File No.: T1340/7008

CANADIAN HUMAN RIGHTS TRIBUNAL

BETWEEN:

FIRST NATIONS CHILD AND FAMILY CARING SOCIETY OF CANADA AND ASSEMBLY OF FIRST NATIONS

Complainants

- and -

CANADIAN HUMAN RIGHTS COMMISSION

Commission

- and -

THE ATTORNEY GENERAL OF CANADA (REPRESENTING THE MINISTER OF ABORIGINAL AND NORTHERN AFFAIRS AND DEVELOPMENT)

Respondent

- and -

CHIEFS OF ONTARIO AND AMNESTY INTERNATIONAL CANADA

Interested Parties

WRITTEN SUBMISSIONS OF THE CANADIAN HUMAN RIGHTS COMMISSION (RESPONDENT'S MOTION ON THE ADMISSIBILITY OF THE OPPOSING PARTIES' EXPERT REPORTS)

OVERVIEW

The present case before the Tribunal is a unique one, raising legal issues never before dealt with by this Tribunal and which may alter the history of Aboriginal people in Canada. The complaint has already had an eventful history since the Commission first referred it to the Tribunal.

Generally, the Commission submits that the evidence to be adduced by the experts is relevant to the issues arising out of the complaint, namely the increased needs of Aboriginal communities due to a history of past abuse; the funding formulas for child welfare on reserve and the need for culturally appropriate services.

PART I – FACTS

The Complaint

1. As appears from the now voluminous record, the complaint filed with the Commission on February 23, 2007 by the two complainants; First Nations Child and Family Services Caring Society of Canada and the Assembly of First Nations, involves an allegation of discrimination in the provision of a service on the grounds of race and national or ethnic origin. The Complainants allege that the Respondent discriminates against Aboriginal children in the provision of a service by inadequately funding child welfare services on reserve contrary to section 5 of the *CHRA.*

2. It is alleged generally that the respondent's actions, as part of the First Nations Child and Family Services National Program Manual, results in the inequitable and under-funding of services pursuant to child/territorial child welfare laws. Specific concerns center on the under-funding of agency infrastructure and services designed to keep families together which contributes to a growing number of Aboriginal children in state care. Through this funding formula and the related arrangements with direct service providers, the Respondent is responsible for the provision of child welfare services on reserves.

3. As appears from the affidavit of Cindy Blackstock, which was filed originally in response to the motion to dismiss the complaint (and reproduced here without the attachments), the complaint asserts that the respondent does not provide sufficient funding to ensure culturally based child welfare services for Registered Indian children resident on reserve, that are comparable in benefit to those received by Aboriginal children and non Aboriginal children living off reserve. It would therefore have an adverse impact on Aboriginals living on reserve on the basis of national or ethnic origin, the whole contrary to section 5 of the *CHRA.*[1]

[1] Affidavit of Cindy Blackstock, sworn February 11, 2010, at para. 9

First Nations Child and Family Services Program

4. The purpose of the respondent's First Nations Child and Family Services Program is to provide for culturally based child welfare services to registered Indian children resident on reserve, through AANDC-authorized First Nations Child and Family Services Agencies, Bands, Tribal Councils, and Provinces or Territories in the absence of available Aboriginal organizations, that are comparable to the child welfare services funded off reserve by Provincial and Territorial governments. The complaint asserts that AANDC's funding service does not provide sufficient program funds structured in appropriate ways to achieve these purposes.[2]

5. Further, the complaint asserts that the AANDC FNCFS Program results in the denial of child welfare services to on reserve registered Indian children when AANDC unilaterally determines that a child is not eligible for child welfare services. This is based on federal government views about its fiduciary responsibility for children's services on reserve that are otherwise available to children off reserve, who are funded by the province/territory.[3]

6. AANDC administered and funded First Nations child and family service agencies on a case-by-case basis until it established a national program policy in 1990. AANDC's FNCFS Program sought to carry out the federal policy commitment to fund on-reserve First Nations child welfare service agencies that are culturally appropriate, comply with provincial legislation and standards and are comparable to what other children receive.[4]

7. The Complainants submit evidence, to be perfected at the hearing on the merits, that the funding provided by AANDC does not reflect the needs of First Nations children and families and the context of each specific First Nations community.

