File No. T-1340/7008

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 Indian and Northern Affairs),

Respondent.

APTN SUBMISSION FOR CAMERA ACCESS TO ARGUMENTS BEFORE THE TRIBUNAL

HILL SOKALSKI VINCENT WALSH TRIPPIER
Litigation Counsel
2670 – 360 Main Street
Winnipeg, Manitoba
R3C 3Z3

Bob Sokalski / Kathleen McCandless
Telephone: (204) 943-6740
Fax: (204) 943-3934
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I. INTRODUCTION

1. There is a pending application for television camera access to the proceedings before the Canadian Human Rights Tribunal for the purpose of recorded broadcasts of the proceedings.

2. The pending application was to be heard by the Tribunal on January 19, 2010 as directed by the Tribunal's letter of November 12, 2009.

3. On January 8, 2010, the pending application was adjourned as a result of a motion by the Attorney General to strike the complaint on the basis of jurisdiction. The schedule set forth by the Tribunal refers to the argument on jurisdiction to be presented in April. Notice of the foregoing was sent in the Tribunal's letter of January 8, 2010.

4. On January 11, 2010 the Aboriginal Peoples Television Network ("APTN") sought confirmation for camera access to the arguments to be presented before the Tribunal. In its request, APTN noted that there would be no witnesses testifying when argument is presented and an Affidavit was submitted to respond to paragraph 10 of the Krista Robertson Affidavit (which was served on all parties on January 14, 2010). Based on the fact that there would be no witnesses testifying and based on the Affidavits of Mark Blackburn and Cynthia Sienkiewicz (addressing the issue of protocols proposed by APTN), there would effectively be no concerns about camera access to the arguments.

5. In response to the APTN request of January 11, 2010, the Tribunal directed that submissions on that request are to be served and filed herein by January 22, 2010.

6. All interested parties would be in receipt of the above-noted electronic communications.

7. Parenthetically, it should be noted that whereas APTN has referred to "concerns" that do not exist in respect of camera access to arguments, APTN does not acknowledge the legitimacy of the concerns raised in the Attorney General's

Submissions. However, for the purpose of camera access to the arguments in the proceedings, even those so-called "concerns" do not come into play; thus eliminating a large number of issues raised in the Attorney General's Submissions.

8. This APTN Submission will therefore focus on the matter of camera access to the arguments in the proceedings before the Tribunal, and reference to any other issues raised by the Attorney General's Submissions can be addressed orally in reference to the Submission and Case Law and Authorities as filed with the Tribunal.

9. APTN maintains that the public has a right of access to see and hear what is before the Tribunal on a matter of profound public interest.

10. As a matter of national public interest, precious few issues can compare with those related to the welfare of children.

II. ARGUMENT

A. JURISDICTION

11. Inasmuch as jurisdiction has been conceded and inasmuch as it has been previously exercised, APTN simply refers to its earlier Submission Brief in this regard.

B. RESPONSE TO COMMISSION BRIEF

12. The Commission is unopposed to the Submissions of APTN on the understanding that the proceedings shall not be broadcast live and on the understanding that there shall be a one hour delay on the broadcast of any aspect of the proceedings that has been videotaped.

13. It was never the intention of APTN to carry out live broadcasts and APTN is prepared to accept the condition suggested by the Commission.

C. RESPONSES TO ATTORNEY GENERAL'S SUBMISSIONS

14. There is no dispute over the fact that the public is entitled to see and hear what takes place in this proceeding (subject only to any order which may be sought based on such evidence and argument that may be considered on an application for that purpose under Section 52 of the *Code*).

