

2011 CarswellNat 2541, 2011 FC 810

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Aboriginal Peoples Television Network v. Canada (Human Rights Commission)

Aboriginal Peoples Television Network, Applicant and Canadian Human Rights Commission, Attorney General of Canada (representing the Minister of the Department of Indian Affairs and Northern Development Canada), First Nations Child and Family Caring Society of Canada, Assembly of First Nations, Chiefs of Ontario and Amnesty International,
Respondents

Federal Court

Allan Lutfy C.J.

Heard: March 9, 2011

Judgment: June 30, 2011

Docket: T-1008-10

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Counsel: Mr. Bob Sokalski, for Applicant

Mr. Jonathan Tarlton, Ms Rosemarie Schipizky, for Respondent, Attorney General of Canada

Mr. Daniel Poulin, Ms Samar Musallam, for Respondent, Canadian Human Rights Commission

Ms Anne Lévesque, for Respondent, First Nations Child and Family Caring Society of Canada

Subject: Public; Constitutional; Civil Practice and Procedure

Aboriginal law.

Human rights.

Judges and courts.

Allan Lutfy C.J.:

1 The applicant, Aboriginal Peoples Television Network (APTN), seeks judicial review of the refusal by the Canadian Human Rights Tribunal (the tribunal) to allow APTN television camera access to its proceedings.

Background

2 The Assembly of First Nations and the First Nations Child and Family Caring Society (the Caring Society) filed a human rights complaint alleging that the inequitable funding of child welfare services on First Nations reserves amoun-

ted to discrimination on the basis of race and national ethnic origin, contrary to section 5 of the *Canadian Human Rights Act*, RSC 1985, c H-6 (the complaint).

3 The uniqueness and importance of this case are highlighted in the affidavit of a member of the Opaskwayak Cree Nation, who is a single mother residing some 600 kilometres north of Winnipeg. In describing the plight of aboriginal children under welfare protection, she states:

From the day I entered child protection, the inadequate funding of the services provided to me affected every aspect of my life. The injustices I experienced while under welfare protection continue to affect me in a way that is impossible for me to convey. I believe that viewing the proceedings will help validate the feelings of injustice I have experienced all of my life. It is important for me to know that these injustices are not being ignored as they have been in the past. It is also important for me to know that my story and those of other First Nations children is being heard. I am hopeful that if our stories are heard, things will change for First Nations children. I believe there can be a brighter future for them.

[emphasis added]

4 According to the tribunal's rules of procedure, the hearing of this complaint will be open to the public. Members of the media will be allowed to attend, take notes and report on the hearing. According to the tribunal's decision, tape recorders and video cameras are not allowed in the hearing room.

5 APTN is the only television network in Canada that focuses specifically on aboriginal issues. APTN requested permission from the tribunal to film the complaint proceedings, including opening and closing statements, testimony of witnesses, questions, objections, and arguments.

6 The tribunal denied the APTN request for camera access.

The decision under review

7 In its reasons, the tribunal touches on the aboriginal community's interest in being able to observe the proceedings, the significant barriers which would make it difficult or impossible for most members of this widely dispersed community to travel to Ottawa for the hearing and the impact the outcome of the proceedings will have, on aboriginal peoples in particular.

8 The tribunal also considered the factors identified against granting camera access and broadcasting. Specifically, the tribunal noted the possibility that the media will broadcast selective excerpts which offer an incomplete portrayal of a witness' testimony. This would risk undermining the integrity of the tribunal process. Also, in the tribunal's view, broadcasting proceedings would undermine the efficacy of witness exclusion orders, and would compromise the privacy interests of participants in the hearing. Finally, again in the opinion of the tribunal, cameras might introduce an element of distraction detrimental to the fairness of the hearing.

9 Immediately following this cursory analysis, the tribunal concludes as follows (at paragraph 37 of her decision):

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.

(Emphasis added.)

Is the decision reasonable?

10 I have concluded that the tribunal's decision was made without regard to the material before it. In particular, the member does not mention, let alone deal with the applicant's detailed Request and Submission of October 22, 2009, to obtain television footage of the proceedings. This Request and Submission (the APTN proposal) is attached to these reasons as Annex "A". Accordingly, the outcome reached by the tribunal is unreasonable when measured against the available record.