8. For example, when AANDC is made aware of discrepancies between its funding service and provincial statutory or regulatory requirements, the practice of

[2] Affidavit of Cindy Blackstock, at para. 10
[3] Affidavit of Cindy Blackstock, at para. 11
[4] Affidavit of Cindy Blackstock, at para. 38

AANDC officials is to fund the discrepancy only if it is consistent with AANDC policies and practices. This results in agencies being unable to fulfill their mandated responsibilities. This is reiterated by AANDC in access to information document 2371-2376, obtained by the Caring Society in January of 2009, entitled "Speaking Points: Domestic Affairs Committee – December 13, 2004":

> Provincial governments have written to Ministers of AANDC and Inter-Governmental Affairs indicating that AANDC is not providing sufficient funding to permit First Nations Child and Family Services Agencies to meet their statutory obligations under the provincial legislation.
>
> Provinces may refuse to renew the mandate of First Nations Child and Family Services Agencies, or entertain requests for approval of new agencies, due to the inadequacy of agency budgets.
>
> Should Provinces assume responsibility for the delivery of Child and Family Services on reserve, the Federal government will most likely end up paying more than it does currently. [5]

Funding Formulas

9. The two funding formulas available to First Nations child and family service agencies in provinces except Ontario, are:[6]

   (i) Directive 20-1; and

   (ii) Enhanced Prevention-Focused Approach

Directive 20-1

10. In summary, from 1990 up until 2007, Directive 20-1 was the funding formula applied by AANDC to most provinces for First Nations child welfare agencies and is composed of two funding streams; "Maintenance" and "Operations". "Maintenance" costs are those directly related to maintaining a child in alternate care out of the parental home, while "Operations" costs are provided annually to the agencies to cover all aspects of the agency's daily operations that are not covered by the Maintenance funding stream. The costs incurred by the agencies are reimbursed in theory by AANDC, but the reality is that many of the expenses incurred in caring for children are not acceptable to AANDC and the agencies are

[5] Affidavit of Cindy Blackstock, at para. 40
[6] Affidavit of Cindy Blackstock, at para. 43

then required to absorb these costs into their already strained operations funding. Directive 20-1 does not account for the actual number of children in care or the actual needs of the children in care. This results in First Nations children being adversely differentiated from those children in care living off reserve.

11. From April 1, 1990 until 2007, Directive 20-1 was the funding formula applied to all provinces for First Nations child welfare agencies with the exception of Spallumcheen First Nation and agencies operating under pre-directive funding arrangements. As of February 11, 2010, Directive 20-1 was applied in British Columbia, Manitoba, Newfoundland, New Brunswick and the Yukon Territory. Two of the First Nations child and family services agencies in Saskatchewan are also operating under Directive 20-1.[7]

12. As appears from the affidavit of Elsie Flette, which was filed originally in response to the motion to dismiss the complaint (and reproduced here without the attachments), under Directive 20-1, funding is provided in two funding streams: (1) "maintenance" is where AANDC reimburses for costs relating to children in care: and (2) "operations" is intended to cover those expenses associated with running an agency and providing child protection services (such as prevention services, staffing and offices).[8]

13. AANDC's Child and Family Services National Program Manual expanded the range of items covered under Operations in section 2.22 but AANDC did not provide any additional targeted funding to cover the newly added cost items under the operations formula. [9]

14. The Introduction of AANDC's Child and Family Services National Program Manual states,

> First Nations have indicated that, although the services to be provided under the operational formula are clearly outlined in the authorities, there may, in some circumstances, not be enough resources to provide these services. For example, when the

[7] Affidavit of Cindy Blackstock, at para. 44
[8] Affidavit of Elsie Flette, sworn February 11, 2010, at para. 9
[9] Affidavit of Cindy Blackstock, at para. 47

> formula was conceived in the early 1980s, computers were not used to the same extent as they are today. As well, there was less emphasis on prevention services than there is now. These changes have put increased pressure on Recipients with limited resources to adapt to current trends. [10]

Enhanced Prevention-Focused Approach

15. In general, this is the new funding formula applied by AANDC. AANDC has stated that it developed the Enhanced Prevention-Focused Approach ("Enhanced Approach") in order to provide First Nations child and family service agencies with more flexibility in how to allocate their funds. This funding formula was developed by AANDC for application in Alberta and was implemented in 2007. Although initially meant only for Alberta, it has since been applied nationally through a template developed by AANDC. Under this funding formula, service agencies are provided with additional prevention funds in the first two years but reduce that amount in the third, fourth and five years. Although developed in order to address the shortcomings of Directive 20-1, the Enhanced Approach fails to provide adequate funding to agencies serving children living on reserve. This too results in First Nations children being adversely differentiated from those children in care living off reserve.