15. There is no pending application or evidence submitted for any such order under Section 52.

16. The Supreme Court of Canada has acknowledged that:

> "...It is exceedingly difficult for many, if not most, people to attend a court trial. Neither working couples nor mothers or fathers house-bound with young children would find it possible to attend court. Those who cannot

> attend rely in large measure upon the press to inform them about court proceedings – the nature of the evidence that was called, the arguments presented, the comments made by the trial judge – in order to know not only what rights they may have, but how their problems might be dealt with in court. It is only through the press that most individuals can really learn of what is transpiring in the courts. They as "listeners" or readers have a right to receive this information." (*Edmonton Journal* – Tab 10 in APTN Cases)

17. In the *Edmonton Journal* case, the Supreme Court of Canada was not asked to go further and to consider the rights of the public to see and hear what was transpiring in Court through camera access. Since that time (1989), there have been numerous instances where the public's right to see and hear proceedings through camera access has been acknowledged and recognized.

18. The fundamental point is that where the public is entitled to be present to see and hear what takes place in this proceeding, they should not be deprived of their right to do so where purely and simply as a matter of practicality (duly acknowledged by the Supreme Court of Canada) the vast and overwhelming majority of them simply cannot attend in person.

19. Put another way, the public should not be denied their right to see and hear the proceedings simply because practicality precludes attendance and where camera access will facilitate those rights.

20. The Attorney General's Submissions place considerable reliance upon the *S.R.C.* decision (Tab 14 of the AG Authorities). Not only are the statements made in that case inconsistent with the comments from the Supreme Court of Canada in *Vancouver Sun* and *Toronto Star* (Tabs 9 and 19 in APTN cases), but the facts are clearly distinguishable. Unlike the *S.R.C.* factual depiction of reporters disrupting the courthouse in "the race for the best photograph within the corridors of the courthouse", the facts before this Tribunal reveal a commitment by APTN to protocols that would eliminate disruption to the proceedings. Unlike the situation in *S.R.C.*, APTN has been proactive in volunteering protocols (Sienkiewicz Affidavit), buttressed by what was added in the January 14, 2010 Blackburn Affidavit:

> In specific response to what is found in paragraph 10 of the Krista Robertson Affidavit sworn December 15, 2009, I was at the Tribunal proceedings on the day in question and I can confirm that the appearance to which she referred is not accurate. The following facts are provided to clarify and correct the apparent misapprehension reflected in paragraph 10 of that Affidavit:
>
> (a) APTN was given clear instructions of what and when it could record during the opening proceedings of the Tribunal on September 14th. The camera was stationed at the back of the room and was focused on the people talking. When it came time, the Tribunal motioned for the taping to end and the camera was turned off and the cameraman waited until the adjournment before removing the equipment from the room; and
>
> (b) The camera that is used by APTN has a red light at the front and rear of the equipment that shows when it is recording. Given where APTN is proposing to position the camera it will be visible by all counsel and the chair. The cameraman who has been given this assignment has been working in the industry for more than 20 years for the Canadian Broadcasting Corporation and now with APTN. He is a consummate professional and would not risk his or APTN's reputation by taping against the wishes of the Tribunal chair.

21. It should also be emphasized that the *S.R.C.* case is presently under appeal to the Supreme Court of Canada and the comments of the Supreme Court of Canada in the current case law lend support for the APTN position.

22. Furthermore, the following quote from the Ontario Court of Appeal case of *R. v. Squires* (1992), 11 O.R. (3d) 385 (Tab 24) states that laws that limit camera access in courthouses violate s. 2(b) of the *Charter*:

> The freedom of expression enjoyed by television journalists, such as the appellant, is the freedom to film events as they occur and to broadcast the film to the public. If television journalists are unable to photograph persons entering or leaving a courtroom, their freedom of expression is curtailed: Canadian Newspapers Co. v. Canada (Attorney General), [1988] 2 S.C.R. 122 at p. 129, 38 C.R.R. 72 at p. 77. I agree, therefore, with Tarnopolsky J.A. that s. 67(2)(a)(ii) infringes the freedom of expression conferred on the appellant by s. 2(b) of the Charter (at para 14).
>
> ...
>
> Without commenting upon the desirability of televising trials, since that issue is not before us, I would agree that a certain amount is lost to journalists and the public because of the limits imposed by s. 67(2) of the Judicature Act. An artist's

