Tribunal 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 Indian and Northern Affairs)

Respondent

-and-

CHIEFS OF ONTARIO AND AMNESTY INTERNATIONAL CANADA

Interested parties

CANADA'S WRITTEN SUBMISSIONS

OVERVIEW

1. The complaint before the Tribunal alleges that the federal government does not fund child and family service providers for First Nations children living on-reserve to the level that provincial and Yukon governments fund child and family service providers off-reserve.

2. As part of their case on the merits of this complaint, several potential expert reports have been filed by the opposing parties. The respondent challenges the admissibility of the reports filed by the opposing parties, as failing to meet the criteria set out by the Supreme Court.

SUBMISSIONS

Proposed expert reports

3. The proposed expert report filed by the opposing parties pursuant to Rule 6(3) of the *Canadian Human Rights Tribunal Rules of Procedure* are:

(i.) *A National Crime: The Canadian Government and the Residential School System 1879 to 1986* by John Milloy;

(ii.) *Places for the Good Care of Children: A Discussion of Indigenous Cultural Considerations and Early Childhood in Canada and New Zealand*, by Margo Greenwood;

(iii.) *Whispered Gently Through Time: First Nations Quality Child Care*, by Margo Greenwood and Perry Shawana;

(iv.) *Report of Dr. Nico Trocmè*, dated September 2, 2009;

(v.) *Keeping First Nations children at home: A few Federal policy changes could make a big difference* by Frederic Wien, Cindy Blackstock, John Loxley and Nico Trocmè;

(vi.) *Wen:de The Journey Continues* by John Loxley (primary author) and multiple individuals; and

(vii.) *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*, by Ruth Hislop and Judy Finlay

Principles for the admissibility of expert evidence

Mohan test for admissibility

4. The leading case on the admissibility of expert evidence is the Supreme Court's decision in *R.* v. *Mohan.* In *Mohan*, Justice Sopinka held that proposed expert evidence must meet the following four criteria:

    i) relevance;
    ii) necessity in assisting the trier of fact;
    iii) the absence of an exclusionary rule; and
    iv) a properly qualified expert.[1]

5. The first criterion of relevance is a threshold requirement that is examined in two ways: 1) through its *logical* relevance and 2) through its *legal* relevance.[2]

6. Logical relevance is established if the expert report is so related to a fact in issue that it tends to establish it.[3] However, even if something is logically relevant, it can still be excluded it fails to demonstrate legal relevance. In *Mohan*, Sopinka, J. described legal relevance as a "cost benefit analysis" that considered the impact of the expert report on the trial process.[4] Considerations under this topic include: 1) whether the probative value of the report is outweighed by the prejudicial effect, 2) whether the report would involve an inordinate amount of time not commensurate with its value and 3) whether the report is misleading in the sense that the its effect is out of proportion to its reliability.[5]

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1 *R.* v. *Mohan*, [1994] 2 S.C.R. 9, at pg. 16, respondent's book of authorities, tab 2
2 *Mohan, supra*, at pg. 16, respondent's book of authorities, tab 2
3 *Mohan, supra*, at pg. 16, respondent's book of authorities, tab 2
4 *Mohan, supra*, at pg. 16, respondent's book of authorities, tab 2
5 *Mohan, supra*, at pg. 16, respondent's book of authorities, tab 2

7. The second criterion of necessity is answered by considering whether the proposed evidence will provide information that is likely outside the experience and knowledge of the trier of fact.[6] This requires that the proposed evidence be more than "helpful."[7]

8. In discussing necessity, the Supreme Court confirmed that expert evidence should only be admitted in situations where non-experts are "apt to come to a wrong conclusion without expert assistance, or where access to important information will be lost unless we borrow from the learning of experts."[8]

9. In *Fairford First Nation* v. *Canada (Attorney General)*, Rothstein, J. (as he was then) refused to admit the report of an alleged expert, holding that the expert report was not necessary after considering whether the proposed expert would "provide information that is outside the experience and knowledge of a judge such that it is necessary to enable the judge to appreciate the matters in issue due to their technical nature."[9]

10. Both necessity and relevance are significantly tied to the issues being adjudicated by the Tribunal. A proposed expert report needs to assist with understanding a particular issue that is before the Tribunal. If the proposed expert report helps understand a matter that is not in issue before the Tribunal, it will not be either relevant or necessary.

