

The Canadian Human Rights Act

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 Indian and Northern Affairs)

Respondent

- and -

CHIEFS OF ONTARIO and
AMNESTY INTERNATIONAL CANADA

Interested Parties

AMENDED NOTICE OF MOTION OF RESPONDENT
For an Order that Opposing Parties' Reports are Inadmissible as Expert Reports

The Respondent, the Attorney General of Canada, is making this motion to the Canadian Human Rights Tribunal.

The motion is made under Rule 3 of the *Canadian Human Rights Tribunal Rules of Procedure*.

The motion is to be heard by the Tribunal at the 11th floor 160 Elgin Street, Ottawa, Ontario, on ~~Tuesday January 19, 2009~~ Tuesday, September 25, 2012 commencing at 10:00 am, or as soon thereafter as it may be heard.

The motion is for an order under Rules 1(6), 3(1), 3(2)(d), 5(2), 5(3)(c) and 6(3), for an order that reports delivered by opposing parties, as enumerated below, are inadmissible as expert reports before the Tribunal in this proceeding (T -1340-07008) and for an order that their evidence not be received in these proceedings.

The reports in question are:

1. *A National Crime*, by John Milloy, Manitoba University Press, 1999;
2. *Conditions Facing First Nations Children in Remote Northern Communities in Ontario: Preliminary Impressions*, a report prepared by the Office of Child and Family Service Advocacy in Ontario, dated July 2006. Judy Finlay was the Chief Advocate at the time the report was published;
3. *Places for the Good Care of Children: A Discussion of Indigenous Cultural Considerations and Early Childhood in Canada and New Zealand*, by Margo Greenwood, June 2009;
4. *Whispered Gently Through Time, First Nations Quality Child Care*, by Margo Greenwood and Perry Shawana, unknown date;
5. Report of Dr. Nico Trocmé, dated September, 2, 2009;
6. Keeping First Nations children at home: A few Federal policy changes could make a big difference, by Frederic Wien; and
7. Wen:de The Journey Continues by John Loxley

The grounds for the motion are:

1. The Complaint filed by the Complainants before the Canadian Human Rights Commission in or about February 2007 and referred by the Commission to the Tribunal by decision dated September 30, 2008 and communicated to the Respondent on October 14, 2008, says in material respects:

"On behalf of the Assembly of First Nations and the First Nations Child and Family Caring Society of Canada, we are writing to file a complaint pursuant to the Human Rights Act regarding the inequitable levels of child welfare funding provided to First Nations children and families on reserve pursuant to the Indian and Northern Affairs Canada (INAC) funding formula "

2. The allegations in the Complaint deal exclusively with INAC's (now Aboriginal Affairs and Northern Development Canada ("AANDC")) funding to provincially-authorized child and family service providers for them to provide child welfare to Indian children and families ordinarily resident on reserve or in the Yukon as compared to funding provided by the provinces and the Yukon Government to Indian and non-Indian children and families for child welfare on and off reserve, and provided by the Yukon Government for child welfare to non-Indian children and families resident in the Yukon.

3. AANDC INAC provides funding to the provincially-authorized providers of child welfare services who, in turn, provide child welfare services or arrange for the provision of child welfare services to Indian children and families ordinarily resident on reserves in the province or resident anywhere the Yukon. This funding is provided to the provinces, the Yukon, First Nations Child and Family Services Agencies, Indian Bands and Tribal Councils ("First Nations Service Providers").

4. *A National Crime*, by John Milloy, is a book published by the University of Manitoba Press in 1999. The book is about Indian residential schools in Canada from 1879 to 1986. *A National Crime* is inadmissible as an expert report in these proceedings because:

- a. The book is not and does not purport to be an expert report prepared for an adjudicative proceeding;
- b. It was not prepared for these proceedings;
- c. It does not comply with Rule 6(3);
- d. It is not about and does not address the AANDC ~~INAC~~ child and family services funding or child welfare which is subject of these proceedings.
- e. More specifically, it does not address the level of funding provided by Indian Affairs to service providers for them to deliver child welfare on reserve and whether such funding is discriminatory within the meaning of the *Canadian Human Rights Act* or otherwise;
- f. Child welfare is mentioned in chapter 10 at pages 211 - 217 of the book but only in relation to the period from the late 1940s through the 1960s and not at all as to whether it is comparable to provincial funding off reserve or whether federal funding is adequate;
- g. The sweep of the report is very broad which is a function of the purpose for which it was written, that is, a history of the Indian residential school system in Canada. It covers a period of in excess of 100 years:
- h. The book does not meet the requirements of an expert report, that is, it was not prepared for this proceeding and does not contain opinions stated by an expert in response to specific questions posed by instructing counsel;
- i. In other words, the book does not meet the requirements of an expert report because it does not set out;
 - i. the author's address, qualifications, and signature,
 - ii. the issue, as framed by instructing counsel, that arises in the subject proceedings which is to be addressed by the author,
 - iii. a statement of assumed or stated facts bearing on the issues in the subject proceedings, and

- iv. does not express an opinion that is both relevant to the subject proceedings and one that is within the author's sphere of expertise;
- j. An expert report is to provide opposing parties with notice of the expert opinions to be relied on in the proceedings together with the facts and assumptions relied on by the expert in reaching those opinion. The book does not do that;
- k. The book does not contain an opinion on a matter that requires expertise to proffer an opinion and one that is within the author's sphere of expertise;
- l. The book does not have the objectivity that an adjudicative body requires and needs from an expert witness who is called to testify with respect to matters the trier of fact is unlikely to form a correct judgment about if unassisted by persons with special knowledge.

