CONFIDENTIAL

EVIDENTIARY REVIEW

Royal British Columbia Museum (RBCM)

May 14, 2021

Evidentiary Review conducted by:

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ROYAL BRITISH COLUMBIA MUSEUM
EVIDENTIARY REVIEW

I. BACKGROUND, MANDATE AND FRAMEWORK

1. The Royal British Columbia Museum (the "RBCM") was founded in 1886. In 2003, it joined with the BC Archives to become British Columbia's combined provincial museum and archives, collecting artifacts, documents and specimens of British Columbia's natural and human history.[1] It is located on the traditional territories of the Lekwungen (Songhees and Xwsepsum Nations)[2] and hosts three (3) permanent galleries (Becoming BC, Natural History, and First Peoples galleries).[3]

2. On September 7, 2016, former Premier Christy Clark announced the Province's agreement to provide $2 million to the RBCM to support all interested Indigenous peoples in British Columbia seeking the return of their ancestral remains and belongings of cultural significance. This plan was under the guidance of Professor Jack Lohman, now former CEO of the RBCM. As part of the plan, the RBCM created a new First Nations department and repatriation program currently known as the Indigenous Collections and Repatriation department or "ICAR".[4]

3. On or around July 6, 2020, Lucy Bell, Head of ICAR, tendered her resignation after working at the museum for approximately three and a half (3 ½) years.

4. On July 24, 2020, the RBCM held a going away event to celebrate Ms. Bell's time at the museum. The meeting was attended by approximately sixty (60) individuals. During this event, Ms. Bell gave a speech which was video recorded by participants. In it, she stated that she made

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[1] https://royalbcmuseum.bc.ca/about/museum-information/history-museum.

[2] https://royalbcmuseum.bc.ca/.

[3] Ibid.

[4] https://news.gov.bc.ca/releases/2016PREM0096-001618.

the decision to leave the museum due to racism and gave numerous examples of statements and actions she and her family experienced.

5. On or about September 3, 2020, the Public Service Agency (the "PSA") engaged me to investigate s.22 reports of racism.

s.22

s.22 As such, my mandate was expanded to include their reports of discrimination and racism.

8. This employment investigation centered on reports of racist and discriminatory acts s.22

s.22 Accordingly, the investigation was not intended to focus on issues relating to systemic discrimination by the institution generally.[s.22]

s.22

9. Overall, this was a complex investigation which was given a high profile by the media and within the RBCM. In addition, it was a large-scale investigation encompassing s.22 complainants and s.22 respondents, s.22

s.22 In total, thirty-one (31) allegations were investigated in this process.

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10. In light of the foregoing, my mandate was to consider on the basis of the evidence gathered in the investigation, whether on the balance of probabilities, the events reported by the Complainants occurred and whether any of the actions or events that did occur constitute a breach of applicable policy and/or the below referenced legislation.[6]

Legal and Policy Framework

11. I have reviewed the reports by the Complainants against a legal framework guided by the BC Human Rights Tribunal (BCHRT), the Canadian Human Rights Tribunal (CHRT) and other provincial human rights tribunals and courts, including the Supreme Court of Canada. Some language about identifying racism is used in this report; definitions for unique terms such as 'microaggression' and 'tokenization' are included where necessary for the discussion to be understood. It must be noted that the parties and witnesses occasionally used these terms and others during our interviews, and where any such terms appear in quoted evidence without a definition provided by the witness, it is not guaranteed that their working definitions of the terms were the same as my own.

12. I have also considered the applicable legislation, starting first and foremost with *British Columbia's Declaration on the Rights of Indigenous Peoples Act*, 2019, c 44 ["DRIPA"]; *the United Nations Declaration on the Rights of Indigenous Peoples*, GA Res. 61/295, UN GAOR, 61st Sess., Supp. No 49 Vol III, UN Doc A/61/49 (2007) ["UNDRIP"]; *the Human Rights Code*, RSBC 1996, c 210; and the *Workers Compensation Act*, RSBC 2019, c 1.

Declaration on the Rights of Indigenous Peoples Act (DRIPA)

13. DRIPA came into force on November 28, 2019. One of the purposes of DRIPA (set out in s. 2) is to affirm that UNDRIP applies to the laws of British Columbia. Section 3 of DRIPA further sets out that the government must take all measures necessary to make British Columbia laws consistent with UNDRIP, in consultation and cooperation with Indigenous peoples.

[6] It should be noted that the scope of my investigation is limited to the witnesses and evidence that I reviewed and does not provide a complete review of RBCM, its policies, or its employees as a whole.

14. While UNDRIP has arguably applied to the laws of British Columbia since Canada first endorsed it on November 12, 2010, the implementation of DRIPA makes explicit that this is the case. Accordingly, UNDRIP must be the lens through which the *Human Rights Code* (the "Code") and the *Workers Compensation Act* (the "Act") are interpreted and applied to the facts of this investigation.

United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)

15. UNDRIP was adopted by the United Nations General Assembly on September 13, 2007 and endorsed by Canada on November 12, 2010. Canada then endorsed the declaration again "without reservation" in 2016.

16. The relevance of UNDRIP in Canada was discussed by the Canadian Human Rights Tribunal in *First Nations Child and Family Caring Society of Canada et al. v. Attorney General of Canada (for the Minister of Indian and Northern Affairs Canada)*, 2016 CHRT 2 and the Tribunal confirmed "when Canada endorsed [UNDRIP], it reaffirmed its commitment to "improve the well-being of Aboriginal Canadians"[7] and that "specific measures, including of a budgetary nature, are often required in order to achieve substantive equality."[8]

17. Several articles of UNDRIP are relevant to issues raised by the Complainants, as well as to the interpretation of the Code and the Act through a lens of reconciliation and anti-racism. Some parts of UNDRIP referenced throughout the report and the relevant articles from the declaration are excerpted in the attached Appendix A to this report.

Truth and Reconciliation Commission of Canada ("TRC") Calls to Action

18. In 2015, the TRC published its final report on the experiences of Indigenous people who went through the residential school system, recording testimony from more than 6,000 residential school survivors about the impacts those experiences had on them. Along with its final report, the

[7] Canada's Statement of Support on the United Nations Declaration on the Rights of Indigenous Peoples, November 12, 2010, online: Indigenous and Northern Affairs Canada http://www.aadnc-aandc.gc.ca>
[8] At paras. 452-453

TRC published 94 Calls to Action to work toward reconciliation with Indigenous peoples in Canada, which included actions to be taken in child welfare, education, health, justice, language, culture, and museums and archives, among others.

19. Some of the 94 Calls to Action published by the TRC are relevant to the subject matter of these complaints, and they are excerpted in the attached Appendix B to this report.

RBCM Mandate Letter

20. As a Crown corporation, the RBCM receives an annual mandate letter from the provincial government. The 2016-17 mandate letter stated (emphasis added):

> *Government provided the following mandate direction to the Royal BC Museum under the Museum Act (2003):*
>
> - *The RBCM is required to fulfil the government's fiduciary role of public trustee to:*
>
> - *Secure, receive and preserve specimens, artifacts, and private archival records and other material that illustrate the natural and human history of British Columbia;*
>
> - *manage the museum archives of government;*
>
> - *communicate knowledge of human and natural history through exhibitions, research, publications and programs; and*
>
> - *hold and make accessible these collections for current and future generations of British Columbians.*
>
> *To achieve this mandate, the Royal British Columbia Museum is directed to take the following strategic actions:*
>
> ...
>
> - *With guidance from the RBCM's First Nations Advisory Council, respond to the relevant Truth and Reconciliation Commission recommendations related to museums and archives in future programming and planning.*

21. The museum's 2017-18 mandate letter included more pointed instructions (emphasis added):

> *To support true and lasting reconciliation with First Nations in British Columbia, our government will be fully adopting and implementing the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), and the Calls to Action of the Truth and Reconciliation Commission. Please ensure that going forward your organization incorporates the UNDRIP and Calls to Action, given the specific mandate and context of your organization.*

The Human Rights Code

22. The Code prohibits discrimination in employment because of race, colour and sex (among other grounds). It states:

> *Discrimination in employment*
>
> *13(1) A person must not*
>
> *(a) refuse to employ or refuse to continue to employ a person, or*
>
> *(b) discriminate against a person regarding employment or any term or condition of employment*
>
> *because of the race, colour, ancestry, place of origin, political belief, religion, marital status, family status, physical or mental disability, sex, sexual orientation, gender identity or expression, or age of that person or because that person has been convicted of a criminal or summary conviction offence that is unrelated to the employment or to the intended employment of that person.*

23. As noted by the B.C. Court of Appeal, a bare assertion of discriminatory conduct is not sufficient (*Chen v. Surrey (City)*, 2015 BCCA 57 at para. 31). There must be more than speculation that discrimination has occurred: *Middlemiss v. Norske Canada Ltd*., 2002 BCHRT 5; *Giesbrecht v. Pacific Marine Contracting and another*, 2018 BCHRT 145; *Helm v. RBC Life Insurance Co*., 2013 BCHRT 282.

