CANADIAN HUMAN RIGHTS TRIBUNAL TRIBUNAL CANADIEN DES DROITS DE LA PERSONNE

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 THE DEPARTMENT OF INDIAN AFFAIRS AND NORTHERN DEVELOPMENT CANADA)

Respondent

and -

CHIEFS OF ONTARIO AND AMNESTY INTERNATIONAL

Interested Parties

RULING

MEMBER: Shirish P. Chotalia, Q.C.

2010 CHRT 16
2010/05/28

I. APPLICATION

[1] The Aboriginal Peoples Television Network ("APTN") makes an application (heard by way of motion) to record the hearing by sound and video before this Tribunal and to broadcast clips from the same for its evening dinner news the same day. It also seeks to retain the tapes for archival purposes. The Complainants and Interested Parties (First Nations Child and Family Caring Society of Canada ("Caring Society"), Assembly of First Nations, Chiefs of Ontario and Amnesty International) support the application. The Commission does not object to the application as long as any order provides that there be a one hour delay between transmission and broadcast. The Respondent, Attorney General of Canada (representing the Minister of Indian Affairs and Northern Development) ("INAC") opposes the application. APTN, the Caring Society and the Respondent filed full submissions in respect of this application. APTN states that it will abide by the Commission request of a minimal one hour delay. APTN presents a protocol by which it states that it will abide, and APTN further states that this protocol will ensure that its broadcast will be appropriate and respectful of the hearing process. It submits that it will provide a fair and accurate account of the proceedings without disturbing them.

[2] APTN is the only network in Canada that focuses specifically on Aboriginal issues. Its audience is targeted to the Aboriginal community and those following issues surrounding the community.

II. CURRENT HEARING PROCESS

[3] The hearing in this matter will follow the current procedure of this tribunal. The hearing will be an open hearing wherein the public may attend and view all proceedings. Subject to an application further to s. 52 of the *Canadian Human Rights Act* ("*CHRA*"), no matters will be heard in secret. The media is welcome to attend the entire hearing and to take notes and report on the hearing. Attendees are not allowed to bring tape recorders to the hearing. The entire hearing is recorded for adjudicative purposes and the digital voice recording ("DVR") is provided to the Chair and to the parties, and may be used by the parties for examination, cross-examination and final argument. The parties may obtain a transcript of the hearings from the DVR at their cost and use the transcript for the same purposes.

[4] The positions of certain parties to this motion require more detailed discussion.

III. APTN'S POSITION

[5] APTN's position includes the following assertions:

a) The importance of these proceedings cannot be overstated. INAC is allegedly discriminating against children who live in First Nations communities by not funding child welfare services to the same degree as is provided to other children. The outcome of these proceedings will have an overwhelming effect on the lives of families living on reserve in Canada.

b) The alleged rate of children that live on reserve who are in the custody of child and family services is eight times greater than for those children that do not live on reserve. Further, both the Auditor General in her report of 2008 and the Standing Committee on Public Accounts in its report of 2009 have specifically pointed to issues with the federal government's funding of child and family services for First Nations people living on reserve.

c) The federal government is enhancing its funding of child and family services to five provinces: Alberta, Saskatchewan, Nova Scotia, Quebec and Prince Edward Island. At the Tribunal,

details will be provided outlining how the funding will help children and families who live on reserve. APTN's viewers have an interest in those details as well as any further information regarding how INAC will provide or enhance funding to other jurisdictions.

d) Television broadcasting depends on audio and visual recordings. APTN's news reporters use television cameras to gather news and to report the news to the public. Preventing the filming of the proceedings would constitute an unjustifiable section 2 (b) infringement of the *Canadian Charter of Rights and Freedoms* ("*Charter*").

e) APTN's presence will not be disruptive and will afford every Canadian with an opportunity to have some access to the hearing which he/she cannot attend, thus fulfilling one of the *Canadian Human Rights Act*'s objectives, which is education.

