

CANADIAN HUMAN RIGHTS TRIBUNAL

BETWEEN:

**FIRST NATIONS CHILD AND FAMILY CARING SOCIETY OF CANADA
and ASSEMBLY OF FIRST NATIONS**

Complainants

and

CANADIAN HUMAN RIGHTS COMMISSION

Commission

and

ATTORNEY GENERAL OF CANADA
(representing the Minister of Indigenous Services Canada)

Respondent

and

**CHIEFS OF ONTARIO, AMNESTY INTERNATIONAL CANADA,
NISHNAWBE ASKI NATION, TAYKWA TAGAMOU NATION and CHIPPEWAS OF
GEORGINA ISLAND, FIRST NATIONS OF QUEBEC AND LABRADOR AND SOCIAL
SERVICES COMMISSION and ASSEMBLY OF FIRST NATIONS QUEBEC-
LABRADOR, OUR CHILDREN OUR WAY, THE ASSEMBLY OF MANITOBA
CHIEFS, SOUTHERN CHIEF'S ORGANIZATION and NATIONAL CHILDREN'S
CHIEF'S COMMISSION**

Interested Parties

**REPLY SUBMISSIONS OF THE ATTORNEY GENERAL OF CANADA
PANEL RECOMPOSITION REQUEST**

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OVERVIEW

1. The three-member panel assigned to conduct this inquiry (the Panel) has only one remaining member. That development raises a legal question concerning the Panel's continuing authority and a separate question concerning the appropriate composition of the Panel going forward. To protect the Tribunal's authority, ensure that future steps occur within statutory, administrative and common law limits, and safeguard the public interest in maintaining confidence in the Tribunal's adjudicative processes, Canada acted promptly to bring this question before the Chairperson.

2. Canada submits that the Panel is inquorate and can no longer exercise the authority assigned to it as a three-member adjudicative body. Since the Panel's composition must be addressed, Canada further submits that the Chairperson should reassign the proceeding to a three-member panel. Canada's request arises solely from Member Lustig's resignation and the resulting issues concerning quorum, authority, and panel composition. It does not concern the participation of any particular member and Canada does not seek to delay the proceedings.

POINTS IN ISSUE

3. The issues are: (a) whether the Panel, originally constituted as a three-member decision-making body, may continue to exercise statutory authority in the absence of two of its three members; and (b) whether the Chairperson should exercise her authority under section 49(2) of the *Canadian Human Rights Act (CHRA)* to reassign a three-member panel due to the complexity of the complaint.

SUBMISSIONS

A. The Panel is inquorate

4. The Panel's authority to continue exercising the Tribunal's statutory functions is not limited to the interpretation of section 49(2) of the *CHRA*, in isolation.¹ The Tribunal is a creature of statute

¹ *Contra* Member Marchildon's July 31, 2026 Submissions, pp 3–4 [**Member Marchildon's Submissions**].

and may exercise only the authority conferred upon it by Parliament. In determining the scope of that authority, the Chairperson must consider all applicable statutory provisions and common law rules that govern the operation of federal statutory bodies.

5. The *CHRA* does not authorize a three-member panel to become a single-member inquiry simply because two members are absent. The *CHRA* distinguishes between an inquiry conducted by a single member and one conducted by a three-member panel, not only at the time of assignment but throughout the inquiry and up to its conclusion.² Nothing in the *CHRA* provides that an inquiry assigned to a three-member panel because “the complexity of the complaint requires the inquiry to be conducted by three members” automatically converts into a single-member inquiry when two members are no longer available.³ Such a result would undermine the purpose of section 49(2) and effectively negate the Chairperson's determination that the complexity of the complaint required adjudication by three members.

6. Nor does section 48.2(2) of the *CHRA* support that result.⁴ That provision permits a former member, with the Chairperson's approval, to continue participating in and conclude an inquiry notwithstanding the expiry of their appointment.⁵ It preserves the member's ability to participate in the inquiry; it does not alter the composition of a panel or authorize a three-member panel to proceed as a single-member inquiry. Had Parliament intended to confer such authority, it would have done so expressly.

² *Canadian Human Rights Act*, RSC 1985, c H-6 at s [49\(2\)–\(3\)](#), [49\(5\)–\(6\)](#), [50](#), [52](#), [53](#), [58](#), [60\(1\)\(b\)](#) [*CHRA*]; *contra* Assembly of First Nations's August 7, 2026 Submissions, paras 5, 8–9 [**AFN's Submissions**].

³ *Contra* Member Marchildon's Submissions, pp 4–6; *contra* AFN's Submissions, paras 5, 7; *contra* First Nations Child and Family Caring Society of Canada's August 7, 2026 Submissions, paras 8–10 [**Caring Society's Submissions**].

⁴ *Contra* AFN's Submissions, para 7.

⁵ *CHRA*, s [48.2\(2\)](#), citing s [48.3](#), [48.6](#), [50](#), [52–58](#).

7. Absent contrary legislative intention, the default quorum rules in the *Interpretation Act* apply.⁶ The Chairperson constituted the Panel as a three-member body, to exercise the Tribunal's jurisdiction and powers as a panel.⁷ The Panel is therefore an "association" within the meaning of the *Interpretation Act*.⁸ Because the Panel consists of "a fixed number" of members, "at least one-half of the number of members...constitutes a quorum".⁹ Parliament expressed no contrary intention in the *CHRA*.

