File No.: T-1008-10

FEDERAL COURT

BETWEEN:

ABORIGINAL PEOPLES TELEVISION NETWORK

Applicant

- and -

**THE 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**

Respondents

RESPONDENT'S RECORD
(First Nations Child and Family Caring Society)

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"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 child 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 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." [1]

[1] Affidavit of Verna Cowley ("Cowley Affidavit"), sworn December 10, 2009 [Applicant's Application Record ("AAR"), p. 188]

Overview

1. This judicial review concerns the ability of First Nations children to witness the adjudication of a complaint regarding *their* human right to be free of discrimination and to have an equal opportunity to grow up in the company of their families and communities. The children whose rights are at stake in this complaint experience disproportionately high levels of poverty, inadequate housing and have poorer health and educational outcomes than other Canadian children.[2] In addition, most of these children reside in rural and remote areas of Canada.[3] The broadcasting of these proceedings is the only way to ensure that the First Nations children and youth will have equal and meaningful access to the adjudication of a complaint concerning *their* human rights.

2. Notwithstanding the above, the *Canadian Human Rights Tribunal* ("Tribunal") concluded that broadcasting the adjudication could impact the fairness of the proceedings and infringe privacy rights of government witnesses. The First Nations Child and Family Caring Society of Canada, a complainant before the Tribunal and respondent in this application, submits that the Tribunal erred in law in three important ways. First, there was no evidence before the Tribunal supporting the finding that the "personal information" of government witnesses would be disclosed if the proceedings were broadcast. Second, the Tribunal failed to take into account the equality and Aboriginal rights of First Nations peoples – including, in particular, disadvantaged children from remote communities - to follow the proceedings in an accessible and culturally relevant manner. Finally, the Tribunal erred in law by failing to decide, and to provide reasons its decide, that cameras must also be excluded for oral arguments before the Tribunal. In light of these serious errors of law, and the important rights and interests of First Nations children at stake in the Tribunal proceeding, the Respondent First Nations Child and Family Caring Society of Canada ("Caring Society") submits that the Tribunal ruling should be overturned.

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[2] Affidavit of Dr. Cindy Blackstock ("Blackstock Affidavit"), sworn December 14, 2009 [AAR, p. 179]
[3] Blackstock Affidavit [AAR, p. 179]

PART I – THE FACTS

Background - Child welfare services on reserves

3. First Nations children are drastically overrepresented in child welfare care. As of May 2005, 0.67% of non-Aboriginal children were in child welfare care in three sample provinces in Canada compared to 10.23% of status Indian children. [4] Overall, there are currently three times more First Nations children and youth in child welfare care than there were when the residential schools system was at its height. [5]

4. Repeated reports, including a report by the Auditor General of Canada in 2008, have found First Nations child welfare services to be significantly inequitable in comparison to those provided to non-Aboriginal children. Repeated reports confirm that these funding inequities hinder the ability of child welfare agencies to provide preventative and least disruptive measures to families to help children remain in their homes and communities and, ultimately, are linked to the alarming rates of First Nations children and youth in care. [6]

The Human Rights Complaint

5. On February 26, 2007, the Assembly of First Nations ("AFN") and the First Nations Child and Family Caring Society ("Caring Society") filed a human rights complaint alleging that the inequitable funding of child welfare services on reserves amounted to discrimination on the basis of race and national ethnic origin contrary to section 5 of the

[4] Child Welfare Tribunal Briefing Notes dated July 24, 2009 ("Briefing Notes"), [AAR, p. 151]
[5] Briefing Notes, [AAR, p. 151]
[6] Briefing Notes, [AAR, p. 151]

Canadian Human Rights Act ("the complaint"). The organizations filed the complaint on behalf of First Nations children and families across Canada.[7]

6. The complaint also alleged that this discrimination causes First Nations children and youth to be disproportionately represented in the child welfare system and very often, needlessly taken away from their families and communities. In September 2008, the Commission referred this complaint to the Canadian Human Rights Tribunal ("Tribunal") for adjudication. [8]

Broad interest in complaint

7. The Caring Society regularly receives emails and calls from these individuals asking questions about the complaint and the Tribunal proceeding. Most of those individuals who contact the Caring Society do not reside in Ottawa. Many have asked the Caring Society whether the proceedings will be broadcast in any way so they can follow the proceeding.[9]

8. In response to the strong interest and frequent inquiries regarding the progress of this complaint, the Caring Society established a website for those interested in following the case. The website has proven to be very popular, receiving over 1.9 million hits annually from users across the country. [10]

APTN's First Request for an Order

9. On October 22, 2009, Mark Blackburn, executive director of the Aboriginal Peoples Television Network ("APTN") wrote to the Tribunal to request permission to obtain

