

June 20, 2024

VIA EMAIL [REDACTED]

Judy Dubois
Registry Operations
Canadian Human Rights Tribunal
240 Sparks Street, 6th Floor West
Ottawa, ON K1A 1J4

Dear Ms. Dubois:

RE: FIRST NATION CHILD AND FAMILY CARING SOCIETY OF CANADA ET AL V ATTORNEY GENERAL OF CANADA, CHRT FILE NO. T1340/7008
O/REF: 5204-002

OVERVIEW

On June 3, 2024, the First Nations Leadership Council (“**FNLC**”) filed a motion for interested party status in the Caring Society’s December 12, 2023 non-compliance motion respecting Jordan’s Principle and Indigenous Services Canada’s (“**ISC**”) March 15, 2024 cross-motion (collectively, “**the motions**”).¹ The FNLC seeks an order for leave to intervene as an interested party subject to certain terms, which the Caring Society summarizes as follows: (a) interested party status that is limited to participation in the motions; (b) permission to make oral and written arguments (the length and schedule of which to be determined by the Panel) and to participate in case conferences, mediation, negotiation, or other dispute resolution or administrative processes in respect of the motions; and (c) participation on a without costs basis.²

For the reasons that follow, the Caring Society consents to, and supports, the FNLC’s motion for interested party status on the motions. The Caring Society’s view is that the existing August 7-8 and 20-21, 2024 hearing dates, which are still seven weeks away, should be preserved notwithstanding the FNLC’s motion.

¹ First Nations Leadership Council June 3, 2024 Motion for Interested Party Status (“**FNLC Motion**”).

² FNLC Motion, Factum at para 44 (Order Sought).

LAW AND ANALYSIS RESPECTING THE FNLC'S MOTION

The Canadian Human Rights Act

The Tribunal has previously set out its jurisdiction for allowing an interested party to intervene before the Tribunal with respect to a complaint.³ Pursuant to paragraph 48.9(2)(b) of the *Canadian Human Rights Act* (“**CHRA**”), the Chairperson may make rules of procedure governing the practice and procedure before the Tribunal, including rules respecting the addition of parties and interested persons to the proceedings.⁴ Subsection 50(1) also contemplates interested parties, which confirms that the Tribunal has the authority to grant a request to become an interested party.⁵ The *CHRA* also provides that proceedings before the Tribunal shall be conducted as informally and expeditiously as the requirements of natural justice and the rules of procedure allow.⁶

The Old Rules of Procedure (03-05-04) Govern the FNLC Motion

In 2022 CHRT 26, the Tribunal observed that because these proceedings were initiated under the *Canadian Human Rights Tribunal Rules of Procedure* (03-05-04) (“**the Old Rules**”) and are ongoing, the Old Rules governed the Federation of Sovereign Indigenous Nations’ motion for interested party status on Canada and the Assembly of First Nations’ (“**AFN**”) joint motion for approval of the first settlement agreement regarding compensation.⁷ The Tribunal’s finding in this respect is consistent with the express provisions of the *Canadian Human Rights Tribunal Rules of Procedure, 2021* (“**the New Rules**”), which provide that:

Non-application

2 (1) These Rules do not apply to an inquiry for which the request to institute an inquiry to the Chairperson under subsection 49(1) of the Act was made before the day on which these Rules come into force.

Consent

(2) However, these Rules apply to any inquiry referred to in subsection (1) on consent of all parties.⁸

The New Rules came into force in 2021.⁹ The Caring Society and the AFN filed this human rights complaint with the Canadian Human Rights Commission (“**the Commission**”) in February 2007.¹⁰ The Commission referred the Complaint to the Tribunal for an inquiry on October 14, 2008.¹¹ Accordingly, the inquiry for which the request to institute an inquiry to the Chairperson under subsection 49(1) of the Act was made prior to the New Rules’ coming into force. Moreover, the Parties have not consented to the application of

³ 2022 CHRT 26 at para [28](#).

⁴ *Canadian Human Rights Act*, R.S.C. 1985, c. H-6, [s 48.9\(2\)\(b\)](#).

