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 12, 2012
Citation: 2012 CHRT 23

I. Context

[1] The Complainants filed a human rights complaint alleging that the inequitable funding of child welfare services on First Nations reserves amounted 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*). In light of the uniqueness and importance of this case and the aboriginal community's interest in being able to observe the proceedings, the Aboriginal Peoples Television Network ("APTN") requested, in a letter dated October 22, 2009, permission from the Tribunal to film the complaint proceedings including opening and closing statements, testimony of witnesses, questions, objections and arguments. The Tribunal denied this request in a decision dated May 28, 2010, (2010 CHRT 16) on the basis that allowing camera access would be detrimental to the fairness of the hearing and could undermine the integrity of the proceedings. APTN subsequently filed an application for judicial review of this decision. On March 14, 2011, the Tribunal rendered a decision (2011 CHRT 4) granting a motion brought by the Respondent for the dismissal of the complaint on the ground that the issues raised in the complaint were beyond the Tribunal's jurisdiction (the "jurisdictional motion"). This decision was also subsequently the subject of an application for judicial review before the Federal Court.

[2] On June 3, 2011, the Federal Court rendered its decision on the issue of APTN's request for camera access to the Tribunal proceedings (2011 FC 810). The Court found that the Tribunal's decision 2010 CHRT 16 was made without regard to the material before it and was unreasonable when measured against the available record. The Court concluded that the decision fell short of the standard of justification, transparency and intelligibility required by *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190, 2008 SCC 9, and allowed APTN's application for judicial review. However, in light of the Tribunal's decision 2011 CHRT 4, in which it was held that it had no jurisdiction to consider the underlying complaint, the matter of the re-determination of the decision not to grant camera access was deferred until the judicial determination of the jurisdictional motion was resolved.

[3] On April 18, 2012, the Federal Court rendered its decision, reported at 2012 FC 445, setting aside the Tribunal's 2011 CHRT 4 decision and remitting the matter to a differently

constituted panel of the Tribunal for re-determination in accordance with its reasons. On July 10, 2012, Vice-Chairperson and Acting Chairperson Gupta appointed a panel of three members to hear the complaint.

[4] On August 24, 2012, following the Federal Court's decision 2012 FC 445 which resolved the jurisdictional motion, the Tribunal proceeded with the re-determination of the motion to grant camera access in accordance with the Federal Court's reasons in 2011 FC 810. In its decision, reported at 2012 CHRT 18, the Tribunal ruled that camera access must be allowed during the proceedings in accordance with operating guidelines that had yet to be defined.

[5] The proposed operating guidelines submitted by APTN in its original 2009 request were discussed in a case management conference with the parties and APTN on September 26, 2012. During the case management conference, contention arose with regard to the Respondent's proposal for the addition of letter '(q)' to the guidelines. The proposed amendment read as follows:

> (q) No witness testimony will be recorded or broadcast. This applies to the questioning and answering on direct examination, cross-examination or any other participation of the witness within the hearing room;

[6] Upon receipt of the proposed amendment, the Panel requested that the parties provide the Tribunal with their views on the addition of guideline '(q)' in the hope of reaching a consensus. Unfortunately, the parties and APTN were unable to agree on the terms of this proposed guideline and, following short deliberations, the Tribunal rendered the present ruling to the parties orally.

II. Analysis

[7] In his decision, reported at 2011 FC 810, Justice Lutfy ruled on the issue raised by the Attorney General concerning evidence that some of the Respondent's witnesses had expressed concern about their testimony being recorded and broadcast due to the risk of selective editing along with the impact on possible exclusion orders and the impact on witnesses. The Federal

Court Judge ruled that the Tribunal had failed to consider whether these concerns over camera access had been dealt with in the case law in *R. v. Pilarinos*, 2001 BCSC 1332, *R. v. Fleet*, (1994), 137 NSR (2d) 156 (SC) and *Andreen v. Dairy Producers Co-operative Ltd. (No. 2)*, (1994), 22 CHRR D/80, and whether these cases were applicable to the facts in this matter. The Judge gave, as an example of this, that there was no evidence that exclusion orders had been issued or were contemplated, or that this issue could not be dealt with if and when it arose.