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[7] *Canadian Human Rights Act*, subsection 40(1)
[8] Briefing Notes, [AAR, p. 151-152]
[9] Blackstock Affidavit, [AAR, p. 178]
[10] Blackstock Affidavit, [AAR, p. 178]

television footage of the adjudication of the complaint. In particular, the APTN sought to obtain footage of the questions, objections, arguments, opening statement and closing statements of the lawyers as well as the testimony of the witnesses.[11] The APTN undertook to respect the following guidelines while filming the proceedings:

a) There would be no more than one television camera at a time in the hearing room;
b) Camera installation will be completed at least 10 minutes prior to the scheduled commencement of the proceedings;
c) Equipment and operating personnel will be placed in an area as agreed between the Tribunal and the APTN and shall not be moved while the Tribunal is in session;
d) Cameras and sounds 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;
e) All non-camera equipment will be outside the hearing room and will not impede public access or traffic;
f) There will be no visual coverage of the members of the public in attendance;
g) There will be no recording of people or events within the Tribunal building during any recess or adjournment;
h) 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;
i) There will be no shots closer than those that would include at least the head and shoulders of any participants being filmed;
j) There will be no live broadcasting without the Tribunal's consent;

[11] Letter of Mark Blackburn to the Canadian Human Rights Tribunal, dated October 22, 2010, [AAR, p. 95-98]

k) Any authorized recording will be used only for the purpose 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;

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

m) 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. There will be a live feed; no archival tape will be provided;

n) None of the film, video tape, still photographs or audio reproduction developed during or by virtue of coverage of a Tribunal proceeding shall be admissible as evidence during the proceeding out of which it arose.[12]

10. The Assembly of First Nations, the Caring Society, Amnesty International and the Chiefs of Ontario consented to the APTN's request.[13] The Commission also consented and made the recommendation that the broadcasting of the proceedings ought to be delayed for a period of one hour to allow parties to raise objections. Only the Attorney General of Canada objected to the request. [14]

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[12] Letter of Mark Blackburn to the Canadian Human Rights Tribunal, dated October 22, 2010, [AAR, p. 95-98]

[13] Email from Owen Reese, counsel for Amnesty International, to the Tribunal and all parties, dated October 27, 2009; Email of Valerie Richer, Senior Policy Analyst of the Assembly of First Nations, to the Tribunal and all parties, dated October 27, 2009; Email of Paul Champ, counsel for the Caring Society, to the Tribunal and all parties dated October 27, 2009; Email of Mike Sherry, counsel for the Chiefs of Ontario, to the Tribunal and all parties dated October 29, 2009, [AAR, p. 225-229]

[14] Email of Daniel Poulin, counsel for the Canadian Human Rights Commission, to the Tribunal and all Parties, dated October 30, 2009, [AAR, p. 213]

11. On November 12, 2009, the Chair of the Tribunal directed the parties to provide written submissions regarding the APTN's request. The Tribunal also scheduled the oral arguments regarding the APTN's motion on January 19, 2010 but that date was pushed back when the Attorney General filed a motion to dismiss the complaint on a preliminary basis ("motion to dismiss"). [15]

APTN's Second Request for an Order

12. On January 11, 2010, Mark Blackburn, executive director of the APTN, again wrote to the Tribunal to request the permission to obtain television footage of the oral arguments on the Attorney Genera's motion to dismiss the complaint on a preliminary basis. Given that there would be no witnesses testifying in the motion to dismiss, this request was separate from the request made by the APTN to obtain footage of the adjudication of the substance of the complaint.[16]

13. The Tribunal's Registry Officer surveyed the parties in order to determine how the APTN's second request for an order should be dealt with by the Tribunal. All of the parties agreed that both of the APTN's motions ought to be heard together. [17]

14. The Tribunal heard the oral arguments for both motions on March 29, 2010.

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[15] Direction from the Tribunal, dated November 12, 2009, [AAR, p. 236]
[16] Email of Mark Blackburn, of the APTN, to Guy Gregoire, of the Tribunal, dated January 11, 2010, [AAR, p. 243]
[17] Email of Maryse Choquette, Registry Officer of the Tribunal, to all parties, dated January 27, 2010, [AAR, p. 248]

Evidence before the Tribunal Regarding the Broadcasting of the Proceedings

i. Benefits of Broadcasting the Proceedings on APTN

15. First Nations Peoples from all over Canada, including and in particular First Nations youth and Elders, supported the APTN's request that both the proceedings and the Attorney General's motion to dismiss be broadcast. The Caring Society submitted seventeen (17) affidavits and a letter from the Elders Council of the Assembly of First Nations highlighting the importance that the proceedings be broadcast. Two of the affidavits presented to the Tribunal were from survivors of the child welfare system who strongly supported the APTN's motions.[18] Other affiants were First Nations Elders, academics, youth, youth workers, political leaders, parents, advocates, and social workers from Newfoundland to British Columbia.

