevance of the proposed evidence**

[63] As noted above, the Senate CHRC Report and the Senate Committee Transcripts it is created from contains the unsworn experiences, anecdotes, hearsay, opinions, comments and recommendations made by various witnesses with respect to the Clerk of the Privy Council's January 2021 "Call to Action on Anti-Racism, Equity, and Inclusion in the Federal Public Service", the federal government's role in creating a culture of rights, systemic discrimination in the CHRC as assessed through experiences of discrimination, the CHRC's steps taken in response, and proposed reforms to the CHRC that could address anti-black discrimination.

[64] The relevance of this proposed evidence is determined by reference to the issues on the underlying certification motion.

[65] The Court must bear in mind that the Plaintiffs are clear in their written representations, as discussed above, that their intention is not to rely on these documents for the truth of their content, or to have them tendered as the basis of material facts for the Court's consideration on the certification motion, while still relying on them to provide "some basis in fact" for certification to be ordered. In essence, the Plaintiffs argue that the content of neither the Senate CHRC Reports nor the Senate Committee Transcript should be considered as evidence in a traditional, legal sense to establish facts in a legal proceeding, but be used as evidence anyway, to assist them in satisfying their burden of proof based on admissible evidence on the certification motion.

[66] The Plaintiffs appear to acknowledge in their written representations that the transcripts include hearsay evidence, but that they remain admissible as evidence on the underlying certification motion because of Rule 81 of *Rules.* They add that they should be admitted as evidence in any event, and even if they are hearsay evidence, because the Plaintiffs do not seek to rely on the truth of the content of the documents.

[67] The Plaintiffs' argument is rejected. Rule 81 is of no assistance to them on this motion. Rule 81 applies to the permitted use of statements of a deponent's belief in an affidavit if the grounds for the belief are set out in the affidavit itself. The Rule is conceived of in this manner so as to provide the adverse party with sufficient information upon which to test the deponent's belief on cross-examination. It is not a licence for the inclusion of double or triple hearsay, nor a vehicle for the admission of untested and likely untestable anecdotal evidence or opinions, comments, and recommendations from non-experts through the use of exhibits. It is certainly not a vehicle for the inclusion of such otherwise inadmissible evidence that the producing party proposes the Court should rely on.

[68] The Plaintiffs argue that the Senate CHRC Report and the Senate Transcripts are relevant to the underlying certification motion because they provide "additional context" with respect to the internal processes of the CHRC and are the extension of the evidence relied upon on the certification motion through the affidavits of Charles Vezina, Marie-Josée Frenette, Raj Anand, Wendy Cukier and unnamed others. Neither Charles Vezina, Marie-Josée Frenette, Raj Anand, Wendy Cukier appeared before the Committee. They did not make any submissions to the Committee. Neither they nor their affidavit evidence were mentioned before the Committee with the exception of Mr. Vezina and the reference his

in affidavit to the grievances that were referred to in the Committee report as part of the impetus for its short study. It is illusory to argue that unsworn statements given by persons other than the subject deponents themselves could be considered as "an extension" of their sworn evidence.

[69] The "additional context", they argue, is relevant to the Court's determination of whether a class proceeding is the preferable procedure to be used in this proceeding because it will provide further context to enable the Court to fairly assess the affidavit evidence provided by Charles Vezina, Marie-Josée Frenette, Raj Anand, Wendy Cukier and unnamed others witnesses who speak to the question of the efficacy of the CHRC as a forum for resolving discrimination complaints.

[70] The Plaintiffs make this argument on the basis of the evidence contained in paragraphs 18 and 19 of Jeff Childs' affidavit of sworn on April 18, 2024.

[71] The content of paragraphs 18 and 19 of Mr. Childs' affidavit have no weight before me as they are not statements of material fact. They are opinion and argument. Argument in an affidavit is improper, contrary to Rule 81 of the *Rules,* and ought to given no weight or be struck entirely (*Canada (Attorney General) v Quadrini*, 2010 FCA 47 (CanLII), *at para 18; Lukács v Canada (Transportation Agency),* 2019 FC 1256 (CanLII) at para 32; *Akme Poultry Butter & Eggs Distributors Inc. v Canada (Public Safety and Emergency Preparedness),* 2024 CanLII 30068 (FC) at paras 25 and 26).

[72] Assuming for the sake of argument that the Plaintiffs' argument as to the use of the additional context is supported by admissible evidence on this motion, which it is not, the Plaintiffs are urging the Court to use hearsay, unsworn and untested testimony, opinion and anecdotes collected through the Committee process to assess the sworn affidavit evidence given by persons who did not appear before the Committee, have sworn affidavits that pre-date the Committee's three days of *viva voce* evidence, are not mentioned in the Committee's transcripts or report, and either have been or could have been cross-examined in the context of this proceeding. The Plaintiffs' argument as framed is untenable upon the consideration of basic principles of how affidavit evidence is assessed on a motion and whether other actual admissible evidence contradicts filed affidavit evidence. Neither the Senate CHRC Report nor the Senate Committee Transcripts nor their content are relevant for the purpose of the court's consideration of Charles Vezina, Marie-Josée Frenette, Raj Anand, Wendy Cukier's affidavit evidence sworn and filed for the certification motion as they would not be admissible as evidence of the truth of their content in any event.

[73] I find that the Plaintiffs have not established that the Senate CHRC Report or of the Senate Committee Transcripts are relevant to the underlying certification motion.