24. To establish discrimination under the Code, the following factors must be established:

a) The complainant has a personal characteristic (or is perceived to have a characteristic) protected under the Code;

b) The complainant experienced an adverse or negative effect [with respect to an area protected by the Code]; and

c) The personal or protected characteristic was a factor in the adverse effect.[9]

25. Regarding the first element of this test, the protected personal characteristic (in this case, race) need only have been **a** factor in the respondent's conduct or the impact of that conduct on the complainant.

26. There is no requirement to establish that a respondent intended to contravene the Code as a prerequisite to finding that their conduct was discriminatory.[10] Accordingly, courts have eliminated the distinction between so-called "direct" and "indirect" discrimination, because that distinction is rooted in the respondent's intent; at this first stage of the analysis, the evidence is to be evaluated through the lens of the complainant's experiences and the adverse impact they are alleging. The Supreme Court of Canada has noted that maintaining a distinction between direct and indirect discrimination may act to legitimize systemic discrimination, because so-called neutral policies and practices can have an unjustifiable adverse impact on a protected class of people.[11]

27. The second component of the test set out above is dependent on the context; in this case, the Complainants must establish that they experienced a negative effect in the employment context. The Tribunal has identified "a negative effect in the employment context" as including refusing to hire; denying a promotion; discipline; denying benefits; refusing to return someone to work; harassment based on a personal characteristic that negatively affects the work environment or leads to negative job-related consequences; and ending employment.

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[9] *Moore v. British Columbia (Education)*, 2012 SCC 61 ["*Moore*"] at para. 33.
[10] *Code* at section 2.
[11] *Moore* at paras. 58-63.

28. The third component of the test - the connection between the adverse effect and the protected characteristic - is typically the most difficult to establish. Whether a protected characteristic is a factor in an adverse treatment is largely a question of fact. In *Vancouver Area Network of Drug Users v. Downtown Vancouver Business Improvement Association*, 2018 BCCA 132, leave to appeal refused, [2018] S.C.C.A. No. 226 at para. 62, the Court described the required connection as follows:

> *...Courts have recognized the equivalency of such words as "connection", "factor", "nexus", and "link" in describing the association that must exist between adverse treatment and prohibited grounds of discrimination. On occasion, they have also used the language of "causation"... discussion of "causation" is generally best avoided, lest it be confused with the concept of "causation" in other areas of the law, which may involve "but for" tests and may import issues of the exclusivity, proximity, or dominance of a cause. The link required to found a claim under the Code need not satisfy the usual criteria that we associate with causation in other areas of the law. According to the caselaw, the adverse treatment must be "based in part" on the protected characteristics, or, the protected ground "need only have contributed to" the discriminatory acts. While this is not the strict causation applied in cases of civil liability, this language does describe an attenuated form of causation. This is what the Code means when it uses the words "because of".*

Reasonable Inference

29. The BCHRT remarked on the difficulty of proving racism in *Mezghrani v. Canada Youth Orange Network (CYON) (No. 2)*, 2006 BCHRT 60, and noted that racial discrimination "is frequently subtle" and "direct evidence of racial discrimination is rarely available", such that the discrimination "must often be inferred from the conduct in issue." According to the BCHRT's recently published report *Expanding Our Vision: Cultural Equality & Indigenous Peoples' Human Rights*, "the burden of proof may be well beyond the capabilities of individual Indigenous complainants.[12]

[12] Ardith Walpetko We'dalx Walkem, QC, *Expanding Our Vision: Cultural Equality & Indigenous Peoples' Human Rights* (2019) ["*Expanding Our Vision*"] at 30.

30. While inferences are permitted, "the subtlety of prejudice does not transform it into a presumption of prejudice under the Code: *Student A v. Institutional Respondent and others,* 2017 BCHRT 13 at para. 94": *Richardson v. Great Canadian Casinos and another*, 2019 BCHRT 265 at para. 144. Any inference of discrimination must be rooted in the objective evidence of a particular case: *Bombardier* at para. 88; *Batson-Dottin v. Forensic Psychiatric Hospital (No. 2)*, 2018 BCHRT 246 at para. 82. As set out in *Seyed-Ali v Central City Brewers and Distillers Ltd. (No.3)*, 2021 BCHRT 28 at para. 141 (emphasis added):

> *The Tribunal recognizes that racial discrimination is often subtle, direct evidence of it is rarely available, and such discrimination can be inferred from circumstantial evidence:* Mezghrani v. Canada Youth Orange Network Inc.*, 2006 BCHRT 60. However, there must be objective evidence to form the basis of that reasonable inference. In* Francis v. BC Ministry of Justice (No. 3)*, 2019 BCHRT 136 at para. 283, the Tribunal stated:*
>
> > *However, that is not the end of the analysis. I accept the Respondent's argument that there must be objective evidence from which any such reasonable inferences can be drawn. It is not enough that Francis subjectively believed or perceived that he had been treated adversely because of his race. Rather, his belief must be that of a reasonably objective observer. In short, a finding that engages s. 13 of the Code must be based on objective evidence and established on a balance of probabilities.* (emphasis added)

31. Regarding what is a "reasonably objective observer", the Tribunal further stated in *Francis v. BC Ministry of Justice (No. 3)*, 2019 BCHRT 136 at para. 284 "Establishing what constitutes a reasonably objective observer in the context of race discrimination cases is challenging. There are "no bright lines" in cases where discrimination must be proven by circumstantial evidence, and these cases are often "difficult" and "nuanced": *Shaw v. Phipps*, 2010 ONSC 3884 [71 C.H.R.R D/168]; aff'd 2012 ONCA 155 [75 C.H.R.R. D/246]; cited with approval in *Brar*[13], infra, para. 716."

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[13] *Brar v. British Columbia Veterinary Medical Assn. (No. 22)*, 2015 BCHRT 151 *[82 C.H.R.R. D/104]*

32. Establishing the evidence on a balance of probabilities means that the standard of proof requires that the inference be more probable than not; however, it need not be the only other rational explanation: *Vestad v. Seashell Ventures Inc*, 2001 BCHRT 38 at para. 44; *Campbell v. Vancouver Police Board (No. 4)*, 2019 BCHRT 275 at para. 103. A respondent may rebut an inference of discrimination by providing a reasonable non-discriminatory explanation for their conduct: *Probyn v. Vernon Dodge Jeep*, 2012 BCHRT 87 at para. 28.

33. The Tribunal has stated that discrimination may, in some cases, "only reveal itself gradually over a series of events." See, for example, *Gichuru v. Pallai (No. 2)*, 2010 BCHRT 125 at para. 95 and *Ibrahim v. Intercon Security Ltd*., 2007 BCHRT 201 at paras. 71-80. It has also indicated that context is important to the analysis.

34. In *Francis* supra (at para. 284) the Tribunal noted that "[a] contextual examination of all relevant circumstances is often required to identify the "subtle scent of discrimination": *Kennedy v. British Columbia (Energy and Mines) (No. 4)*, 2000 BCHRT 60 [39 C.H.R.R. D/42], para. 168. For example, one such contextual circumstance is any historical disadvantage experienced by the group: *Mezghrani v. Canada Youth Orange Network Inc. (CYONI) (No. 2)*, 2006 BCHRT 60 [CHRR Doc. 06-066], para. 28".

35. In *Campbell v. Vancouver Police Board (No. 4)*, 2019 BCHRT 275 at paras. 104-105, the Tribunal noted:

> *...indeed it is undisputed, that the social context of this interaction is not enough, on its own, to prove that Ms. Campbell was discriminated against. In other words, the fact that she is Indigenous and had an adverse encounter with the police does not mean that she was discriminated against.*
>
> *That said, the facts of this complaint – like many race-based complaints – can only be properly understood within their broader social context: Campbell at paras. 16-19. In large part, this is because:*
>
> > *Individual acts themselves may be ambiguous or explained away, but when viewed as part of the larger picture and with an appropriate understanding of how racial discrimination takes place, may lead to an inference that racial discrimination was a factor in the treatment an individual received.*
> >
> > *OHRC Guidelines at p 21*

To this I add that a proper understanding of the social context may support a finding that an individual has experienced a race-based adverse impact.

36. Based on the foregoing, it is important to address the context of this investigation. RBCM, like most museums, has a history in colonialism. It has custody and control of what some label as "artifacts" and others describe as "belongings" of Indigenous communities across BC. The Museum acknowledges in its policy on repatriation that "many cultural materials were alienated from Indigenous peoples during the period when the potlatch and other indigenous cultural practices were illegal under the Indian Act"[14]. It also holds the ancestorial remains of Indigenous people which, until recently, have been acquired by the museum through "a variety of circumstances and from a variety of sources including anthropological collecting, archaeological excavations, the coroner's office and the Royal Canadian Mounted Police".[15]

37. It has been clearly established through the TRC that Canada's relationship with and treatment of Indigenous peoples has caused harm which is ongoing and impacts successive generations. For many Indigenous people, the museum's control of ancestral remains is much more than just emotionally triggering, it represents the continued suffering and dismantling of their cultures, communities, and families. For many Indigenous employees of the RBCM, they work and interact with the Indigenous artifacts which may include their own families' or communities' ancestral remains or cultural materials. A further important component of the backdrop to this investigation is the museum's mandate letter which states that in order to support true and lasting reconciliation with First Nations in British Columbia, RBCM must incorporate UNDRIP and the TRC's Calls to Action. In this context, there is a heightened and significant cultural sensitivity in which the Complainants' reports of discrimination must be considered.

