

Canadian Human
Rights Tribunal



Tribunal canadien
des droits de la personne

Ottawa, Canada K1A 1J4

July 31, 2026

By Email

(See Distribution List)

**Re: First Nations Child and Family Caring Society et al. v. Attorney General of Canada
Tribunal File: T1340/7008**

Sent on behalf of Member Sophie Marchildon

Subject: Views on Canada's Request for the reconstitution of a three-member Panel

Dear Tribunal Chairperson Khurana,

Thank you for the opportunity to join my voice to this process and provide my views as Panel Chair of this case over the last 14 years.

Brief procedural history of this case:

Chairperson Sinclair had originally set a 72-day hearing for the complaint on its merits. Newly appointed Chairperson Chotalia reassigned the case to herself alone and dismissed it on a motion.

In 2012, when the Federal Court directed the Tribunal to constitute a new panel, I was assigned the matter by Interim Chairperson Gupta who could have assigned the case to himself but decided not to. He decided that given that I was already seized of other complex cases and

given my extensive experience in human rights, Indigenous and international law and health and social services law, he would assign me the case if I agreed. Later, upon request of the complainants, the Interim Chairperson Gupta after considering the parties and my consent of the addition of two other members, rendered a decision to constitute a three-member Panel and appointed me as Panel Chair. At the time, there was a possibility of a massive 72-day hearing on the merits of the complaint, which played a central role in my accepting the addition of two members. I agreed that the merits of the case raised novel and highly complex issues, and I was assigned to lead it. The parties and the panel members all agreed that, in the interest of efficiency, I could case-manage the case by myself without the constant need to seek the consent of the other members for procedural decisions. Over the last two years, at my request, Member Lustig and I have dealt with procedural matters jointly.

When Member Bélanger passed away in 2015, Member Lustig and I lawfully continued to deliberate on the matter, which involved novel and highly complex issues, and issued the merits decision in 2016 CHRT 2.

Over the span of ten years we issued a series of remedial rulings and orders that together form a comprehensive corpus of findings, reasons and orders to ensure that the orders are effective and responsive to the systemic discrimination that I found jointly with Member Lustig. On July 7, 2026, Member Lustig resigned from the panel. The following day, I requested to speak with you before informing the parties of Member Lustig's resignation and sought your views on my continuing the case alone, to which you agreed. I then advised the parties that I would continue alone. On July 21st, 2026, at a Case Management Conference Call (CMCC), I asked the parties if they had questions or comments since Member Lustig's resignation. The AGC indicated that it

was seeking instruction on the composition of the Panel. No one else than Canada had comments on this point. All parties other than Canada indicated that they were ready and willing to proceed with the interim issues concerning Jordan's Principle on an expedited basis.

I do not agree with Canada's narrow legal position on quorum and agree only in part with its characterization of the long-term phase of these proceedings, for the reasons that I will explain below.

Legal Framework Under the Canadian Human Rights Act (CHRA)

I agree that the Chairperson has exclusive authority to assign members to inquiries into complaints and to determine the composition of the Panel.

Section 49(2) of the CHRA explicitly states that inquiries may be conducted by a panel of one or three members:

On receipt of a request, the Chairperson shall institute an inquiry by assigning a member of the Tribunal to inquire into the complaint, but the Chairperson may assign a panel of three members if he or she considers that the complexity of the complaint requires the inquiry to be conducted by three members. (emphasis added).

The Act is silent both on quorum and on what occurs when a three-member panel is subsequently reduced to two members or one, reinforcing the conclusion that quorum is not a statutory requirement. In *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 SCR 27 at para 21-22, the Supreme Court of Canada discussed Elmer Driedger *Construction of Statutes* (2nd ed. 1983)'s approach to statutory interpretation:

Today there is only one principle or approach, namely, the words of an Act are to be read in

their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

(...) I also rely upon s. 10 of the *Interpretation Act*, R.S.O. 1980, c. 219, which provides that every Act “shall be deemed to be remedial” and directs that every Act shall “receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act according to its true intent, meaning and spirit”. (emphasis added).

The CHRA should be the foundational basis of the analysis, and general administrative law principles, while helpful, should not take precedence over the CHRA. Special consideration ought to be given to sections 2 (Purpose of the CHRA), 49(2), and 53(2) of the CHRA in determining Canada’s request.

Because the Act permits a panel of one, I, as the remaining Panel Chair¹ and now referred to as the Tribunal Member, retain full statutory authority to hear and decide the remainder of the case.

Canada’s request characterizes a three-member panel as an inflexible requirement, contrary to both the express wording of the CHRA and the clear absence of any statutory quorum requirement.

