

**CANADIAN HUMAN RIGHTS TRIBUNAL**

**B E T W E E N :**

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

**Complainants**

**- and -**

**CANADIAN HUMAN RIGHTS COMMISSION**

**Commission**

**- and -**

**ATTORNEY GENERAL OF CANADA  
(representing the Minister of Indian and Northern Affairs)**

**Respondent**

**- and -**

**CHIEFS OF ONTARIO and  
AMNESTY INTERNATIONAL CANADA**

**Interested Parties**

---

**WRITTEN SUBMISSIONS  
On the Motion to Strike the Respondent's Expert Report**

---

**I. INTRODUCTION**

1. This is a motion by the First Nations Child and Family Caring Society ("the complainant" or "the Caring Society") for an Order striking the Respondent's expert report, which was filed in two parts together with a covering letter from KPMG on September 15, 2010 ("the report").

2. The complainant maintains that the report is inadmissible, as it fails to identify or set out the qualifications of any person who is its author and who the Respondent intends to call as an expert witness in respect of the report, as required by Rule 6(3) of the *Canadian Human Rights Tribunal Rules of Procedure*. It is the complainant's position that these omissions go well beyond a mere technical breach, and that the report is inadmissible in these proceedings before the Tribunal.

## II. FACTS

3. On September 15, 2010, the Respondent sent to counsel for the complainant a letter enclosing its expert report (in two, separately bound parts) and accompanying covering letter from KPMG.

Affidavit of Sarah Wassill, dated July 20, 2012 at para. 2

Letter of J. Tarlton, dated September 15, 2010, with enclosed expert report (in two parts) and accompanying covering letter from KPMG, Exhibit "A" to the Affidavit of Sarah Wassill, dated July 20, 2012

2. The Respondent's September 15, 2010 letter describes the report as having been prepared by KPMG. The enclosed covering letter, although signed by KPMG Senior Vice President Paul M. Ross, gives no indication as to the identity or qualifications of the report's author (or authors). Rather, Mr Ross's letter simply notes "we" have identified several clerical errors and included an addendum to the report.

Letter of J. Tarlton, dated September 15, 2010, with enclosed expert report (in two parts) and accompanying covering letter from KPMG, Exhibit "A" to the Affidavit of Sarah Wassill, dated July 20, 2012

Letter of P. Ross, dated September 15, 2010, Exhibit "A" to the Affidavit of Sarah Wassill, dated July 20, 2012

4. The two, separately bound portions of the report are entitled "Indian and Northern Affairs Canada: Review of Wen:de The Journey Continues" and "Indian and Northern Affairs Canada: Child and Family Services Funding Review." Neither portion gives any indication as to the identity or qualifications of the report's author (or authors), aside from a copyright statement which identifies KPMG as "a Canadian limited liability

partnership and a member firm of the KPMG network of independent member firms affiliated with KPMG International Cooperative [...], a Swiss entity.”

KPMG Report Part 1, Indian and Northern Affairs Canada: Review of Wen:de The Journey Continues, Exhibit “A” to the Affidavit of Sarah Wassill, dated July 20, 2012 at i

KPMG Report Part 2, Indian and Northern Affairs Canada: Child and Family Services Funding Review, Exhibit “A” to the Affidavit of Sarah Wassill, dated July 20, 2012 at ii

5. The preliminary sections to each portion of the report state only that:

INAC engaged KPMG LLP (“KPMG”) to review and critique the economic analysis used to develop the recommendations for a new funding formula contained in this report and quantify the resulting cost implications. Our mandate was to review the calculations and economic analysis contained in the “Wen:de The Journey Continues” report. We are not experts in assessing the costs necessary to operate a child and family services agency. Our comments and calculations in this report are based solely on our analysis of the information provided to us.