Poisoned Work Environment

38. I have also considered the concept of poisoned work environment.

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[14] Indigenous Collections and Repatriation Policy | Royal BC Museum and Archives | Victoria, BC, Canada
[15] Ibid.

39. In *Brar* supra, the Tribunal identified a number of factors that might constitute a poisoned work environment, including:

> – *Even a single statement or incident, if sufficiently serious or substantial, can have an impact on a racialized person by creating a poisoned environment.*
>
> – *A poisoned environment is based on the nature of the comments or conduct and the impact of these on an individual rather than on the number of times the behaviour occurs. As mentioned earlier, even a single egregious incident can be sufficient to create a poisoned environment.*
>
> – *A poisoned environment can be created by the comments or actions of any person, regardless of his or her position of authority or status in a given environment.*
>
> – *Behaviour need not be directed at any one individual in order to create a poisoned environment. Moreover, a person can experience a poisoned environment even if he or she is not a member of the racialized group that is the target. (at para. 741)*

40. Management personnel who know or ought to know of the existence of a poisoned atmosphere but permit it to continue thereby discriminate against affected employees, even if they themselves are not involved in the production of that atmosphere: *Kinexus Bioinformatics Corp. v. Asad,* 2010 BCSC 33; *Ghosh v. Domglas Inc. (No.2)* (1992), 17 C.H.R.R. D/216 at para. 76 (Ont. Bd. Inq.).

Systemic Discrimination

41. The BC Human Rights Tribunal discussed systemic discrimination in *Radek v. Henderson Development (Canada) and Securiguard Services (No. 3)*, 2005 BCHRT 302 ["Radek"] and stated at para. 501:

> *The leading case on systemic discrimination remains the decision of the Supreme Court of Canada in C.N.R. v. Canada (Human Rights Commission), 1987 CanLII 109 (SCC), [1987] 1 S.C.R. 1114 (better known as "Action Travail des Femmes"). In that case, the Court adopted the following description of systemic discrimination contained in the 1984 Report of the Commission on Equality in Employment by Judge Rosalie Abella (as she then was):*

> *Discrimination ... means practices or attitudes that have, whether by design or impact, the effect of limiting an individual's or a group's right to the opportunities generally available because of attributed rather than actual characteristics ... It is not a question of whether this discrimination is motivated by an intentional desire to obstruct someone's potential, or whether it is the accidental by-product of innocently motivated practices or systems. If the barrier is affecting certain groups in a disproportionately negative way, it is a signal that the practices that lead to this adverse impact may be discriminatory.*
>
> *That is why it is important to look at the results of a system…. (at para. 34).*

42. *Radek* reviewed the evidentiary requirements needed to establish systemic discrimination and stated at para. 509:

> *In my view, the nature of the evidence necessary to establish systemic discrimination will vary with the nature and context of the particular complaint in issue. If the remedial purposes of the Code are to be fulfilled, evidentiary requirements must be sensitive to the nature of the evidence likely to be available. In particular, evidentiary requirements must not be made so onerous that proving systemic discrimination is rendered effectively impossible for complainants. In my view, to accept the respondents' arguments with respect to the necessity of statistical evidence, would, in the context of a complaint of the type before me, render proof of systemic discrimination impossible.*

43. *Radek* also discussed at paras. 539-540 the relative weight, or lack thereof, that should be given to evidence that other racialized people were not discriminated against in the same context:

> *...[T]he fact that one or two Aboriginal security guards may have been employed at the mall over the four year period about which I heard testimony, or that some Aboriginal people may have had no problems at the mall, does not prove that other Aboriginal people were not discriminated against.*

44. It should be noted that poor workplace treatment of someone with a protected characteristic does not, in itself, amount to systemic racism: *Seyed-Ali v Central City Brewers and Distillers Ltd. (No.3)*, 2021 BCHRT 28 at para. 144:

> *The Code does not protect people from general bullying and harassment. The Code only protects individuals from bullying and harassment that is connected to a protected characteristic:* Complainant v. Douglas College and another*, 2019 BCHRT 5 at para 40;* Curtis v. Fraternal Order of Eagles and others*, 2012 BCHRT 45. Mr. Seyed-Ali must show that Mr. Black's bullying and harassment towards him was connected to his ethnicity.*

45. Systemic racism is found in broader policies and practices that enable individual acts of discrimination. Some of these individual acts, in this discriminatory framework, may be relatively small or benign-seeming actions but that does not mean the harm suffered is small or benign.

46. The *Expanding Our Vision* report adds at page 23:

> *When racism is pervasive, unnamed and unacknowledged, Indigenous Peoples' attempts to address it can lead to subtle forms of retaliation or "gaslighting", including disbelief, minimization, or arguments that Indigenous Peoples are "playing the race card". The BCHRT in* Radek [at para. 524] *observed that "Once an individual's actions were labelled in this way, they could be discounted and ignored. Any possibility of consideration of the genuineness of an allegation of racial discrimination was foreclosed after the application of the label."*

Microaggressions

47. "Microaggression" is a relatively new term used to describe "the subtle, mostly nondeliberate biases and marginalizations that ultimately [add] up to serious assaults"[16]; these covert instances of discrimination are targeted at individuals from marginalized groups, are chronic and can occur daily.[17] In some contexts, these experiences of marginalized people are understood as racial profiling, such as when an Indigenous person is followed or stopped by staff or security

[16] *Expanding Our Vision, supra* at 20-21.
[17] Ibid.

in a store – sometimes referred to as "shopping while Indigenous"[18] – or a Black person is pulled over by police for no clear reason, an experience described in the U.S. as "driving while Black".[19]

48. These everyday expressions of prejudice are enabled by power structures and can be subtle enough that they are difficult to prove. In this sense, they can be classified as systemic discrimination.[20] In addition to the definition of systemic discrimination referred to above and cited in *Radek*, the Supreme Court of Canada defined systemic discrimination in the employment context in *Action Travail des Femmes* at page 1139, referring to Justice Abella's Royal Commission report[21]:

> *In other words, systemic discrimination in an employment context is discrimination that results from the simple operation of established procedures of recruitment, hiring and promotion, none of which is necessarily designed to promote discrimination. The discrimination is then reinforced by the very exclusion of the disadvantaged group because the exclusion fosters the belief, both within and outside the group, that the exclusion is the result of "natural" forces, for example, that women "just can't do the job" (see the* Abella Report*, pp. 9-10).*

49. The subtle and everyday nature of microaggressions can make them difficult to identify, especially for a person who has not had firsthand experience of systemic discrimination to draw upon. The *Expanding Our Vision* report offers three types of microaggressions and examples at page 21 to assist us:

> *In the American Indian context, "micro-discriminations" are more commonly referred to "microaggressions" which are chronic and covert: "They are defined as 'events involving discrimination, racism, and daily hassles that are targeted at individuals from diverse racial and ethnic groups.' Microaggressions are chronic and can occur on a daily basis." Wing Sue and his colleagues identify three types of microaggressions, with Indigenous examples added:*

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[18] Ibid.
[19] See for example, *Commission des droits de la personne et des droits de la jeunesse (DeBellefeuille) c. Ville de Longueuil,* 2020 QCTDP 21 at para 210. It is worth noting that this term has gained wider exposure since the Black Lives Matter movement.
[20] *Expanding Our Vision, supra* at 30-31.
[21] Abella, Rosalie S., *Report of the Commission on Equality in Employment*. Ottawa: Minister of Supply and Services Canada, 1984 ["*Abella Report*"].

- *Microinsults: "communications that convey rudeness and insensitivity and demean a person's racial heritage" (i.e. eye rolling);*

- *Microinvalidations: "communications that exclude, negate or nullify the psychological thoughts, feelings, or experiential reality of a person of color" (i.e. "I don't see colour" which denies the experiences of racialized people, or asking if someone is "really Indigenous"); and*

- *Microassaults: "explicit racial derogation[s] characterized primarily by a verbal or nonverbal attack meant to hurt the intended victim" (i.e. avoiding people of a particular race, associating Indigenous Peoples with aggressive imagery, alcohol use or theft).*

50. During this investigation, there were incidents presented in the evidence which matched these examples. Other reported incidents were more difficult to identify as racial microaggressions, other types of harassment, or just negative interactions in the employment context. There is also little guidance in the legal literature on this topic, likely because it is an emerging discussion. The challenge in determining whether a seemingly innocuous comment or action was motivated by a discriminatory stereotype or bias makes its necessary to rely on the broader context and circumstantial evidence in arriving at conclusions. In this investigation, I relied on the prima facie discrimination test from the case law and treated the reported microaggressions as reported acts of discrimination, and to evaluate the evidence for each of those reported acts, I relied on the framework for inferring discrimination discussed above.