¹ In this letter, references to the “Panel Chair” and to “me” or “I” are used interchangeably

As noted in the case relied on by the AGC, *IBM Canada Ltd. v. Deputy M.N.R., Customs and Excise*, 1991 CanLII 13584, [1992] 1 F.C. 663 at 672(F.C.A.), (IBM), “[t]he quorum of a body made up of several members has been defined by this Court as ‘the minimum number of members who must be present for that body to exercise its powers validly.’” In the case of the CHRA, section 49(2) makes it clear that the minimum number of members is the single member who shall be appointed. Further, *IBM* involves a very different factual and procedural matrix and is not directly applicable to these unique proceedings. None of the cited cases by Canada are persuasive. One deals with quorum requirements in the bylaw, the other case deals with quorum requirement within a statute. The most relevant case is *Brink’s Canada Ltd v Canada (Human Rights Commission)*, [1996] 2 FC 113 (TD). Notably, that case confirms that the Chair can establish a new Panel where the existing one is unable to proceed. That is, however, premised on the initial Panel being unable to proceed, which is not the case in the current circumstances and with the current wording of the s. 49(2) of the CHRA. For greater certainty, I confirm that I remain able and willing to proceed with these proceedings. Furthermore, the structure of the CHRA has changed since 1996 where the composition of the Panel affected parties’ rights of appeal. That is no longer the case, and the choice of a one- or three-member Panel has no effect on parties’ procedural rights of appeal.

Moreover, the inquiry into the complaint was fully completed, and we are now 10 years into the remedial phase, not merely at the start of the remedial process. The plain language of section 49(2) of the CHRA permits a single-member panel by requiring the appointment of only one member. While a three-member panel is a possibility, it is not a requirement of the

CHRA.

The AGC rests its request on the flawed premise that because this inquiry was initiated by a three-member panel, it cannot lawfully conclude as a single-member panel. This position ignores the plain language and statutory architecture of the CHRA and the very unique, novel and specific context and proceedings of this case.

I believe that a single-member Panel is fully lawful under the CHRA. While I agree that these proceedings are highly complex, they have been highly complex throughout the entire period during which I have chaired them, and they have provided me with extensive experience, knowledge, and understanding of the case. I also have extensive knowledge of the systemic discrimination that we found and, after years of adjudicating this case, can readily assess whether the proposed long-term reforms and supporting evidence will remedy that systemic discrimination.

I agree that the long-term reform phase is procedurally complex and do believe that it will require sustained efforts and case management. If this aspect requires additional members to serve alongside me on the Panel, or if another member is assigned to case-manage the proceedings so that I may focus on the substantive issues, I will accept that decision.

Furthermore, I do not view the substantive adjudication of long-term reforms and interim Jordan's Principle issues as more complex than the matters adjudicated over the past 14 years. While I agree that this long-term phase includes a forward-looking aspect and requires consideration of new and evolving evidence, which has yet to be filed or tested before the Tribunal, I strongly disagree that it can be severed from the prior proceedings.

The unfairness to First Nations children and families and to the complainants, whose complaint was substantiated, would lie in appointing three new members who did not hear the case over the past 14 years. Those members would be required to determine the long-term reforms necessary to remedy systemic discrimination that they themselves did not adjudicate. They would also be required to interpret 14 years of rulings and orders that they did not issue and to determine whether those orders have been adequately satisfied. This could jeopardise the integrity of the long-term reform process and would be prejudicial and unfair. That would create significantly greater complexity than addressing the participation of additional interested parties with limited involvement or managing different levels of litigation.

Moreover, the Supreme Court of Canada establishes that administrative tribunals have control over their own processes to ensure timely access to justice.

Administrative law principles and the CHRT Rules of Procedure protect the continuity of complex litigation. Because a single member has the complete legal authority to conduct an inquiry under the CHRA, the Panel Chair retains jurisdiction to issue orders on outstanding systemic or implementation issues. Striking a new panel at this advanced remedial stage would be highly inefficient.