11 Under the heading Guidelines for Coverage, the APTN proposal suggested some 15 operating guidelines concerning the television coverage. The guidelines covered issues from the positioning of the television equipment to suitable attire for the APTN filming crew. The APTN proposal also set out the purpose of the television coverage, and stated that APTN "commits to work with the tribunal to establish guidelines that respect the dignity and integrity of the tribunal's proceedings". The APTN proposal was necessarily subject to the approval of the tribunal.

12 It was open to the tribunal, through its counsel, to engage in a discussion with the APTN concerning its proposal. There is no evidence before this Court that this was done.

13 The tribunal's decision does not refer to this proposal, or provide any reasons why these guidelines were inadequate to manage any of the potential negative impacts of filming. The tribunal failed to provide reasons why a total ban on broadcasting was necessary.

14 There was little affidavit evidence before the tribunal regarding any of the potential negative impacts of filming the proceedings. The Attorney General provided one affidavit from a Litigation Case Manager with the Department of Indian Affairs and Northern Development. Her affidavit stated that the government's witnesses had all "expressed concern" about their testimony being videoed and televised. Their primary concern was that if their testimony was taken out of context, it would portray them in a negative light and damage their working relationships with First Nations persons and agencies. None of the proposed witnesses expressed concern that their testimony would be affected by the presence of a camera, or otherwise expressed any concerns relating to the fairness of the hearing. None of the potential witnesses were named, and no evidence was provided directly from them regarding their concerns.

15 The tribunal's three primary concerns with camera access - risk of selective editing, impact on possible exclusion orders, and impacts on witnesses - have been considered in the case law. These concerns are discussed in detail 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. *Pilarinos* concerned an application for expanded media coverage of the trial of a former Premier of British Columbia who was charged with fraud on the government and breach of trust by a public officer. *Fleet* concerned an application to broadcast the trial of an accused charged with murder, where camera access was denied. *Andreen* is a decision of the Saskatchewan Human Rights Commission allowing camera access to an inquiry into complaints of sexual harassment, on certain conditions.

16 The tribunal failed to consider whether the concerns over camera access raised in these cases are applicable to the facts in this case. For example, 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.

17 Similarly, 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].

18 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.

19 The interests of people living on reserve in observing the proceedings at issue are more direct than those of the general public in observing a criminal trial. The proceedings will decide whether large numbers of geographically dispersed people have experienced discrimination. The proceedings directly implicate the human rights of APTN's intended audience.

20 By failing to consider the unique facts of this case, the tribunal's decision was made without regard to the material before it. The decision falls short of the standard of justification, transparency and intelligibility required by *Dunsmuir v New Brunswick*, 2008 SCC 9.

Mootness

21 On March 14, 2011, after the Court had taken this proceeding under reserve, the tribunal granted the motion brought by the Attorney General of Canada that the issues raised in the complaint of the First Nations Child and Family Caring Society of Canada (and the Assembly of First Nations) were beyond the tribunal's jurisdiction (the jurisdictional motion). The tribunal's decision is reported at 2011 CRHT 4.

22 The tribunal's dismissal of the complaint raised the issue of the mootness of this application for judicial review concerning camera access to the tribunal's proceeding. An understanding of the timelines in the proceedings both before the tribunal and this Court is useful to situate the mootness issue.

23 On June 2 and 3, 2010, the jurisdictional motion was argued before the tribunal. Written submissions were subsequently filed.

24 On June 25, 2010, APTN initiated this application for judicial review challenging the tribunal's refusal to allow camera access to its hearings. On November 4, 2010, after its application for judicial review had been perfected, APTN filed a requisition for hearing.

25 Prior to scheduling the hearing, the Court used case management to obtain from the parties more information on the status of the jurisdictional motion before the tribunal. The goal was to avoid, if possible, the duplication of judicial resources. The Court was advised that the tribunal decision concerning the jurisdictional motion continued to be under reserve.

26 On February 1, 2011, the hearing of the APTN application for judicial review was scheduled for March 7, 2011. In fact, the hearing lasted two days.

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27 As noted earlier, on March 14, 2011, the tribunal granted the relief sought in the jurisdictional motion and dismissed the complaint for lack of jurisdiction.

28 The Attorney General of Canada contested the APTN application for camera access to the tribunal proceedings both before the tribunal and in this Court.

29 After consideration of the parties' submissions concerning mootness and, in particular, the principles of *Borowski v Canada (Attorney General)*, [1989] 1 SCR 342, I have concluded in the exercise of my discretion that this application for judicial review should be determined now. In my view, there remains a live controversy between the parties, at least until the application for judicial review of the tribunal decision concerning the jurisdictional motion has been finally resolved.