51. Regarding which party bears the onus or burden of proof in a claim of discrimination under the Code, I note the BCHRT's comments in *Francis* supra: "The onus is on [the complainant] to establish his case on a balance of probabilities: *Ontario (Human Rights Comm.) and O'Malley v. Simpsons-Sears Ltd.*, 1985 CanLII 18 (SCC), [1985] 2 S.C.R. 536, p. 558 [7 C.H.R.R. D/3102, para. 24782]. If he establishes his case, the burden shifts to the respondent to establish a bona fide and reasonable justification for its conduct: *Moore* at para. 33. At the outset, I acknowledge that such bona fides are rarely established in cases involving racial discrimination…" (at para. 278 and 279).

Bona Fide Occupational Requirement (BFOR)

52. A respondent employer may have grounds to rely on s. 13(4) of the Code as a defence:

(4) Subsections (1) and (2) do not apply with respect to a refusal, limitation, specification or preference based on a bona fide occupational requirement.

53. In a Tribunal proceeding, it is important that the BFOR analysis not occur until after the complainant has established prima facie discrimination. The position of the respondent, including hardship, motive, efforts to accommodate, and state of mind, is not relevant to any part of the three-step test because their intent is not considered as a factor in the analysis.

54. To succeed with a BFOR defence, the respondent must establish:

a. *that the discriminatory practice has a legitimate general purpose, rationally connected to the job;*

b. *that the practice was adopted in good faith; and*

c. *that the practice is reasonably necessary for the respondent to accomplish its purpose.*

55. The third step of the BFOR test requires that to prove that a discriminatory practice is reasonably necessary, the respondent must show that it is impossible to accommodate individual employees who are adversely affected by the practice without the respondent experiencing undue hardship. In other words, the respondent has an obligation to accommodate affected employees to the point of undue hardship.

56. Accommodations must be meaningful and should take into consideration each affected individual's unique capabilities, inherent worth, and dignity, up to the point of undue hardship. The respondent cannot expect to succeed at this stage of the analysis if it cannot demonstrate that it investigated (again, meaningfully and to the point of undue hardship) alternative approaches that would not have a discriminatory effect.

57. Financial constraints, however serious, are not likely to be enough for the respondent to establish undue hardship unless in all the circumstances, the respondent did everything it reasonably could to find an alternative approach and was unsuccessful. See, for example, *Moore,* at paras. 50-52 (emphasis added):

*The District's justification centred on the budgetary crisis it faced during the relevant period, which led to the closure of the Diagnostic Centre and other related cuts. There is no doubt that the District was facing serious financial constraints. Nor is there any doubt that this is a relevant consideration. It is undoubtedly difficult for administrators to implement education policy in the face of severe fiscal limitations, but accommodation is not a question of "mere efficiency", since "[i]t will always seem demonstrably cheaper to maintain the status quo and not eliminate a discriminatory barrier" (*VIA Rail*, at para. 225).*

In Jeffrey's case, the Tribunal accepted that the District faced financial difficulties during the relevant period. Yet it also found that cuts were disproportionately made to special needs programs. Despite their similar cost, the District retained some discretionary programs, such as the Outdoor School — an outdoor campus where students learned about community and the environment — while eliminating the Diagnostic Centre. As Rowles J.A. noted, "without undermining the educational value of the Outdoor School, such specialized and discretionary initiatives cannot be compared with the accommodations necessary in order to make the core curriculum accessible to severely learning disabled students" (para. 154).

More significantly, the Tribunal found, as previously noted, that the District undertook no assessment, financial or otherwise, of what alternatives were or could be reasonably available to accommodate special needs students if the Diagnostic Centre were closed.

s.22

Workers Compensation Act

59. The Act is relevant in this investigation because in one instance, I have found that conduct by a respondent was not racism and is more accurately described as workplace harassment. The Act does not define harassment; however, pursuant to Occupational Health and Safety policies under the Act, WorkSafeBC describes bullying and harassment as:

> *…any inappropriate conduct or comment by a person towards a worker that the person knew or reasonably ought to have known would cause that worker to be humiliated or intimidated, but excludes any reasonable action taken by an employer or supervisor relating to the management and direction of workers or the place of employment.*

60. WorkSafeBC's definition does not require an abuse of power, misuse of authority or a pattern of mistreatment. Indeed, courts and arbitrators have long agreed that depending on the circumstances of a matter, a single event if egregious enough may constitute harassment. Furthermore, harassment may occur where there is no power imbalance between the parties.

61. WorkSafeBC Practice Directive #C3-3 (Interim) sets out clarification on the interpretation of bullying and harassment (emphasis added):

> *Interpersonal conflicts between a worker and co-workers, supervisors or customers are not generally considered significant unless the conflict results in behavior that is considered threatening or abusive.*
>
> *…*
>
> *Not all interpersonal conflict or conduct that is rude or thoughtless will be considered abusive behaviour. Each case will need to be investigated to determine the details and nature of the interpersonal conflict. However, conduct that is*

determined to be threatening or abusive is considered a significant work-related stressor.

62. In the decision, A1901824 (Re), 2020 CanLII 47344 (BC WCAT), Vice Chair Thomson discussed the legitimate exercise of managerial action as compared to harassment. This is known as the "labour relations exclusion":

> *Section 135(1)(c) provides that there is no entitlement for compensation if the mental disorder is caused by a decision of the worker's employer relating to the worker's employment. The Act provides a list of examples of such decisions including changing work to be performed, working conditions, discipline and termination of employment. The policy explains that this list is not exhaustive.*
>
> *The practice directive provides further guidance. It explains that there may be situations that fall outside these "routine" employment issues that give rise to a compensable mental disorder, such as targeted harassment or another traumatic workplace event. An employer has the prerogative to make decisions regarding the management of the employment relationship. This does not mean that decisions can be communicated in any fashion. However, the fact that the decisions were communicated in a manner that was upsetting to the worker is not demonstrative. The practice directive says that heated exchanges or emotional conflicts are not uncommon when addressing discipline, performance or assignment of duties. In order to constitute a workplace stressor, it must be threatening or abusive.*
>
> *As pointed out by the worker's representative, in noteworthy* WCAT Decision 2014-02791*, for the labour relations exclusion not to apply there would need to be extremely egregious behavior, such that a reasonable person considering it would clearly see it as abusive or personally threatening. In* WCAT Decision A1601845*, the panel found that even severe criticism by a supervisor genuinely attempting to deal with a perceived performance problem will fall within the exclusion, except if it occurs in a seriously hostile, intimidating, threatening or abusive manner.*

63. Just as it is with complaints under the Code, complaints under the Act must meet the threshold of being more than speculation or conjecture; see *Workers' Compensation Appeal Tribunal v. Hill*, 2011 BCCA 49 ("*Hill*") at para 27 (BCCA).

Case Law

64. As noted in *Cara Operations Ltd. v. Teamsters, Chemical, Energy & Allied Workers, Local 647* ((2005) Carswell Ont 7614 (Ont. Arb. Bd (Luborsky) at 8):

> *...one must be careful not to construct too narrow a definition of "departure from reasonable conduct" lest every perceived slight or subjective inference of abuse might result in paralysing consequences to the workplace. There is a wide range of personalities that we experience in our interaction with others; not all of which may be pleasing to our individual sensitivities, but which we must live with nevertheless, within legal bounds, developing a certain "thickness of skin" to the challenges another's disagreeable mannerisms might present. Whether dealing with a family member, backyard neighbor, co-worker or supervisor, the question of whether the other person's behavior amounts to a "departure from reasonable conduct" is an objective inquiry that given the expected variability in human capabilities and personalities, must be afforded a relatively wide margin of interpretation.*

65. Arbitrators have cautioned against the liberal use of the word "harassment" in workplace disputes (*Re Government of BC and BCGEU* (1995), 49 LAC (4th) 193 (B.C. Arb. Bd.) at 227-232 and 248) and turning the term into a "weapon." (*Joss v. Canada (Treasury Board)* (2001) Carswell at 4151 at para. 63). More specifically, Arbitrator Laing's comments in the former case are particularly instructive:

> *227. In these times there are few words more emotive than harasser. It jars our sensibilities, colours our minds, rings alarms and floods of adrenaline through the psyche. It can be used casually, in righteous accusation, or in a vindictive fashion.*
>
> *228. Whatever the motivation or reason for such a charge, it must be treated gravely, with careful, indeed scrupulous, fairness given both to the person raising the allegations of harassment and those against whom it is made.*
>
> *229. The reason for this is surely self-evident. Harassment, like beauty, is a subjective notion. However, harassment must also be viewed objectively. Saying this does not diminish its significance. It does, however, accentuate the difficulty of capturing its essence in any particular circumstance with precision and certainty.*
>
> *230. For example, every act by which a person causes some form of anxiety to another could be labelled as harassment. But if this is so, there can be no safe interaction between human beings. Sadly, we are not perfect. All of us, on occasion,*

are stupid, heedless, thoughtless and insensitive. The question then is, when are we guilty of harassment?