IV. CARING SOCIETY'S POSITION

[6] The Caring Society's position includes the following assertions:

a) The public has a right to meaningful access to public proceedings. Moreover, First Nations people from remote communities across Canada have a direct interest in the outcome of this case, and many of them will only have meaningful access to this hearing if it can be viewed on APTN.

b) The determination of the motion for televised access must be informed by Canada's constitutional values, including the freedom to communicate and receive information about court proceedings, equality for historically disadvantaged groups, and the importance of respecting First Nations traditions.

c) Television access to the proceedings is consistent with the open court principle and the right to meaningful access to the proceedings.

d) Television access to the proceedings will provide all First Nations peoples with an equal opportunity to access them, and the denial of such access would adversely impact a disproportionate number of First Nations people who cannot attend in person due to geographic and socio-economic barriers.

e) Television access to the proceedings will advance the purpose of the *CHRA* to educate the public about discrimination and human rights. Public education about human rights and discrimination has been held to be one of the central goals of human rights legislation and helps to advance the main purpose of the *CHRA*: the eradication of discrimination.

f) Television access to the proceedings will allow them to be reported in a manner that is consistent with First Nations traditions and culture. Canadian courts have recognized the sharing of oral knowledge as an integral part of the distinctive culture of many First Nations communities. Audio and visual recordings of the hearing will make it more culturally relevant and accessible; the decision as to whether to allow television access should reflect and honour the ancestral rights of First Nations, and their traditional practices, including the oral sharing of knowledge.

V. RESPONDENT'S POSITION

[7] The Respondent's position includes the following assertions:

a) The Respondent opposes the motion for television access to the present *CHRA* proceedings.

b) The public interest in open court proceedings is served by allowing the dissemination by the media of the details of the proceedings; it does not include a right-constitutional or otherwise-to film and broadcast the proceedings themselves.

c) The presence of television cameras at the hearing risks affecting the testimony of witnesses, the behaviour of participants and the overall serenity of the atmosphere. This in turn could potentially affect the outcome of the hearing and compromise the fairness of the proceedings and the legislative objectives of the adjudicative process.

d) The Courts have repeatedly disallowed filming of trial proceedings. Important distinctions exist between the filming of administrative, quasi-judicial and judicial proceedings on the one hand, and the filming of hearings held by commissions of inquiry on the other.

VI. THE LAW GOVERNING THIS MATTER

[8] Extensive arguments were made by APTN and the Caring Society to the effect that denying camera access to the proceedings would be inconsistent with the open court principle, now enshrined in s. 2 of the *Charter*. The Respondent made extensive arguments in support of the premise that camera access was not mandated by s. 2 of the *Charter*. I have not been convinced by the authorities cited to me that denying camera access would constitute an unjustifiable breach of that aspect of the freedom of expression which guarantees the public's right to receive information, through the media, about court proceedings. I come to this conclusion principally for the following reasons:

- denying camera access does not prevent APTN from reporting on the proceedings, but merely limits the form or method of reporting in which it can engage;
- in any event, as will become clear from the analysis below, I believe that limiting camera access to the proceedings-even if it constituted a *prima facie* s. 2 *Charter* breach-would be justifiable under the test established in *Dagenais v. Canadian Broadcasting Corp.*, 1994 CanLII 39 (S.C.C.), [1994] 3 S.C.R. 835, and *R. v. Mentuck*, 2001 SCC 76 (CanLII), [2001] 3 S.C.R. 442, 2001 SCC 76. I make this finding on a general basis, as I note that requiring the Tribunal to perform a *Dagenais/Mentuck* analysis on a witness-by-witness basis unacceptably hampers the efficient conduct of the proceedings.