5. As to the report, *Conditions Facing First Nations Children in Remote Northern Communities in Ontario: Preliminary Impressions*, dated July 2006 and published by the Office of Child and Family Service Advocacy in Ontario at a time when Judy Finlay was the Chief Advocate, the report is inadmissible as an expert report in these proceedings because:

- a. The report is not and does not purport to be an expert report prepared for an adjudicative proceeding;
- b. It was not prepared for these proceedings;
- c. It does not comply with Rule 6(3);
- d. It is not about and does not address the ~~AANDC~~ ~~INAC~~ child and family services funding or child welfare which is subject of these proceedings;
- e. More specifically, it does not address the level of funding provided by Indian Affairs to service providers for them to deliver child welfare on reserve and whether such funding is discriminatory within the meaning of the *Canadian Human Rights Act* or otherwise;
- f. Child welfare is mentioned at pages 6 - 7 of the report, but not in relation to funding or as to any comparative or evaluated way, or as to whether federal funding is adequate;

- g. The sweep of the report is very broad which is a function of the purpose for which it was written, that is, an overview concerns and issues facing First Nations children and youth from northern Ontario fly-in communities;
- h. The report does not meet the requirements of an expert report, that is, it was not prepared for this proceeding and does not contain opinions stated by an expert in response to specific questions posed by instructing counsel;
- i. In other words, the report does not meet the requirements of an expert report because it does not set out;
 - i. the author's address, qualifications, and signature,
 - ii. the issue, as framed by instructing counsel, that arises in the subject proceedings which is to be addressed by the author,
 - iii. a statement of assumed or stated facts bearing on the issues in the subject proceedings, and
 - iv. does not express an opinion that is both relevant to the subject proceedings and one that is within the author's sphere of expertise;
- j. An expert report is to provide opposing parties with notice of the expert opinions to be relied on in the proceedings together with the facts and assumptions relied on by the expert in reaching those opinions. The report does not do that;
- k. The report does not contain an opinion on a matter that requires expertise to proffer an opinion and one that is within the author's sphere of expertise;
- l. The report does not have the objectivity that an adjudicative body requires and needs from an expert witness who is called to testify with respect to matters the trier of fact is unlikely to form a correct judgment about if unassisted by persons with special knowledge.

6. As to the reports *Places for the Good Care of Children: A Discussion of Indigenous Cultural Considerations and Early Childhood in Canada and New Zealand*, by Margo Greenwood dated June 2009, and *Whispered Gently Through Time, First Nations Quality Child Care*, by Margo Greenwood and Perry Shawana of unknown date;

- a. Each report is not and does not purport to be an expert report prepared for an adjudicative proceeding;
- b. Each was not prepared for these proceedings;
- c. The reports do not comply with Rule 6(3);
- d. Each is not about and does not address the AANDC INAC child and family services funding or child welfare which is subject of these proceedings;
- e. More specifically, they do not address the level of funding provided by Indian Affairs to service providers for them to deliver child welfare on reserve and whether such funding is discriminatory within the meaning of the Canadian Human Rights Act or otherwise;
- f. Child welfare is not addressed in relation to funding or as to any comparative or evaluated way, or as to whether federal funding is adequate;
- g. The sweep of each report is very broad, which is a function of the purpose for which it was written, that is, an overview concerns and issues facing First Nations children and families;
- h. Neither report meets the requirements of an expert report, that is, it was not prepared for this proceeding and does not contain opinions stated by an expert in response to specific questions posed by instructing counsel;
- i. In other words, each report does not meet the requirements of an expert report because it does not set out;
 - i. the author's address, qualifications, and signature,
 - ii. the issue, as framed by instructing counsel, that arises in the subject proceedings which is to be addressed by the author,
 - iii. a statement of assumed or stated facts bearing on the issues in the subject proceedings, and
 - iv. does not express an opinion that is both relevant to the subject proceedings and one that is within the author's sphere of expertise;
- j. An expert report is to provide opposing parties with notice of the expert

opinions to be relied on in the proceedings together with the facts and assumptions relied on by the expert in reaching those opinions. Neither report does that;

- k. Neither report contains an opinion on a matter that requires expertise to proffer an opinion and one that is within the author's sphere of expertise;
- l. The reports do not have the objectivity that an adjudicative body requires and needs from an expert witness who is called to testify with respect to matters the trier of fact is unlikely to form a correct judgment about if unassisted by persons with special knowledge.

