



May 20, 2020

### VIA EMAIL

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

Dear Ms. Dubois:

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

On behalf of the First Nations Child and Family Caring Society (the “**Caring Society**”), we write further to the Panel’s direction dated May 6, 2020 on procedural matters and the submissions received from Nishnawbe Aski Nation (“**NAN**”) on May 13, 2020. In order to respect both the spirit and direction of the Panel, we are proposing a procedural protocol to address the irregularities identified by the Caring Society in its May 5, 2020, letter to the Panel and to resolve any irregularities before the time of filing going forward. We also respond to NAN’s submissions on affidavits sworn by more than one affiant.

### **Proposed Protocol**

The proposed protocol was shared with NAN on May 13, 2020 (prior to it filing its submissions), and with all of the parties on May 14, 2020, in an effort to provide the Panel with a unified and clarified approach to procedural irregularities. NAN has communicated to the Caring Society that they do not agree with the proposed protocol as they disagree with our concerns regarding joint affidavits. The Attorney General of Canada (“**Canada**”) made some suggestions with which the Caring Society agrees and which have been incorporated in to the protocol.

While we are of the view that NAN’s suggested process outlined in its May 13, 2020 letter goes some way in addressing our concerns, we are of the view that this should apply to all forms of evidence. This position is in keeping with the Panel’s direction requesting the parties to “resolve procedural issues whenever it is possible before involving the Tribunal”. For any other evidence with a procedural irregularity, NAN’s suggested process puts the onus on other parties to object, rather than on the party seeking to introduce the evidence with the irregularity. The Panel’s direction is not limited to requiring the parties to resolve the disagreement relating to unsworn affidavits.

### **Affidavits sworn by more than one affiant**

We respectfully disagree with NAN's submissions regarding affidavits sworn by more than one affiant. The rules of procedure of the Canadian Human Rights Tribunal refer to affiants in a singular person. Rule 80(1) of the *Federal Courts Rules* specifically provides that affidavits shall be drafted in the first person. The tradition of one deponent per affidavit is echoed in the Federal Court of Appeal form 80A and the *Rules of the Supreme Court of Canada* in Rule 89. Similarly, sections 14 and 15 of the *Canada Evidence Act* refer to "a person" making an affidavit.

In sum, there is no legislative support for the contention that joint affidavits can be filed in matters that fall within federal jurisdiction. While NAN sought to file a joint affidavit in January 2017 (to which Canada initially objected) as well as more recently in relation to NAN's motion, those affiants were ultimately not cross-examined and therefore, the potential challenges facing a joint affidavit have not yet been realized.

There are obvious and practical reasons underlying the requirements found in these laws and rules of procedure. Filing an affidavit with two deponents raises a host of procedural difficulties that could needlessly complicate and lengthen litigation. For example, which deponent will be cross-examined? What evidence within the affidavit is attributable to which affiant? If both are cross-examined, what will happen if the deponents provide conflicting answers on cross-examination? Such issues are likely to lead to disagreements between the parties and require the assistance of the Panel to resolve. Yet, this is precisely the type of situation the Panel's direction urges the parties to resolve.

To this end, and in an effort to avoid further delays and conflicts, the Caring Society requests the Tribunal to direct that any further procedural irregularities be subject to the proposed procedural protocol.

Yours truly,



Sarah Clarke

**Copy to:** Robert Frater, Q.C., Peter Nostbakken, Jonathan Tarlton, Patricia MacPhee,  
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