This case has generated a massive evidentiary record, over 10 years of evidence, and multiple interim orders. The AGC's assertion regarding independent "new evidence" does not provide the full picture and negates the interdependence of the Tribunal's jurisprudence. The AGC asserts that long-term program reform can proceed as an isolated exercise

detached from the historic record, adjudicated by a new panel relying solely on "new evidence." This assertion is wrong. It betrays a fundamental misapprehension of this Tribunal's role, which is not merely to review isolated transaction files, but to ensure that the Tribunal's overarching orders are effective in permanently eliminating the systemic racial discrimination identified in the 2016 Merits Decision and subsequent rulings, and in preventing its recurrence. This Tribunal remains seized of this matter precisely in that regard. While it is true that new evidence can and will be brought forward as long-term reform progresses, this new evidence cannot be evaluated in a vacuum. It is inextricably tethered to a foundational, multi-year record. Critical evidentiary elements such as the Institute of Fiscal Studies and Democracy (IFSD) reports upon which Canada itself heavily relied on to structure and justify the Ontario Final Agreement (OFA) form part of an immutable historical archive. Only an adjudicator possessing a full, uncorrupted memory of this gigantic evidentiary record can meaningfully and expeditiously determine whether newly introduced evidence demonstrates the true, permanent eradication of systemic discrimination. Canada's submissions textually partition these proceedings, completely negating the deep interdependence of the dense, cohesive body of rulings issued by this Tribunal over the last decade. The operational history of this file demonstrates that familiarity is the linchpin of efficiency. It was the existing panel's extensive, deeply internalized knowledge of the record that enabled the Panel to interpret, analyze, decide, and approve the complex OFA rapidly within six weeks after the hearing. This exceptional efficiency directly allowed First Nations in Ontario to move forward into an active implementation phase without costly administrative stasis. The monumental interpretive

task of examining and reconciling a decade of Tribunal rulings to determine whether a future long-term reform plan or agreement would satisfy the findings and orders in those rulings and, more importantly, the spirit underlying those orders, cannot reasonably be completed within weeks, or even a few months, by 3 newly appointed Panel Members. Such appointments would inevitably result in further delay and could give rise to additional complications.

While the AGC continues to contest the approach set out in 2025 CHRT 80², the Tribunal subsequently approved the OFA in March 2026, explicitly noting that comprehensive written reasons were to follow³. Member Lustig retired prior to the formal release of those finalised reasons.

Consequently, forcing a panel reset at this exact juncture introduces severe systemic risks and structural absurdities into the remaining proceedings. Furthermore, seeking a panel reset at a critical juncture acts as a systemic obstruction. Delaying final remedies through procedural technicalities directly impacts the human rights of First Nations children and families.

² <https://canlii.ca/t/kg77g>; I encourage you to read this ruling to see the recent approach taken by the Panel to move long-term reform forward expeditiously.

³ What necessarily requires more time is the meticulous preparation of comprehensive written reasons setting out the legal and factual justification for approving an intricate and large agreement.

The Panel Chair's Continued Jurisdiction

The Panel's jurisdiction over the remedial phase is already established and integrated.

The Panel Chair was leading the original panel that found systemic discrimination in the 2016 merit decision and all subsequent rulings and orders. Her jurisdiction remains tethered to those binding findings. Constituting an entirely new panel at this advanced stage of the remedial and clarification phases would fracture the continuity in the exercise of that statutory authority. Establishing an entirely new Panel after more than a decade of active, highly complex litigation would cause great prejudice. The Panel Chair represents the sole remaining direct source of historical memory, having overseen thousands of pages of evidence, numerous witnesses, and a comprehensive web of interconnected interim and remedial orders. The prejudice to First Nations children and families caused by my removal, particularly without cause and after a decade of remedial decision-making, outweighs Canada's strict quorum argument. At this point, there is nothing in the record to indicate that any other party shares the AGC's concerns. If, after considering the views I have expressed, the complainants and interested parties representing First Nations children in these proceedings disagree with me, I will seriously reconsider my position. My priority is what is best for First Nations children, whose interests are more important than mine.

I believe that the principle of proportionality supports my remaining on the case. Appointing three new members, who would also have other cases to adjudicate, would not guarantee greater speed and could undermine the continuity and effectiveness of both past final orders and future orders.

Cases before the Tribunal require case-specific approaches. This case concerns vulnerable children and the effects of past and present child welfare practices found to have perpetuated many of the harms of the residential school system by effectively transforming residential schools into child welfare institutions. Those practices have profoundly affected, and continue to affect, First Nations children, their families, their communities, and their Nations. Given its distinctive history, subject matter, and continuing consequences, this case cannot be approached in the same manner as other systemic cases before the Tribunal.