> rendering can never capture the vital and spontaneous depiction offered by televised images. The United States Third Circuit Court of Appeals has considered this loss in United States v. Criden, 648 F.2d 814 at 824 (1981), noting: "There can be no question that actual observation of testimony or exhibits contributes a dimension which cannot be fully provided by secondhand reports".
>
> It follows that I do not consider the visual deprivation mandated by s. 67(2)(a)(ii) to be trivial or insignificant, as the respondent contends. Rather, I believe that the images taken in a courthouse corridor can make an important contribution to the public's understanding of complex and abstract court proceedings in our visually sensitive age. The range of time at which news coverage is avail-able offers the added promise of disseminating images and ideas that originate in court proceedings to the public in periods when the public is able to receive them, rather than restricting observation to a small and select group of people who can attend the courthouse in person.
>
> The prohibition embodied in s. 67(2)(a)(ii) precludes a better appreciation of the democratic system, to which the courts undoubtedly belong. There is ample evidence in this case to suggest that television journalism, perhaps the most widely resorted to medium of journalism today, is handicapped as to the coverage it can convey of judicial proceedings, thereby precluding any meaningful realization of its potential in informing the public and of its s. 2(b) right (at paras 58-60).

23. It should be noted that in *Squires* four out of five members on the Ontario Court of Appeal panel found that the statutory provision in question which imposed camera access restrictions violated the *Charter*, but two of those four found the limitation to be reasonable in the specific circumstances of that case. Those circumstances of course related to issues that come before trial courts and which are not present in our case. Furthermore, the statements made by the Supreme Court of Canada in *Vancouver Sun* and *Toronto Star* (Tabs 9 and 19 of the APTN Cases) definitely militate against such a finding today. Moreover, the British Columbia Supreme Court in *Cho* (Tab 30) ruled in favour of camera access, relying in large measure on the comments from Mr. Justice Tarnopolsky (concurred in by Krever, J.A.) in *Squires*.

24. In *Canadian Newspapers Co. v. Canada (Attorney General)*, [1988]2 S.C.R. 122 (Tab 25) the Supreme Court of Canada held that a law which prohibited media from printing or broadcasting the identity of a sexual assault complainant violated s. 2(b) of the *Charter*:

> Freedom of the press is indeed an important and essential attribute of a free and democratic society, and measures which prohibit the media from publishing information deemed of interest obviously restrict that freedom (at para 14).

25. Since "publishing" includes printing or broadcasting (as the court confirmed), then a measure that prohibits camera access from a hearing would likewise violate s. 2(b): it "prohibits the media from publishing information (i.e., images and sound of testimony) deemed of interest."

26. In *New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly)*, [1993] 1 S.C.R. 319 (Tab 26) Cory J., (in dissent), held that a law that prohibited media from televising legislative assembly proceedings violated s. 2(b):

> In my view, the protection of news gathering does not constitute a preferential treatment of an elite or entrenched group, the media, rather it constitutes an ancillary right essential for the meaningful exercise of the Charter. Although the language of the section may not specifically grant special rights to a defined group it does include freedom of the press within the ambit of protected expression. It is obvious that a prohibition on television cameras is by definition a restriction on freedom of the press. Whether such a restriction is justified will depend on s. 1. Certainly, if the legislative assembly prohibits any media access to the public debates or excludes one form of the media (television) from the public debates, there has been an infringement of the Charter right to freedom of expression. (emphasis added)

27. While Cory J. dissented on the main issues of the judgment, the majority did not address whether s. 2(b) was not infringed. Rather, it held that the legislative assembly was immune from *Charter* scrutiny because of privilege. Sopinka J. agreed with Cory J. that s. 2(b) was infringed.

28. The fact is that the broadcast media's expression is being restricted. Using the test set out in *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 SC.R. 927 (Tab 27) this expression goes to core reasons for freedom of expression: the search for the truth and community involvement.

