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Fasken Martineau DuMoulin LLP
Barristers and Solicitors
Patent and Trade-mark Agents

55 Metcalfe Street, Suite 1600
Ottawa, Ontario K1P 6L5
Canada

T +1 613 236 3882
+1 877 609 5685
F +1 613 230 6423
fasken.com

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Peter N. Mantas
+1 613 696 6886
pmantas@fasken.com

Canadian Human Rights Tribunal
240 Sparks Street, 6th Floor West
Ottawa, ON K1A 1J4
Attention: Chairperson Khurana

Dear Chairperson Khurana:

Re: Tribunal File T1340/7008 — Canada’s Request for Reconstitution of the Panel

1. We write on behalf of the Assembly of First Nations (“AFN”) in response to Canada’s letter dated July 28, 2026, requesting that the Chairperson “restore” the Panel to its previous three-member composition. The AFN opposes Canada’s request, as do the First Nations Child and Family Caring Society (“**Caring Society**”), the Chiefs of Ontario (“**COO**”), and the Nishnawbe Aski Nation (“**NAN**”). The AFN has reviewed and supports the submissions of the Caring Society, COO, and NAN. The request is unnecessary, unsupported by the relevant statutory framework, inconsistent with the Tribunal’s prior management of this proceeding, and would risk serious prejudice by delaying a long-running remedial process that is now under an accepted and Tribunal-ordered timetable.
2. The Chairperson’s July 2026 direction correctly recognizes the urgency of this issue.¹ This proceeding has been ongoing for approximately 14 years. The Tribunal has set short deadlines so that the request can be addressed in a timely manner. That direction reflects

¹ *First Nations Child and Family Caring Society et al. v. Attorney General of Canada*, CHRT File No T1340/7008, Direction from the Chairperson (29 July 2026).



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the same imperative that has animated this matter throughout: First Nations and First Nations children, youth, and families should not be made to wait any longer for final, durable and effective remedies.

3. Member Marchildon can and should continue as the sole member to preside over the remaining stages of this proceeding. She has been the lead member of the Panel since 2012, directed the Merits Decision process and the extensive remedial phase, and is positioned to ensure the orderly continuation of this matter. Reconstituting the Panel now would inject avoidable delay, complexity, expense and uncertainty into a proceeding where the Tribunal has already accepted a detailed timetable to bring the matter to a hearing.

I. Canada's request is inconsistent with the governing statutory framework

4. The Canadian Human Rights Act² (“CHRA”) is the relevant statutory framework governing membership of the Panel. Section 48.9(1) directs that Tribunal proceedings be conducted “as informally and expeditiously as the requirements of natural justice and the rules of procedure allow.”³ Section 49(2) provides that, on receipt of a request for inquiry, the Chairperson shall assign a member of the Tribunal to inquire into the complaint, but may assign a panel of three members if the Chairperson considers that the complexity of the complaint requires it.⁴
5. Nothing in the CHRA requires that a three-member panel must remain at three members regardless of later developments in a proceeding. Nor does the CHRA provide that the

² *Canadian Human Rights Act*, RSC 1985, c H-6.

³ *Canadian Human Rights Act*, RSC 1985, c H-6, s. [48.9\(1\)](#). See also: *Brink's Canada Ltd. v. Canada (Human Rights Commission)* (T.D.), [\[1996\] 2 FC 113](#), para. 22.

⁴ *Canadian Human Rights Act*, RSC 1985, c H-6, s. [49\(2\)](#).

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departure, death or resignation of members automatically ousts the authority of the remaining member(s) to continue an inquiry. To the contrary, the statutory scheme prioritizes flexible, fair and expeditious adjudication, and it entrusts the Chairperson with broad supervisory authority over assignments and the allocation of Tribunal work.