[9] In addition to the open court principle and s. 2 of the *Charter*, the Caring Society is also invoking the aboriginal rights and traditions affirmed by s. 35 of the *Constitution Act, 1982*, as well as the equality rights guaranteed in s. 15 of the *Charter*. The argument made is that the camera access motion involves an interpretation of the *CHRA*, and that the aforementioned constitutional rights should inform this interpretation exercise.

[10] However, I do not accept that, in determining this motion, I am applying or interpreting a provision of the *CHRA*. The *CHRA* does not prohibit, nor require, camera access. Section 52 assumes that the inquiry will be conducted in public, but even if the camera access motion is denied, the inquiry does not cease to be conducted in this way. It remains a public inquiry.

[11] Ultimately, given the silence of the enabling legislation on the point in issue, I feel that the determination of this motion requires an exercise of the Tribunal's common law discretion as "master of its own house" or master of its own procedure. (See *Therrien (Re)*, 2001 SCC 35; *Prassad v. Canada (M.E.I)*, [1989] 1 S.C.R. 560).

[12] This is not to say that the discretion may be exercised in an unconstitutional manner, or in a manner that thwarts the objectives of the *CHRA*. Rather, it is merely a reflection of the fact that consideration of this motion needs to be grounded in the realities of what this

Tribunal requires in order to properly adjudicate the complaint, and what would detract from the integrity of such adjudication.

VII. ANALYSIS

Factors militating in favour of granting the Motion for Camera Access and Broadcasting

[13] In exercising my discretion whether or not to grant this motion, I note that there are a number of factors raised by APTN and the Caring Society that would support an order for camera access.

Community Interest

[14] First of all, it is undeniable that justice is enhanced when those who have a direct interest in legal proceedings are better able to follow and observe them. In the current matter, the underlying human rights complaint is of great and direct interest to large numbers of First Nations people, in particular those individuals who have received child and family services, or have relatives or close friends who have received such services. To the extent that camera access makes the proceedings easier to follow for the people directly affected, and facilitates the sharing of information about the proceedings, such access would be beneficial to the community interest in the administration of justice.

Challenges unique to this constituency

[15] Secondly, the above factor has even more weight when one considers the unique features of the concerned communities in this particular case. The constituency served by the Complainants is widely dispersed geographically, and to a significant extent, lives in regions of the country where the cost of physically traveling to Ottawa for the hearing is economically prohibitive. In this regard, I accept the submission made by the Caring Society regarding the significant economic barriers faced by many First Nations people, and children in particular. Moreover, the distribution of the constituency across the country makes it impossible for the Tribunal to find any single venue that would adequately facilitate physical access for all concerned.

[16] Finally, the major policy dimensions of these proceedings inform the degree and extent of interest shared by those members of the public, including First Nations persons (but not limited thereto) who feel that the case will have a large impact on their lives, or the lives of those who are close to them.

[17] However, these factors need to be balanced against others, in particular, those raised by the Respondent.

Factors militating against granting the Motion for Camera Access and Broadcasting

The CHRT Proceedings: An Adjudicative Process

[18] From a reading of the materials filed by the parties, the Caring Society appears to view the present proceedings as something akin to a truth and reconciliation commission. For its part, APTN attempts to draw an analogy from the media practices of commissions of inquiry. However, in neither case does the characterization of the present proceedings accurately reflect the statutory regime under which it operates.

[19] Under the *CHRA*, the primary objective of the Tribunal is to adjudicate complaints, and decide whether statutory liability should be imposed. As was stated by the Supreme Court in *Bell Canada v. Canadian Telephone Employees Association*, 2003 SCC 36, [2003] 1 S.C.R. 884:

23 The main function of the Canadian Human Rights Tribunal is adjudicative. It conducts formal hearings into complaints that have been referred to it by the Commission. It has many of the powers of a court. It is empowered to find facts, to interpret and apply the law to the facts before it, and to award appropriate remedies. Moreover, its hearings have much the same structure as a formal trial before a court. The parties before the Tribunal lead evidence, call and cross-examine witnesses, and make submissions on how the law should be applied to the facts. The Tribunal is not involved in crafting policy, nor does it undertake its own independent investigations of complaints: the investigative and policy-making functions have deliberately been assigned by the legislature to a different body, the Commission.