29. Broadcast media coverage promotes these values given the special educative and remedial nature of human rights law. Television will provide a link to many First

Nations (and other members of the public) who would not otherwise be able to attend the proceedings. It will thus serve to involve them in, and educate them about, human rights laws.

30. The Attorney General's Submissions also rely on the British Columbia decision in *Pilarinos* (Tab 12 of the AG Authorities) but the concerns raised in that case have no application before this Tribunal because there are no criminal consequences or rights of an accused at stake in this case.

31. The Supreme Court of Canada has made it clear that human rights proceedings are distinct from criminal and civil litigation proceedings. At least two Supreme Court of Canada cases confirm this distinction. In *Blencoe v. British Columbia (Human Rights Commission)*, [2000] 2 S.C.R. 307 (Tab 28) the Court stated:

> With respect, the Court of Appeal in Kodellas and the majority of the Court of Appeal in the case at bar have erred in transplanting s. 11(b) principles set out in the criminal law context to human rights proceedings under s. 7. Not only are there fundamental differences between criminal proceedings and human rights proceedings that the majority failed to recognize, but, more importantly, s. 11(b) of the Charter is restricted to a pending criminal case ... As this Court has recently confirmed in Mills (1999), supra, at paras. 61 and 64, Charter rights must be interpreted and defined in a contextual manner, because they often inform, and are informed by, other similarly deserving rights and values at play in particular circumstances. The Court of Appeal has failed to examine the rights protected by s. 7 in the context of this case (emphasis added) (at para 92).
>
> In discussing the nature and purpose of s. 11(b), Lamer J. emphasized in Mills (1986), supra, that the need for protecting the individual in such cases arises "from the nature of the criminal justice system and of our society" (p. 920). He described the criminal justice process as "adversarial and conflictual" and states that the very nature of the criminal process will heighten the stress and anxiety that results from a criminal charge. In contrast to the criminal realm, the filing of a human rights complaint implies no suspicion of wrongdoing on the part of the state. The investigation by the Commission is aimed solely at determining what took place and ultimately to settle the matter in a non-adversarial manner. The purpose of human rights proceedings is not to punish but to eradicate discrimination. Tribunal orders are compensatory rather than punitive. The investigation period in the human rights process is not one where the Commission "prosecutes" the respondent. The Commission has an investigative and conciliatory role until the time comes to make a recommendation whether to refer the complaint to the Tribunal for hearing. These human rights proceedings are designed to vindicate private rights and address grievances (emphasis added) (at para 94).

32. In *Canada (Human rights commission) v. Taylor*, [1990] 3 S.C.R. 892 (Tab 29) the Court stated:

> It is essential, however, to recognize that, as an instrument especially designed to prevent the spread of prejudice and to foster tolerance and equality in the community, the Canadian Human Rights Act is very different from the Criminal Code. The aim of human rights legislation, and of s. 13(1), is not to bring the full force of the state's power against a blameworthy individual for the purpose of imposing punishment. Instead, provisions found in human rights statutes generally operate in a less confrontational manner, allowing for a conciliatory settlement if possible and, where discrimination exists, gearing remedial responses more towards compensating the victim (emphasis added) (at page 21).

33. To bring the point home, one need look no further than the following list of factors that make the *Pilarinos* decision inapplicable to our case:

(a) Pilarinos and Clark were accused of crimes. No one in our hearing is similarly implicated;

(b) There is no jury in our proceedings; and

(c) The *Pilarimos* decision makes no mention of the Human Rights Code objectives of education, remediation and vindication of rights. Nor should it: it is a criminal law case and the transposition of its principles onto our hearing is most inappropriate.

34. In addition, as already submitted in relation to the Attorney General's reliance on *S.R.C.*, the Supreme Court of Canada has provided much more current commentary in support of media rights in the *Vancouver Sun* and *Toronto Star* decisions (Tabs 9 and 19 of the APTN cases).