6. Canada's submission that the Panel is "inquorate" imports a concept that does not fit this statutory context. The Tribunal is an adjudicative tribunal operating under a statutory scheme that permits assignment of either a single member or a three-member panel, depending on the Chairperson's assessment of complexity at the time of assignment.
7. That reading is confirmed by s. 48.2(2) of the CHRA, which permits a member whose appointment has expired, with the Chairperson's approval, to conclude an inquiry already begun. Member Marchildon's continued authority has already been addressed through that approval *and* the Chairperson's exercise of discretion under s. 49(2) to assign Member Marchildon as the Panel's sole member following Member Lustig's retirement.⁵ Canada's request would reopen a question that has already been settled and impose requirements that the CHRA simply does not contain.
8. Moreover, s. 22 of the *Interpretation Act* does not establish that the proceeding is inquorate, as Canada has incorrectly and baldly asserted. This section of the *Interpretation Act* does not *create* a quorum.⁶ Canada's reliance on s. 22(2)(c) of the *Interpretation Act* to advance its position, in particular, is misplaced. It operates only where an applicable quorum exists

⁵ Letter from Panel Chair Marchildon to Tribunal Chairperson Khurana, July 31, 2026 at page 2.

⁶ Lorne Sossin, Robert W. MacAulay, James L.H. Sprague, *Practice and Procedure Before Administrative Tribunals* (Toronto: Thomson Reuters Canada, 2021) "Number Required for Quorum" § 16:110.

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under the governing enactment and provides only that a vacancy does not impair the right of the remaining members to act “if the number of members in office is not less than a quorum.” The quorum must therefore be found elsewhere, in the governing enactment. Here, the CHRA does not prescribe a quorum for an inquiry panel. Section 49(2) permits the Chairperson to assign one member, or a panel of three members where complexity requires it. It does not provide, notably, that once three members are assigned, three members remain a continuing quorum for every later step in the inquiry.

9. That point is supported by *Rafeek v. Minister of Employment and Immigration*. There, the Federal Court held that the predecessor provision to s. 22 did not apply because the governing statute did not determine the number of members of the decision-making committee, did not determine the minimum number who had to participate, and contained no specific enactment either requiring an act to be done by more than two persons or establishing a body consisting of three or more members.⁷ The same is true here. The CHRA simply does not prescribe a quorum. Canada cannot use the *Interpretation Act* to invent a quorum obligation that Parliament did not enact.
10. Similarly, in *Reference re Tariff Board Act*, the Federal Court of Appeal held that the *Interpretation Act* cannot be used to alter the requirements of a statutory quorum provision and explained that the provision operates only where “a statutory quorum is exercising a statutory power.”⁸ In that case, the governing statute expressly required “three or more

⁷ *Rafeek v. Canada (Minister of Employment & Immigration)*, (1986) 5 F.T.R. 5, 1986 CarswellNat 833 (Fed. T.D.) at para 7.

⁸ *In re Tariff Board Act*, 1977 CanLII 3121 (FCTAD) at para 5.

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members” to actually exercise the Board’s appeal function under the governing statute. The CHRA contains no equivalent requirement for this inquiry. Section 22(2)(c) therefore cannot transform the 2012 discretionary assignment into an enduring quorum rule.

II. The 2012 assignment does not justify reconstitution now

11. Canada relies on the AFN’s successful 2012 motion for a three-member panel.⁹ That reliance is misplaced, outdated and belies a fundamental misapprehension of the AFN’s current positions. The AFN’s 2012 position was advanced at the beginning of the fresh inquiry, after the Federal Court had remitted the matter for redetermination and before the evidentiary hearing on the merits had occurred. At that stage, the parties and Tribunal were preparing to hear the merits of an exceptionally complex complaint from the beginning.
12. In that ruling, the Acting Chairperson recognized that the Chairperson’s assignment power under s. 49(2) is a discretionary case-management power, to be exercised having regard to the complexity of the matter, the expeditious resolution of the complaint, and the Tribunal’s institutional resources. The Acting Chairperson also expressly noted the importance of avoiding delay in this very case, given that every delay caused prejudice to First Nations children. The 2012 ruling therefore supports a practical, fair and expeditious approach to panel composition. It does not memorialize a permanent three-member structure or create a continuing quorum requirement.