11. With respect to the last two criteria under *Mohan*, the proposed evidence cannot fall outside an exclusionary rule of evidence, and it must be adduced through a witness who

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6 *Mohan*, *supra*, at pg. 19, respondent's book of authorities, tab 2
7 *Mohan*, *supra*, at pg. 19, respondent's book of authorities, tab 2
8 *R.* v. *D. (D.)*, [2000] 2 S.C.R. 275, at para. 57, respondent's book of authorities, tab 3
9 *Fairford First Nation* v. *Canada (Attorney General)* (1998), 145 F.T.R. 115, at paras. 8-9, respondent's book of authorities, tab 4

is shown to have acquired special or peculiar knowledge in the area on which the witness will testify through study or experience.[10]

The importance of the cost/benefit analysis

12. The criteria set out in *Mohan* continue to guide the law on expert evidence. However, the Ontario Court of Appeal in *R. v. Abbey* outlines a new approach that uses the *Mohan* criteria but in a slightly re-organized format to reflect developments in the law.[11] This is a two step process that first requires the tier of fact to consider whether the criteria for admissibility have been satisfied and then weigh the costs and benefits of admitting the evidence in the context of the case:

> Using these criteria, I suggest a two-step process for determining admissibility. First, the party proffering the evidence must demonstrate the existence of certain preconditions to the admissibility of expert evidence. For example, that party must show that the proposed witness is qualified to give the relevant opinion. Second, the trial judge must decide whether expert evidence that meets the preconditions to admissibility is sufficiently beneficial to the trial process to warrant its admission despite the potential harm to the trial process that may flow from the admission of the expert evidence. This "gatekeeper" component of the admissibility inquiry lies at the heart of the present evidentiary regime governing the admissibility of expert opinion evidence...[12]

13. In establishing this two-part test, the Court in *Abbey* re-stated the preconditions for admissibility as the same as in *Mohan*, except for limiting the consideration of relevance to logical relevance.[13]

14. In the second stage of the test in *Abbey*, the "gatekeeper" component, the Court indicated

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[10] *Mohan, supra*, at pg. 21, respondent's book of authorities, tab 2
[11] *R. v. Abbey*, 2009 ONCA 624, leave to appeal to SCC refused 2010 CanLII 37826, respondent's book of authorities, tab 5
[12] *Abbey, supra*, at para. 76, respondent's book of authorities, tab 5
[13] *Abbey, supra*, at paras. 80-2, respondent's book of authorities, tab 5

the cost-benefit analysis is case specific and requires the trier of fact to "identify and weigh competing considerations to decide whether on balance those considerations favour the admissibility of the evidence."[14]

15. The factors included as part of the "benefit" portion of this analysis are the probative value and the significance of the issue to which the evidence is directed.[15]

16. In considering the probative value of evidence, reliability figures prominently. Reliability in this context is "not only the subject matter of the evidence, but also the methodology used by the proposed expert in arriving at his or her opinion, the expert's expertise and the extent to which the expert is shown to be impartial and objective."[16]

17. Also included in this evaluation of the "benefit" portion is the legal relevance of the proposed evidence. While *logical* relevance was found to remain as part of the preconditions for admissibility, the Court in *Abbey* directed the consideration of the *legal* relevance to take place in the cost/benefit analysis.[17]

18. On the "cost" side of the analysis, the Court quoted from Binnie, J in *R. v. J. (J-L)*, describing the considerations as including "consumption of time, prejudice and confusion".[18]

19. Under the test established in *Abbey*, the proposed expert evidence in this case must not only meet the criteria established in *Mohan*, but must satisfy the Tribunal that the "cost-benefit analysis demands a consideration of the extent to which the proffered opinion

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[14] *Abbey, supra*, at para. 79, respondent's book of authorities, tab 5
[15] *Abbey, supra*, at para. 87, respondent's book of authorities, tab 5
[16] *Abbey, supra*, at para. 87, respondent's book of authorities, tab 5
[17] *Abbey, supra*, at para. 84-5, respondent's book of authorities, tab 5

evidence is necessary to a proper adjudication of the fact(s) to which that evidence is directed."[19]

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

20. The criteria for admissible expert reports is found at Rule 6(3) of the Rules of Procedure:

> 6(3) Within the time fixed by the Panel, each party shall serve on all other parties and file with the Tribunal,
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> (*a*) a report in respect of any expert witness the party intends to call, which report shall,
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> (i) be signed by the expert;
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> (ii) set out the expert's name, address and qualifications; and
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> (iii) set out the substance of the expert's proposed testimony; and
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> (*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*).[20]

The proposed expert evidence should be excluded

21. The first step in considering the proposed expert evidence is to define the matters that are in issue. At issue are allegations that the funding provided by the federal government to child and family service providers on-reserve is less than what the provincial and Yukon governments provide to child and family service providers off-reserve. The necessity, relevance and potential cost/benefit of the proposed expert evidence must be considered through this lens.