⁵ *CHRA*, [s 50\(1\)](#). See also 2022 CHRT 26 at para [28](#).

⁶ *CHRA*, [s 48.9\(1\)](#).

⁷ 2022 CHRT 26 at para [2](#).

⁸ *Canadian Human Rights Tribunal Rules of Procedure, 2021*, SOR/2021-137 at [s 2](#).

⁹ *Canadian Human Rights Tribunal Rules of Procedure, 2021*, SOR/2021-137 (“Registration 2021-06-11”; see also [s 48](#), which provides: “These Rules come into force on the 30th day after the day on which they are registered”).

¹⁰ 2012 FC 445 at para [19](#), aff’d [2013 FCA 75](#).

¹¹ 2016 CHRT 2 at para [6](#).

the New Rules pursuant to s 2(2) of the New Rules.

The Old Rules therefore govern this motion. For that reason, the Tribunal will have to consider the fact that the FNLC motion has been brought pursuant to s 48.9(2)(b) of the *CHRA* and Rule 27(1) of the New Rules.¹²

The FNLC's motion can proceed under the Old Rules

In the Caring Society's view, the applicability of the Old Rules does not impact the ultimate disposition of the FNLC's motion for two reasons. First, the Tribunal is the master of its own procedure,¹³ has discretion to grant interested party status,¹⁴ and has a statutory mandate to conduct proceedings as informally and expeditiously as the requirements of natural justice and the rules of procedure allow.¹⁵ Second, the Panel has previously "waived the formalities" on an earlier request for interested party status, which came in the form of "a general letter expressing its interest to join the proceedings to provide its views" rather than "a notice of motion and a motion (Rule 3 and rule 8 of the Tribunal's Rules of Procedure Rule 3) or in making a request to the Tribunal to be dispensed of these requirements in light of specific and justifiable circumstances (see rule 1(4) of the Tribunal's Rules of Procedure)".¹⁶ In the motion, "the Panel opted for an imperfect, expeditious way to address the matter" given a host of considerations, including that hearing dates were upcoming in the near future (but not entirely confirmed at the time).¹⁷ The Caring Society therefore submits that the Panel has the discretion to, and should, accept and determine the FNLC's motion, which meets the requirements of the Tribunal's procedural rules.

The Old Rules

The Old Rules contemplate the addition of interested parties. Rule 8(1) provides that "[a]nyone who is not a party, and who wishes to be recognized by the Panel as an interested party in respect of an inquiry, may bring a motion for an order granting interested party status", while Rule 8(2) provides that "[a] motion under 8(1) shall comply with the requirements of Rule 3 and shall specify the extent of the desired participation in the inquiry".¹⁸ In turn, Rule 3(1) provides that motions are to be made by a Notice of Motion which Notice shall (a) be given as soon as is practicable; (b) be in writing unless the Panel permits otherwise; (c) set out the relief sought and the grounds relied upon; and (d) include any consents of the other parties.¹⁹ Pursuant to Rule 3(2), the Panel (a) shall ensure that the other parties are granted an opportunity to respond; (b) may direct the time, manner and form of any response; (c) may direct the making of argument and the presentation of evidence by all parties, including the time, manner and form thereof; and (d) shall dispose of the motion as it sees fit.²⁰

Accordingly, in form, the FNLC motion is consistent with Rules 8(1)-(2). The Caring Society's view is that the FNLC motion is consistent with Rule 3(1), overall. The Caring Society also submits that the Panel's

¹² FNLC Motion, Factum at para 1.

¹³ 2016 CHRT 11 at para [2](#).

¹⁴ 2016 CHRT 11 at para [2](#).

¹⁵ *CHRA*, s [48.9\(1\)](#).

¹⁶ 2019 CHRT 11 at para [16](#).

¹⁷ 2019 CHRT 11 at para [16](#).

¹⁸ Old Rules at Rule 8.

¹⁹ Old Rules at Rule 3(1).

²⁰ Old Rules at Rule 3(2).

