Canadian Human Rights Tribunal

Tribunal canadien des droits de la personne

Between:

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 Affairs and Northern Development of Canada)

Respondent

- and -

Chiefs of Ontario

- and -

Amnesty International

Interested Parties

Ruling

Members: Sophie Marchildon, Réjean Bélanger and Edward P. Lustig
Date: October 31, 2012
Citation: 2012 CHRT 28

I. Context

[1] The Complainants have filed a human rights complaint alleging that the inequitable funding of child welfare services on First Nations reserves amount to discrimination on the basis of race and national ethnic origin, contrary to section 5 of the *Canadian Human Rights Act*, RCS 1985, c H-6 (the *Act*). The complaint was referred to the Tribunal by the Canadian Human Rights Commission (the Commission) on October 14, 2008, and on November 3, 2008, the Commission indicated that it would be participating at the hearing on this matter.

[2] On December 21, 2009, the Respondent filed a motion for the dismissal of the complaint on the ground that the issues raised were beyond the tribunal's jurisdiction (the jurisdictional motion). The Tribunal ruled on the jurisdictional motion on March 14, 2011, in a decision reported at 2011 CHRT 4, and granted the motion, thereby dismissing the complaint. This decision was subsequently the subject of an application for judicial review before the Federal Court and, on April 18, 2012, the Federal Court set aside the Tribunal's decision and remitted the matter to a differently constituted panel of the Tribunal for re-determination in accordance with its reasons (2012 FC 445). On July 10, 2012, a panel of three Tribunal members, composed of members Marchildon, Lustig and Bélanger were appointed to hear this case (2012 CHRT 16).

II. FNCFCS' Motion to strike the Respondent's Expert Report

[3] On July 23, 2012, counsel for FNCFCS filed a Notice of Motion to strike the two parts and covering letter of the Respondent's expert report from KPMG filed September 15, 2010, on the ground that the report failed to meet the requirements set out in Rule 6(3) of the *Canadian Human Rights Tribunal Rules of Procedure* (the *Rules of Procedure*). Rule 6(3) reads as follows:

> a. 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;

(ii) set out the expert's name, address and qualifications; and

(iii) set out the substance of the expert's proposed testimony; and

b. *(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*).

[4] Specifically, FNCFCS highlighted the report's failure to identify or set out the qualifications of any expert from KPMG, a consulting firm, who the Respondent intended to call as an expert witness in respect of the report. FNCFCS submitted that without identifying its individual author and his or her qualifications, the report was inadmissible as expert evidence. In letters dated August 13, 2012, both AFN and the Commission expressed their support for this motion.

[5] On August 27, 2012, in response to this motion, the Respondent submitted a letter drafted by Paul Ross, Senior Vice President of KPMG, indicating that he had authored the KPMG expert report and enclosing a copy of his Statement of Qualifications. The Respondent submits that this letter and the Statement of Qualifications address the concerns raised by FNCFCS in their motion, that FNCFCS has not suffered any prejudice by the delay in providing this information and therefore that the motion should be dismissed.

III. The Respondent's Motion to strike the opposing parties' Expert Reports

[6] On August 29, 2012, the Respondent filed a motion to strike the Chiefs of Ontario (COO) expert report by Hislop, R. and Finlay, J. entitled *Conditions Facing First Nations Children in Remote Northern Communities in Ontario: Preliminary Impressions*, prepared by the Office of Child and Family Service Advocacy in Ontario, dated July 2006. The Respondent's motion also sought to strike following expert reports from the Commission:

(a) Milloy, J. A National Crime: The Canadian Government and the Residential School System, 1879 to 1986 (University of Manitoba Press: 1999);

(b) Greenwood, M. Places for the Good Care of Children: A Discussion of Indigenous Cultural Considerations and Early Childhood in Canada and New Zealand, June 2009;

(c) Greenwood, M. and Shawana, P. Whispered Gently Through Time, First Nations Quality Child Care;

(d) Report of Dr. Nico Trocmé, dated September 2, 2009;

(e) Wien, F. Keeping First Nations children at home: A few Federal policy changes could make a big difference; and

(f) Loxley, J. Wen:de The Journey Continues.