35. In particular, whereas the Judge in *Pilarinos* asserted that the Dagenais/Mentuck analysis did not apply, the Supreme Court of Canada expressed a different view a few years later in *Vancouver Sun* and *Toronto Star*, where the Supreme Court of Canada extended the application of the Dagenais/Mentuck analysis in media cases, suggesting that the comments of the Judge in *Pilarinos* no longer have any application. Specifically,

the Supreme Court of Canada extended the publication ban test to all discretionary orders that limit the media's freedom of expression in relation to legal proceedings (contrary to the earlier finding in *Pilarinos*).

36. It is also especially important to note that the Supreme Court of Canada decision in *Toronto Star* pertained to access to an information sworn in support of a search warrant. The principles for application to our case are the same. There is a presumptive right of access and those principles have been applied time and again to enable access to Courts and Court documents, including video tapes and audio tapes.

37. In the present case, a helpful example can be found in the British Columbia decision in *R. v. Cho* 2000 BCSC 1162 (Tab 30). Although this case involved a criminal trial before a jury, the Court permitted camera access for recording and broadcast of the submissions of counsel and the comments from the Bench (this despite objections from both prosecution and defence counsel). This clearly supports the APTN Submission herein. In this decision, Mr. Justice MacKinnon referred at length to the comments from Mr. Justice Tarnopolsky in *Squires (supra)*. At paragraph 22 of *Cho* he quoted Mr. Justice Tarnopolsky as follows:

> "In summary, the public interest in open trials and in the ability of the press to provide complete reports of what takes place in the courtroom is rooted in the need(1) to maintain an effective evidentiary process; (2) to ensure a judiciary and juries that behave fairly and that are sensitive to the values espoused by the society; (3) to promote a shared sense that our courts operate with integrity and dispense justice; and (4) to provide an ongoing opportunity for the community to learn how the justice system operates and how the law being applied daily in the courts affects them.
>
> Without commenting upon the desirability of televising trials, since that issue is not before us, I would agree that a certain amount is lost to journalists and the public because of the limits imposed by s.67(2) of the *Judicature Act*. An artist's rendering can never capture the vital and spontaneous depiction offered by televised images. The United States Third Circuit Court of Appeals has considered this loss in *U.S. v. Cricen*, 648 F. 2d 814 (1981) at p. 824 noting, "There can be no question that actual observation of testimony or exhibits contributes a dimension which cannot be fully provided by secondhand reports".
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38. Whereas the Attorney General has referred to the notions of privacy and security interests, there are certainly none that could apply in any argument presented to the Tribunal as proposed. For example, when referring to "security interests" in the *Vancouver Sun* case, one needs to be mindful of the facts in that case relating to the Air India trial and the investigative hearing in relation to terrorism offences. No such "security interests" are present in this case. Reference can be also made to the *Cho* decision for the Court's comments on privacy claims.

39. Moreover, the Supreme Court of Canada has recognized "... that certain aspects of the private life of a person who is engaged in a public activity or has acquired a certain notoriety can become matters of public interest." Reference is made to *Les Editions Vice-Versa Inc., et al v. Aubry* [1998] 1 S.C.R. 591 (Tab 31), where the Supreme Court of Canada went on to state (at page 31):

> "There are also cases where a previously unknown individual is called upon to play a high profile role in a matter within the public domain, *such as an important trial..."* (emphasis added)

40. In *Cho* (at para 23), Mr. Justice MacKinnon quoted further from the comments of Mr. Justice Tarnopolsky on the matter of privacy as follows:

> "It is true that trial participants may have their dignity and privacy protected from television broadcasting, but there is no protection from newspaper or radio intrusion into such dignity and privacy. Is the difference between the one intrusion and the other discernible or obvious? Is it sufficiently important to permit the one and totally prohibit the other? The answer has to be in the negative. (emphasis added)
>
> An open and public hearing, which is such an essential feature of our system of administration of justice, does not countenance distinctions being made between different forms of media on the ground of form, unless it interferes with a fair trial or obstructs dignity and decorum in the court and court-house."