KPMG Report Part 1, Indian and Northern Affairs Canada: Review of Wen:de The Journey Continues, Exhibit “A” to the Affidavit of Sarah Wassill, dated July 20, 2012 at 1, 5

and:

Our mandate is to attempt to compare funding levels between federal and provincial agencies. We are not experts in assessing the outcomes of services provided by family service agencies. Our comments and calculations in this report are based solely on our analysis of funding information provided to us.

KPMG Report Part 2, Indian and Northern Affairs Canada: Child and Family Services Funding Review, Exhibit “A” to the Affidavit of Sarah Wassill, dated July 20, 2012 at 2, 6

6. The report consistently refers to “our review,” notes that “we have the following comments, concerns and alternative calculations,” and offers “KPMG comments” and “KPMG alternate calculations.” At no time does the report identify or set out the qualifications of its author (or authors), or of the individual(s) whose comments, concerns, and calculations are presented in the report.

See, for example, KPMG Report Part 1, Indian and Northern Affairs Canada: Review of Wen:de The Journey Continues, Exhibit “A” to the Affidavit of Sarah Wassill, dated July 20, 2012 at 6-19 and KPMG Report Part 2, Indian and Northern Affairs Canada: Child and Family Services Funding Review, Exhibit “A” to the Affidavit of Sarah Wassill, dated July 20, 2012 at 10, 25, 29, 38, 41-42, 53, 110

### III. POSITION OF THE COMPLAINANT

7. Rule 6(3) of the *Canadian Human Rights Tribunal Rules of Procedure* ("Rules of Procedure") establishes the Tribunal's rules concerning expert witness reports. Rule 6(3) provides:

Within the time fixed by the Panel, each party shall serve on all other parties and file with the Tribunal,

- a. a report in respect of any expert witness the party intends to call, which report shall,
  - i. be signed by the expert;
  - ii. set out the expert's name, address and qualifications; and
  - iii. set out the substance of the expert's proposed testimony; and
- b. a report in respect of any expert witness the party intends to call in response to an expert's report filed under 6(3) (a), which report shall comply with the requirements of 6(3) (a).

*Canadian Human Rights Tribunal Rules of Procedure*, Rule 6(3)

8. It is the complainant's position that the report filed by the Respondent fails to meet the requirements of Rule 6(3), in that it fails to set out the name, address and qualifications of the individual who is the author of the report and who the Respondent intends to call as an expert witness in the hearing of this matter. The complainant further submits that these are not merely technical omissions, but rather that they are serious shortcomings which are highly prejudicial to the complaint and which render the report inadmissible as expert evidence before the Tribunal.

9. The requirements set out in Rule 6(3) are substantive requirements necessary for ensuring that parties may tender opinion evidence only from properly qualified individuals, the nature and scope of whose qualifications and expertise may be assessed through cross-examination before the Tribunal. Indeed, basic requirements such as those set out in Rule 6(3) are common features of rules governing the admissibility of expert evidence before courts and administrative tribunals.

See, for example, Ontario's *Rules of Civil Procedure*, R.R.O. 1990, Regulation 194, Rule 53.03; British Columbia's *Supreme Court Civil Rules*, B.C. Reg. 168/20009, Rule 11-6

10. In *Jones v. Ma*, the British Columbia Supreme Court considered the admissibility of a report the cover of which was signed by an individual, but the content of which the plaintiff maintained was a “corporate” report which embodied the observations and opinions of several individuals, without clearly distinguishing who made the various observations on which the opinions were based and who engaged in the process of forming the opinions expressed in the report. As in the present case, it was noted that the report in question was “replete with sentences that use the word “we” as the subject of a sentence, without further specifying who the “we” consists of.”

*Jones v. Ma*, 2010 BCSC 867 at paras. 1-4

11. Although counsel for the defendant attempted to argue that these were merely stylistic defects and that the report in its entirety could be attributed to the individual who signed the covering letter, the Court concluded that the report was largely the work of another individual. The failure to disclose this information amounted to a failure to comply with the requirements of the rule, as a result of which the report was excluded from evidence. According to Justice Ehrcke:

This is not simply a matter of form. The purpose of the rule is to ensure fairness to both parties by providing the party on whom the report is served with adequate notice to enable them to effectively cross-examine the expert and to properly instruct their own expert if they choose to retain one.