The AGC's request risks ongoing harm to the children and families protected by the orders and how the Panel was ensuring their effectiveness until completion of its final stage of long-term reform that was clearly defined and requiring the AGC to demonstrate how the systemic discrimination found by the Panel has been remedied and will not reoccur. This requires the Tribunal to have in-depth knowledge of the evidence, findings, orders, proceedings and dialogic approach to effectively measure if the systemic discrimination is eliminated and will not reoccur to protect generations to come. This is the whole purpose of why the Panel retained jurisdiction. The long-term remedial phase is not intended to be siloed from or divorced from the very findings based on the evidence at the Merits stage and additional evidence in the remedial phase. The Tribunal encourages novelty and innovation and does not require long-term reform measures to mirror its previous orders. There may be many ways to eliminate systemic discrimination, and I respect that flexibility. However, the very nature of systemic racial discrimination is that it is embedded in institutional systems, structures, and patterns, often over extended periods of time. Once such systemic discrimination has been established on the evidence, that evidentiary

record remains essential to determining whether the discriminatory patterns have in fact been eliminated. This necessarily requires a thorough understanding of the prior evidence, findings, and orders. In this case this evidence is massive. I retain this knowledge. Assessing whether the orders have effectively eliminated the systemic discrimination found, and whether they are capable of preventing its recurrence, requires an analysis grounded in both the historical evidentiary record and the new evidence before the Tribunal.

Furthermore, the main question that was presented by the COO-NAN and Canada before the Tribunal to seek approval of the Ontario Final Agreement: Do the reforms contained in the OFA and the Trilateral Agreement end the discrimination found by the Tribunal in on-reserve child and family services in Ontario and prevent its recurrence?⁴ To conduct this analysis, the Tribunal considers the prior evidence and findings together with the new evidence before it.

Response to the AGC (Canada)'s arguments on delays, Consultation and Retention of Jurisdiction Issues and long-term reform of Jordan's Principle

While some delays were attributable, in part, to the Panel, including as a result of health issues, the Panel's efforts to expeditiously advance the long-term reform process beyond Ontario were met with resistance from Canada and, ultimately, with an application for judicial review. Canada's position was that the matter should proceed first in relation to Ontario only.

⁴ JOINT WRITTEN SUBMISSIONS OF THE MOVING PARTIES, CHIEFS OF ONTARIO AND NISHNAWBE ASKI NATION - PUBLIC VERSION, at Paragraph 129.

In 2022 CHRT 8, the Tribunal issued consent orders concerning what the parties had described as 80% of the long-term reform, with the rest to be completed by March 2023⁵. However, this deadline was not met, and it was only in 2024 that some of the parties reached a long-term agreement on FNCFS Program reform, which was ultimately rejected by the First Nations-in-Assembly. The Ontario Chiefs decided to move forward with Canada and presented the OFA to this Tribunal. Canada no longer wished to consult with the complainants or to move forward with long-term reform outside Ontario. Although the AGC characterizes the consultation motion in its submissions as a decision that remains pending, the nuance is that the motion was held in abeyance as suggested by Canada⁶ and as part of the Panel's decision to move the matter forward rapidly. In 2025 CHRT 80, the Panel decided to move the matter toward completion and placed the consultation motion in abeyance so that long-term FNCFS Program reform could proceed on separate tracks in Ontario and outside Ontario, particularly given Canada's opposition to that approach and its refusal to engage in further consultation with the complainants.

⁵ 2022 CHRT 8 at para [63] (...) On December 31, 2021, the Parties executed an AIP on long-term reform and a separate AIP on compensation. On January 4, 2022, the Parties publicly announced that they reached these agreements. As part of the AIP on long-term reform, and upon execution of a Final Settlement Agreement by November 30, 2022, the Parties committed to reforming the FNCFS Program by March 31, 2023 and improving Canada's compliance with and reforming Jordan's Principle.

⁶ 2025 CHRT 80 at para. 45 (...) Canada also urges the Tribunal to facilitate the consideration of the Ontario Final Agreement, which is conditional on Tribunal approval, by placing the Caring Society's consultation motion temporarily into abeyance. Consideration of national reform continues to be extremely important to Canada. It is Canada's perspective that the Tribunal's analysis of the Ontario Final Agreement will inform the next steps on national reform.

The Tribunal has not yet completed its adjudication of the Jordan's Principle interim orders addressed in 2025 CHRT 6⁷. In that decision, the Tribunal directed the parties to consult through a process of their choosing and to return to the Tribunal with any co-developed options or, failing agreement, with their respective proposed options. The parties elected first to engage in Tribunal-assisted mediation and subsequently in mediation conducted without the Tribunal's assistance. However, none of the issues was resolved. The complainants and the COO have recently requested that the Tribunal proceed with those interim orders on an expedited basis.

The long-term reform phase of Jordan's Principle was severed from the long-term reform of the FNCFS Program by the parties.

The Tribunal will determine, following consultation with the parties, the appropriate process for addressing Jordan's Principle long-term reform⁸. However, the outstanding interim issues must also be determined in the near future.