30 APTN, supported by the Caring Society and the Commission, argued that the tribunal erred by concluding that denying camera access to the proceedings did not constitute an unjustifiable breach of section 2(b) of the *Canadian Charter of Rights and Freedoms*. I find it unnecessary to decide the *Charter* issue at this time: *Tremblay v Daigle*, [1989] 2 SCR 530 at para. 77.

31 Accordingly, the APTN application for judicial review of the tribunal's ruling not to allow camera access to its hearing concerning the complaint will be granted. Because the tribunal has ruled that it has no jurisdiction to consider the underlying complaint, the matter of redetermination of its decision not to grant camera access should be deferred until the judicial determination concerning the jurisdictional issue has been definitively resolved.

Judgment

THIS COURT'S JUDGMENT is that

1. This application for judicial review is granted;
2. The decision of the Canadian Human Rights Tribunal, dated May 28, 2010, is set aside. Re-determination of the matter by a different member is deferred until the judicial determination concerning the jurisdictional issue has been definitively resolved.

Annex "A"

October 22, 2009

TO: Canadian Human Rights Tribunal
Suite A100, 11th Floor
160 Elgin Street
Ottawa, ON K1A 1J4
Attention: Gregory M. Smith, Registrar

Request and Submission

This Request and Submission concerns the Canadian Human Rights Tribunal File No. T-1340-708 in which the Complainants are First Nations Child and Family Caring Society of Canada and Assembly of First Nations, and the Respond-

ent is Indian and Northern Affairs Canada.

The Aboriginal Peoples Television Network ("APTN") is requesting of the Canadian Human Rights Tribunal (the "*Tribunal*") permission to obtain television footage of the proceedings which are scheduled to start on the 16th day of November, 2009.

Description. Effect and Purpose of Coverage

1. APTN is the only network in Canada that focuses specifically on Aboriginal issues. The network tells the stories of First Nations peoples, Inuit and Métis. APTN was allowed to tape the opening of the proceedings (T-1340-708) before broadcast on APTN's evening news and for archival purposes.

2. The purpose of the coverage is the following:

(a) The importance of these proceedings cannot be overstated. Indian and Northern Affairs Canada is allegedly discriminating against children who live in First Nations communities by not funding services to the same degree as is provided for children living off reserve. The outcome of this Tribunal proceeding will have an overwhelming effect on the lives of families living on reserve in Canada;

(b) The Canadian Human Rights Commission has directed the Tribunal to determine whether the practices and policies of Indian and Northern Affairs Canada in funding Child Welfare Services for First Nations and First Nations children on reserve in Canada constitute discrimination under the Canadian Human Rights Act because such services are underfunded in comparison to the funding of such services in the dominant society. The issue ranks amongst the most important in the lives and well-being of First Nations peoples in Canada. Therefore, all First Nations peoples and communities have an acute interest in, and need to understand, the true facts and legalities affecting their children and their lives. The issues are unique and seminal. Therefore, it is fundamentally important, not only to First Nations peoples but to all Canadians, that the evidence and arguments which will be brought to bear in the course of the proceeding, be available and accessible to the public. This will be an historic opportunity for transparency to prevail. It will also ensure that First Nations peoples, care providers and Canadians in general will be able through these proceedings to feel secure that these important issues are being determined by way of a comprehensive review, of an impartial tribunal and with the full participation, not only of counsel for the Canadian Human Rights Commission and Indian and Northern Affairs Canada, but also, with the participation and advocacy of two reputable First Nations organizations, First Nations Child and Family Caring Society of Canada and Assembly of First Nations. In short, this hearing is uniquely suited for the fullest possible public participation and viewing and, in that way, all parties can be assured that there is, and will be, appropriate accountability and transparency of practices and policies regardless of the outcome;

(c) The federal government has announced that it is enhancing its funding to five provinces, Alberta, Saskatchewan, Nova Scotia, Quebec and Prince Edward Island. It is anticipated that details will be released at the Tribunal hearing outlining how the funding will help children and families who live on reserve. Moreover, any information about how and whether INAC is planning to enhance funding to other jurisdictions is of fundamental importance to APTN viewers;

(d) Because these proceedings are of unique and extraordinary public interest, APTN intends to make an extraordinary commitment of resources to provide the best possible news coverage for its viewers. Television is a medium that depends on audio and visual recordings. APTN reporters use television cameras to gather news and to report the news to the public. When a reporter cannot record an event the reporter is forced to describe the

event from notes, which are never as accurate, or as full, in their information to the public as is a first hand recording. If this application is denied, APTN's ability to inform the public will be severely limited, and the understanding of First Nations peoples and all Canadians of the circumstances and issues, will be severely limited and an opportunity to build the trust of First Nations will have been lost.