*Jones v. Ma*, 2010 BCSC 867 at paras. 10-14

12. The significance of meeting the rules for expert evidence - and the prejudice that arises where such requirements are not met - was discussed at length in *Dhaliwal v. Bassi*, where the BC Supreme Court held that:

Unless the authors of all parts of an opinion are known, unless the qualifications of each person contributing to the opinion are known, and unless the facts upon which each of the persons contributing to an opinion are set out, the cross-examination of an expert witness regarding the opinion that had been provided would be impossible.

*Dhaliwal v. Bassi*, 2007 BCSC 548 at paras. 3-10

13. In *Heidebrecht v. Fraser Burrard Hospital Society*, Justice Henderson held that:

In my view, a document is not a written statement setting out the opinion of an expert unless it appears clearly from the face of that document that the opinions in it are

those of the individual expert who prepared and signed the statement. Our rules make no provision for the entry in evidence of joint or corporate opinions. The opinion must be that of an individual expert, and it must fall, of course, within the scope of her own expertise. The opinion cannot simply be a reporting of the opinions of others. The statement, to be admissible, must clearly show that this is the case.

I find some support for this view in the decision of my brother, Judge MacDonald, in *Emil Anderson Construction Co. Ltd. et al v. British Columbia Railway Company* reported at (1987) 15 B.C.L.R. (2d) 28. As that case points out, there is a real possibility of procedural prejudice to cross-examining counsel if he or she cannot tell from the report which of the opinions are truly those held by the witness giving evidence and which are simply opinions of other team members reported to her and asserted by her in the written report.

*Heidebrecht v. Fraser Burrard Hospital Society*, [1995] B.C.J. No. 2996 at paras. 11-12

14. In the present case, the report tendered by the Respondent indicates that it is based upon observations and opinions of a team or group of individuals employed by KPMG. The report fails to identify any of these individuals or their qualifications, and it fails to specify which observations and opinions are attributable to which individual contributor. The complainant submits that, as under the British Columbia rules, the Tribunal's rules do not provide for the introduction into evidence of joint or corporate opinions such as the one filed by the Respondent.

15. Given the Respondent's failure to meet the requirements set out in Rule 6(3), and for all the underlying reasons for such requirements as articulated in the jurisprudence cited above, it is the complainant's position that the report filed by the Respondent on September 15, 2010 is inadmissible as expert evidence.

#### IV. CONCLUSION

16. By tendering a report by a corporate entity rather than an individual, the Respondent has failed to comply with Rule 6(3) and has made it impossible for the parties - or the Tribunal - to know the basis of the opinions expressed in the report. In such circumstances, admission of the KPMG report would give rise to serious and substantial prejudice to the complainant. Accordingly, it is the complainant's respectful submission that the report filed by the Respondent on September 15, 2010 ought to be deemed inadmissible in the present hearing.

All of which is respectfully submitted on this 23<sup>rd</sup> day of July, 2012.



---

Paul Champ

**CHAMP & ASSOCIATES**  
Barristers and Solicitors  
Equity Chambers  
43 Florence Street  
Ottawa, ON K2P 0W6  
Phone: (613) 237-4740  
Fax: (613) 232-2680

*Counsel for the Caring Society*

## V. LIST OF AUTHORITIES

### Statutes and Regulations

*Canadian Human Rights Tribunal Rules of Procedure*, Rule 6(3)

*Ontario Rules of Civil Procedure*, R.R.O. 1990, Regulation 194, Rule 53.03

*British Columbia Supreme Court Civil Rules*, B.C. Reg. 168/20009, Rule 11-6

### Jurisprudence

*Dhaliwal v. Bassi*, 2007 BCSC 548

*Heidebrecht v. Fraser Burrard Hospital Society*, [1995] B.C.J. No. 2996

*Jones v. Ma*, 2010 BCSC 867