16. AANDC has said it developed the Enhanced Approach in order to provide First Nations child and family service agencies with more flexibility in how to allocate their funds. This formula was developed by AANDC for application in Alberta and implemented in 2007. AANDC officials initially advised that the Enhanced Approach would not be applied to other regions but they reversed this position and applied it nationally according to a national template developed by AANDC.[11]

Hearing

17. As appears from the record, the Tribunal hearing originally began on September 14, 2009. One party (the Caring Society) was asked to make an opening statement. Hearing dates were scheduled from September to November 2009.

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[10] Affidavit of Cindy Blackstock, at para. 48
[11] Affidavit of Cindy Blackstock, at para. 63

The Tribunal adjourned the hearing allowing the Commission to file an Amended Statement of Particulars which it filed on September 28, 2009.

18. After the complainants were abandoned by the original Counsel, the Tribunal ordered on September 17, 2009, that the Commission file its experts reports by October 14, 2009 (except the report of Professor Loxley which was to be filed by October 30, 2009)

PART II – ISSUES

19. The Commissions submits that the sole question at issue is whether the Tribunal should exercise its discretion and dismiss the expert reports submitted by the Commission.

20. The Commission submits that the Reports meet the requirements of the Rules of the Tribunal and are admissible. What must be determined by the trier of fact is the weight to be given to the evidence.

21. To dismiss the reports as requested by the Attorney General of Canada would impose greater obligations on complainants than are found in the *Federal Courts Rules, 1998*, in respect of the testimony of expert witnesses,[12] and would be inconsistent with the necessary flexibility of the Tribunal's process.

PART III – SUBMISSIONS

A. General Principles Applicable to the Opinion of Experts[13]

NECESSITY

22. Some expert evidence can assist the trier of fact with the necessary technical or scientific basis with which to properly assess certain types of evidence presented. As Dickson J. stated in *R v. Abbey*[14] where he described the role of

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[12] *Federal Courts Rules, 1998*, SOR/98-106 as amended, Rule 52.2
[13] John Sopinka, Sidney N. Lederman & Alan W. Bryant, *The Law of Evidence in Canada*, 3d ed. (Markham: Butterworths Canada Ltd., 2009), at page 785 and following.
[14] *R. v. Abbey*, [1982] 2 S.C.R. 24, at 42.

the expert as providing the judge and jury with a ready-made inference which, due to the technical nature of the facts, they are unable to formulate.

23. In *Mohan*, the Supreme Court of Canada stated that the helpfulness standard for the admissibility of expert evidence needed to be "necessary in the sense that it provide information which is likely outside the experience or knowledge of a judge or jury".[15] The Supreme Court explained that the evidence must be necessary in order to allow for the trier of fact:

    i) to appreciate the facts due to their technical nature; or

    ii) to form a correct judgment on a matter if ordinary persons are unlikely do so without the assistance of persons with special knowledge.[16]

24. The Commission submits that the reports before the Tribunal provide necessary context and information, which will assist the trier of fact to arrive at the ultimate issues to be determined in the complaint.

RELEVANCE

25. Relevance is a threshold requirement for the admission of expert evidence, as well as all other evidence. However, potentially relevant evidence may be excluded if its prejudicial effect outweighs its probative value.[17]

26. The Respondent insists that a proposed expert report that does not deal with the specific issue before the Tribunal is neither relevant nor necessary. However, given the complexity of the issues this Tribunal is asked to determine, the Commission submits the reports at issue provide the contextual reality to assist the trier of fact and are therefore both necessary and relevant.

JUDICIAL DISCRETION

27. The Law of Evidence maintains that although relevant evidence is generally admissible, a judge has discretion to exclude submitted evidence if the probative

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[15] *R. v. Mohan,* [1994] 2 S.C.R. 9, at 10.
[16] *Mohan, supra*, at 23.
[17] *R. v. Pascoe* (1997), 32 O.R. (3d) 37, at para 27.

value of the evidence is potentially misleading, or its submission may consume an amount of time that is disproportionate to its evidential value.[18]

28. The Commission submits that the Respondent's motion to exclude the Commission's expert reports goes to the weight of the evidence before the Tribunal. Admissibility and weight are separate and distinct when determining when evidence is acceptable to the trier of fact.

29. The admissibility of the expert reports can be argued at this time. However, the weight to be placed on the evidence is to be argued during the proceeding. Credibility of witnesses is to be dealt with at the time the weight placed on the evidence is determined. This requires witnesses to be heard. The Respondent's motion cannot succeed without allowing for the trier of fact to weigh the evidence the witnesses will provide.

