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SENT VIA EMAIL

May 27, 2020

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

Dear Ms. Dubois:

**Re: FNCFCSC et al v AGC (CHRT File T1340/7008) – Reply re. Caring Society’s
Procedural Concerns**

Would you please forward this correspondence to the Panel? We write in response to the Panel’s direction of May 6, 2020, setting a deadline of May 27, 2020, for Nishnawbe Aski Nation (“NAN”) to file a reply regarding procedural matters initially raised in a letter to the Tribunal from the First Nations Child and Family Caring Society (“Caring Society”) on May 5, 2020.

We have had exchanges with counsel for the Caring Society and have read the May 20, 2020 submissions of, respectively, the Caring Society, the Attorney General of Canada, the Assembly of First Nations (“AFN”), and the Canadian Human Rights Commission. The Caring Society has proposed a procedural protocol to govern “procedural irregularities.” Canada “agrees” with the protocol without making further submissions. The AFN and the Commission have both stated they do not have concerns with the protocol, but neither has endorsed it. Neither Chiefs of Ontario (“COO”) nor Amnesty International has made submissions.

The Panel has requested that the parties “resolve procedural issues whenever it is possible before involving the Tribunal.” We suggest, respectfully, that the Caring Society has created a “tempest in a teapot.” We respectfully suggest that we find a simpler, more proportionate, and more effective solution. We take full responsibility and apologize for the failure to file the affidavits in a timely manner. We suggest that a simple courtesy call to counsel would have sufficed to remedy the issue.

NAN believes the proposed protocol may unintentionally result in increased time being spent by the parties and Tribunal on questions relating to procedure. We do not believe a joint affidavit is a “procedural irregularity”. We now understand it is the Caring Society’s position that a joint affidavit *is* a “procedural irregularity”. Had the proposed protocol been in place in 2019 when NAN filed the joint affidavit of Dr. Thomas Wilson and David Barnes, it would not have been of benefit or assistance because of this difference of opinion. The existence of the protocol could lead to time spent



debating or litigating what is or is not a “procedural irregularity” and therefore subject to the protocol, when such time would be better spent directly discussing any underlying procedural concerns.

We have a few points to make in reply to the Caring Society’s May 20th submissions that a joint affidavit is a “procedural irregularity.” To the Caring Society’s point that “Rule 80(1) of the *Federal Courts Rules* specifically provides that affidavits shall be drafted in the first person”, we point out the following:

- The “first person” is inclusive of both first person singular and first person plural.¹ Even if the *Federal Court Rules* applied to Tribunal proceedings,² the joint affidavit is in conformity with the requirement that an affidavit be drafted in the first person.
- Procedural rules in provinces also require that affidavits be drafted in the first person, and some have rules specific to the jurat of affidavits sworn by more than one deponent.³ There is nothing about the requirement that an affidavit be drafted in the first person that precludes an affidavit being sworn by more than one person.

To the assertion that “there is no legislative support for the contention that joint affidavits can be filed in matters that fall within federal jurisdiction”, we point out the following:

- There is nothing in the *Canada Evidence Act*, the Canadian Human Rights Tribunal *Rules of Procedure*, or any of the legislation/Rules cited by the Caring Society that indicates an affidavit cannot be sworn by more than one person. Silence cannot be interpreted as a prohibition.
- Reference in the *Canada Evidence Act* to “a person” making an affidavit should not be interpreted as meaning each affidavit can be signed by only one person. Each person signing an affidavit is still “a person”, even if more than one person signs an affidavit. As mentioned above, some provincial rules of procedure have specific requirements when an affidavit is sworn by more than one deponent. Provincial rules also refer to “the deponent”, e.g. when setting out the general rule that the contents of the affidavit shall be confined to the statement of facts within the personal knowledge of the deponent. The use of the singular in these rules/provisions does not indicate that an affidavit cannot be sworn by more than one person.
- Had Parliament (or the Chairperson under s. 48.9(2) of the *Canadian Human Rights Act*) wanted to prohibit affidavits from being sworn by more than one deponent, it would have drafted such a prohibition, e.g. by requiring that an affidavit be drafted in the first person singular.

¹ For example, dictionary.com defines “first person” as “the grammatical person used by a speaker in statements referring to himself or herself (**first person singular**) or to a group including himself or herself (**first person plural**)”: <https://www.dictionary.com/browse/first-person> (emphasis in original); The Cambridge Dictionary online defines the noun “the first person” as “the form of a verb or pronoun that is used when people are speaking or writing about themselves” and it defines the adjective “first-person” as “telling a story using the form ‘I’ or ‘we’”: <https://dictionary.cambridge.org/dictionary/english/first-person>; See also *Gibb v. Pereira*, 2017 ONSC 4762, at para 27, sixth bullet: “I note that the Rule 4.06(1)(b) requirement of expressing affidavits ‘in the first person’ does not rule out use of the ‘first person plural’”; Finally, Collins Dictionary on-line defines “first person plural” as “a grammatical category of pronouns and verbs used by the speaker to refer to or talk about him-self or herself together with others”: <https://www.collinsdictionary.com/dictionary/english/first-person-plural>

² Which of course it does not: Federal Courts Rules, SOR/98-106, s. 1.1(1).

³ E.g. *Rules of Court, NB Reg 82-73*, at Rs. 4.05(1)(a), 4.05(7); *Rules of Civil Procedure*, RRO 1990, Reg 194, Rs. 4.06(1)(b), 4.06(4); *Court of Queen's Bench Rules*, Man Reg 553/88, Rs. 4.07(1)(b), 4.07(4).



- The Caring Society has not provided any case law supporting its contention that an affidavit sworn by more than one person is prohibited or otherwise a “procedural irregularity.”

In conclusion, we do not believe it would be wise to create formal rules out of a situation that arose from inadvertence with the unsworn affidavits. It appears to us that the Caring Society’s concerns have been selective: it has not raised concerns before the Tribunal with an unsworn affidavit by COO, but has raised concerns before the Tribunal with unsworn affidavits by NAN. We suggest that the answer to the concerns raised by the Caring Society is not a new protocol. Rather, if there are perceived deficiencies in a party’s filings, we suggest that a courtesy call to counsel be a first step. Unfortunately, this did not occur regarding NAN’s unsworn affidavits. It seems to us the creation of a protocol is a mistake that will invariably lead to more, rather than less, time spent on procedure.

We believe the proposal in our May 13, 2020, submissions is responsive and proportional to the concerns raised by the Caring Society, and will achieve the Panel’s desired outcome of ensuring the parties turn to the Tribunal only as a last resort.

We thank you for considering the above and would be happy to respond to any questions. We also wish to apologize for this whole process, sparked by our inadvertence with the unsworn affidavits.

Yours very truly,



Julian N. Falconer

cc. All parties’ counsel (via email)

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