16. According to the Elders Council of the Assembly of First Nations, the broadcasting of the proceedings on APTN would help make them culturally relevant for First Nations People. They stated:

> "As Elders, it is also our role to pass on the oral history, culture and languages of our peoples. If these proceedings are not broadcasted, we fear that we will not be able to honor this role because we will not have access to them. In our culture, information has traditionally been passed on orally. We believe that First Nations people will be more likely to follow the proceedings if they are broadcasted on APTN because it is our tradition to learn through oral and visual information"[19]

[18] Cowley Affidavit, p. 186; Affidavit of Jordon Quequish, sworn December 9, 2009, [AAR, p. 208]
[19] Letter from the Elders Council of the Assembly of First Nations ("Letter from the Elders"), dated December 10, 2009, [AAR, p. 175]

17. Dr. Cindy Blackstock, executive director of the Caring Society, who has worked in child welfare for over 25 years including over a decade of service specific to First Nations, was of the opinion that First Nations youth would feel disempowered and detached from the proceedings if they are not provided with an opportunity to access them through the APTN. [20] Verna Cowley, survivor of the child welfare system, stressed the importance of being able to actively follow a hearing relating to her own life experience on the APTN. Ms. Cowley stated:

> "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 child 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 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."[21]

18. Jordan Queshish, also a survivor of the child welfare system and member of the National Youth Council of the Assembly of First Nations, stated that the broadcasting of the proceedings would help First Nations children feel more involved in the adjudication of a complaint involving their human rights. He explained:

> "Having the opportunity to watch the proceedings on APTN will make me feel involved in the proceedings. It is important for me as a First Nations to have the chance to participate in some way in these proceedings that will likely directly impact my peoples' future"[22]

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[20] Blackstock Affidavit, [AAR, p. 179]
[21] Cowley Affidavit, [AAR, p. 188]
[22] Affidavit of Coldy Tootoosis, sworn December 9, 2009, [AAR, p. 211]

19. According to Valerie Richer, senior policy analyst to the Assembly of First Nations, the broadcasting of the proceedings would also serve the purpose of educating First Nations Peoples about their equality rights under the *Canadian Human Rights Act*. She stated:

> "[t]here remains a segment of the population at odds with the Canadian human rights legislation in this country which the enactment of Bill C-21: *An Act to amend the Canadian Human Rights Act,* S.C. 2008, c. 30 was meant to address. Allowing the proceeding to be televised has the potential to affirm for First Nation people that they too have a place within the Canadian human rights legislation. For many years, First Nations people have operated under the false assumption that the CHRA was not applicable to First Nations people. It is time to change this history."[23]

20. The evidence before the Tribunal also demonstrated that the broadcasting of the proceedings would help build trust and reconciliation between First Nations Peoples and the Canadian government:

> "Reconciliation can occur through a process whereby information is shared, witnessed and discussed in an open forum. Closed door hearings do nothing to foster improved relationships or access to justice. Allowing the taping of the proceedings would promote greater understanding, equitable access to justice for First Nations people and support the pursuit of reconciliation"[24]

21. Similarly, Grand Chief Randall Phillips, of the Oneida Nation of the Thames Settlement in Ontario stated that he would lose trust in the Canadian government and in the human rights process if it was not broadcast:

> "I would be extremely disappointed if these proceedings are not broadcasted. It would cause me to loose faith in the process. I fear that the proceedings would not

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[23] Letter of Valerie Richer ("Richer Letter"), Assembly of First Nations, to Nicole Bacon, dated December 15, 2009, [AAR, p. 238]
[24] Richer Letter, [AAR, p. 238]

be reported in an independent manner, through the eyes of First Nations people if they are not broadcasted"[25]

22. According to the evidence before the Tribunal, the audio and visual recording of the proceedings would also help the APTN produce more accurate reporting regarding the adjudicating of the human rights complaint. According to Mark Blackburn:

> "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. Where a reporter is unable to record an event, the reporter must then describe the event from his or her notes. This intermediate step leads to a result where the broadcasting is not as accurate nor as comprehensive as is a first hand recording"[26]

ii. Barriers Faced by First Nations People

23. The evidence before the Tribunal indicated that the vast majority of First Nations Peoples face unique and intersecting barriers that make it impossible to attend the hearing in person. For example, approximately 70% of First Nations Peoples on reserve reside in rural, remote or northern communities.[27] Many affiants stated that geographical barriers would prevent the overwhelming majority of First Nations Peoples from attending the hearing in person.[28] As explained by Chief Roger Atwin:

> "The broadcasting of the proceedings is the only way to ensure that First Nations communities located outside the National Capital Region are provided with an equal