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[18] *Abbey*, *supra*, at para. 90, respondent's book of authorities, tab 5 ; *R. v. J. (J-L)*, [2000] 2 SCR 600, at para. 25, respondent's book of authorities, tab 6

[19] *Abbey*, *supra*, at para. 93

[20] Rule 6(3), *Canadian Human Rights Tribunal Rules of Procedure*, respondent's book of authorities, tab 1

22. One factor common to all of the proposed expert reports, except the report of Dr. Trocmè, is that none of them were prepared for this proceeding. Rather, the proposed expert reports are books, articles and papers that were prepared for another purpose and are not directed at the issues in this matter. This *prima facie* calls into question their relevance and necessity.

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

23. This report is a text on the Indian Residential school system and its legacy. While the text addresses issues pertaining to First Nations children and families, it is not logically relevant to the issues of federal/provincial funding of child and family service providers.

24. The text also does not provide the Tribunal with information that is helpful or necessary to the trier of fact, as it is beyond the scope of the allegations that the Tribunal must determine.

25. The 'expert' is not a properly qualified expert in the subject matter before the Tribunal. Rather, his expertise is as a historian.

26. Finally, this report fails on the second branch of the *Abbey* test. Not only is the text not legally relevant as it is outside the subject matter of the complaint, it is highly prejudicial to the respondent while providing no probative value to the issue at hand. Further, hearing testimony with respect to the text and the Indian Residential school experience would consume vast amounts of the Tribunal's time but provide no counterbalancing benefit to outweigh this cost.

Places for the Good Care of Children: A Discussion of Indigenous Cultural Considerations and Early Childhood in Canada and New Zealand, by Margo Greenwood

27. This is the doctorate thesis of on the subject of Indigenous Culture considerations and Child Placement. The thesis describes itself as being "....broadly speaking, about Indigenous early childhood and the potential of understanding child development as a site for cultural rejuvenation and efforts to rebuild colonized people."

28. Dr. Greenwood's conclusions, that early childhood is a critical site for cultural rejuvenation and that autonomy by Indigenous communities over language and culture is fundamental to such rejuvenation, is not relevant to the issue of the funding of child and family service providers by federal and provincial entities.

29. The 'expert' is not a properly qualified expert. At the time of the drafting of her thesis, Dr. Greenwood had obtained a Master of Arts degree in the area of "School of Child and Youth Care" but has no stated expertise in the area of funding child and family service providers on-reserve or off-reserve. The thesis does not contain an opinion on a matter that requires expertise or is in the author's area of expertise.

30. The thesis, which is substantial in length, can only serve to consume the time of the Tribunal, while providing no information which would be helpful or necessary to the Tribunal in coming to a conclusion on the ultimate issue. Therefore, it does not meet the second branch of the *Abbey* test.

Whispered Gently Through Time: First Nations Quality Child Care, by Margo Greenwood and Perry Shawana

31. The study is referred to as a "project" and its stated purpose is - to provide a vehicle for communities to articulate the nature and structure of child care in their community. The purpose of this report is to document those voices and their recommendations for quality child care services and options for First Nations jurisdiction in child care.

32. Neither the purpose for the drafting of the report nor the conclusions of the report are relevant to the issue of the funding of child and family service providers by federal and provincial entities. The report was prepared for use by First Nations communities to provide options for the development of child care program implementation models.

33. The paper, which is substantial in length, can only serve to consume the time of the Tribunal, while providing no information which would be helpful or necessary to the Tribunal in coming to a conclusion on the ultimate issue. Therefore, it does not meet the second branch of the *Abbey* test.

34. The 'expert' is not a properly qualified expert. At the time of the drafting of the paper in December 2003, Dr. Greenwood had obtained a Master of Arts degree in the area of "School of Child and Youth Care" and has no expertise in the area of funding child and family service on-reserve or off-reserve. The paper does not contain an opinion on a matter that requires expertise or is in the author's area of expertise.

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

35. This proposed expert report pertains to Jordan's Principle and is a paper that was published in the 'First Peoples Child & Family Review: A Journal on Innovation and Best Practices in Aboriginal Child Welfare Administration, Research, Policy & Practice.'

36. The paper contains the statement that it "summarizes the results of a comprehensive and multi-disciplinary review of Canada's funding policy for First Nations child and family service delivery on reserve which was conducted by the First Nations Child and Family Caring Society of Canada in 2005.

37. This report fails to meet the requirements of the second part of the *Abbey* test, in particular with respect to its reliability.

38. This report cannot be viewed as being objective or impartial. Much of the work referenced in the article was undertaken in collaboration with the First Nations Child and Family Caring Society, which is one of the complainant organizations in this matter. Also, one of the co-authors of this report is Cindy Blackstock, the Executive Director of the same complainant organization.

39. This involvement of the complainant organization in the proposed expert report is neither insignificant nor minor and it raises serious questions of the report's impartiality.