[8] In examining whether these cases were indeed applicable to the case at hand, the Federal Court Judge stated:

> […] there was no evidence before the tribunal that the privacy interests at stake in the case at bar were similar to the privacy interests at stake in *Pilarinos*, *Fleet*, and *Andreen*. In *Andreen*, the privacy concern was that "there is a distinction between disclosing potentially intimate details of one's life in a hearing room where the public attend, on the one hand, and having those disclosures broadcast throughout the province, and perhaps throughout the country, over a television network, on the other hand" (para. 14) [emphasis added].
>
> The evidence before the tribunal was that the human rights complaint would not require personal information about a complainant or respondent to be disclosed. None of the proposed witnesses were survivors of the child welfare system. No personal respondents were named in the complaint. The government witnesses would be testifying about policies and decisions made regarding the provision of child welfare services. Information about these policies and decisions is already publicly available through several reports, including a National Policy Review (2000) prepared by the Assembly of First Nations and First Nations child and family service agency representatives in partnership with the Department of Indian Affairs and Northern Development, a 2008 Report from the Auditor General of Canada, a 2009 Report of the Standing Committee on Public Accounts, and the 2008 Canadian Incidence Study on Reported Child Abuse Neglect. The evidence before the tribunal was that the testimony and submissions would focus on widely known public policies.

[9] Having considered the Federal Court Judge's reasons, the parties' submissions on this issue, and the guidelines proposed by APTN, the Tribunal is of the view that the Respondent's proposed blanket exclusion of the recording and broadcasting of all witness testimony is unnecessary and goes against the Federal Court's 2011 decision. In the Tribunal's view, the

guidelines as they now stand, address the Respondent's concerns regarding witness testimony. Paragraph l) of the guidelines addresses the issue of broadcasting and witness exclusion. This paragraph reads as follows:

> In the event of witness exclusion, the testimony of both the excluded witness(es) and those present in the hearing room may be recorded but shall not be broadcasted until the testimony of the last of those witnesses has been heard.

[10] Furthermore, taking into consideration witnesses' concerns regarding the fact that they might potentially be obliged to divulge information of a personal nature that would subsequently be broadcasted on national television, the Tribunal has replaced the Respondent's proposed letter '(q)' with the following guideline:

> There shall be no broadcasting of the testimony of a witness who has objected to the broadcasting of his or her testimony on the basis that it contains information that is personal in nature once this objection has been upheld by the Tribunal upon examining the witness' testimony.

[11] In applying this guideline, the Tribunal will allow the recording of the witness testimony and subsequently, rule on whether the testimony contained information that is personal in nature so as to warrant upholding the objection and prohibiting the broadcasting. In establishing whether the objection should be upheld, the Tribunal will determine whether the information disclosed is "personal information", such as defined under section 3 of the *Privacy Act*, and will balance the right to privacy with the public's right to access, as well as the *Canadian Human Rights Act*'s underlying purpose to promote human rights. The issue of objections to the broadcasting of witness testimony will be, in this manner, dealt with if and when it arises in the course of the proceedings.

III. Ruling

[12] The Tribunal will not add the Respondent's proposed letter '(q)' to the guidelines for camera access. Letter '(q) of the Guidelines will, rather, read as follows:

> There shall be no broadcasting of the testimony of a witness who has objected to the broadcasting of his or her testimony on the basis that it contains information that is personal in nature once this objection has been upheld by the Tribunal upon examining the witness' testimony.

Signed by

Sophie Marchildon
Panel Chairperson

Signed by

Réjean Bélanger
Tribunal Member

Signed by

Edward P. Lustig
Tribunal Member

Ottawa, Ontario
October 12, 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 12, 2012

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