[25] Affidavit of Grand Chief Randall Phillips, sworn December 9, 2009, [AAR, p. 207]
[26] Affidavit of Mark Blackburn, sworn December 11, 2010, [AAR, p. 104]
[27] Blackstock Affidavit, [AAR, p. 179]
[28] Blackstock Affidavit, [AAR, p. 179]; Affidavit of Chief Roger Atwin, sworn December 10, 2009, [AAR, p. 188]; Affidavit of Madeline Lanaro, sworn December 10, 2009, [AAR, p. 189]; Affidavit of Jean Larocque, sworn December 14, 2009, [AAR, p. 193]

> opportunity to remain informed about how their stories are told and how their rights are asserted. I cannot overstate how important this is to me." [29]

24. According to Madeline Lanaro, the cost related to traveling long distances will make it impossible for her, and other First Nations Peoples from remote areas, to personally attend the adjudication of the complaint. She explained:

> "I live in a very isolated community. Travel to Vancouver, the closest city, takes 3 hours and is very expensive. Many people in my community cannot afford to go to Vancouver, let alone Ottawa, which can cost over $1000 for a return trip. The broadcasting of the proceedings will allow them to be accessible to me and other First Nations people residing in remote areas."[30]

25. Based on the evidence before the Tribunal, members of historically disadvantaged groups within the First Nations community face compounding and intersecting barriers that would make it even more difficult for them to attend the hearing in person. According to Verna Cowley, a single mother and survivor of the child welfare system:

> "Because I am a single mother, I cannot afford to travel to Ottawa in order to personally attend the proceedings. The broadcasting of the proceedings is the only way for me to actively follow the adjudication of the complaint concerning the injustices which I personally encounter (sic) as a child."[31]

26. Dr. Cindy Blackstock also voiced her concerns about the barriers to attending the hearing faced by certain individuals because of their family status. She stated:

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[29] Affidavit of Chief Roger Atwin, sworn December 10, 2009, [AAR, p. 182]
[30] Affidavit of Madeline Lanaro, sworn December 10, 2009, [AAR, p. 190]
[31] Cowley Affidavit [AAR, p. 187]

> "Members of historically disadvantaged groups in First Nations communities, such as people with disabilities, seniors and women, have also told me that they will not be able to follow the proceedings if they are not broadcasted. For example, Carolyn Buffalo, Chief of Montana Cree Nation in Hobbema, Alberta, has told me that she will not be able to attend the entire proceeding because she must provide care for her son Noah, who has a severe disability."[32]

27. Dr. Blackstock also noted that one in eight First Nations children have a disability. This is approximately double the rate seen in non-Aboriginal Canadian children. [33]

28. The evidence before the Tribunal also indicated that age-related barriers make it impossible for the Elders in the community to personally attend the hearing. According to the Elders Council of the Assembly of First Nations:

> "As Elders, it is our role to protect and teach children and support and guide their families. We believe that the proceedings should be broadcasted on APTN so that we can honor this role. Many of us reside far from Ottawa and will not be able to follow these proceedings if they are not broadcasted"[34]

29. The concern about Elders not being to attend the hearing was echoed by Chris McCormick, of Batchewanna First Nations, Ontario. He stated:

> "[M]any of our Peoples, particularly our Elders and those who live in the North, do not speak French or English. If the proceedings are broadcasted, they will have a chance to view the translators so that they can be informed about the proceedings"[35]

30. Some affiants emphasized that socio-economic barriers also prevent many First Nations Peoples from attending the proceedings. Dr. Cindy Blackstock stated that an

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[32] Blackstock Affidavit, [AAR, p. 180]
[33] Blackstock Affidavit, [AAR, p. 180]
[34] Letter from the Elders, [AAR, p. 175]
[35] Affidavit of Deputy Grand Chief Chris McCormick ("Deputy Grand Chief McCormick Affidavit"), sworn December 9, 2009, [AAR, p. 199]

overwhelming number of First Nations children live in poverty.[36] According to Deputy Grand Chief Chris McCormick:

> "Many First Nations people in our communities face socio-economic barriers that would prevent them from personally attending the hearing. Unemployment ranges from 70%-80% in some of our communities. It would be impossible for these people to attend the proceedings. People on social assistance, those who receive old age pension and any other fixed income will not be privy to information regarding the proceedings if they are not broadcasted. I think the broadcasting of the proceedings will make them accessible to all First Nations Peoples regardless of their socio-economic status and the barriers they encounter."[37]

31. Dr. Rosa-Alma McDonald, of Akwesasne Mohawk Territory, in Ontario, former director of education for the Assembly of First Nations and one of the coordinators and authors of the 2000 Joint National Policy Review on First Nations child welfare services also stated:

> "I believe that these proceedings will only be accessible for First Nations Peoples if they are broadcasted on APTN. I believe that it is critical that First Nations Peoples from all over Canada are able to follow the proceedings for free"

iii. Evidence Pertaining to Potential Harms Associated with Denying First Nations Children Equal and Meaningful Access to the Adjudication of the Complaint Regarding their Human Rights

32. The Attorney General relied on two affidavits in opposing the APTN's motion. Both affiants were part of the legal team defending the human rights complaint. With one exception, neither provided any direct evidence of their own experience or concerns about the proceedings.