40. Finally, the article and the reports relied upon by Mr. Wien provide conclusions on the ultimate issue of funding levels. Accordingly, the article and reports do not serve to assist the trier of fact in making a decision but instead attempt to usurp the trier of fact's function in making a decision on the ultimate issue.

41. Lastly, the article is highly prejudicial, with little probative value.

42. The concerns with respect to the admission of this report outweigh any possible benefits. Therefore, it should be excluded as expert evidence, as per the reasoning in the second branch of the *Abbey* test.

Wen:de The Journey Continues by John Loxley (Multiple authors)

43. This report also fails to satisfy the second branch of the *Abbey* test. The 'expert' is not objective or impartial, as the Report upon which he wishes to rely when providing testimony was co-authored by Cindy Blackstock, Executive Director of one of the complainant organizations. This raises a question of impartiality as one of the members of the complainant organization was involved in the preparation of this report.

44. The report also does not serve to assist the trier of fact in making a decision but instead attempt to usurp the trier of fact's obligation to make a decision on the ultimate issue.

Report of Dr. Nico Trocmè, dated September 2, 2009

45. In this letter, Dr. Trocmè responds to five questions which had been posed by the Caring Society's previous counsel. Dr. Trocmè notes that his response reflects his position on the questions asked and not an expert opinion on a particular matter.

46. The contents of the report are not relevant, as the questions pertain to the impacts of funding (and limited funding) on First Nations persons, and not on a comparison of federal/provincial funding, which is the substance of the complaint.

47. Dr. Trocmè is not an expert in federal or provincial resource allocation for child and family service providers.

48. The paper does not contain an opinion on a matter that requires expertise or is in the author's area of expertise.

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, by Ruth Hislop and Judy Finlay

49. The paper is neither logically nor legally relevant to the issue before the Tribunal. The paper contains the statement - "This report will serve as a brief overview of factors to consider when talking about concerns or issues facing First Nations children and youth from Northern remote fly-in communities in Ontario.

50. This report contains observations of some of the issues effecting Aboriginal communities in Northern Ontario (reserve and non-reserve) and describes hardships (past and present) faced by those communities. It cannot in any way be characterized as a report on the issue of the funding of child and family service providers.

51. Lastly, the paper does not express an opinion that is relevant to the subject of the proceedings and within the author's area of expertise.

52. The time it would consume for no tangible purpose also weighs against its admission as an expert report. The observations made within the report are neither helpful nor necessary to the Tribunal for the purpose of rendering a decision in the complaint.

The proposed expert evidence does not comply with Rule 6(3)

53. As noted, only one of the six reports is actually produced for the purposes of the adjudication in this matter. The rest are books, papers and reports that already existed. They are not signed by the expert and several of them have multiple authors – in

particular: *Whispered Gently Through Time: First Nations Quality Child Care*, by Margo Greenwood and Perry Shawana; *Keeping First Nations children at home: A few Federal policy changes could make a big difference*, by Frederic Wien, Cindy Blackstock, John Loxley, and Nico Trocmè; and *Wen:de The Journey Continues* by John Loxley.[21]

54. The party submitting the proposed expert reports should have to comply with the requirements of Rule 6(3) within a set amount of time, failing which the reports should be struck.

Conclusion

55. The proposed expert reports violate the requirements of expert reports set out in the jurisprudence and in the *Tribunal's Rules of Procedure*. Therefore, the reports should be found inadmissible.

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[21] The respondent acknowledges that there is correspondence from Professor Loxley indicating that he was the primary author of "*Wen:de The Journey Continues*" and from Dr. Wien summarizing what his proposed expert testimony will include.

ORDER SOUGHT

56. The respondent respectfully requests that the following documents be ruled inadmissible as expert evidence:

(i.) *A National Crime: The Canadian Government and the Residential School System 1879 to 1986* by John Milloy,

(ii.) *Places for the Good Care of Children: A Discussion of Indigenous Cultural Considerations and Early Childhood in Canada and New Zealand*, by Margo Greenwood,

(iii.) *Whispered Gently Through Time: First Nations Quality Child Care*, by Margo Greenwood and Perry Shawana;

(iv.) *Report of Dr. Nico Trocmè*, dated September 2, 2009;

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(vi.) *Wen:de The Journey Continues* by John Loxley (primary author) and multiple individuals; and

(vii.) *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*, by Ruth Hislop and Judy Finlay.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated at Halifax, Nova Scotia, this 29th day of August 2012.

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List of Authorities

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

R. v. *Mohan*, [1994] 2 S.C.R. 9

R. v. *D. (D.)*, [2000] 2 S.C.R. 275

Fairford First Nation v. *Canada (Attorney General)* (1998), 145 F.T.R. 115

R. v. Abbey, 2009 ONCA 624, leave to appeal to SCC refused at 2010 CanLII 37826

R. v. J. (J-L), [2000] 2 SCR 600