231. I do not think every act of workplace foolishness was intended to be captured by the word "harassment". This is a serious word, to be used seriously and applied vigorously when the occasion warrants its use. It should not be trivialized, cheapened or devalued by using it as a loose label to cover petty acts or foolish words, where the harm, by any objective standards, is fleeting. Nor should it be used where there is no intent to be harmful in any way, unless there has been a heedless disregard for the rights of another person and it can be fairly said "you should have known better".

232. To this point, I have addressed the generic use of the word "harassment" as a concept of general application ...

***

248. As I said earlier in this award, harassment is a serious subject and allegations of such an offence must be dealt with in a serious way, as was the case here. The reverse is also true. Not every employment bruise should be treated under this process. It would be unfortunate if the harassment process was used to vent feelings of minor discontent or general unhappiness with life in the workplace, so as to trivialize those cases where substantial workplace abuses have occurred…

66. In terms of the standard required to prove an allegation of harassment, a complainant carries the burden of proving, on a balance of probabilities, that the respondent(s) engaged in the comments and conduct which constitutes harassment or bullying. I am mindful that the complaints of Indigenous people are often not believed—see the "playing the race card" discussion in para. 46 above—and there is a developing momentum in the public consciousness that they should be believed and a reverse onus may be appropriate. However, I must make my findings herein based on the legal guidelines currently in place, which place the burden of proof on the Complainants to establish on a balance of probabilities that they experienced discrimination. In other words, although it may seem to some that the framework utilized herein is unfair to complainants, it remains the current view held by courts and tribunals that the burden rests with complainants to prove their claims on a balance of probabilities.

Applicable Policies

RBCM Diversity Policy

67. This policy states as its purpose:

> *The Royal BC Museum has identified Diversity as one of its six core values. We believe Diversity in our organization, is demonstrated by sharing scientific and cultural knowledge which embraces the rich diversity of the people and environment of British Columbia. We respect this diversity by reflecting and responding to the rights and differences of the people we serve; and by being champions of environmental sustainability. Foundational to this Value, is the philosophy and understanding that each staff member, volunteer, and Board member will ensure that the Royal BC Museum upholds its principles of equity, diversity, ecological sustainability, and inclusiveness in all its practices, including when carrying out their various roles within the Royal BC Museum and as representatives of the museum and archives in public.*
>
> *The Royal BC Museum is unreservedly opposed to any form of discrimination on the grounds of age, disability, gender reassignment, marriage or civil partnership, pregnancy and maternity, race, religion or belief, sex and sexual orientation (defined as Proscribed Grounds). Using fair and objective employment practices, the organization aims to ensure that all employees/volunteers and potential employees/volunteers are treated fairly and with respect at all stages of their employment. All employees, volunteers, visitors and clients have the right to be free from harassment and bullying of any description, or any other form of unwanted behaviour. Such behaviour may come from other employees or by people (third parties) who are not employees of the Royal BC Museum, such as visitors, clients or partners. All employees and volunteers have an equal chance to contribute and to achieve their potential, irrespective of any defining feature that may give rise to unfair discrimination. All employees, volunteers, visitors and clients have the right to be free from discrimination because they associate with another person who possesses a Proscribed Ground or because others perceive that they have a particular Proscribed Ground, even if they do not.*
>
> *...*
>
> *Reporting Discrimination / Potential Discrimination:*
>
> *Employees who feel that they have suffered any form of discrimination should raise the issue through the following means: to their Department Head, Vice President or the Head of Human Resources to investigate the situation and if applicable, involve the Union.*

68. RBCM's Diversity Policy states that it "works in concert with existing policies and procedures governing employee of the Royal BC Museum, as BC Public Servants. These are: ... BC Public Service Standards of Conduct Policy [and] Oath of Employment...".

Standards of Conduct

69. RBCM employees sign an Oath of Employment which states they will honour and faithfully abide by the Standards of Conduct for Public Service Employees. Those standards say:

> *Standards of Conduct*
>
> *This policy statement applies to all persons and organizations covered by the Public Service Act. The policy statement supports the core policy objective that "public service employees exhibit the highest standards of conduct."*
>
> *Employees ... conduct must instill confidence and trust and not bring the BC Public Service into disrepute. The honesty and integrity of the BC Public Service demands the impartiality of employees in the conduct of their duties.*
>
> *The requirement to comply with these standards of conduct is a condition of employment. Employees who fail to comply with these standards may be subject to disciplinary action up to and including dismissal.*
>
> ...
>
> ***WORKPLACE BEHAVIOUR***
>
> *Employees are to treat each other with respect and dignity and must not engage in discriminatory conduct prohibited by the Human Rights Code...Further, the conduct of BC Public Service employees in the workplace must meet acceptable social standards and must contribute to a positive work environment. Bullying or any other inappropriate conduct compromising the integrity of the BC Public Service will not be tolerated.*
>
> ...
>
> ***Line Managers***
>
> *Provide comprehensive orientation to new employees related to the Standards of Conduct;*
>
> ...

Respond to reports of bullying, breaches of the Standards of Conduct, and wrongdoing, or refer them to the next level of excluded manager not involved in the matter;

...

Contribute to a work environment that is free of discrimination;

...

Employees

...

Maintain appropriate workplace behavior;

Report incidents of bullying, breaches of the Standards of Conduct and wrongdoing.

Avoid engaging in discriminatory conduct or comment; and

Check with their supervisor or manager when they are uncertain about any aspect of this policy statement.

70. The BCGEU Collective Agreement states:

1.7 Human Rights Code

The parties hereto subscribe to the principles of the Human Rights Code of British Columbia...The government of British Columbia, in cooperation with the Union, will promote a work environment that is free from discrimination where all employees are treated with respect and dignity.

Discrimination relates to any of the prohibited grounds contained in the BC Human Rights Code. Prohibited conduct may be verbal, non-verbal, physical, deliberate or unintended, unsolicited or unwelcome, as determined by a reasonable person. It may be one incident or a series of incidents depending on the context...

Discrimination does not include actions occasioned through exercising in good faith the Employer's managerial/supervisory rights and responsibilities.

1.8 Sexual harassment

> *Sexual Harassment is one form of discrimination and is defined as any unwelcome comment or conduct of a sexual nature that may detrimentally affect the work environment or lead to adverse job-related consequences for the victim of the harassment. Prohibited conduct may be verbal, non-verbal, physical, deliberate or unintended, unsolicited or unwelcome, as determined by a reasonable person. It may be one incident or a series of incidents depending on the context. Sexual harassment does not include actions occasioned through exercising in good faith the Employer's managerial/supervisory rights and responsibilities.*

Human Resources Policy 11 - Discrimination and Harassment in the Workplace (Policy 11)

71. Also relevant to this investigation is Policy 11, which "applies to all employees appointed under the *Public Service Act* and applies to incidents that occur at or away from the workplace during or outside working hours if a connection exists to the employment relationship." This policy statement supports the core policy objective of "promoting a safe and healthy workplace that supports the well-being of employees" and the objective that "public service employees exhibit the highest standards of conduct."

72. Consistent with the Standards of Conduct, it prohibits discrimination and harassment as related to any of the prohibited grounds contained in the Human Rights Code. Like the Standards of Conduct, it also places obligations on all employees to refrain from such behavior and obligates management to take steps to prevent and address discrimination and harassment in the workplace.

Obligations of Supervisors

73. I have considered the implications arising from (some of) the respondents being in managerial roles as part of the framework for my analysis. It is trite law that supervisors act as an "agent of the organization" and given their positions of trust, they are held to a higher standard of behaviour.

74. As stated in *Francis* supra "An employer is required to provide a respectful work environment that is free from discrimination: *Canada (Treasury Board) v. Robichaud*, 1987 CanLII 73 (SCC), [1987] 2 S.C.R. 84 [8 C.H.R.R. D/4326]. The primary, but not exclusive, responsibility for ensuring a discrimination-free workplace rests with the person in control of the employee's employment, a responsibility that is recognized in s. 44(2) of the Code: *Schrenk*, para.

56. Preventing employment discrimination is a shared responsibility among those who share a workplace, including both supervisor and colleagues. This is especially so where the employer's best efforts are inadequate to resolve the issue: *Schrenk*."

Credibility

75. As investigator, I am entitled to accept some, none, or all of a witness's evidence. Where there was disagreement in the evidence, I set out my findings and the reasons for them. Where necessary, I have assessed credibility.