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[36] Blackstock Affidavit, [AAR, p. 179]
[37] Deputy Grand Chief McCormick Affidavit, [AAR, p. 189]

33. Krista Robertson is a litigation case manager employed by the Department of Indian and Northern Affairs ("INAC"). She filed an affidavit claiming that several unidentified federal government officials were concerned about testifying before cameras. The affidavit stated:

> "I have spoken with several of these federal officials and all expressed concern about their testimony being videoed or televised. These officials are concerned that their evidence will be taken out of context and that, as a result, they and their work will be misunderstood by those who view the television coverage."

34. Ms. Robertson's affidavit also stated that Ms. Karen Cuddy, legal counsel for the Respondent in this complaint, had been told by "provincial officials" and "First Nations service providers" that they feared they would be intimidated by the cameras. Ms Robertson does not indicate whether Ms. Cuddy told her the names of the unidentified officials. The affidavit stated:

> "I am informed by Ms. Cuddy, and verify believe it to be true that these witnesses expressed strong concerns about the hearing being videoed and televised. Comments included that they would be intimidated by the camera and therefore would not say everything they otherwise would. Other comments included not wanting to be taped because only extracts or clips of the taping would be shown on television and viewed by the public. Strong concerns were expressed about testimony being taken out of context."

35. The only direct evidence presented by the Attorney General related to Ms. Robertson's own perception of the camera which was in the hearing room on September 14, 2009 for a spiritual and cultural ceremony. Ms. Robertson, who will not be testifying in these proceedings, stated that her attention was drawn to the camera when she was in the hearing room. [38]

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[38] Affidavit of Krista Robertson ("Roberston Affdavit"), sworn December 15, 2009, [AAR, p. 142]

36. Ms Robertson's affidavit makes no mention of any potential government witnesses expressing concerns about privacy rights to either her or legal counsel.

Decision of the Tribunal

37. On May 28, 2010, the Tribunal issued its decision regarding the APTN's requests. The Tribunal made the following findings regarding the APTN's motions:

a) Allowing the motion 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. Due to these unique features and attributes of video broadcasting, allowing camera access to the proceedings risks undermining the integrity of the Tribunal process and the public confidence in the integrity of this process; [39]
b) The broadcasting of the proceedings would compromise the privacy rights of witnesses to an intolerable degree. [40]

38. The Tribunal made no specific findings or decision regarding the APTN's request to broadcast the oral arguments regarding the Attorney General's motion to dismiss this complaint, which involved no *viva voce* evidence.

[39] AAR, Order of the Canadian Human Rights Tribunal ("Tribunal Decision") dated May 28, 2010, paras. 26-29, [AAR, p. 59]
[40] Tribunal Decision, paras. 30-34 [AAR, p. 60]

PART II – THE ISSUES

39. The Caring Society submits that the issues for determination are as follows:

a) What is the appropriate standard of review?

b) Did the Tribunal err in law by finding that broadcasting the proceedings will violate the privacy rights of witnesses in the absence of any evidence to this effect?

b) Did the Tribunal err in law by failing to exercise its discretion in accordance with human rights legislation and the equality rights of First Nations children and youth?

c) Did the Tribunal err in law by failing to decide and provide reasons for denying television access to the Attorney General motion to dismiss the complaint?

PART III – THE ARGUMENTS

A. What is the appropriate standard of review?

40. The Caring Society accepts and adopts the submissions of the APTN pertaining to the appropriate standard of review. This judicial review raises questions of law that are beyond the scope of expertise of the Tribunal. Moreover, the standard of correctness must be applied when reviewing decisions involving the application and interpretation of the *Canadian Charter of Rights and Freedoms.* [41]

B. Did the Tribunal err in law by finding that broadcasting the proceedings will violate the privacy rights of witnesses in the absence of any evidence to this effect?

41. The Tribunal essentially concluded that the interests of First Nations children and youth directly affected by the complaint, were outweighed by the privacy rights of unnamed government officials who might be called to testify. The Tribunal stated:

> "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".

42. Section 3 of the *Privacy Act* defines "personal information" as, *inter alia*, information such as the home address, blood type and fingerprint of individuals as well as their medical,

[41] Part I of the *Constitution Act,* 1982, being Schedule B to the *Canada Act* 1982 (U.K.), 1982, c. 11

criminal or educational past.[42] In an effort to protect such personal information, the Tribunal concluded that camera access would "inevitably compromise the privacy of hearing participants to an intolerable degree". Based on this finding, it held that camera access to the proceedings ought to be denied.