[7] The Respondent questions the necessity, relevance and potential cost-benefit of the proposed expert reports to the matter at issue, relying on the criteria established by the Supreme Court in *R. v. Mohan*, [1994] 2 S.C.R. 9 to determine the admissibility of expert evidence, namely relevance, necessity in assisting the trier of fact, the absence of an exclusionary rule, and a properly qualified expert. The Respondent also relies on the Ontario Court of Appeal's new approach to these criteria adopted in *R. v. Abbey*, 2009 ONCA 624 and Rule 6(3) of the *Rules of Procedure*.

[8] The Respondent challenges both the relevance of these reports along with their necessity in assisting the trier of fact. According to the Respondent, none of the proposed expert reports pertain to the allegation 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. In addition, none of the proposed expert reports, with the exception of the report of Dr. Trocmé, were prepared for this proceeding and the information they contain goes beyond the scope of the allegations that the Tribunal must determine. The Respondent further contends that the proposed experts behind many of these reports are not properly qualified experts in the area of funding child and family service on-reserve or off-reserve.

[9] The Respondent also brings specific objections regarding the reports entitled '*Wen:de The Journey Continues*' and '*Keeping First Nations children at home: A few Federal policy changes could make a big difference*', which were co-authored by Dr. Cindy Blackstock, the Executive Director of FNCFCS. In light of Dr. Blackstock's role in these proceedings, the Respondent contends that the reports are unreliable, have little probative value and cannot be viewed as being objective or impartial. The Respondent also submits that all these concerns, along with the prejudicial impact of these reports to the Respondent, outweigh any possible benefits to their admission. The reports should therefore be excluded as expert evidence.

[10] In response, FNCFCS argues that this motion is premature. FNCFCS contends that while the failure to meet the criteria in Rule 6(3) for the proper service of expert witness reports can be raised on a preliminary basis, the Respondent's motion does not challenge the reports' compliance with this Rule. Rather, the Respondent challenges the admissibility of the reports by disputing the qualifications and objectivity of their authors. In response, FNCFCS argues that it is inappropriate at this stage to adopt this approach. Indeed, FNCFCS maintains that these are matters which cannot be decided by the Tribunal before the hearing has begun and until the panel has heard from the proposed expert at the initial qualification stage. At that stage, the panel will have the chance to assess the scope of the author's expertise and its relevance to the case, and the Respondent will be able to challenge the authors' qualifications and objectivity through cross-examination.

[11] FNCFCS relies on the Tribunal's ruling in *PSAC v. Northwest Territories (Minister of Personnel)*, [2001] C.H.R.D. No. 26 at paragraphs 5 and 12, where member Groark stated: "issues with respect to the relevance and admissibility of an expert's testimony are more properly decided when the witness is called". FNCFCS submits that in bringing this motion at the preliminary stage, the Respondent is asking the Tribunal to effectively bypass the qualifying process and preemptively exclude expert evidence without hearing any evidence as to the witnesses' qualifications or the scope of their proposed testimony. For these reasons, FNCFCS submits that the Respondent's motion should be dismissed, and the issues of the reports' admissibility and qualifications and objectivity of any expert witness should be left for

determination by the Tribunal in the ordinary course. In an email dated September 21, 2012, AFN confirmed its support for the position of FNCFCS and the Commission with respect to this motion.

[12] On September 25 and 26, 2012, the panel heard the parties' oral submissions on the Respondent's motion to exclude the Commission's expert reports. The Respondent took this opportunity to argue orally its reply to FNCFCS's response to the motion to strike expert reports. In addition to its initial submissions, the Respondent further argued that the motion was not premature as the existing issues that gave rise to the motion will remain throughout the hearing. Indeed, the issues of impartiality and objectivity raised by the reports co-authored by Dr. Blackstock will not change as Dr. Blackstock will continue to be a Complainant in this matter. The Respondent submits that while she can give evidence as a witness, it would be inappropriate to allow her to give evidence as an expert despite the fact that she may have the necessary professional and academic qualifications to do so.

[13] Overall, the Respondent expressed that while it understands the need to provide background and context to the complaint, it is concerned that the Commission's expert reports go far beyond the scope of the complaint as it was originally particularized in 2007 and beyond the basis on which the complaint was referred by the Commission to the Tribunal in 2008.

