

Three Strikes and Hopefully Canada is out as it tries to escape accountability for racial discrimination against First Nations children: A summary of the hearing of Canada's motion to dismiss the Canadian Human Rights Tribunal on First Nations child welfare, June 2, 3, 2010

Record number of people from all over Canada showed up to watch the Canadian Human Rights Tribunal on First Nations Child Welfare presided by Chair Shirish Chotalia in Ottawa. Children, youth, Elders, Chiefs, parents and First Nations child and family service agencies were joined by many caring Canadians including a group of students from Elizabeth Wyn Wood Secondary in Ottawa who had made their own "I am a witness" t-shirts to mark the occasion. This hearing takes place as Canada is about to host the G-8 and G-20 Summits which have as a key theme child and maternal health costing tax payers over 1 billion dollars in security costs alone. Consider that as you read this account of Canada's efforts to avoid accounting for inequitable treatment of vulnerable First Nations children and their families.

At issue, was Canada's attempt to avoid a full and public hearing on a complaint filed in 2007 by the Assembly of First Nations and the First Nations Child and Family Caring Society of Canada alleging that Canada is racially discriminating against First Nations children and families by providing less child welfare benefit on reserves than other children enjoy. The inequality has been linked to growing numbers of First Nations children in care driven there by inadequate and inequitable investments by the Federal Government in services to keep children safely in their family homes. This complaint was filed after ten years of working with Government to address the problem failed to resolve the inequality.

Canada has consistently tried to avoid a hearing on the merits using a legal loophole arguing that the Canadian Human Rights Act does not have jurisdiction to hear this complaint as what they characterize as "funding" is not a service within the meaning of the Canadian Human Rights Act. They tried twice, and failed, to get the Federal Court to put the brakes on the tribunal hearing. The funding is not a service argument, in my view, inaccurate and splitting hairs – it is clear to any reasonable person that child welfare services cannot be provided without funding. More importantly this argument does not prioritize concern for the children over concern for government interests. First Nations want a full hearing on the merits and feel there is overwhelming evidence that Canada is discriminating against First Nations children (i.e.: expert reports, Auditor General of Canada, Standing Committee on Public Accounts, INAC's own documents).

Here is a summary of the Hearing on Canada's motion to dismiss at the Canadian Human Rights Tribunal on June 2, 3, 2010.

Canada's Counsel Mr. Tarlton and Mr. Bumbers started the proceedings arguing that the Canadian Human Rights Tribunal does not have jurisdiction to hear this complaint as all Canada does is fund child welfare on reserves - the Provinces/Territories legislate and First Nations deliver. If there are any discrimination claims to be made because of service delivery, Canada implies that others are responsible. Canada cites a comparator group suggesting there is no comparator group for First Nations children even though they admit their own funding agreements bind First Nations agencies to deliver child welfare according to provincial/territorial laws applying to all children. Canada did not

meaningfully discuss the two Federal Court orders that stayed their application to derail the tribunal in their opening statement.

The complainants and interested parties who are opposing Canada presented over 600 pages of evidence and case law in opposition to Canada's 7 page affidavit supporting their motion to dismiss - The Chiefs of Ontario Counsel Mike Sherry did an impressive job demonstrating the level of control that INAC exercises over child welfare and the lack of investment in intervention services to keep kids safe at home. Patti Latimer for Amnesty International followed stressing that federalism should not be an escape hatch for Canada to avoid its accountability under international and domestic human rights law. She made special mention of Canada's obligations under the United Nations Convention on the Rights of the Child and the United Nations Declaration on the Rights of Indigenous Peoples. Assembly of First Nations (AFN) Counsel - Dave Nawegahbow and Joan St. Pierre did an elegant and powerful presentation laying out how Canada has consistently put itself between First Nations and their lands and First Nations parents and their children through residential schools and other regressive policies. AFN argued this pattern of assimilation persists as Canada is trying to obviate its responsibility for First Nations children served by child welfare agencies and fettered joint efforts by AFN and INAC to address the inequality over a ten year period. AFN also drew Chair Chotalia's attention to the two Federal Court decisions that had stayed Canada's request to derail the tribunal and suggested that Canada is simply trying at the same strategy here that failed to succeed in Federal Court.

First Nations Child and Family Caring Society Counsel, Paul Champ, then took the Tribunal through a whole series of INAC authored or commissioned documents admitting the inequality, documenting their control over First Nations child welfare agencies and the link between their misguided programs and growing numbers of children in care.

Canada's Counsel Mr. Tarlton and Mr. Bumbers ended the proceedings arguing that all Canada does is fund child welfare on reserves - the Provinces legislate and First Nations deliver. They went as far as to suggest that INAC could be perceived as the good guys because at least they are providing some funding on reserves and the provinces do not. Canada agreed that the complainants would be very disappointed if the hearing was dismissed but they argued that the higher consideration was their view that the Tribunal does not have jurisdiction. They said it was clear from Canada's 7 page affidavit filed in support of its arguments that the tribunal has no jurisdiction. Canada suggested First Nations pursue political alternatives (but offer no accounting of the 10 years we have tried this with no results) or other unnamed legal strategies to get equity for the kids. They offered no suggestions on how to alleviate the harm to children now.

The Chair has reserved judgment . Please go to www.fnwitness.ca for news on developments as they happen.