Requirements of Rule 6(3)

30. Rule 6(3) of the Tribunals *Rules of Procedure* provide that an expert report must be signed, provide the expert's name, address, qualifications, and the substance of the expert's proposed testimony. The Rule is not meant to replace the actual testimony; it is meant to provide an outline of the evidence that will be adduced. It is, generally, a more detailed will say.

31. As the Commission submitted it its submissions in respect of the KPMG report filed by the Respondent, procedure must be Justice's servant and not its mistress,[19] and should not be mechanically applied. *Rule* 6(3) requires that the Report should set out the expert's name, address and qualifications, etc. All the reports submitted by the Commission meet the Rules.

32. As set out in a recent ruling by this Tribunal, "the will-says do not require the *verbatim* proposed testimony of a witness, but rather, the main issues to be

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[18] *Mohan, supra*, at 21.
[19] *Hamel v. Brunelle and Labonté*, [1977] 1 SCR 147, at 156

covered by the witness, so that the other party can prepare its cross-examination and general case".[20] [Emphasis in original]

33. The rules do not contain a section to exclude an expert report and the Tribunal must be cautious not to resort to extraordinary measures such as striking out a large segment of a party's evidence. As this Tribunal has indicated, there are strong policy reasons why the Tribunal's *Rules of Procedure* contain only ten rules, whereas the *Federal Courts Rules* are over 500 in number. Notably, there is also a statutory basis as subsection 48.9(1) of the *CHRA* provides: "Proceedings before the Tribunal shall be conducted as informally and expeditiously as the requirements of natural justice and the rules of procedure allow".[21]

34. The Rules do not require that the proposed report be written for the purpose of the hearing or that a certain format be used.

35. In its amended notice of motion, the Respondent indicates that the following reports do not comply with Rule 6(3):

a) *A National Crime* – John Milloy

b) *Conditions Facing First Nations Children in Remote Northern Communities in Ontario: Preliminary Impressions* – Ruth Hislop and Judy Finlay

c) *Places for the Good Care of Children: A Discussion of Indigenous Cultural Considerations and Early Childhood in Canada and New Zealand* and *Whispered Gently Through Time, First Nations Quality Child Care* – Margo Greenwood

d) *Keeping First Nations children at home: A Few Federal policy changes could make a big difference* – Frederic Wien

e) *Conditions Facing First Nations Children in Remote Northern Communities in Ontario: Preliminary Impressions from the Perspective of the Office of the Child and Family Service Advocacy* – Ruth Hislop and Judy Finlay

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[20] *Baillie et al. v. Canadian Human Rights Commission and Air Canada and Air Canada Pilots Association*, 2011 CHRT 17 at para. 15.
[21] *Baillie, supra,* at para. 22.

f) *Report of Dr. Nico Trocmé*

g) *Wen: de The Journey Continues* – John Loxley

36. The Commission submits that the requirements set out in Rule 6(3) for each of these reports were met.

The Expert Reports

A National Crime: The Canadian Government and the Residential School System 1879 to 1986 – Professor John Milloy

37. As appears from the Tribunal record, in a letter dated October 14, 2009, the Commission provided the Tribunal and parties with the curriculum vitae of John Milloy. His report was provided on October 20, 2009.

38. This report has direct relevance to the contextual background of the complaint. Mr. Milloy is an historian who has studied the history of the residential school system and its direct relationship with the development of child welfare in the context of Aboriginal children living on reserve.

39. The Commission submits the report will demonstrate that a per capita formula is not sufficient because of the increased needs of the Aboriginal communities living on reserve. It will provide the Tribunal with information that is crucial to a fulsome understanding of the contextual reality framing this complaint.

40. The Respondent argues that the report is highly prejudicial to it and provides no probative value to the issues before the Tribunal. Of significance is that the history of the residential schools in Canada was addressed directly in 2008 by the Prime Minister of Canada when the Government issued an apology to the Aboriginal people across the country. As the Prime Minister stated,

> The government now recognizes that the consequences of the Indian Residential Schools policy were profoundly negative and that this policy has had a lasting and damaging impact on Aboriginal culture, heritage and

> language. (...) The legacy of Indian Residential Schools has contributed to social problems that continue to exist in many communities today.[22]

The Commission submits that with such a public acknowledgement and apology, the Respondent will not suffer prejudice. Professor Milloy's report simply provides the historical framework necessary to the current situation of child welfare on reserves.