[20] I will not discuss in detail the mandate of the Truth and Reconciliation Commission of Canada, other than to say it will be evident from a reading of that body's enabling instrument that its mandate is significantly different from that of the tribunal described by the Supreme Court in *Bell Canada, supra*.

[21] In regard to matters before commissions of inquiry, as the Respondent has stated in its submissions, the public plays a crucial role in these types of proceedings. Inquiries seek to educate the public, to assist in community healing, and to restore public confidence in institutions. These are laudable objectives, and unquestionably of invaluable importance to any democratic society ruled by law.

[22] However, in establishing the CHRT, Parliament gave effect to a different order of priorities. The Tribunal has its own distinct function to perform in the legal system, namely, presiding over adversarial proceedings, determining liability, and-in the case of a substantiated complaint-issuing orders. In this context, while the public is not generally excluded, the public's role in the CHRT process is simply not as pivotal as it is in those commission of inquiry proceedings where television camera access is routinely granted.

[23] APTN placed much reliance on the Saskatchewan Board of Inquiry decision in *Andreen v. Dairy Producer Co-operative Ltd.* (No. 2) (1994), 22 C.H.R.R. D/80. Even allowing for the different enabling legislation, which I feel played a large role in the *Andreen* decision, I respectfully disagree with the members' approach in that case, which in my view (at least in the context of the *CHRA*) overly conflates the objects of the legislation with the purpose of the adjudicative body created thereunder. I also note that the camera access granted in the *Andreen* case was more restricted than the relief sought by APTN in this motion.

[24] While not applicable to this dispute, s. 52 of the *CHRA* is nonetheless illustrative of the Tribunal's nature and function: Tribunal proceedings are to be conducted in public. However, the right of the public to observe them is subordinate to several overriding considerations, in particular, the fairness of the inquiry. It is to the question of fairness which I now turn.

Fairness to all Parties

[25] As has been alluded to above, the primary goal of any adjudicative process is, after hearing evidence and argument, to determine whether the evidence led can support findings of fact that give rise to legal liability. All of this must take place in conditions that respect the rules of natural justice.

[26] Television broadcasting poses unique challenges to the adjudicative process. On one hand, it offers the potential of enhanced accuracy of reporting, since raw images and dialogue can be directly transmitted to the public with minimal interpretive filtering by journalists. On the other hand, one would be naïve to believe that no journalistic license is ever exercised in regard to the format in which television footage is broadcast, especially in the context of news programs. In this last respect, the mere ability to edit footage of the proceedings and broadcast extremely short excerpts thereof grants immense discretion to the broadcaster, and raises the potential for selective depiction of evidence, incomplete portrayals of a witness' testimony going to credibility, and significant manipulation of the sequence, duration and context of the filmed events. Yet despite all this, the depictions and portrayals retain a very convincing semblance of accuracy, because they feature realistic sound and images of the source event.

[27] Due to these unique features and attributes of video broadcasting, I believe that allowing camera access to the proceedings risks undermining the integrity of the Tribunal process, and just as importantly, public confidence in the integrity of this process.

[28] I add that while it is not clear whether an order will be sought for the exclusion of witnesses in these proceedings, such orders are commonly sought and granted in CHRT proceedings. It is not difficult to imagine the mischief posed to the efficacy of such an order in a hearing where witness testimony is being broadcast to the public on a regular basis, while other witnesses have yet to testify on the same issues.

[29] In view of the above, I conclude that granting camera access is likely to significantly and irreparably impair the fairness of the hearing for all parties. Compromising the fairness of the proceedings could render it a nullity in law.