Directions respecting the FNLC motion have been wholly consistent with Rule 3(2). The Caring Society is also cognizant of the fact that Rule 1 provides that, much like the New Rules, the purpose of the Old Rules is, in part, to ensure that all proceedings before the Tribunal are conducted as informally and expeditiously as possible.²¹

The Tribunal's Jurisprudence

As this Panel observed in 2022 CHRT 26, the Panel's approach in past rulings on motions for interested party status is "the most relevant and authoritative to this motion given that this is the same case with the same historical context".²² Notably, the Panel addressed the test for granting interested party status in 2016 CHRT 11.²³ In assessing Nishnawbe Aski Nation's motion for interested party status, the Panel's approach was as follows:

An application for interested party status is determined on a case-by-case basis, in light of the specific circumstances of the proceedings and the issues being considered. A person or organization may be granted interested party status if they are impacted by the proceedings and can provide assistance to the Tribunal in determining the issues before it. That assistance should add a different perspective to the positions taken by the other parties and further the Tribunal's determination of the matter. Furthermore, pursuant to section 48.9(1) of the CHRA, the extent of an interested party's participation must take into account the Tribunal's responsibility to conduct proceedings as informally and expeditiously as the requirements of natural justice and the rules of procedure allow.²⁴

This Panel has also drawn on the Tribunal's jurisprudence in determining whether to grant interested party status. For example, in determining the Innu Nation's request to make a limited intervention as an interested party on the Caring Society's non-compliance motion seeking to secure prevention funding for First Nations not served by an FNCFS Agency, the Panel considered the following factors: (a) the prospective interested party's expertise will be of assistance to the Tribunal; (b) its involvement will add to the legal positions of the parties; and (c) the proceeding will have an impact on the prospective party's interests.²⁵

Although the onus is on the FNLC to demonstrate how its expertise will assist the Tribunal in its determination of the issues,²⁶ the Caring Society submits as follows:

- Factor A – the prospective interested party's expertise will be of assistance to the Tribunal: The Caring Society recognizes that FNLC and its member organizations and the First Nations governments they represent have significant expertise and knowledge that will be of assistance to the Tribunal and that they will bring a unique perspective to the motions, specifically given their direct involvement in the implementation of Jordan's Principle "on the ground". Moreover, approximately one third of First Nations are in British Columbia and the preponderance of small

²¹ Old Rules at Rule 1(1)(c).

²² 2022 CHRT 26 at para 38.

²³ 2020 CHRT 31 at para 27; 2016 CHRT 11 at para 3.

²⁴ 2016 CHRT 11 at para 3 (citations omitted). See also 2020 CHRT 31 at para 27.

²⁵ See e.g., 2020 CHRT 31 at para 26, citing *Walden et al. v. Attorney General of Canada (representing the Treasury Board of Canada and Human Resources and Skills Development Canada)*, 2011 CHRT 19 at para 23.

²⁶ 2022 CHRT 26 at para 29.

population communities (often located in remote and rural areas) are in this region and thus the needs for Jordan's Principle are coloured by this distinct context. The majority of First Nations languages are from this region and, sadly, many are endangered. Specifically relevant to this motion and the principle of cultural appropriateness, the Potlatch which has been raised in the Caring Society motion and AFN's responding materials, is practiced by coastal First Nations in British Columbia.

- Factor B – its involvement will add to the legal positions of the parties: The Caring Society recognizes that FNLC and its member organizations and First Nations Governments that it represents will add to the legal positions of the parties and “ensure the specific perspectives of First Nations in BC are being heard and considered on issues that have a real and substantial impact on First Nations in BC”.²⁷
- Factor C – the proceeding will have an impact on the moving party's interests: The Caring Society recognizes that FNLC organizations and the First Nations in British Columbia who comprise them have a “significant interest” in the Tribunal's orders on the motions given the impacts of same on First Nations and their children, youth, and families in British Columbia.²⁸

Lastly, and guided still by the Panel's observation that its approach on past rulings is “the most relevant and authoritative to this motion given that this is the same case with the same historical context”,²⁹ the Caring Society submits that:

- In granting, in part, the Congress of Aboriginal Peoples' motion for interested party status on the Caring Society's non-compliance motion related to the definition of a “First Nations child” for the purposes of Jordan's Principle, the Panel ordered limited interested party status with conditions that included “CAP will not delay the proceedings and must file its submissions no later than March 13, 2019.”³⁰ Ultimately, the motion was heard on March 27-28, 2018, with no adjournment of the hearing dates resulting. “Given the short time frame before the hearing of this issue, any delay will be deemed a renunciation by CAP to participate in the proceedings.”³¹
- In granting the Innu Nation's motion for a limited interested party status with certain parameters, the Tribunal directed that “the Innu Nation will abide by the pre-established schedule and will file their affidavits no later than October 23, 2020, their factum no later than December 4, 2020 and their reply no later than January 6, 2021”.³²
- In granting the Federation of Sovereign Indigenous Nations' motion in part, the Panel ordered that “[t]he FSIN will not delay the proceedings and must file its submissions no later than September 9, 2022. Given the short timeframe before the hearing of this issue, any delay will be deemed a renunciation by FSIN to participate in the proceedings”.³³

²⁷ FNLC Motion, Factum at para 40.

²⁸ FNLC Motion, Factum at para 43.

²⁹ 2022 CHRT 26 at para 38.

³⁰ 2019 CHRT 11 at paras 28 and 52.

³¹ 2019 CHRT 11 at para 52.

³² 2020 CHRT 31 at paras 48 and 51.

³³ 2022 CHRT 26 at para 61(l).

CASE MANAGEMENT CONFERENCE AND NEXT STEPS

The Caring Society fully welcomes the FNLC's participation in the motions scheduled to be heard in August. As noted above, their organization represents a third of First Nations in Canada, living in a unique context, which provides a distinct perspective on the importance of the proper implementation of Jordan's Principle.

The proper treatment of urgent Jordan's Principle cases and backlog management lie at the heart of the Caring Society's non-compliance motion. For this reason, the Caring Society has sought to move this proceeding forward as quickly as possible. In light of the long procedural delays over the last few months, which have already pushed the hearing back from an initially targeted timeline of early spring to a presently scheduled timeframe of late summer, the Caring Society respectfully asks that the existing hearing dates be preserved. As a result, the Caring Society's view is that any case management conference should be held within days of the Panel's ruling on the FNLC's motion to discuss the balance of the schedule, and that the parties should be directed to make counsel available for a case management conference within three days of the Panel's ruling.

In making this request, the Caring Society is mindful that late stage interventions have been accommodated within existing hearing schedules on two past occasions, which demonstrates that it is possible to provide an opportunity to respond while preserving already-scheduled steps in this proceeding. As of July 2, 2024, the August 7, 2024 hearing date will still be roughly five weeks away. This is more than enough time to complete written briefings in advance of a four day hearing, which will give all parties ample opportunity to put their positions before the Panel.

Yours truly and respectfully submitted,

David P. Taylor

DPT/jk

cc.

Christopher Rupar, Paul Vickery, Sarah-Dawn Norris, Meg Jones, Dayna Anderson, Kevin Staska,
and Samantha Gergely
Co-counsel for the respondent Attorney General of Canada

Stuart Wuttke, Adam Williamson, and Lacey Kassis
Co-counsel for the co-complainant the Assembly of First Nations

Brian Smith and Jessica Walsh
Co-counsel for the Canadian Human Rights Commission

Maggie Wente and Darian Baskatawang
Co-counsel for the interested party Chiefs of Ontario

Justin Safayeni and Stephen Aylward
Co-counsel for the interested party Amnesty International

Julian Falconer, Asha James, Shelby Percival, and Meaghan Daniel
Co-counsel for the interested party Nishnawbe Aski Nation

Crystal Reeves and Dawn Johnson
Co-counsel for the First Nations Leadership Council

Sarah Clarke and Kevin Droz
Co-counsel for the co-complainant the First Nations Child and Family Caring Society of Canada