IV. Analysis and Decision

A. FNCFCS' Motion to Strike the Respondent's Expert Report

[14] In light of the Respondent's August 27, 2010 letter providing the name of the author of the KPMG report along with his Statement of Qualifications, the Tribunal asked FNCFCS whether it wished to maintain its motion to strike the report. FNCFCS responded that it was satisfied with the information provided and the report's compliance with Rule 6(3), and withdrew the motion.

B. Respondent's Motion to Strike the Commission's Expert Reports

[15] It is well established in law and, recognized by the parties, that the *Mohan* decision and the criteria of relevance, necessity in assisting the trier of fact, absence of any exclusionary rule and, a properly qualified expert, form the test to be applied in deciding whether expert evidence is admissible. However, it is important to distinguish between an application for leave to *call* witnesses and the issues which arise with respect to the *admissibility* of their evidence. As stated by this Tribunal in the *PSAC* decision, *supra*, the latter is more properly decided when the witness is called to testify.

[16] At this preliminary stage of the proceedings, the Tribunal is merely trying to establish whether or not to allow the Commission to *call* its expert witnesses. To this end, it is sufficient for the Tribunal to determine that the expert's testimony is needed to determine one of the factual issues in the case (*Mellon v. Canada*, at paragraph 6) or, in other words, to determine whether the Commission possesses reasonable grounds for calling the witnesses as their testimony would logically contribute to the Commission's position: *PSAC, supra*, at paragraphs 5 and 6.

[17] For reasons that follow, we are satisfied that the Commission and the Complainants can reasonably claim that they need the evidence contained in the expert reports. John Milloy's report, *A National Crime: The Canadian Government and the Residential School System, 1879 to 1986*, appears *prima facie* to provide a context to the complaint and child welfare services in Canada. Margo Greenwood's reports *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* (co-authored with Perry Shawana) pertain to the issue of First Nations child care in Canada and Nico Trocmé's report, along with that of John Loxley and Frederic Wien, address the key issue of INAC's child and family services funding policies and formulas.

[18] The Tribunal is of the view that these reports logically contribute to the Commission's position and, therefore, that the proposed expert witnesses may be called by the Commission. The Tribunal is not in a position, and need not, determine the relevance of these reports or their

necessity in assisting the panel as per *Mohan* and as challenged by the Respondent. While the Respondent argues that the impartiality issues raised by Dr. Blackstock's involvement in two of the reports will not change between now and the time of the hearing on the merits of the complaint, this submission goes to the reliability of the evidence and, therefore, to its relevance: *Mohan* at paragraphs 18 and 19. The Tribunal is unable to make such an inquiry until Dr. Blackstock and/or her co-authors are called to testify.

[19] The Tribunal takes note of the COO's letter dated September 19, 2012, informing the parties that Ruth Hislop and Dr. Finlay's report entitled *"Conditions Facing First Nations Children in Remote Northern Communities in Ontario: Preliminary Impressions from the Perspective of the Office of Child and Family Services Advocacy"* would not be tendered as an expert report in these proceedings although the COO reserved the right to call Dr. Finlay as a witness. As such, the Tribunal need not determine its compliance with Rule 6(3) or whether the report would logically contribute to the Complainants' position.

[20] For the foregoing reasons, the motion is dismissed.

Signed by

Sophie Marchildon
Panel Chairperson

Signed by

Réjean Bélanger
Tribunal Member

Signed by

Edward P. Lustig
Tribunal Member

Ottawa, Ontario
October 31, 2012

Canadian Human Rights Tribunal

Parties of Record

Tribunal File: T1340/7008

Style of Cause: First Nations Child and Family Caring Society of Canada et al. v. Attorney General of Canada (for the Minister of Indian and Northern Affairs Canada).

Ruling of the Tribunal dated: October 31, 2012

Date and Place of Hearing: September 25, 2012 in Ottawa (Ontario)

Appearances:

Paul Champ, for the Complainant First Nations Child and Family Caring Society of Canada

David Nahwegahbow and Stuart Wuttke, for the Complainant Assembly of First Nations

Daniel Poulin and Samar Musallam, for the Canadian Human Rights Commission

Jonathan Tarlton, Melissa Chan and Edward Bumburs, for the Respondent

Michael Sherry, for the Interested Party Chiefs of Ontario

Justin Safayeni, for the Interested Party Amnesty International