

Canadian Human
Rights Tribunal



Tribunal canadien
des droits de la personne

Between:

First Nations Child and Family Caring Society of Canada

- and -

Assembly of First Nations

Complainants

- and -

Canadian Human Rights Commission

Commission

- and -

Attorney General of Canada

(Representing the Minister of Indian Affairs and Northern Development of Canada)

Respondent

- and -

Chiefs of Ontario

- and -

Amnesty International

Interested Parties

Ruling

Member: Sophie Marchildon

Date: April 24, 2013

Citation: 2013 CHRT 11

[1] On Sunday, February 24, 2013, National Film Board (NFB) was given access to the Tribunal's hearing room to install their material prior to the hearing commencing the following day in the *First Nations Caring Society and al v. Attorney General of Canada (for the Minister of Indian and Northern Affairs Canada)* case which NFB was authorized to film.

[2] NFB found that the Tribunal's sound system was insufficient to permit appropriate recording. NFB therefore installed an additional microphone to make up for non-functioning microphones. The next day, February 25, 2013, NFB's technician, Glenn Hodgins, having read all of the Tribunal's equipment online manuals, arrived at the Tribunal early to work with the sound technician to get usable sound. At 9:25 the same day, the Tribunal's sound technician stated that the equipment was broken and needed repair. Mr. Hodgins therefore placed, in plain view, wireless microphones in front of the witness box, the Panel Chair's seat and in front of three counsel tables to be able to adequately hear and record the proceedings in the event of a malfunction of the Tribunal's sound system. At 9:35, just as the Tribunal commenced the hearing, the sound started to work and as the feed was clean, the wireless microphones were not used to record the hearing.

[3] On the afternoon of February 26, 2013, a number of the counsel present raised concerns regarding the direction of the cameras, which had been aimed at their tables during the breaks, and the possibility that their conversations had been filmed, raising a potential privilege breach.

[4] In the evening of Tuesday, February 26, 2013, it was brought to the attention of the Panel Chair that the microphones installed by NFB had been recording at all times, raising another potential privilege breach.

[5] On the morning of February 27, 2013, the Panel Chair ordered the removal of NFB's wireless microphones; such removal was done within the hour following the Panel Chair's request. The Panel Chair then met with the parties in Chambers and informed them of the potential privilege breach due to the fact that the microphones installed by NFB had been

recording at all times. Parties were asked for their views on the matter. Parties suggested that the NFB be ordered to destroy the first two days of recording to remedy any potential privilege breach.

[6] Following consultations with the parties, the Tribunal issued an oral ruling ordering NFB to refrain from filming during breaks and to refrain from using the first two days of film until further notice. The Panel Chair subsequently met with NFB to seek further clarification on the circumstances surrounding the potential privilege breach with particular attention to the technical dimensions. The Tribunal requested that NFB detail its version of the events in writing and provide a copy to the Tribunal.

[7] Later that evening, the Panel Chair received information from Mr. Hodgins, in writing, that not only clarified the events but also confirmed that a misunderstanding had occurred. The morning of March 1st, 2013, the Tribunal also received a letter from NFB's Business Affairs and Legal Services office, further elucidating the circumstances surrounding the events raised in this ruling.

[8] The Tribunal provided a copy of the letter to the parties during the lunch break and that evening, the Panel Chair met again with the parties in Chambers to discuss what appeared to have been a miscommunication and misunderstanding of events. The Panel Chair expressed that she wished to reflect on NFB's clarification of events and informed parties that, if needed, she would seek further clarification before rendering a ruling.

[9] At all material times, NFB acted in good faith and accepted to comply with the Tribunal's direction.

[10] In balancing the parties' fundamental right to protect privileged information and NFB's objectives; I order the following:

[11] From the evidence gathered, it appears that certain conversations between counsel may have been captured on camera; NFB is therefore ordered to destroy any exchange between counsel taking place at their respective tables or elsewhere, during breaks and during the hearing, that have been captured on film on February 25 and 26, 2013.

[12] The evidence does not suggest that conversations were recorded at all times. However, to ensure that no privilege is breached, the Tribunal orders NFB to destroy any other collateral voice sound recordings of conversations that are not part of the case. What is considered to be part of the case includes, for example: the opening statements, the witness's testimony, counsel asking questions to a witness or addressing the bench, the Panel asking questions or giving instructions, the registry officer giving instructions, administering the oath and receiving evidence. Discussions amongst panel members or amongst counsel are not considered to be part of the public case and any recording of these discussions must be destroyed. This order will apply to the February 25-26, 2013, hearing days.

[13] In the unlikely event that isolating the different sound recordings is not possible, the Tribunal orders NFB to destroy the entire two days of filming that were recorded on February 25, 2013, and February 26, 2013. NFB may, however, use all recordings such as interviews that took place outside of the hearing room in accordance with the Tribunal's guidelines.

[14] The Tribunal orders NFB to comply with the Tribunal's existing media guidelines and any further guidelines issued by the Tribunal.

Signed by

Sophie Marchildon on behalf of the Panel
Administrative Judge

OTTAWA, Ontario
April 24, 2013

Canadian Human Rights Tribunal

Parties of Record

Tribunal File: T1340/7008

Style of Cause: First Nations Child and Family Caring Society of Canada et al. v. Attorney General of Canada (for the Minister of Indian and Northern Affairs Canada).

Ruling of the Tribunal dated: April 24, 2013

Appearances:

Paul Champ, for the Complainant First Nations Child and Family Caring Society of Canada

David Nahwegahbow and Stuart Wuttke, for the Complainant Assembly of First Nations

Daniel Poulin, Philippe Dufresne and Sarah Pentney, for the Canadian Human Rights Commission

Jonathan Tarlton and Melissa Chan, for the Respondent

Michael Sherry, for the Interested Party Chiefs of Ontario

Justin Safeyeni, for the Interested Party Amnesty International