⁹ *First Nations Child and Family Caring Society of Canada et al. v Attorney General of Canada (for the Minister of Indian and Northern Affairs Canada)*, [2012 CHRT 16](#).

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13. The situation now is fundamentally different. The Tribunal has already issued its landmark Merits Decision in 2016 CHRT 2.¹⁰ The Tribunal has since supervised an extensive remedial phase, issued numerous remedial decisions and directions, and retained jurisdiction to ensure effective implementation. The remaining work is not a new inquiry into the merits. It is the continuation of a remedial process already shaped by a substantial history of findings, orders, case-management directions and party reliance. While a three-member Panel may have been an appropriate response to complexity in 2012, when a 72-day hearing lay ahead, in 2026 the best way to manage complexity is for the remaining Member of that Panel to see the proceedings to their conclusion as the sole adjudicator.
14. The AFN's 2012 position cannot be fairly transformed into a present-day argument for interrupting the proceeding. The question now is whether it is necessary, fair, proportionate and consistent with the CHRA to add two new members to an advanced remedial proceeding after the Tribunal has already accepted a detailed timetable and after the remaining Panel Chair has been involved throughout. In the AFN's view, the answer is no.

III. Reconstitution would be disproportionate and contrary to the accepted timetable

15. The timing of Canada's request is particularly troubling. The parties spent months negotiating a timetable for the national long-term reform process. On May 19, 2026, the AFN and the Caring Society filed a proposed timetable that had been reviewed by Canada and reflected a negotiated proposal. That timetable contemplated, among other things,

¹⁰ *First Nations Child and Family Caring Society of Canada et al. v. Attorney General of Canada (for the Minister of Indian and Northern Affairs Canada)*, [2016 CHRT 2](#).

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supplemental evidence in 2026, a ten-day evidentiary hearing in January 2027, written submissions in February 2027, and final oral submissions from March 8 to 10, 2027.

16. On May 22, 2026, the Tribunal accepted the parties' timetable, subject to directions.¹¹ Canada's request threatens that timetable. Adding two new members would inevitably require those members to become familiar with an extraordinary record, including the Merits Decision, the extensive remedial jurisprudence, prior directions, the long-term reform plans, the record relating to interested parties, and the evidence yet to be filed. Even with the diligent work of new members, reconstitution would introduce avoidable delay and uncertainty into a schedule the Tribunal has already determined should proceed.
17. The present timetable was designed to move this matter toward final adjudication of long-term reform outside Ontario. Canada's current request is the latest procedural step by which it seeks to delay or destabilize the national long-term reform hearing process. Canada cannot now invoke the complexity of the proceeding to jeopardize the very timetable it negotiated and that the Tribunal accepted and is prepared to implement.

IV. The proceeding can fairly continue before Member Marchildon solely

18. Member Marchildon's continued involvement represents an important safeguard of fairness, efficiency and continuity. She is familiar with and able to situate the remaining disputes within the history of the matter without requiring the parties to expend time and resources educating new members on years of background. That continuity is especially important in a proceeding where delay has real consequences for First Nations children.

¹¹ *First Nations Child and Family Caring Society et al. v. Attorney General of Canada*, CHRT File No T1340/7008, Tribunal Directions (22 May 2026).

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19. That continuity is not abstract. Member Marchildon has overseen the Merits Decision, the remedial record, the interim and long-term reform rulings, and the Tribunal's retained-jurisdiction approach. The remaining adjudication requires an understanding and appreciation of both the historical evidentiary record and the new evidence before the Tribunal. That is precisely the function she is uniquely positioned to perform.
20. Canada has not identified any concrete unfairness that would arise if Member Marchildon continues alone. Its concern is structural and speculative. In this context, the real prejudice lies in disrupting an advanced remedial process and further postponing justice and effective redress for ongoing systemic discrimination against First Nations *children* and families. An entire generation has passed; children born when this Complaint was first brought in 2007 are now adults with children of their own. Yet Canada has still not implemented the necessary remedy to address systemic discrimination against First Nations children and youth. Any step that risks delaying a final, effective and durable remedy must be avoided.

