

CONWAY

Litigation/Litige

David P. Taylor
Direct Line: 613.691.0368
Email: dtaylor@conway.pro

Assistant: Doreen Navarro
Direct Line: 613.691.0375
Email: dnavarro@conway.pro

December 21, 2018

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**

OUR MATTER ID: 5204-002

I write further to the case management conference held on December 17, 2018 and in particular to provide an itemization of the matters presently under discussion by the parties and which are outstanding. The list is subject to change depending on Canada's response regarding the subjects on which assistance from the Tribunal by way of mediation is sought, as well as the possible emergence of other matters. A draft of this letter has been shared with the parties.

As noted during the case conference, the Caring Society, the Assembly of First Nations, the Chiefs of Ontario, and Nishnawbe Aski Nation have identified three broad categories of subjects:

- a) Matters requiring Tribunal adjudication;
- b) Matters that could be assisted by Tribunal mediation; and
- c) Items that have not progressed sufficiently to be brought to the Tribunal.

Conway Baxter Wilson LLP/s.r.l.
400 - 411 Roosevelt Avenue, Ottawa ON K2A 3X9
Tel: 613.288.0149 Fax: 613.688.0271
www.conway.pro

This categorization was shared with Canada on Thursday, December 13, 2018. A draft of this letter has been shared with the parties.

A. Matters requiring Tribunal adjudication

The complainant and interested parties have identified the following items for adjudication:

- (1) The definition of “First Nations child” under Jordan’s Principle;
- (2) Major capital funding under the FNCFS Program, Jordan’s Principle, and for First Nations child and family well-being;
- (3) Compensation for individuals under the FNCFS Program;
- (4) Compensation for individuals under Jordan’s Principle;
- (5) Restitution for small First Nations Child and Family Services Agencies for downward scaling; and
- (6) Ongoing Tribunal supervision and accountability measures following the end of the Tribunal’s supervision.

In terms of scheduling for these matters, as expressed in case management on December 17, 2018 there is agreement between the parties that Items #A1 (the definition of “First Nations child” under Jordan’s Principle) and #A2 (major capital funding under the FNCFS Program, Jordan’s Principle, and for First Nations for child and family well-being) ought to be dealt with beginning on February 6, 2019.

As contemplated at the December 17, 2018 case conference, the parties have had discussions regarding a schedule for the exchange of materials and propose the following dates:

- | | |
|-------------------|---|
| January 16, 2019: | Identification of existing materials that would form a “joint record” for the Tribunal (e.g., previously filed affidavits, transcripts from cross-examinations, material produced/discussed at the CCCW) ¹ |
| January 23, 2019: | Tendering any new affidavit evidence on which a party would rely ² |
| January 30, 2019: | All parties exchange outlines of the legal submissions/arguments they will make at the hearing beginning on February 6, 2019 |

We understood from the December 17, 2018 case conference that there would be at least some further discussion of Item #A6 (ongoing Tribunal supervision and accountability measures following the end of the Tribunal’s supervision) at the January 9, 2019 appearance, time permitting.

¹ This date would be subject to receipt of the transcripts of the cross-examinations of Mr. Perron (May 9, 2018), Ms. Isaak (Oct 30, 2018), and Dr. Gideon (Oct 30-31, 2018), which is anticipated by the end of the month.

² The Caring Society and the Commission have both indicated that they do not anticipate filing any further evidence.

The issues related to compensation for First Nations individuals (#A3 and #A4) and restitution for small First Nations Child and Family Services Agencies (#A5) have been identified for adjudication in March 2018.

B. Matters that the Caring Society, the Assembly of First Nations, the Chiefs of Ontario, and Nishnawbe Aski Nation agree could be assisted by mediation with the Panel members

The Caring Society, the Assembly of First Nations, the Chiefs of Ontario, and Nishnawbe Aski Nation have identified the following items as matters lacking a comprehensive plan or specific deadline, and for which these parties have been unable to achieve such a comprehensive plan or specific deadline through the Consultation Committee on Child Welfare (“CCCW”):

- (1) Funding agreements for First Nations Child and Family Services Agencies following the Tribunal’s February 1, 2018 orders;
- (2) Establishing a policy on re-allocation;
- (3) Training for Indigenous Services Canada employees;
- (4) Performance evaluation for Indigenous Services Canada employees;
- (5) Appeals process for Jordan’s Principle decisions;
- (6) Appeals process for FNCFS Program decisions;
- (7) Jordan’s Principle approval factors, timelines, and service standards; and
- (8) A baseline study on the needs of First Nations children based on the ACE (Adverse Childhood Experiences) Study Model.

The Caring Society, the Assembly of First Nations, the Chiefs of Ontario, and Nishnawbe Aski Nation were prepared to participate in mediation on January 8 and (time permitting) on January 9, 2019 in order to set parameters and timelines for bringing these initiatives to fruition. The Commission also indicated that it was prepared to participate in such discussions.

However, Canada does not agree that the matters raised are at an impasse, such that they would benefit from mediation-adjudication at this time. Canada’s preference is to discuss each item at the next CCCW meeting. The next CCCW meeting is currently scheduled for January 17, 2019.

As such, and in response to the Panel Chair’s communication of December 20, 2018, the parties will not be in a position to participate in mediation on January 8, 2018.

C. Items that have not progressed sufficiently to be brought to the Tribunal

The Caring Society, the Assembly of First Nations, the Chiefs of Ontario, and Nishnawbe Aski Nation agree that further work remains to be done (whether at the CCCW or otherwise) on the following items, all of which already have set timelines in place under other Tribunal orders or directions:

- (1) Long-term funding methodology for the FNCFS Program (the parties are awaiting the final report of the Institute for Fiscal Studies and Democracy and Indigenous Services Canada's response to that report);
- (2) Remoteness Funding (the NAN-RQ Table has yet to provide its final report);
- (3) The Ontario Special Study (the work of the Ontario Technical Table is continuing); and
- (4) Continuation of the Choose Life Order beyond March 31, 2019 (further discussions are required of the Choose Life Working Group and, if necessary, at the CCCW).

Should there be any questions regarding the above, please do not hesitate to contact me at your convenience.

Yours truly,



David P. Taylor

Copy to: **Robert Frater, Q.C., Jonathan Tarlton, Patricia MacPhee, Kelly Peck, and Max Binnie**
Co-counsel for the respondent Attorney General of Canada

David Nahwegahbow, Stuart Wuttke, and Thomas Milne
Co-counsel for the complainant Assembly of First Nations

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

Maggie Wente, Kaitlin Ritchie, and Sinéad Dearman
Co-counsel for the interested party Chiefs of Ontario

Justin Safayeni
Counsel for the interested party Amnesty International

Julian Falconer, Akosua Matthews, and Molly Churchill
Co-counsel for the interested party Nishnawbe Aski Nation

Sarah Clarke, Barbara McIsaac, Q.C., and Nicholas McHaffie
Co-counsel for the complainant First Nations Child and Family Caring Society