Privacy of the Participants

[30] Even assuming that many of the participants in the process (e.g. Complainant witnesses, counsel for the Complainants, CHRC counsel) are willing to waive any privacy right to have their images broadcast across the country while participating in legal proceedings, I do not think it fair to extrapolate from this that all participants in the hearing are prepared to freely grant such a waiver.

[31] In addition to any legal rights hearing participants might possess entitling them to control the use of their image and likeness by others, as a federal institution, the CHRT is bound by the provisions of the *Privacy Act*. Some of the fundamental tenets of this legislation are that federal institutions: (i) shall not collect personal information "unless it relates directly to an operating program or activity of the institution", and; (ii) shall only use personal information under their control "for the purpose for which the information was obtained" (*Privacy Act*, R.S., 1985, c. P-21, as amended, ss. 4, 7(a)). Again, while the consent of the individuals concerned may mitigate the effect of these principles, it is to be noted that the *Privacy Act* is a quasi-constitutional statute and must be interpreted purposively. Moreover, in the context of an adversarial litigation process, the possibility of obtaining or ascertaining the existence of freely-given and informed consent may be quite limited.

[32] Ultimately, the hearing participants will be attending at the hearing room for the purpose of participating in quasi-judicial proceedings; they make themselves available for this purpose. In this context, allowing them to be filmed and have their statements and likeness broadcast to innumerable spectators across the country in a sense renders them "captive actors" in a media drama. This is not compatible with what should be the only motivation for

their presence in the hearing room, and the only activity on which they should be focused : namely, participating in legal proceedings, and fulfilling legally-defined roles and functions connected thereto.

[33] In short, I find that camera access will inevitably compromise the privacy of hearing participants to an intolerable degree, and introduce an element of distraction which is significantly detrimental to the hearing process.

[34] Before leaving this section of the analysis, I wish to make one additional observation. While I do not in any way base my decision on this incident, I note that earlier this month an issue arose regarding the Complainant Caring Society's publication, via the Internet, of evidence obtained during a pre-hearing affiant cross-examination from which the public had been excluded. Such an incident serves as a reminder that the Tribunal must be vigilant in articulating the adjudicative needs of its quasi-judicial process vis-à-vis the technological realities prevalent in the field of communications media. I repeat, however, that I have not relied on this incident in deciding the current application for television camera access.

VIII. CONCLUSION: THE DISCRETION OF THE ADJUDICATOR

[35] Earlier in these reasons I observed that this motion calls upon the Tribunal to exercise its discretion as master of its own procedure, or master of its own house. But there are at least two important limits on this discretion: the existence of any rules laid down by statute, and the principles of natural justice.

[36] While reasonable people may disagree about the application of some of the legal principles described in this decision, it is important to state that I alone, as the member assigned to inquire into this complaint, am responsible and accountable for the integrity of this adjudicative process. It is my legal duty to ensure that this hearing takes place in conditions which comply with the *CHRA*, which respect the principles of natural justice, and which-more broadly-help maintain the reputation of the administration of justice, on which the entire legal system depends.

[37] It is my firm opinion, after due consideration of the submissions of the parties, that nothing less than the exclusion of cameras from the hearing room will suffice to ensure that the publicity generated by these proceedings does not undermine its integrity.

[38] On a final note, I should add that nothing in this ruling is meant to minimize the importance of the considerations raised by APTN and the Caring Society. The disposition of this case is the result of a balancing of closely competing interests and principles. In deference to the considerations raised by APTN, the Caring Society, and those parties who support their position, pursuant to the unanimous request of all parties, in the event that the jurisdictional motion is dismissed, an opening ceremony will take place at the outset of the hearing on the merits, and I grant television camera access to the Applicant to film and broadcast this ceremony.

[39] Thus the motion is granted in part only as per paragraph 38.

"Signed by"

Shirish P. Chotalia, Q.C.

OTTAWA, Ontario
May 28, 2010

PARTIES OF RECORD

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