⁷ <https://canlii.ca/t/kc7s3>

⁸ 2025 CHRT 80 at para. 9. This ruling does not decide the Consultation Motion brought by the Caring Society, which is broader in scope and will require a lengthier consultation process, as it encompasses Jordan's Principle long-term reform. Also see note 5.

I have dedicated over 14 years of my life to this case to ensure the systemic discrimination is eliminated and to ensure our orders are effective. I have acquired in-depth expertise that should continue to serve First Nations children and families who were harmed by Canada. Given the history of this proceeding, the Tribunal should be cautious of the risk that the AGC is engaged in judge shopping and should not too readily accede to technical arguments seeking to change the composition of a Panel hearing a case (see *Constantinescu v. Correctional Service Canada*, 2022 CHRT 13 at para. 160). I respectfully urge you, in your capacity as Chair of the CHRT, to give this matter careful consideration⁹. For clarity, I would not have the same concerns about appointing two additional members to a panel on which I continued to sit. Moreover, as I remain the sole member of the Panel, I am prepared to relinquish my other assignments outside this matter so that I may devote my full attention to bringing these proceedings to a timely conclusion.

The public interest and the ongoing well-being of the vulnerable children protected by this Tribunal's orders justifies that I continue alone to resolve the remaining remedial matters or alternatively with myself and two added Tribunal Members.

⁹ *Mississaugas of the Credit First Nation v. Attorney General of Canada*, 2025 CHRT 60 (CanLII), <https://canlii.ca/t/kcxrp>, At para. [28] I am also mindful of the current Member's adjudicative independence and impartiality, and my role in guaranteeing the same (*Bell Canada v. Canadian Telephone Employees Association*, 2003 SCC 36, at paras 51 – 54)

Decision sought

I request a dismissal of the AGC's request to strike a new panel in its entirety and a directive confirming that I, as the Panel Chair, shall proceed alone as Tribunal member to finalise the remedial phase of FNCFCSC and *al v. AGC*.

Alternatively, I request that another member be assigned exclusively to manage the procedural aspects of these proceedings, while I remain the sole adjudicator of the substantive issues.

Although innovative in the Tribunal context, this approach reflects a case-management model commonly employed by courts.

Alternatively, given the unique context of this case, which requires unique measures, I would request to remain on the Panel to ensure continuity and avoid the real risks mentioned above, with the addition of two seasoned bilingual members who have expertise, experience with, interest in, and sensitivity for cases involving First Nations. I have a great track record of working well both alone and on a Panel and would welcome remaining on the Panel and working with the two new members. I would remain available to provide any historical knowledge regarding the Panel's approach, the proceedings, the evidence, the findings and orders, and the spirit underlying those orders. Should you decide that it is best to have a three-member Panel and assign the case to a Panel including yourself, another member and me, the CHRA provides that you would preside over the Panel. In that event, I would welcome the corresponding change in our respective functions. I remain available to answer any questions that you may have on these proceedings. I respectfully request an opportunity to provide further views, if necessary, following receipt of the parties' responses and Canada's reply, and solely for the limited purpose of correcting any factual

inaccuracies concerning these proceedings or addressing any expressed preference for a panel composed of three new members, rather than the three-member panel I propose, consisting of myself as the continuing member and two newly assigned members.

Respectfully,

Sophie Marchildon, LLB. LLM., Méd. Arb.,

Tribunal member and Panel chair of the case *FNCFCSC and al. v. AGC*

Sent by,

Heather Nagy,
Registry Officer

DISTRIBUTION LIST

David Taylor, Sarah Clarke, Robin McLeod and Kiana Saint-Macary
Counsel for the First Nations Child and Family Caring Society of Canada

Peter N. Mantas, Gabrielle Cyr, Clive Ngan and Tina Sun
Counsel for the Assembly of First Nations

Anshumala Juyal and Khizer Pervez
Counsel for the Canadian Human Rights Commission

Paul Vickery, Sarah-Dawn Norris, Meg Jones, Dayna Anderson, Kevin Staska, Sarah Bird, Jon Kahn, Alicia Dueck-Read, Aman Owais and Adam Lupinacci
Counsel for the Attorney General of Canada

Maggie Wente, Benjamin Brookwell, Sinéad Dearman and Jessie Stirling-Voss
Counsel for Chiefs of Ontario

Julian Falconer, Asha James, Shelby Percival, Meaghan Daniel, David Schwartz, Erin McMurray and Jordan Tully
Counsel for Nishnawbe Aski Nation

Justin Safayeni and Stephen Aylward
Counsel for Amnesty International