41. As already noted, there is no fair trial disruption or obstruction issue in this case in view of the proactive steps undertaken by APTN in regard to the proposed protocols.

42. Mr. Justice MacKinnon then went on to conclude:

> "So far as I am aware there is no privacy right afforded in court to any person save for those statutory rights protecting certain witnesses and events. It is also open to the trial judge to consider any request for exclusion based upon a real or potential issue of safety and/or fairness."

43. With no evidence of any issues of safety or fairness, there is no reason for camera access to be restricted.

44. Furthermore, any alleged claim to privacy is one that logically would only be expected from the complainants, but they in fact support the position of APTN.

45. Reference is also made to the decision of the *Canadian Human Rights Tribunal* in *Bouvier v. Metro Express*, [1992] 17 C.H.R.R. 313 (Tab 32) where the Tribunal stated:

> "In view of how important it is that the judicial process in our society be public, and particularly in the area of human rights where the educational aspect of the process plays a leading role, and in view of the decisions in *Attorney General of Nova Scotia v. MacIntyre*, [1982] 1 S.C.R. 175 and *Edmonton Journal v. Alberta*, [1989] 2 S.C.R. 1326, we refused the request by Loomis that the hearing be held in camera."

46. In addition, reference should also be made to *Marakkaparambil and Ontario Human Rights Commission* 2007 HRTO 24 (CanLII) (Tab 33).

47. As noted earlier in reference to the Supreme Court of Canada decision in *Toronto Star*, there is a presumptive right of access to Courts and Court documents and this includes access to surveillance videotape, video-taped and audio-taped confessions and other electronic based exhibits. The Courts have recognized the public's right to access to such evidence to enable the public to see and hear what was before the judge and/or jury in the proceedings in question. Among the cases ordering production of video-taped or audio-taped evidence to the media for broadcast to the public are the following:

(a) *CTV Television Inc. v. Hogg*, 2006 MBCA 132 (Tab 33);

(b) *CTV Television v. Ontario Superio Court of Justice*, 2002 CarswellOnt 955 (Ont.C.A.) (Tab 34);

(c) *R. v. Canadian Broadcasting Corporation and Canwest Television Inc.* (Manitoba Court of Queen's Bench unreported May 2, 2001) (Tab 35);

(d) *CTV Television Inc. v. R.*, 2005 CarswellMan 232 (Man.Q.B.) (Tab 36); and

(e) *R. v. O'Brien*, May 26, 2009 Ontario Superior Court of Justice (Tab 37).

48. The same principles would apply to enable the public to exercise its rights to see and hear what is occurring in the Tribunal proceedings which can occur with camera access.

49. Whereas the Attorney General has referred to the "very few decisions" that were found from its electronic searches, one need look no further than the research already done and compiled as referenced in paragraph 27 of the APTN Submission Brief. Referring specifically to the Canadian Judicial Council Inquiries that have permitted

camera access to their proceedings, one of the examples is the Judicial Inquiry into the Conduct of Judge Frank D. Allen (Tab 38). With no prejudice to the Judge being shown, and with the unobtrusiveness of the camera, the Panel chaired by former Associate Chief Justice Oliphant allowed camera access. The same result followed in a later case involving Judge B.P. MacDonald. APTN therefore again makes reference to the protocols it has proposed in the circumstances.