76. In making my assessments of credibility and assessing what weight to give their evidence, I have relied on the principles established in the leading BC decision of *Faryna v. Chorny*, [1952] 2 D.L.R. 354 (BC CA), particularly the following comments:

> *... Opportunities for knowledge, powers of observation, judgment and memory, ability to describe clearly what he has seen and heard, as well as other factors, combine to produce what is called credibility.*
>
> *The credibility of interested witnesses, particularly in cases of conflict of evidence cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of the witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions (...) Again, a witness may testify to what he sincerely believes to be true, but he may be quite honestly mistaken. (para. 356-357)*

77. I have also considered the decision of Dillon J. in *Bradshaw v. Stenner*, 2010 BCSC 1398, 2012 BCCA 296, leave to appeal refused, [2012] S.C.C.A. No. 392 at paras. 186-187:

> *Credibility involves an assessment of the trustworthiness of a witness' testimony based upon the veracity or sincerity of a witness and the accuracy of the evidence that the witness provides (*Raymond v. Bosanquet (Township) *(1919), 59 S.C.R. 452, 50 D.L.R. 560(S.C.C.)). The art of assessment involves examination of various factors such as the ability and opportunity to observe events, the firmness of his memory, the ability to resist the influence of interest to modify his recollection, whether the witness' evidence harmonizes with independent evidence that has been*

*accepted, whether the witness changes his testimony during direct and cross-examination, whether the witness' testimony seems unreasonable, impossible, or unlikely, whether a witness has a motive to lie, and the demeanour of a witness generally (*Wallace v. Davis*, [1926] 31 O.W.N. 202 (Ont.H.C.);* Farnya v. Chorny*, [1952] 2 D.L.R. 152 (B.C.C.A.)* [Farnya]; R. v. S.(R.D.)*, [1997] 3 S.C.R. 484 at para.128 (S.C.C.)). Ultimately, the validity of the evidence depends on whether the evidence is consistent with the probabilities affecting the case as a whole and shown to be in existence at the time (*Farnya *at para. 356).*

*It has been suggested that a methodology to adopt is to first consider the testimony of a witness on a 'stand alone' basis, followed by an analysis of whether the witness' story is inherently believable. Then, if the witness testimony has survived relatively intact, the testimony should be evaluated based upon the consistency with other witnesses and with documentary evidence. The testimony of non-party, disinterested witnesses may provide a reliable yardstick for comparison. Finally, the court should determine which version of events is the most consistent with the "preponderance of probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions" (*Overseas Investments (1986) Ltd. v. Cornwall Developments Ltd. *(1993), 12 Alta. L.R. (3d) 298 at para. 13 (Alta. Q.B.))...*

78. Based on the foregoing, an investigator must ultimately determine whether the story "adds up," "hangs together," "makes sense" and "is it plausible?".

s.22

81. I have also considered similar fact evidence where appropriate. While hearsay evidence, or accounts of what the witness has heard other people saying, in most cases has little value, where

some witnesses claim they too have been harassed, this information, if substantiated, may serve as similar fact evidence. This can be used as indirect evidence that the conduct complained of likely occurred.

Similar Fact Evidence

82. In this matter there are several individuals making similar allegations or providing evidence of similar kinds of behaviour and as such, I have considered the applicability and value of similar fact evidence. I have considered the "rules" around similar fact evidence, notwithstanding that I am not a judge and am conducting an administrative investigation where such rules may be relaxed.

83. In the civil court context, evidence of good character is generally inadmissible. However, evidence of bad character may be admissible as circumstantial proof of a fact, if it is determined that the probative value of the evidence outweighs the prejudicial effect.[22]

84. Resolving the admissibility of similar fact evidence is a difficult exercise. The problem lies in the fact that this evidence is simultaneously probative and prejudicial. A person's capacity and propensity to commit certain kinds of harm—including criminal acts—is likely relevant when brought up in the context of other harm they caused, since people tend to act consistently with their known character. However, too much focus on this idea may capture the attention of the trier of fact to an unwarranted degree. The potential for prejudice, distraction and time consumption that similar fact evidence can cause is considerable.[23]

85. To avoid this pitfall, the courts say a trier of fact should consider several factors when deciding how much weight to give to similar fact evidence. Its probative value comes primarily from the improbability of coincidence between the defendant's/respondent's alleged similar acts and the acts they stand accused of. As such, the value of the evidence will tend to be enhanced where:

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[22] https://kmlaw.ca/wpcontent/uploads/2015/09/NSDS_EVIDENCE101_A_PRIMERONEVIDENCELAW_03jun14 1.pdf

[23] https://www.westlawnextcanada.com/blog/insider/ced-an-overview-of-the-law-similar-fact-evidence-160/

i. *the similar acts are proximate in time to the offences before the trier of fact;*

ii. *the acts are similar in detail;*

iii. *there are multiple occurrences as opposed to just a single event;*

iv. *the surrounding circumstances provide similarities;*

v. *there are distinctive features unifying the incidents; and*

vi. *there are no intervening events that undermine the value of the evidence.*

86. The probative value of similar fact evidence will be severely diminished where there is a potential for collusion between witnesses. These factors are not exhaustive and are merely a guide to the types of matters that may assist in determining the probative value of the evidence.

II. PROCESS

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90. s.22 All witnesses and the Parties were advised of their right to bring an uninvolved support person or representative of BCGEU or the Excluded Employees' Association, as applicable, to the interviews. s.22

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s.22

91. In response to the Provincial Health Officer requiring social distancing due to the pandemic, persons being interviewed were given the choice of meeting in person where social distancing could be implemented, or over Zoom. As such, I conducted s.22 interviews in person, and the remaining s.22 via video conference. The Parties were interviewed either in person or by videoconferencing using Zoom.

92. Prior to the pandemic, courts and tribunals have accepted evidence by video and telephone.[24] In assessing the credibility of the witnesses who spoke to me by video, I considered the criteria courts review in accepting such evidence:

- whether they are alone in the room from which they are testifying, which they were in every case;
- whether there are any sounds indicating that someone else is present or is coaching the witness;
- the need to give attention to the tone of voice, and pauses in speaking, as other clues as to demeanour are not available; and
- whether it is necessary or merely preferable to be able to see the witness. If credibility is not in issue, the decision-maker may not need to see the witness (e.g. in the case of an expert witness), in which case teleconferencing may be the best option. If it is merely a matter of preference, the use of videoconferencing should be subjected to a cost/ benefit analysis.

s.22

[24] Courts have held that there is no denial of natural justice or fundamental justice in the use of video testimony and accepted telephone testimony out of necessity, where it would be difficult or impossible for them to testify otherwise.

s.22

s.22 The Parties were interviewed at the beginning of the investigation s.22
s.22

94. Regarding my specific process, in addition to speaking with individuals, I reviewed hundreds of documents, including but not limited to, email and text exchanges involving one or all of the Parties, HR documents, RBCM policies, financial documents including budgets, spreadsheets, invoices, minutes of various meetings, calendars, notes taken by Parties or witnesses, video, text message, and photographs.

95. During all interviews I conducted, I took handwritten notes.[25] I later transcribed my written notes and emailed them to the interviewee to review and make any corrections, after which they were asked to either sign a statement or send a reply email confirming the accuracy of the notes s.22
s.22

96. The Parties and witnesses were given my contact information in order to communicate with me if any they had further information to share.

97. All individuals interviewed were cautioned by me about the need to maintain strict confidentiality throughout this investigation and to not disclose any information pertaining to the complaints, our interviews or this investigation process. The issue of retaliation was also

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[25] s.22 interviews were conducted by Ms. Raymond, who was assisting me with this investigation. Those interviews were held via Zoom and recorded (with the permission of the interviewee) for me to review.
s.22

addressed, and the Parties and witnesses were advised to notify the PSA and/or me if they experienced any form of reprisal due to the investigation.

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III. ALLEGATIONS

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146. ICAR's staffing and resources shortfall emerged quickly and was promptly identified as a problem[s.22]

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s.22

149. In addition to the repatriation work, which by all accounts from witnesses was complex, highly sensitive, substantial in scope and time consuming, ICAR was also responsible for caring for the Indigenous Collections, including the Audiovisual Collection. s.22

s.22

s.22

s.22

I note that in or around September 2017, the museum submitted the Ida Halpern audiovisual collection, which dates back to 1947, for inscription on UNESCO's "Memory of the World Register", and the Canadian Commission for UNESCO accepted that submission around March 2018; s.22

s.22

152. UNDRIP, which the museum is required to adhere to by both its mandate letter and the provisions of DRIPA, states at Articles 11, 12 and 31 (please see the appendices of this report for a more substantive version of UNDRIP's terms):

> *Article 11*
>
> *1. Indigenous peoples have the right to practise and revitalize their cultural traditions and customs. This includes the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, artefacts, designs, ceremonies, technologies and visual and performing arts and literature.*
>
> *2. States shall provide redress through effective mechanisms, which may include restitution, developed in conjunction with Indigenous peoples, with respect to their cultural, intellectual, religious and spiritual property taken without their free, prior and informed consent or in violation of their laws, traditions and customs.*

Article 12

1. Indigenous peoples have the right to manifest, practise, develop and teach their spiritual and religious traditions, customs and ceremonies; the right to maintain, protect, and have access in privacy to their religious and cultural sites; the right to the use and control of their ceremonial objects; and the right to the repatriation of their human remains.

2. States shall seek to enable the access and/or repatriation of ceremonial objects and human remains in their possession through fair, transparent and effective mechanisms developed in conjunction with Indigenous peoples concerned.

Article 31

1. Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions.

2. In conjunction with Indigenous peoples, States shall take effective measures to recognize and protect the exercise of these rights.

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Findings – Under-resourcing of ICAR

186. Organizations such as RBCM often experience the "pinch" of funding limitations.[s.22] museums in particular often struggle with resources[s.22]

s.22

Furthermore, government institutions have a duty to the public to ensure fiscal responsibility. In that context it would be unreasonable to expect that ICAR (or any department in the museum) would reach perfection or even a surplus in resources.