43. The Caring Society submits that there was no evidentiary basis for the finding that the broadcasting of the proceedings would prejudice the privacy rights of witnesses to "an intolerable degree". In fact, this issue was not even raised by the Attorney General in its submissions to the Tribunal, but rather was an issue raised by the Tribunal of its own accord.[43] The absence of evidence is an unreasonable error.

44. According to the Supreme Court of Canada, a decision without any evidence in its support is an error or law and is reviewable as being arbitrary.[44] In *Quebec (Attorney General) v. Canada (National Energy Board),* Mr. Justice Iacobucci explained:

> "While the respondents are correct in asserting that the principle of curial deference applies to the weighing of the evidence by the Board in the exercise of its discretion, **this principle cannot be invoked to save a decision for which there is no foundation in the evidence or that is based on irrelevant considerations.** Once the Board decides that a particular factor is relevant to its decision, **there must be some evidence to support the conclusion reached relating to it"**[45] [emphasis added]

45. Though it is true that most human rights complaints before the Tribunal require evidence relating to a complainant's personal and medical information, the issue in this complaint is whether the federal government provides equitable child welfare services to agencies serving First Nations children and families on-reserve.[46] In this case, the

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[42] *Privacy Act*, R.S., 1985, c. P-21, section 3
[43] Submissions of the Attorney General of Canada, dated December 15, 2009, [AAR, p. 114]
[44] *Toronto (City) Board of Education v. O.S.S.T.F., District 15,* [1997] 1 S.C.R. 487, para. 44-45
[45] *Quebec (Attorney General)v. Canada (National Energy Board),* [1994] 1 S.C.R. 159, p. 178
[46] Briefing Notes, [AAR, p. 151-153]

complainants are not individuals who have personally experienced discrimination or survived the child welfare system but two organizations that have filed a complaint on behalf of First Nations children and families. Contrary to most human rights complaints, the adjudication of this complaint will not require personal information about a complainant to be disclosed. None of the witnesses will be survivors of the child welfare system and there is no evidence that personal information regarding a child in care will be tendered to the Tribunal during the adjudication of this complaint.

46. Similarly, the respondent in this complaint is not an individual, such as an individual employer or a landlord, who is alleged to have personally engaged in discriminatory actions. No personal respondents are named in this complaint. Rather, this complaint concerns discriminatory government policies and decisions of the Department of Indian and Northern Affairs ("INAC") regarding the provision of child welfare services. These policies and decisions will be the focus of the adjudication of this complaint. Information about these policies and decisions is already widely available to the public through several reports, such as the National Policy Review of 2000, a 2008 Report from the Auditor General of Canada, the Canadian Incidence Study on Reported Child Abuse Neglect, and the 2009 Report of the Standing Committee on Public Accounts.[47] The broadcasting of testimony and oral submissions regarding widely known public policies and research and reports that have already been published cannot be said to violate anyone's privacy rights under the *Privacy Act.*

47. Furthermore, because the focus of this complaint is government policies and actions rather than the personal experiences of an individual who has faced discrimination, the witnesses in the proceedings will provide testimony regarding information already available in the public realm and not their personal experiences. As confirmed by the affidavit of Krista Robertson, most of the Attorney General's witnesses will be civil servants who will

[47] Briefing Notes, [AAR, p. 151-153]

speak to the governmental policies that are at issue in this complaint. In fact, of the 21 individuals INAC plans to call to testify, 17 are federal officials employed by Health Canada or INAC. The other witnesses will consist of "provincial officials or First Nations service providers."[48] There is no reason to believe or even to speculate that any of these civil servants will disclose any personal information about themselves in their testimony. At the very least, there was no evidence before the Tribunal supporting the finding that these civil servants will be called to disclose personal information, such as information regarding their blood type, fingerprints or their home address, when testifying regarding INAC's policies regarding the provision of child welfare services on reserves.

48. In sum, there was no evidence before the Tribunal supporting the finding that the privacy rights of the participants would be violated if the proceedings were broadcast on the APTN. This complaint does not involve personal complainants or respondents. The evidence in this case will focus on well known governmental policies and reports that have already been published. In the absence of any evidence in support of the finding that the broadcasting of these proceedings will cause the privacy rights of hearing participate to be violated, this decision cannot stand.

C. Did the Tribunal err in law by failing to exercise its discretion in accordance with human rights legislation and the equality rights of First Nations children and youth?