50. In addition to the foregoing examples, it is very instructive to examine the decision in the *Calpine* case (Tab 14 in APTN Cases). Despite the fact that Securities Commission Hearings are nothing short of adversarial, and despite the fact the scrutiny of the particular proceedings was focused upon private individuals (as opposed to the scrutiny of the Government in our case), the British Columbia Securities Commission made an order permitting camera access. The following quotation from the decision is particularly apt for our case:

> "The Commission has no formal policy on this issue but has not permitted cameras or recording equipment, other than hand held tape recorders, to be brought into the hearing room. The applicants argued that the Commission should allow recording and broadcasting of the proceedings for both legal and policy reasons. Their argument can be summarized as follows:
>
> 1. Section 178(1) of the Securities Regulation requires that the hearing be open to the public. Section 178(2) permits hearings to be held in camera only in very limited circumstances.
>
> 2. Section 2(b) of the Canadian Charter of Rights and Freedoms, which provides "freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication", gives the media a prima facie right of access to the hearing, including the right to record the proceeding.
>
> 3. This right may be limited only under section 1 of the Charter, which provides that the rights and freedoms in the Charter are guaranteed, "subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society".
>
> 4. Before deciding to limit media access to the hearing, the Commission must have sufficient evidence to satisfy it that an infringement of section 2(b) of the Charter is justified under section 1.
>
> 5. The parties opposed to the application have provided no evidence to support such an infringement.

6. Securities markets and regulation depend fundamentally on disclosure and public confidence, which would be promoted by the wider public access to the hearing that would be provided by broadcasting.

7. The Ontario Securities Commission has had a policy (OSC Policy 2.12) permitting televising of hearings since 1986.

8. Experience in televising court proceedings in the United States and quasi-judicial proceedings in Canada has been positive. With modern technology, recording need not be disruptive.

The applicants made a specific proposal for recording the hearing by means of a single camera, with no extra lighting, and with sound picked up from the system in the hearing room. Tapes of the hearing would be shared by the stations.

Mr. Butler spoke on behalf of those opposed to the application. He argued as follows:

1. The paramount interest is for the Respondents to be given a fair hearing.

2. The electronic media can cover the hearing adequately without recording it by taking notes and interviewing witnesses outside.

3. The camera would be disruptive in light of the size of the hearing room and the probable warm weather during the hearing.

4. The presence of the camera would have an adverse effect on witnesses, jeopardizing the fairness of the hearing. This can not be proven but, even if there is a chance it would happen, we must choose in favour of a fair hearing. The recording equipment would also intrude on communication between counsel and clients, jeopardizing solicitor-client privilege and impeding the fact finding process.

5. Recording would erode the dignity of the hearing as high profile witnesses concern themselves with their appearance on television rather than telling the truth.

6. Television will not cover the whole hearing but will only run 30 second clips on the evening news.

In our assessment, the assertions of Mr. Butler do not overcome the arguments made by the applicants. The proposal by the applicants appears to provide adequate safeguards to avoid disrupting the hearing or jeopardizing solicitor-client privilege. The concerns about the effect on witnesses are mere speculation, unsupported by evidence. The fact that television stations will broadcast only short segments of the hearing is consistent with the approach of other media, which report only highlights of Commission hearings.

While we have some concerns about the potential impact of television coverage on the decorum of the hearing, there is no evidence to suggest that the fairness of the hearing would be affected and no reason to believe that appropriate arrangements could not address our concerns.

Accordingly, we will permit the applicant television and radio stations, and any other stations, to record and broadcast the hearing, subject to the following conditions:

- The recording must be undertaken substantially in the manner proposed by the applicant television stations (single camera, tripod mounted and battery powered, with no special lighting, a single operator, pick-up of sound from the system in the hearing room or a single microphone, pooling of system, and set up and shut down procedures established in consultation with the Commission).

- Any additional radio or television stations wishing to participate must be included in the pooling arrangement.

- The Commission retains the right to require recording to cease at any time it becomes disruptive to the hearing or adversely affects a witness.

- No other recording will be permitted in or around the hearing room. Any other recording or interviews of witnesses will be restricted to the ground floor lobby of the building or outside.

- In all other respects, Policy 2.12 of the Ontario Securities Commission will apply.

This decision will be varied if necessary during the course of the hearing to ensure that the fairness, order and decorum of the hearing are maintained."

