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VIA EMAIL

Judy Dubois
Registry Operations
Canadian Human Rights Tribunal
160 Elgin Street, 11th Floor
Ottawa, ON K1A 1J4

Dear Madam:

RE: FIRST NATIONS CHILD AND FAMILY CARING SOCIETY OF CANADA ET AL. V. ATTORNEY GENERAL OF CANADA
T#1340/7008

OUR MATTER ID: 5204-002

I write further to the cross-examinations of Valerie Gideon (May 7, 2019) and Joanne Wilkinson (May 14, 2019), and the responses Canada has made to requests for information made by the Caring Society during those examinations. This letter serves as the Caring Society's request for relief in relation to the responses given and, as agreed with counsel for Canada, serves as our motion material in respect of same.

As raised during Ms. Wilkinson's cross-examination, the Caring Society objects to the redactions made to withhold the identities of the FNCFS Agencies to whom the denials and appeals relate in the documents provided as Undertaking Responses #5 and #8.¹ The Caring Society has also yet to receive production of the correspondence from the Provinces referenced at paragraph 18

¹ May 14, 2019 cross-examination of Joanne Wilkinson at pages 66-67 and 192-193

of Dr. Gideon's April 16, 2019 affidavit, which were requested during Dr. Gideon's May 7, 2019 cross-examination.²

The Law

Under the Tribunal's *Rules of Procedure*, Canada has an obligation to produce documents "that relate to a fact, issue, or form of relief sought in the case, including those facts, issues and forms of relief identified by other parties under this rule".³ The Caring Society, in the interests of proportionality, has not sought continuous disclosure throughout the remedies stage. Instead the Caring Society has relied on the Consultation Committee on Child Welfare, which has often allowed the parties to work together in the sharing of relevant documents. However, Canada remains obliged to disclose relevant documents within its possession and control, particularly now given that it is seeking to withdraw from the Tribunal process over the objections of the complainants and interested parties. It is within this adversarial context that the Caring Society is seeking production of the documents referred to above.

It is a basic tenet of the adversarial process that relevant documents are to be disclosed. As the Tribunal recently stated in *Valenti v Canadian Pacific Railway*:

[...] a party must show – not that a document is relevant in the traditional sense – but that disclosure of such document will be useful, is appropriate, will likely contribute to advancing the debate, is based on an acceptable objective that he or she seeks to attain in the case, and that the document is related to the dispute (*CEPU v Bell Canada*, 2005 CHRT 34 at para 11).

Most importantly, the link between the issues to be proven and the requested material must be demonstrated in the present case before the Tribunal – and not in another case before another tribunal or court (*Warman v Bahr*, 2006 CHRT 18 at paras 6-7, 9).

The question is, could the document, if accepted as evidence at a hearing, affect the conclusion of the Tribunal in regard to the existence of a fact, a disputed point of law, or the justification of a remedy sought? If the answer is yes, the document is then deemed to be arguably relevant and should be disclosed. It is not sufficient that the name of one of the parties appears on the document to make this document arguably relevant.⁴

The documents meet the test for disclosure

The documents in question are relevant. Canada proffered Dr. Gideon and Ms. Wilkinson as witnesses to support its contention that the Tribunal ought to discharge itself of this complaint. The documents requested from Ms. Wilkinson relate to requests made pursuant to the Tribunal's February 1, 2018 orders that have been denied, whether in first instance or on appeal. It is

² May 7, 2019 cross-examination of Valerie Gideon at pages 27-29.

³ *Rules of Procedure* at Rules 6(1)(d) and 6(4).

⁴ *Valenti v Canadian Pacific Railway*, 2017 CHRT 25 at paras 22-24.

essential for the Caring Society to be able to consider specific information regarding these denials, as this information is vital to informing its position regarding the continuation of the Tribunal's jurisdiction over its February 1, 2018 orders.

Understanding the context of these denials requires knowledge of the specific FNCFS Agency to which the denial relates. The Tribunal has been clear that each community's particular cultural, historical and geographical circumstances must be taken into account,⁵ and has specifically ordered that the budgets for each individual FNCFS Agency are to be based on an evaluation of that Agency's distinct needs and circumstances, including an appropriate evaluation of how remoteness may affect the Agency's ability to provide services.⁶ The Caring Society cannot be in a position to make submissions with respect to how the denials in question may or may not have respected the distinct needs and circumstances of the FNCFS Agencies in question if it must rely on second-hand information obtained from the community, rather than records in Canada's possession. Accordingly, the documents are highly relevant to the Tribunal's orders, over which Canada contends the Tribunal ought to cede jurisdiction. They should as such be produced in their unredacted form.

The communications from provinces with respect to Jordan's Principle are also relevant. Canada's evidence is that, at this time, there is not a concrete plan for implementing Jordan's Principle beyond March 31, 2022. The position of provinces, including any possible resistance, is relevant to submissions related to Canada's plan of continuing to develop its approach to Jordan's Principle over the next three years.

The documents are not privileged

In the case of both documents, Canada cited a need to either seek consent of the Province or FNCFS Agencies or other privacy related concerns. In the adversarial process, this is not a basis for withholding disclosure. There is no privilege in third party privacy that has been claimed and, in any event, Canada has failed to provide any facts grounding a claim to such a privilege. Rather, the privacy interests of a third party are protected by the implied undertaking that all parties are subject to when in receipt of disclosure as part of the adversarial process. Should Canada wish to protect privacy interests with regard to the document becoming part of the record, the proper procedure is for it to bring a motion under section 52 of the *Canadian Human Rights Act*, and not to unilaterally redact or withhold the document.

The redactions Canada has applied to the documents associated with Undertaking Responses #5 and #8 from Ms. Wilkinson's cross-examination are not like the redactions the Caring Society has applied to its documents to remove names identifying children or their families. Those redactions have been in keeping with the Tribunal's direction, most recently stated in a letter dated March 15, 2017, that "[t]he Panel would also appreciate that, in the future, the names of children and any personal information appearing on resumes be redacted from documents before they are filed with the Tribunal." The names of the FNCFS Agencies involved are in no way similar to the

⁵ *First Nations Child and Family Caring Society of Canada et al v Attorney General of Canada*, 2016 CHRT 2 at para 465.

⁶ *First Nations Child and Family Caring Society of Canada et al v Attorney General of Canada*, 2016 CHRT 16 at para 160(A)(2).

information covered by the Panel's March 15, 2017 direction and the privacy concerns cannot be compared.

Impact on timing of submissions related to the Tribunal's retention of jurisdiction

Counsel for the complainants, the Commission and the interested parties have indicated to Canada that they would be in a position to serve and file written submissions with respect to jurisdiction by Friday, July 12, 2019. In the event that the concerns related to the documents noted above have not been resolved by Friday, July 5, 2019, the Caring Society would be in a position to provide its submissions within one week of the production of the documents by Canada, or of the Tribunal's refusal of this motion.

Yours truly,



David P. Taylor

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