187. On the other hand,[s.22] ICAR was far from perfect but was, in fact, inadequately resourced[s.22]

s.22

189. s.22

s.22 It is not uncommon in any workplace to find that staff feel overworked.[s.22]

s.22

190. In the *Moore, supra,* decision, which I discussed briefly in the legal framework section of this report, the court said regarding budget cuts to the special needs learning program at the complainant's school:

> *The District's justification centred on the budgetary crisis it faced during the relevant period, which led to the closure of the Diagnostic Centre and other related cuts. There is no doubt that the District was facing serious financial constraints. Nor is there any doubt that this is a relevant consideration. It is undoubtedly difficult for administrators to implement education policy in the face of severe fiscal limitations, but accommodation is not a question of "mere efficiency", since "[i]t will always seem demonstrably cheaper to maintain the status quo and not eliminate a discriminatory barrier" (*VIA Rail, *at para. 225).*
>
> *In Jeffrey's case, the Tribunal accepted that the District faced financial difficulties during the relevant period. Yet it also found that cuts were disproportionately made to special needs programs. Despite their similar cost, the District retained some discretionary programs, such as the Outdoor School — an outdoor campus where students learned about community and the environment — while eliminating the Diagnostic Centre. As Rowles J.A. noted, "without undermining the educational value of the Outdoor School, such specialized and discretionary initiatives cannot be compared with the accommodations necessary in order to make the core curriculum accessible to severely learning disabled students" (para. 154).*
>
> *More significantly, the Tribunal found, as previously noted, that the District undertook no assessment, financial or otherwise, of what alternatives were or could be reasonably available to accommodate special needs students if the Diagnostic Centre were closed.*

191. I find that RBCM's duty to implement and follow UNDRIP in the course of its operations obligates RBCM do what is necessary to facilitate Indigenous peoples' access to, and protection and repatriation of, their audiovisual cultural property and their ancestral remains and ceremonial objects that are part of the RBCM's collections and archives. ICAR is unique in the museum in

that it is the department which has the care and control of Indigenous cultural and heritage objects and therefore receives and must answer access and repatriation requests.[s.22]

s.22

ICAR was created and that answering such requests was part of the reason ICAR was created. s.22

s.22

192. It must be recognized that there is a hierarchical structure within the museum where line managers report to the CEO and as such, it is not the role or expectation that the CEO would normally be actively involved in staffing issues[s.22]

s.22

195. It is important to consider the comments of the Supreme Court of Canada's Madam Justice Abella in paragraph 41 above, that "It is not a question of whether this discrimination is motivated by an intentional desire to obstruct someone's potential, or whether it is the accidental by-product

of innocently motivated practices or systems. If the barrier is affecting certain groups in a disproportionately negative way, it is a signal that the practices that lead to this adverse impact may be discriminatory." In this context, the barrier of limited resources appears to have impacted ICAR disproportionally, s.22

s.22

197. I note the Canadian Human Rights Tribunal's statement "specific measures, including of a budgetary nature, are often required in order to achieve substantive equality."

198. s.22 I find the RBCM, s.22 was at all material times aware of the museum's UNDRIP obligations and that ICAR was experiencing staff and resource shortfalls s.22 s.22 but failed to provide ICAR with the staffing or resources required to meet the museum's UNDRIP obligations s.22 s.22 Without adequate resources, the museum's commitment to UNDRIP was perfunctory.

199. In addition, I find that ICAR was chronically under-resourced as a result of this failure and that this chronic under-resourcing created unnecessary and undue pressures on the ICAR staff s.22 s.22 As a result, they were subjected to an unhealthy workplace. Accordingly, I find this allegation is substantiated.

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Findings – Failure to Act

252. As set out in the above-referenced Policies and Standards of Conduct, management has an obligation to address employee concerns of an unsafe workplace and discrimination. Caselaw set out above also states that management has an obligation to address a poisoned work environment.

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In the circumstances, I find this allegation substantiated on these counts.

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s.22 the allegation is substantiated.

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I find this allegation substantiated.

s.22

Allegation 2d: Condoned Misconduct and promoted or sustained systemic racism and a culturally unsafe environment by failing to acknowledge, act on or remedy misconduct by others employed at the RBCM

s.22

s.22

s.22

s.22

I note that a Diversity and Inclusion consultant, Alden Habacon, who was engaged by the museum prior to this investigation in response to the BLM movement, was refocused to work closely and intensely with the museum as an emergency response to issues around psychological safety and inclusion s.22

s.22 Mr. Habacon also worked with the museum to provide training for all staff and executive on the topics of inclusion literacy, psychological safety, being an active bystander and unconscious bias.

270. In addition, the museum's Diversity and Inclusion Steering Committee which was initially created to find a consultant was disbanded and the current EDIA Task Force was formed to begin looking at all RBCM's policies and procedures and make recommendations for change.

s.22

277. In the circumstances, despite the actions that were taken s.22 s.22 it remained "an unsafe place for Indigenous people" s.22

Findings – Condoned Misconduct and promoted or sustained systemic racism and a culturally unsafe environment by failing to acknowledge, act on or remedy misconduct by others employed at the RBCM

s.22

s.22 As set out herein, I have found that the workplace was culturally unsafe. s.22 s.22 As such, I find this allegation substantiated.

s.22

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Withheld pursuant to/removed as

s.22

s.22

Allegation 6a: Condoned Misconduct and promoted or sustained systemic racism and a culturally unsafe environment by failing to acknowledge, act on or remedy misconduct by others employed at the RBCM

s.22

s.22

Findings – Condoned Misconduct and promoted or sustained systemic racism and a culturally unsafe environment by failing to acknowledge, act on or remedy misconduct by others employed at the RBCM

s.22

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Withheld pursuant to/removed as

s.22

s.22

Systemic Racism/Museum Leadership Issues: s.22

s.22

s.22 I found above that this allegation was substantiated s.22

s.22

s.22

s.22 I consider it necessary to review the evidence I received regarding the museum's leadership problems and the reported systemic and attitudinal barriers.

Summary of Evidence

s.22

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Withheld pursuant to/removed as

s.22

s.22

837. As noted above, the RBCM's mandate letter has explicitly required the museum to implement UNDRIP and the TRC Calls to Action since 2017-18, and DRIPA passed in 2019.[s.22]

s.22

838. However, despite having clear directives and a CEO [s.22] who [s.22] identified this as a priority and seemed to be eminently qualified to get the job done, the RBCM has not yet met its obligation to implement UNDRIP or the Calls to Action in any meaningful way.[s.22]

s.22

s.22

so these mandates continue to be put to the side.

839. [s.22] there has been minimal direction or assistance from the RBCM leadership in implementing UNDRIP, and it appears that the executive pushed the task onto ICAR without correspondingly investing or redirecting resources to actually do the work.[s.22]

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Withheld pursuant to/removed as

s.22

s.22

s.22 RBCM's volunteer pool, which includes over six hundred (600) people. s.22

s.22

850. s.22 only twenty-one (21) RBCM volunteers identify as Indigenous and they have all joined the museum within the last five (5) years, after HR made a concerted effort to recruit more Indigenous volunteers. s.22

s.22

Findings

851. I find that the RBCM's leadership has been poor and the actions, and inactions,[s.22] s.22 have had the effect of perpetuating systemic racism in the organization, created an environment where Indigenous employees have been exposed to further discrimination, and deprived those employees and the Indigenous communities that engage with the RBCM of the improvements promised to them by the TRC Calls to Action, UNDRIP and DRIPA.[s.22] s.22

852. Regarding onboarding practices, I find that the existing practice amounts to taking new employees and "throwing them in the deep end", which may be viable for staff coming to the RBCM from other government positions but disadvantages outside hires [s.22] s.22 I have found that to increase Indigenous hiring for both temporary and permanent positions, the museum must look beyond its own staff to external hires. I find that the existing onboarding practices are not

compatible with successfully training and retaining qualified Indigenous hires and have already substantially impacted ICAR's operations.

853. I find the existing onboarding practices for RBCM volunteers are likewise inadequate, especially with regard to cultural sensitivity training. I find that the lack of cultural sensitivity training for volunteers and the "old guard" mentality of being free to engage in discriminatory behaviour without losing their position has created an unsafe environment for Indigenous museum employees, volunteers and guests.

854. Based on the foregoing, I find these allegations are substantiated.

IV. CONCLUSION

855. This investigation has reviewed thirty-one (31) allegations and forty-three (43) examples of racism and discrimination s.22 as well as the s.22 Complainants' personal experiences of systemic or institutional-level discrimination s.22 s.22

856. The relevance of the findings herein may have limited applicability to other employers given the nature of this particular workplace. That is, the RBCM is required to implement DRIPA, its mandate letter requires it to respond to relevant recommendations made by the TRC and moreover, it is a cultural institution with a history and collection of artifacts and belongings that represents for many, the mistreatment of Indigenous people. It is in this context that I have made my findings.