49. The Caring Society submitted to the Tribunal that denying the APTN's request to broadcast the proceedings would be inconsistent with existing Aboriginal rights guaranteed by section 35 of the *Constitutional Act,* 1982 as well as the equality rights protected by section 15 of the *Canadian Charter of Rights and Freedoms*. The Tribunal noted that the issues were raised but did not analyze or consider them. Rather, the Tribunal simply held

[48] Robertson Affidavit, [AAR, p. 141]

that the determination of the motion required an exercise of the Tribunal's common law discretion as "master of its own house". The Caring Society submits that the Tribunal erred by failing to consider these important constitutional arguments.

50. It is well established that an administrative tribunal's discretionary powers must be exercised in accordance with the *Charter* and human rights legislation. According to Justice Lamer, "Legislation conferring an imprecise discretion must therefore be interpreted as not allowing *Charter* rights to be infringed".[49] It is submitted that the Tribunal erred in law by failing to exercise its discretion to provide First Nations children an equal and meaningful opportunity to follow these proceedings, in accordance with section 15 of the *Charter.*

51. Although the broadcasting of proceeding is not a current or usual practice before the Tribunal, human rights and *Charter* jurisprudence recognizes that positive, and sometimes unconventional, measures must often be taken in order to confer an equal treatment to members of historically disadvantaged groups. [50]

52. In the case at bar, the evidence before the Tribunal indicated that positive measures, namely the broadcasting of the proceedings on APTN, were necessary to ensure that First Nations children had equal and meaningful access to a hearing regarding *their* human rights. All of the evidence before the Tribunal supported the finding that First Nations Peoples, and First Nations children and youth in particular, would not be able to actively follow this hearing if is was not broadcast on APTN.[51] The barriers faced by First Nations children and

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[49] *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038, p. 1078

[50] *Eldridge v. British Columbia (Attorney General),* [1997] 3 S.C.R. 624, para. 78-79

[51] Letters from the Elders, [AAR, p. 175]; Blackstock Affidavit, [AAR, p. 177-180]; Affidavit of Chief Roger Atwin, sworn December 10, 2009 [AAR, p. 182]; Cowley Affidavit, [AAR, p. 186]; Affidavit of Madeline Lanaro, sworn December 10, 2009, [AAR, p. 189]; Affidavit of Sara-Lynne Knockwood, sworn December 9, 2009, [AAR, p. 192]; Affidavit of Jean Larocque, sworn December 10, 2009 [AAR, p. 193]; Deputy Grand

youth on reserves, and those in child protection in particular, include disabilities, extreme poverty, geographical remoteness, illiteracy and language barriers. [52] The evidence also indicated that the proceedings would be more culturally relevant to First Nations children and Elders if there were broadcasted on ATPN given that in many First Nations communities, information and knowledge have traditionally been passed on orally.[53]

53. Most importantly, this case is unique for many reasons. Firstly, this is the first case involving the equality rights of First Nations Peoples to be adjudicated by the Tribunal since the repealed of section 67 of the *Canadian Human Rights Act.* By repealing section 67 of the Act, which formerly shielded provisions of the *Indian Act* from human rights scrutiny, the Canadian government made a commitment to make the federal human rights system accessible to First Nations Peoples. Moreover, unlike most complaints which involve one individual complainant, this case involves tens of thousands of First Nations children and youth from across Canada. Contrary to most human rights adjudications, those whose rights will be directly affected by the outcome of this complaint will not take part in the proceedings unless they are broadcast.

54. Finally, the complaint concerns the equality rights of children. As L'Heureux-Dubé J. said in *Young v. Young,* courts and adjudicative bodies must "be directed to create or support the conditions which are most conducive to the flourishing of the child".[54] Accordingly, the Supreme Court has held that the involvement of children in decisions and processes that affect their lives is "by definition, in a child's best interests" and should be a

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Chief McCormick Affidavit, [AAR, p. 197]; Affidavit of Sasha Maracle, sworn December 9, 2009, [AAR, p. 202]

[52] Blacktock Affidavit, [AAR, p. 179-180], Affidavit of Sara-Lynne Knockwood, [AAR, p. 192]; Deputy Grand Chief McCormick Affidavit, [AAR, p. 197]

[53] Letter from the Elders, [AAR, p. 175], Blackstock Affidavit, [AAR, p. 180], Affidavit of Cheryl Stephanie Casimer, sworn December 9, 2009, [AAR, p. 184]

[54] *Young v. Young,* [1993] 4 S.C.R. 3, p. 65, in *A.C. v. Manitoba (Director of Child and Family Services),* [2009] 2 S.C.R. 181, at para. 88

"primary consideration in all actions concerning children"[55] Such a robust conception of the "best interests of the child" standard is also, according to the Supreme Court, consistent with international instruments to which Canada is a signatory. According to Article 17 of the *Convention on the Rights of Children*, states must recognize the important function performed by the mass media and ensure that the child has access to information and material from a diversity of national and international sources, especially those aimed at the promotion of children's social, spiritual and moral well-being and physical and mental health.[56]

55. In short, the determination of whether to allow the APTN to broadcast the proceedings was indeed a matter of discretion. However, the Tribunal did not exercise its discretion in a manner consistent with the *Charter* as it was required to do. Based on the evidence before the Tribunal, the broadcasting of the proceedings would enable First Nations children to have equal and meaningful access to the adjudication of a complaint regarding their human rights. This is also consistent with the best interest of First Nations children, whose rights are at stake in this complaint, and Canada's international obligations.