51. A more current example (August, 2005) can be found in the Manitoba Securities Commission case involving The Crocus Investment Fund (Tab 13 in APTN Cases). Again, this involved a highly adversarial process where the public interest in camera access prevailed over the strenuous objections of the parties.

52. These cases have duly taken into account the oft-repeated concern that the proceedings in question may not necessarily be broadcast in their entirety. Needless to say, that is an issue that cannot be confined to television broadcasting. Other media almost never publish the totality of an entire case or proceeding. Responsible media such as APTN would not carry out broadcasts that leave an inaccurate impression; and if any media were to do so (whether in print or broadcast), there are legal remedies

available for such transgressions. The comments from Mr. Justice MacKinnon in *Cho* aptly sum up this point as follows:

> "42 No one suggests the requested process is intended to cover the entire case. News outlets almost never publish complete trial proceedings. Editing is done every day. A person in actual attendance at a trial might read news items of that trial and conclude that the report either had not got it right, or left an erroneous impression of the proceedings. That would certainly not be a reason to deny access to the courts.
>
> 43 Sketches sometimes bear no resemblance to the subject and news stories sometimes fail to reflect the proceedings. Editing, as noted, is done all the time. Merely because a trial is covered from start to finish, does not mean that it will all be reported. It is no part of my job to edit, comment or otherwise indicate what I think should or should not be reported."

53. Whereas the Attorney General attempts to draw distinctions between the present case and other public inquiries, the alleged distinctions are without merit. All of the comments submitted by the Attorney General regarding public inquiries have no less application to Human Rights Code proceedings. As stated by the Board in *Andreen* (Tab 8):

> "3. The objects of this Act are: (a) to promote recognition of the inherent dignity and the equal inalienable rights of all members of the human family; and (b) to further public policy in Saskatchewan that every person is free and equal in dignity and rights and to discourage and eliminate discrimination.
>
> These words tell us that the *Code* is not meant to be merely a passive or reactive document; one of its underlying purposes is clearly the promotion of human rights and the educational component of that promotion. This leads us to the view that the investigation and determination of whether or not human rights code violations exist should be done in a manner that is open to the public because in the end that may serve to demystify the process in the eyes of the public to the benefit of complainants and respondents alike."

54. Public education is no less a part of the proceedings before this Tribunal as confirmed by the *Canadian Human Rights Tribunal* in *Bouvier* (Tab 32). Where there is strong support for camera access by the complainants and where the complaints relate

to government, the need for transparency and public access to see and hear what is before the Tribunal becomes paramount.

55. It should also not be overlooked that the Supreme Court of Canada has recognized and acknowledged the special position of the media in several *Charter* cases.

56. The Supreme Court of Canada recognized the special significance of the important work of the media in *Edmonton Journal* (Tab 10 of APTN Cases). This special significance has been recognized time and again by the Supreme Court of Canada in *CBC v. New Brunswick*, [1993] 3 S.C.R. 459 and *C.B.C. v. Lessard*, [1991] 3 S.C.R. 21 which were each applied by the Manitoba Court of Appeal decision in *C.B.C. and CTV v. AG Canada, et al* 2009 MBCA 122 (Tab 39). Although the latter cases commented on the special position of the media in relation to search warrants and production orders, that does not alter the transcendent view expressed by Cory, J. in *Edmonton Journal.*

57. Whereas camera access was not the subject matter of debate in *Edmonton Journal* (because the issue was not raised) the comments of the Court pertaining to the rights of the public as "listeners" or readers would logically and necessarily extend to their rights as viewers.

III. CONCLUSION

58. The public's right to see and hear the proceedings should not be denied by the impracticalities created by geography, obligations and other limitations precluding physical attendance at the proceedings.

59. The public's right to see and hear the proceedings and the public education purpose of the *Human Rights Code* will be facilitated through camera access.

60. Transparency and public access are paramount when it comes to the actions of government and in the circumstances there are no legitimate grounds to deny the public's right to see and hear the proceedings through camera access.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 22nd day of January, 2010.