41. The Tribunal must take judicial notice of "such matters as the history of colonialism, displacement, and residential schools and how that history continues to translate into lower educational attainment, lower incomes, higher unemployment, higher rates of substance abuse and suicide, and of course higher levels of incarceration for Aboriginal peoples. [23]

Keeping First Nations children at home: A few Federal policy changes could make a big difference - Frederic Wien, Cindy Blackstock, John Loxley and Nico Trocmé

42. As appears from the Tribunal record, in a letter dated October 30, 2009, the Commission provided the Tribunal and parties with the report and curriculum vitae of Dr. Frederic Wien.

43. The concern articulated by the Respondent is an issue of the reliability, not the admissibility of the report. As articulated above, the reliability of evidence goes to weight and is to be assessed at a later stage by the Tribunal.

44. The Commission submits that the fact that a report was written in collaboration with the agent for one of the complainants does not make it partial if the expert is ready to adopt the conclusions of the report. Certain reports have been written in collaboration with the Respondent and this does not make them any less independent.

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[22] House of Commons Debates, *Apology to Former Students of Indian Residential Schools,* 39th Parliament, 2nd Sess., No. 110 (June 11, 2008) at 6849 (Hon Peter Milliken)
[23] *R. v. Ipeelee*, 2012 SCC 13 at para. 60.

Report of Dr. Nico Trocmé

45. The Commission submits that the Respondent's concerns with this report go to the weight of the evidence, not its admissibility. Such a determination can only be made by the Tribunal and requires the proposed expert to testify.

Wen:de The Journey Continues – John Loxley (primary author)

46. As appears from the Tribunal record, in a letter dated November 3, 2009, the Commission provided the Tribunal and parties with the report as well as Dr. Loxley's curriculum vitae and a letter dated November 2, 2009 in which he confirms being the primary author of the report and that he stands by the findings.

47. As in other reports, the Respondent expresses its lack of impartiality and objectivity because Cindy Blackstock, an agent of the Complainant, is a co-author of the report. The Commission submits that having a co-expert should not be an issue. To accept the Respondent's position would make it impossible for experts in the same field to file complaints if they have witnessed discriminatory practices, since this would arguably disqualify fellow experts. We submit that the issue is not the fact that Cindy Blackstock was one of the authors, but rather whether John Loxley adopts the report's conclusions as he did on November 2, 2009 that is of importance to the Tribunal.

Conditions Facing First Nations Children in Remote Northern Communities in Ontario: Preliminary Impressions from the Perspective of the Office of Child and Family Service advocacy – Ruth Hislop and Judy Finlay

48. As appears from the Tribunal record, an email to the Tribunal and the parties dated October 30, 2009, sent by Mr. Sherry, counsel for the Chiefs of Ontario, attached the curriculum vitae and report of Dr. Finlay.

49. This report is directly relevant to the issues before this Tribunal. It will provide the Tribunal with information concerning the realities of child welfare services on reserve. Many reserves exist in remote communities and therefore require services at varying levels – this is directly relevant to the determination of funding

levels and services available on reserve and goes directly to the issues before the Tribunal in this complaint.

Places for the Good Care of Children: A Discussion of Indigenous Cultural Considerations and Early Childhood in Canada and New Zealand and *Whispered Gently Through Time, First Nations Quality Child Care* – Margo Greenwood

50. The Commission submits that it will no longer be relying on the reports filed by Margaret Greenwood. Ms. Greenwood's currently filed reports are hereby withdrawn.

PART IV - CONCLUSION

51. For all the foregoing reasons, the Commission submits that, with the exception of the Greenwood reports which are hereby withdrawn, (i) the expert reports fulfill the requirements for expert evidence as articulated in *R v. Mohan;* and (ii) any issues raised pursuant to the weight of the expert report can be determined once the expert has provided testimony before the trier of fact.

52. Therefore, it is submitted that the Respondent's motion should be dismissed.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

This 14th day of September, 2012

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LIST OF AUTHORITIES

Legislation

Canadian Human Rights Act, R.S.C., c. H-6, section 48.9(1)

Federal Courts Rules, 1998, SOR/98-106 as amended, Rule 52.2

Caselaw

Baillie et al. v. Canadian Human Rights Commission and Air Canada and Air Canada Pilots Association, 2011 CHRT 17

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R. v. Abbey, [1982] 2 S.C.R. 24

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R. v. Pascoe (1997), 32 O.R. (3d) 37

Secondary Sources

John Sopinka, Sidney N. Lederman & Alan W. Bryant, *The Law of Evidence in Canada*, 3d ed. (Markham: Butterworths Canada Ltd., 2009), at page 785

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House of Commons Debates, *Apology to Former Students of Indian Residential Schools,* 39th Parliament, 2nd Sess., No. 110 (June 11, 2008) at 6849 (Hon Peter Milliken)