D. Did the Tribunal err in law by failing to decide and provide reasons for denying television access to the Attorney General's motion to dismiss this complaint?

As indicated in the record, the hearing concerned <u>two</u> motions made by the APTN. The first motion sought the permission to broadcast the adjudication of the complaint, including the testimony of the witnesses and the tendering of evidence. The second request related to the broadcasting of the Attorney General's motion to dismiss the complaint, which consisted of only oral arguments by counsel. On January 27, 2010, the Tribunal's Registry

[55] *A.C. v. Manitoba (Director of Child and Family Services),* [2009] 2 S.C.R. 181, paras. 88 and 93
[56] *Convention on the Rights of the Child*, Can. T.S. 1992 No. 3 (Signed on May 28, 1990 and Ratified on December 13, 1991)

Officer wrote all parties to confirm that both of the APTN's motions would be heard together.[57] In spite of this, there is no indication that the Tribunal considered the two motions that were before it. Throughout its reasons, the Tribunal suggests that there was only one motion for determination.[58] As such, the Tribunal failed to decide or provide reasons in relation to the APTN's second motion and by doing so, committed an error of law.

56. The obligation of decision-makers to decide and provide reasons for their decisions is a cornerstone of procedural fairness and natural justice. According to the Federal Court of Appeal, the duty to provide reasons is "a salutary one."[59] Indeed, reasons serve a number of beneficial purposes including that of focusing the decision maker on the relevant factors and evidence. In the words of the Supreme Court of Canada:

> "Reasons, it has been argued, foster better decision making by ensuring that issues and reasoning are well articulated and, therefore, more carefully thought out. The process of writing reasons for decision by itself may be a guarantee of a better decision."[60]

57. In the case at bar, the Tribunal not only omitted to provide reasons for its decision to deny camera access to the motion to dismiss, it completely failed to decide this issue. The reasons for denying camera access to the adjudication of the complaint, which focused on the privacy rights of the witness and concerns of selective depiction of their testimony, did not apply to the broadcasting of the motion to dismiss. This is an error of law and a breach of natural justice.

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[57] Email from Maryse Choquette, Registry Officer of the Tribunal, to all parties, dated January 27, 2010, [AAR, p. 248]
[58] Tribunal Decision, paras. 1, 10, 11, 13, and 35, [AAR, p. 50-63]
[59] *VIA Rail Canada Inc. v. National Transportation Agency* [2001], 193 D.L.R. (4th) 357, paras. 17-19
[60] *Baker v. Canada (Minister of Citizenship and Immigration* [1999], 2 S.C.R. 817

PART IV – REQUESTED ORDER

50. The Caring Society submits that the judicial review should be allowed. Alternatively, the Caring Society asks this Court to return the issue of whether the oral arguments in this hearing, where no concerns about the privacy or credibility of the witnesses would be at stake, can be broadcasted.

Dated at Ottawa, this 25th day of October, 2010.

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PART V – LIST OF AUTHORITIES

Statutes relied upon

Canadian Charter of Rights and Freedoms, Part I of the *Constitution Act,* 1982, being Schedule B to the *Canada Act* 1982 (U.K.), 1982, c. 11, sections 2(b) and 15

Canadian Human Rights Act, R.S., 1985, c. H-6, section 5, 40(1), and 52

Privacy Act, R.S., 1985, c. P-21, section 3

Case Law

A.C. v. Manitoba (Director of Child and Family Services), [2009] 2 S.C.R. 181

Baker v. Canada (Minister of Citizenship and Immigration [1999], 2 S.C.R. 817

Eldridge v. British Columbia (Attorney General), [1997] 3 S.C.R. 624,

Quebec (Attorney General) v. Canada (National Energy Board), [1994] 1 S.C.R. 159

Slaight Communications Inc. v. Davidson, [1989] 1 S.C.R. 1038

Toronto (City) Board of Education v. O.S.S.T.F., District 15, [1997] 1 S.C.R. 487

VIA Rail Canada Inc. v. National Transportation Agency [2001] 193 D.L.R. (4th) 357

Other sources

Convention on the Rights of the Child, Can. T.S. 1992 No. 3 (Signed on May 28, 1990 and Ratified on December 13, 1991)