**(3) The absence of prejudice to the opposing party**

[74] Although the Defendant has not led any affidavit evidence of any prejudice it would suffer if leave was granted for the Plaintiffs to include the Senate CHRC Report and the Senate Committee Transcripts, the existence of prejudice arising from leave being granted is apparent. The Defendant will be unable to test the evidentiary findings made in

the Senate CHRC Report, or to cross examine the witnesses that appeared before the Senate Committee in person or in writing. This loss of opportunity is clearly prejudicial to the Defendant (*Robb v St. Joseph's Health Care Centre*, [1998] O.J. No. 5394 (Gen. Div.), at para 23, aff'd [2001] O.J. No. 4605 (C.A.) at para. 210).

[75] The Plaintiffs have not satisfied me that there is no prejudice to the Defendant.

[76] The Plaintiffs argue in their written representations that the Court would be prejudiced by the exclusion of the Senate CHRC Report and of the Senate Committee Transcripts. I must reject this assertion for the reasoning set out by Justice Perell in *Shah v LG Chem, Ltd*., 2015 ONSC 776 at para 38:

> [38] As noted above, however, the plaintiffs submit that it is in the interests of justice to grant leave because the court itself would be prejudiced by the absence of the additional evidence because the court would be missing important information relevant to the jurisdiction analysis.
>
> [39] However, in the context of an adversarial system of justice, where there are rules of civil procedure and rules of evidence, I do not see how the court can be said to be prejudiced if it enforces the rules of civil procedure and the law of evidence.
>
> [40] I cannot speak for the inquisitorial system, because Ontario courts operate under the adversarial system, and under that system, with rules of engagement that include rules of civil procedure and the law of evidence, the opposing parties have a great deal of control over the evidence, and judges are frequently denied important information possibly relevant to coming to a decision or information a judge might just be curious about. That denial of information does not amount to the court being prejudiced. In any event, litigation under an adversarial system is not about the court's interest or curiosity; the administration of justice is about the parties' procedural and substantive rights, not the court's right to have information to decide cases.

**(4) How the proposed evidence would be of assistance to the Court in disposing of the motion**

[77] The Plaintiffs' argument with respect to how the proposed evidence would be of assistance to the Court was dealt with above with respect to the proposed evidence's relevance to the certification motion.

[78] The reasoning set out there applies equally here. The Plaintiffs have not established how the Senate CHRC Report, or the Senate Transcripts would be of assistance to the Court in disposing of the certification motion.

**F. Conclusion on the motion for leave to introduce evidence after cross-examinations**

[79] The Plaintiffs have not satisfied the applicable test for leave to introduce evidence after cross-examinations pursuant to Rule 84(2) with respect to the Senate CHRC Report or the Senate Committee Transcripts. The Plaintiffs' motion in this regard is therefore dismissed.

[80] As the motion for leave to introduce the Senate CHRC Report and the Senate Transcripts as evidence after cross-examinations is dismissed at the leave stage, there is no need for the Court to consider whether the Senate CHRC Report or the Senate Committee Transcripts would be subject to parliamentary privilege. The Court makes no finding or order on this issue.

**THIS COURT ORDERS** that:

1. The Plaintiffs' motion is granted in part and dismissed in part.

2. The Plaintiff Ms. Shalane Rooney is hereby removed as a party Plaintiff in this proceeding pursuant to Rule 104(1)(a) of the *Rules*, without costs, and shall be removed from the style of cause.
3. Leave is granted for the Plaintiffs to serve additional affidavit evidence to include the following documents in its motion materials for use on its certification motion:
    a) The Report of The Employment Equity Act Review Taskforce dated January 8, 2024; and,
    b) The Auditor General's Report on the Inclusion of Racialized Employees in the Workplace dated October 19, 2023.
4. The Plaintiffs' additional affidavit evidence as contemplated in paragraph 3 above, shall be served and filed through a supplementary motion record by no later than **July 15, 2024**.
5. Leave is granted to the Defendant for him to serve additional evidence in response to the
    a) The Report of The Employment Equity Act Review Taskforce dated January 8, 2024;
    b) The Auditor General's Report on the Inclusion of Racialized Employees in the Workplace dated October 19, 2023.
6. The Defendant's additional affidavit evidence as contemplated in paragraph 5 above, shall be served and filed through a supplementary responding record by no later than **August 2, 2024**.
7. The Plaintiffs' motion for leave to serve and file additional affidavit evidence to include:

a) the Senate Committee's Report on Anti-Black Racism, Sexism and Systemic Discrimination in the Canadian Human Rights Commission dated December 11, 2023; and,

b) the transcripts from public hearings conducted by the Standing Senate Committee on Human Rights on May 1, May 8 and May 15, 2023, preceding the Senate CHRC Report and are associated with it;

in its motion materials for use on its certification motion is dismissed.

8. The whole, without costs.

"Benoit M. Duchesne"
Case Management Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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|---|---|
| **DOCKET:** | T-1458-20 |
| **STYLE OF CAUSE:** | NICHOLAS MARCUS THOMPSON, JENNIFER PHILLIPS, MICHELLE HERBERT, KATHY SAMUEL, WAGNA CELIDON, DUANE GUY GUERRA, STUART PHILP, SHALANE ROONEY, ~~YONITA PARKES~~, DANIEL MALCOLM, ALAIN BABINEAU AND BERNADETH BETCHI, CAROL SIP, MONICA AGARD, AND MARCIA BANFIELD SMITH v HIS MAJESTY THE KING |
| **HEARD:** | VIRTUALLY, ON APRIL 9 AND 24, 2024 |
| **REASONS FOR JUDGMENT AND JUDGMENT:** | DUCHESNE AJ. |
| **DATED:** | JULY 8, 2024 |

APPEARANCES

| | |
|---|---|
| Courtney Betty<br>Hugh Scher<br>Glyn Hotlz | FOR THE PLAINTIFS |
| Mahyar Makki<br>Paul J. Martin<br>David A. Ziegler<br>Frederic Gilbert<br>Caroline Youdan | FOR THE DEFENDANT |

**SOLICITORS OF RECORD:**

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