857. The majority s.22 described the RBCM as being like most museums with a legacy rooted in colonialism. RBCM itself states it "was founded in 1886 by the BC Government apparently in response to a petition from prominent citizens". It further states that these citizens:

> *...were concerned about the loss of British Columbian natural products and native artifacts. Wanting to stop European and American museums from appropriating*

BC artifacts. Notably, the petitioners argued that the export of First Nations artifacts was particularly troubling, under the premise that "their loss [was] frequently irreparable.[47]

858. Partly as a result of UNDRIP, there has been a global push to decolonize museums. In August 2016, RBCM released a formal public response to the Truth and Reconciliation Commission's Final Report: "Honouring the Truth, Reconciling for the Future." In it, the RBCM stated "In line with the recommendations of the Truth and Reconciliation Commission, we are further revitalizing our policies and responsive practices."

859. Notwithstanding that statement, this investigation has identified that RBCM as a workplace is not a culturally safe environment, and it seems likely that significant work will be needed to bring the organization into compliance with its mandate to follow DRIPA and implement new practices reflecting the requirements set out in UNDRIP and the TRC Calls to Action. This situation has arisen partly from the acts of individuals, and partly from the way the organization is structured and operated, either causing or drawing attention to ineffective leadership at the executive level, a lack of effective onboarding, and a feeling among employees and mid-level management that there is a lack of resources to support them in their work and the organization as a whole.

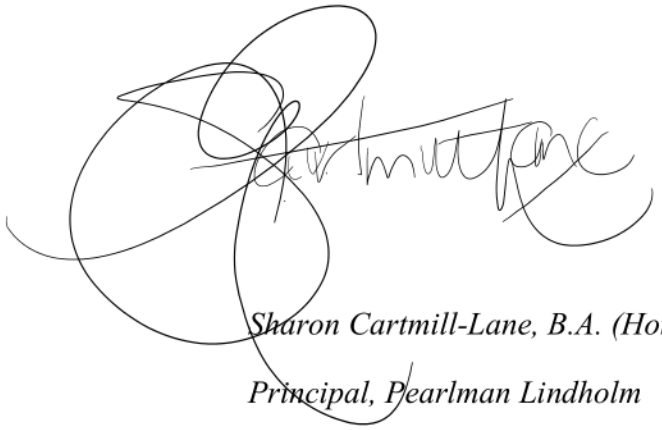
860. This has been felt most acutely in the ICAR department. The nature of their work with communities and repatriation, which I have learned requires a great deal of personal interaction and navigation of individual First Nations' cultural practices, creates a burden of emotional labour on top of the "typical" volume of work it has as a department of the museum.[s.22]

s.22

s.22 if the RBCM is to move beyond a token commitment to the

ICAR department, repatriation work and obligations under DRIPA, there must be significant effort and results from responsible parties above the department Head.

Respectfully Submitted:



Sharon Cartmill-Lane, B.A. (Hons.), M.A., LL.B.

Principal, Pearlman Lindholm

May 14, 2021

APPENDIX A - EXCERPTS FROM UNITED NATIONS DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES *(UNDRIP)*

Article 1

Indigenous peoples have the right to the full enjoyment, as a collective or as individuals, of all human rights and fundamental freedoms as recognized in the Charter of the United Nations, the Universal Declaration of Human Rights and international human rights law.

Article 2

Indigenous peoples and individuals are free and equal to all other peoples and individuals and have the right to be free from any kind of discrimination, in the exercise of their rights, in particular that based on their Indigenous origin or identity.

…

Article 5

Indigenous peoples have the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions, while retaining their right to participate fully, if they so choose, in the political, economic, social and cultural life of the State.

…

Article 8

1. Indigenous peoples and individuals have the right not to be subjected to forced assimilation or destruction of their culture.

2. States shall provide effective mechanisms for prevention of, and redress for:

   (a) Any action which has the aim or effect of depriving them of their integrity as distinct peoples, or of their cultural values or ethnic identities;

   (b) Any action which has the aim or effect of dispossessing them of their lands, territories or resources;

   (c) Any form of forced population transfer which has the aim or effect of violating or undermining any of their rights;

(d) Any form of forced assimilation or integration;

(e) Any form of propaganda designed to promote or incite racial or ethnic discrimination directed against them.

…

Article 11

1. Indigenous peoples have the right to practise and revitalize their cultural traditions and customs. This includes the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, artefacts, designs, ceremonies, technologies and visual and performing arts and literature.

2. States shall provide redress through effective mechanisms, which may include restitution, developed in conjunction with Indigenous peoples, with respect to their cultural, intellectual, religious and spiritual property taken without their free, prior and informed consent or in violation of their laws, traditions and customs.

Article 12

1. Indigenous peoples have the right to manifest, practise, develop and teach their spiritual and religious traditions, customs and ceremonies; the right to maintain, protect, and have access in privacy to their religious and cultural sites; the right to the use and control of their ceremonial objects; and the right to the repatriation of their human remains.

2. States shall seek to enable the access and/or repatriation of ceremonial objects and human remains in their possession through fair, transparent and effective mechanisms developed in conjunction with Indigenous peoples concerned.

Article 13

1. Indigenous peoples have the right to revitalize, use, develop and transmit to future generations their histories, languages, oral traditions, philosophies, writing systems and literatures, and to designate and retain their own names for communities, places and persons.

2. States shall take effective measures to ensure that this right is protected and also to ensure that Indigenous peoples can understand and be understood in political, legal and administrative proceedings, where necessary through the provision of interpretation or by other appropriate means.

…

Article 15

1. Indigenous peoples have the right to the dignity and diversity of their cultures, traditions, histories and aspirations which shall be appropriately reflected in education and public information.

2. States shall take effective measures, in consultation and cooperation with the Indigenous peoples concerned, to combat prejudice and eliminate discrimination and to promote tolerance, understanding and good relations among Indigenous peoples and all other segments of society.

…

Article 17

1. Indigenous individuals and peoples have the right to enjoy fully all rights established under applicable international and domestic labour law.

…

3. Indigenous individuals have the right not to be subjected to any discriminatory conditions of labour and, inter alia, employment or salary.

…

Article 21

1. Indigenous peoples have the right, without discrimination, to the improvement of their economic and social conditions, including, inter alia, in the areas of education, employment, vocational training and retraining, housing, sanitation, health and social security.

2. States shall take effective measures and, where appropriate, special measures to ensure continuing improvement of their economic and social conditions. Particular attention shall be paid to the rights and special needs of Indigenous elders, women, youth, children and persons with disabilities.

Article 22

1. Particular attention shall be paid to the rights and special needs of Indigenous elders, women, youth, children and persons with disabilities in the implementation of this Declaration.

2. States shall take measures, in conjunction with Indigenous peoples, to ensure that Indigenous women and children enjoy the full protection and guarantees against all forms of violence and discrimination.

…

Article 31

1. Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions.

2. In conjunction with Indigenous peoples, States shall take effective measures to recognize and protect the exercise of these rights.

…

Article 34

Indigenous peoples have the right to promote, develop and maintain their institutional structures and their distinctive customs, spirituality, traditions, procedures, practices and, in the cases where they exist, juridical systems or customs, in accordance with international human rights standards.

…

Article 38

States in consultation and cooperation with Indigenous peoples, shall take the appropriate measures, including legislative measures, to achieve the ends of this Declaration.

APPENDIX B – EXCERPTS FROM THE TRC CALLS TO ACTION

43. We call upon federal, provincial, territorial, and municipal governments to fully adopt and implement the United Nations Declaration on the Rights of Indigenous Peoples as the framework for reconciliation.

44. We call upon the Government of Canada to develop a national action plan, strategies, and other concrete measures to achieve the goals of the United Nations Declaration on the Rights of Indigenous Peoples.

...

47. We call upon federal, provincial, territorial, and municipal governments to repudiate concepts used to justify European sovereignty over Indigenous peoples and lands, such as the Doctrine of Discovery and *terra nullius*, and to reform those laws, government policies, and litigation strategies that continue to rely on such concepts.

...

57. We call upon federal, provincial, territorial, and municipal governments to provide education to public servants on the history of Aboriginal peoples, including the history and legacy of residential schools, the United Nations Declaration on the Rights of Indigenous Peoples, Treaties and Aboriginal rights, Indigenous law, and Aboriginal–Crown relations. This will require skills based training in intercultural competency, conflict resolution, human rights, and anti-racism.

…

92. We call upon the corporate sector in Canada to adopt the United Nations Declaration on the Rights of Indigenous Peoples as a reconciliation framework and to apply its principles, norms, and standards to corporate policy and core operational activities involving Indigenous peoples and their lands and resources. This would include, but not be limited to, the following:

...

ii. Ensure that Aboriginal peoples have equitable access to jobs, training, and education opportunities in the corporate sector, and that Aboriginal communities gain long-term sustainable benefit from economic development projects.

iii. Provide education for management and staff on the history of Aboriginal peoples, including the history and legacy of residential schools, the United Nations Declaration on the Rights of Indigenous Peoples, Treaties and Aboriginal rights, Indigenous law, and Aboriginal–Crown relations. This will require skills based training in intercultural competency, conflict resolution, human rights, and anti-racism.