V. Canada's request is inconsistent with the remedial purpose of this proceeding

21. This case concerns systemic discrimination against First Nations children and families. The Tribunal substantiated the complaint in 2016 CHRT 2 and has since issued a long series of remedial orders.¹² The longevity of this proceeding is therefore not a reason to add new process. It is a reason to avoid unnecessary delay. More than a decade after the Tribunal's Merits Decision, Canada's latest request risks prolonging the very conditions the Tribunal's remedial orders are meant to address and frustrating the very purpose of human

¹² *First Nations Child and Family Caring Society of Canada et al. v. Attorney General of Canada (for the Minister of Indian and Northern Affairs Canada)*, [2016 CHRT 2](#), paras. [456-467](#), [481](#).

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rights legislation, which, as the Supreme Court has previously held, must especially be afforded a “large and liberal construction and interpretation.”¹³

22. The AFN respectfully submits that this would be inconsistent with the Tribunal’s remedial mandate. The Tribunal has repeatedly managed this proceeding with attention to the need for timely, effective relief. That approach should continue.

VI. Requested disposition

23. For these reasons, the AFN respectfully requests that the Chairperson dismiss Canada’s request to reconstitute the Panel. The AFN further requests that the Chairperson confirm that Member Marchildon may continue to preside over the proceeding.
24. In the alternative, the AFN respectfully requests that the Chairperson re-confirm to the Parties that she has already exercised her case-management discretion under s. 49(2) of the CHRA to assign Member Marchildon as the sole member inquiring into this Complaint following Member Lustig’s retirement. Given the advanced stage of the proceeding, and the Tribunal’s accepted timetable, re-confirming her as a single member would be the fairest, most efficient and least disruptive course.
25. In the further alternative, if the Chairperson is not prepared to dismiss Canada’s request, the AFN requests that any further process be strictly limited and expedited so as not to affect the existing timetable. The AFN does not consent to any adjournment or suspension of the long-term reform schedule as a result of Canada’s request.

¹³ *Canada (House of Commons) v. Vaid*, 2005 SCC 30 (CanLII) at para 80.

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26. This proceeding has been ongoing for far too long. The accepted timetable now provides a pathway to hearing and determination. The AFN respectfully submits that the Tribunal should preserve that pathway and permit the case to proceed.

Yours truly,

FASKEN MARTINEAU DuMOULIN LLP



Peter Mantas

Counsel for the Assembly of First Nations

Cc:

David Taylor, Henna Mohan, Sarah Clarke, Robin McLeod – Counsel for the First Nations Child and Family Caring Society of Canada

Dayna Anderson, Paul Vickery, Meg Jones, Alicia Dueck-Read, Aman Owais, Kevin Staska, Margaret Girard, Jon Khan – Counsel for the Attorney General of Canada

Maggie Wentz, Sinéad Dearman, Jenna Rogers, Jessie Stirling-Voss, Ashley Ash, and Katelyn Johnstone – Counsel for the Chiefs of Ontario

Julian Falconer and Meaghan Daniel – Counsel for the Nishnawbe Aski Nation

Justin Safayeni, Stephen Aylward and Geneviève Citron – Counsel for Amnesty International

Harold Cochrane, K.C. and Alyssa Cloutier – Counsel for the Southern Chiefs' Organization Inc.

Carly Fox and Jason Erbeznik – Counsel for the Assembly of Manitoba Chiefs

Alexandra Heine and Dan Goudge – Counsel for Our Children, Our Way Society

Pierre-Simon Cleary and Sophie Gagné – Counsel for the First Nations of Quebec and Labrador Health and Social Services Commission and the Assembly of First Nations Quebec-Labrador



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Liam Smith, Tuma Young, K.C., Scott Smith, Alexander DeParde – Counsel for the National Children's Chiefs Commission

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