7. *Report of Dr. Nico Trocme, dated September 2, 2009, is inadmissible as an expert report in these proceedings because:*

- a. The report does not address the comparison of federal/provincial funding, which is the substance of the complaint;
- b. The report does not contain an opinion on a matter that requires expertise to proffer an opinion and one that is within the author's sphere of expertise;
- c. The report does not have the objectivity that an adjudicative body requires and needs from an expert witness who is called to testify with respect to matters the trier of fact is unlikely to form a correct judgment about if unassisted by persons with special knowledge.

8. *Keeping First Nations children at home: A few Federal policy changes could make a big difference by Frederic Wien*

- a. The article is not and does not purport to be an expert report prepared for an adjudicative proceeding;
- b. It was not prepared for these proceedings;
- c. It does not comply with Rule 6(3);
- d. The article does not address the comparison of federal/provincial funding, which is the substance of the complaint;
- e. The article does not meet the requirements of an expert report, that is, it was not prepared for this proceeding and does not contain opinions stated by an expert in response to specific questions posed by instructing counsel;

- f. In other words, the article does not meet the requirements of an expert report because it does not set out:
 - i. the author's address, qualifications, and signature,
 - ii. the issue, as framed by instructing counsel, that arises in the subject proceedings which is to be addressed by the author, and
 - iii. a statement of assumed or stated facts bearing on the issues in the subject proceedings, and
 - iv. does not express an opinion that is both relevant to the subject proceedings and one that is within the author's sphere of expertise;
- g. An expert report is to provide opposing parties with notice of the expert opinions to be relied on in the proceedings together with the facts and assumptions relied on by the expert in reaching those opinions. The article does not do that;
- h. The article does not contain an opinion on a matter that requires expertise to proffer an opinion and one that is within the author's sphere of expertise;
- i. The article does not have the objectivity that an adjudicative body requires and needs from an expert witness who is called to testify with respect to matters the trier of fact is unlikely to form a correct judgment about if unassisted by persons with special knowledge.
- j. The article improperly provides conclusions on the ultimate issue before the Tribunal.

9. *Wen:de The Journey Continues* by John Loxley and other multiple authors

- a. The report is not and does not purport to be an expert report prepared for an adjudicative proceeding;
- b. It was not prepared for these proceedings;
- c. It does not comply with Rule 6(3);
- d. The report does not address the comparison of federal/provincial funding, which is the substance of the complaint;

- e. The report does not meet the requirements of an expert report, that is, it was not prepared for this proceeding and does not contain opinions stated by an expert in response to specific questions posed by instructing counsel;
- f. In other words, the report does not meet the requirements of an expert report because it does not set out:
 - i. the author's address, qualifications, and signature,
 - ii. the issue, as framed by instructing counsel, that arises in the subject proceedings which is to be addressed by the author, and
 - iii. a statement of assumed or stated facts bearing on the issues in the subject proceedings, and
- g. An expert report is to provide opposing parties with notice of the expert opinions to be relied on in the proceedings together with the facts and assumptions relied on by the expert in reaching those opinions. The report does not do that;
- h. The report does not contain an opinion on a matter that requires expertise to proffer an opinion and one that is within the author's sphere of expertise;
- i. The report does not have the objectivity that an adjudicative body requires and needs from an expert witness who is called to testify with respect to matters the trier of fact is unlikely to form a correct judgment about if unassisted by persons with special knowledge.
- j. The article improperly provides conclusions on the ultimate issue before the Tribunal.

7. 10. The following documentary evidence will be used in support of the motion:

- a. Affidavit of Odette Johnson sworn December 21, 2009;
- b. Complaint dated in or about February 2007;
- c. Directive 20-1
- d. Enhanced Prevention Approach funding formula;
- e. A National Crime, by John Milloy, 1999;
- f. Report entitled *Conditions Facing First Nations Children in Remote Northern Communities in Ontario: Preliminary Impressions*, dated July

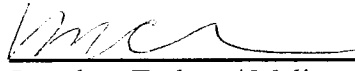
2006 and published by the Office of Child and Family Service Advocacy in Ontario at a time when Judy Finlay was the Chief Advocate;

- g. *Places for the Good Care of Children: A Discussion of Indigenous Cultural Considerations and Early Childhood in Canada and New Zealand*, by Margo Greenwood, June 2009;
- h. *Whispered Gently Through Time, First Nations Quality Child Care*, by Margo Greenwood and Perry Shawana, unknown date;
- i. Report of Dr. Nico Trocmé, dated September, 2, 2009; and
- j. Keeping First Nations children at home: A few Federal policy changes could make a big difference, by Frederic Wien
- k. Wen:de The Journey Continues by John Loxley and other multiple authors

~~Dated at the City of Vancouver, British Columbia, this 21st day of December 2009.~~

Dated at the City of Halifax, in the Province of Nova Scotia this 28th day of August, 2012.

Mitchell Taylor, Q.C.
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