3. APTN proposes to obtain the following footage in the hearing room:

- (a) Questions, objections, arguments, opening statements, closing statements posed by lawyers;
- (b) Answers from witnesses;
- (c) Questions, objections, arguments, rulings, opening statement, closing statement, final ruling from the Commissioner.

Consent of the Tribunal

4. APTN acknowledges this application is subject to the reasonable consent of the Tribunal. It further commits to work with the Tribunal to establish guidelines that respect the dignity and integrity of the Tribunal's proceedings. If requested by the Tribunal, APTN would be pleased to assist the Tribunal in obtaining the consent of the parties to this Application. However, APTN respectfully suggests that this matter is of such national importance and concern to First Nations and others, that transparency, accountability and the fullest participation by the public require the Tribunal's consent to this application whether or not the consent of the parties is sought or given.

Guidelines for Coverage

5. The applicant undertakes to abide by the following guidelines and any order of the Tribunal which may supplement these guidelines in this case:

- (a) No more than one television camera will be used at any one time;
- (b) Camera and operating personnel will be in place at least 10 minutes prior to the scheduled commencement or re-commencement of the proceeding;
- (c) Equipment and operating personnel will be placed in an area, as agreed between the Tribunal and APTN, and shall not be moved or removed while the Tribunal is in session. The area designated shall provide reasonable access to coverage;
- (d) Cameras and sound recording equipment will be unobtrusive and not distracting. There will be minimum sound, no visible lights, and equipment will be operated in a manner that prevents participants from knowing whether the equipment is recording. With the concurrence of the Tribunal or its designates modifications and additions may be made to light sources existing in the facility, providing such modifications or additions are installed and maintained without significant public expense;
- (e) All non-camera equipment will be outside the hearing room and will not impede public access or traffic;
- (f) Operating personnel in the hearing room will be suitably attired and conduct themselves in keeping with Tribunal proceedings;
- (g) There will be no visual coverage of the members of the public in attendance. The camera will be positioned

to the right of the Commissioner's bench and the public gallery will not appear in any of the shots during the hearings. The camera will be turned off at lunch and breaks;

(h) There will be no recording of people or events within the Tribunal building during any recess or adjournment;

(i) Cameras will not be focused on any materials on counsel tables, or in counsel's possession, or on any materials used in the examination of a witness that are not admitted into evidence. There will be no broadcast of conferences which occur in a Tribunal facility between counsel and their clients, between co-counsel of a client, or between counsel and the Tribunal privately or in camera;

(j) There will be no shots closer than those that would include at least the head and shoulders of any participant being filmed;

(k) There will be no live broadcasting without Tribunal consent;

(l) Any authorized recording will be used only for the purpose(s) authorized and only during the time period, if any, specified in the authorization. Use for any other purpose or time period requires the applicant to obtain the consent of the Tribunal, and must be the subject of a separate Tribunal application and order pursuant to these provisions;

(m) All recordings of authorized coverage of Tribunal proceedings shall be retained and securely stored by APTN for a period of at least three years. During that period APTN will provide them to the Tribunal upon the direction of the Tribunal;

(n) APTN has the equipment necessary to provide a live feed of the proceedings for up to six media outlets should they choose to cover this hearing. The feed will be provided to them at no cost. This will be a live feed; no archival tape will be provided;

(o) None of the film, video tape, still photographs or audio reproductions developed during or by virtue of coverage of a Tribunal proceeding shall be admissible as evidence in the proceeding out of which it arose, any proceeding subsequent or collateral thereto, or upon any retrial or appeal of such proceedings.

Co-ordinates

6. The in charge person at APTN is: Mark Blackburn, Executive Producer, APTN Ottawa, 600 - 165 Sparks Street, Ottawa, ON K1P 5B9, (Office) 613-567-1550 ext. 249, (Cell) 613-298-5799, Email: *MBlackburn@aptn.ca*.

7. Jack R. London, C.M., Q.C. also is available at the convenience and call of the Tribunal at Pitblado LLP, Barristers and Solicitors, 2500 - 360 Main Street, Winnipeg, MB R3C 4H6, (Office) 204-956-3500, (Fax) 204-957-0227, Email: *london@pitblado.com*.

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