8. In any event, quorum is also a common law concept that applies when not specified in a statute.¹⁰ When statutory jurisdiction and powers are assigned to a group of individuals, the default common law quorum is a majority of the group.¹¹ The Chairperson's assignment of the inquiry to a three-member panel allows the panel to exercise jurisdiction and powers *as a panel*. As a result, even if s 22(2) of the *Interpretation Act* does not apply, the common law quorum for a three-member panel would be a majority (i.e., two members).

9. As a three-member statutory "association" with only one remaining member, the Panel is inquorate and cannot continue to exercise statutory authority. Quorum ceases to exist where less than half of the members of a panel are present, as occurred after Member Lustig's departure.¹² Section 22(2) of the *Interpretation Act* implicitly and expressly contemplates vacancies in multi-member bodies and preserves the authority of the remaining members only where their number is not less than

⁶ *Interpretation Act*, RSC 1985, c I-21, s 3(1) [*Interpretation Act*].

⁷ *CHRA*, s 49(2); *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 at para 19 [2012 CHRT 16].

⁸ *Interpretation Act*, s 22(2); *CHRA*, s 49(2)-(3), 49(5)-(6), 50, 52, 53, 58, 60(1)(b).

⁹ *Interpretation Act*, s 22(2)(a)(i).

¹⁰ *Contra* Member Marchildon's Submissions, pp 3-6; *contra* AFN's Submissions, paras 6-7; *contra* Caring Society's Submissions, para 8.

¹¹ *Murray v Rockyview (Development Appeal Board)*, 1980 ABCA 113 at para 62; *Boucher v Métis Nation of Alberta Association*, 2009 ABCA 5 at para 36.

¹² *Interpretation Act*, s 22(2)(a).

quorum.¹³ Even if s 22(2) of the *Interpretation Act* does not apply, the common law leads to the same result.

10. None of the authorities relied upon by the responding parties support continuation by a sole member. *Rafeek* is distinguishable because the governing statute did not establish a body consisting of a specified number of members.¹⁴ *Reference re Tariff Board Act* confirms that vacancy provisions do not reduce the number of members required to perform a statutory function; and the portion relied upon by the AFN concerns what is now section 22(1) of the *Interpretation Act*, not the distinct quorum and vacancy provisions in section 22(2).¹⁵ *Faghihi* is distinguishable because, unlike the *Immigration Act*, section 49(2) of the *CHRA* expressly contemplates assignment to a three-member panel where the complexity of the complaint requires it.¹⁶ Once constituted, that panel must exercise its authority as a three-member body. The Tribunal's procedural discretion cannot override Parliament's chosen adjudicative structure.

B. The Chairperson should reassign the inquiry to a three-member panel

The reasons that justified a three-member panel in 2012 remain compelling

11. The Tribunal assigned this matter to a three-member panel in 2012 because of its complexity, significance, and novel nature, and because the matter would benefit from the insight and contribution of additional members.¹⁷ Those considerations remain all the more compelling today, as the proceeding has become even more complex than it was in 2012. In addition to continuing to address issues of substantial public importance, it now includes multiple ongoing litigation streams, additional interested parties, new evidentiary records and full-scale federal policy reform.

¹³ *Interpretation Act*, s 22(2)(b)–(c).

¹⁴ *Rafeek v Canada (Min of Employment & Immigration)*, (1986) 5 FTR 5, 1986 CarswellNat 833 (FC); *contra* AFN's Submissions, para 9.

¹⁵ *In re Tariff Board Act*, 1977 CanLII 3121 (FCTAD); *contra* AFN's Submissions, para 10.

¹⁶ *Faghihi v Canada (Minister of Citizenship and Immigration) (TD)*, [2000] 1 FC 249, aff'd [2001 FCA 163](#); *contra* Caring Society's Submissions, para 7.

¹⁷ 2012 CHRT 16 at paras [19–22](#), [28–30](#).

12. Canada seeks to preserve the adjudicative structure that the complainants originally sought and that the Tribunal itself determined was appropriate. Canada's request is tied directly to Member Lustig's resignation and the resulting legal issues. It is not driven by any substantive disagreement with prior Tribunal decisions or orders (many of which were issued on consent), ongoing proceedings, or the timing of future hearings. Canada raised the issue only after the circumstances giving rise to it occurred.

13. Against this background, Canada's request cannot fairly be characterized as a "systemic obstruction", exceptional, tactical, or otherwise inconsistent with the history of this proceeding.¹⁸ The absence of two panel members has not diminished the considerations that originally led to the three-member assignment.

A three-member panel best serves the public interest

14. A three-member panel would reflect the complexity and scale of the remaining issues, promote deliberative decision-making, and enhance public confidence in the Tribunal's processes. Canada acknowledges that the Chairperson has authority to reassign either a single-member inquiry or a three-member panel.¹⁹ However, the issue is not whether additional members may assist with particular aspects of the proceeding.²⁰ The issue is whether the inquiry itself should continue before three members. Given the complexity, significance, and ongoing scope of this matter, Canada submits that it should.

Canada does not seek delay

15. Canada agrees that these proceedings must continue expeditiously and does not seek delay, suspension of existing timetables, or adjournment of upcoming proceedings. Canada raised this issue

¹⁸ *Contra* Member Marchildon's Submissions, p 9; *contra* Caring Society's Submissions, paras 19–21.

¹⁹ [CHRA](#), s 49(2).

²⁰ *Contra* Member Marchildon's Submissions, pp 6, 16.

promptly because it sought to address a threshold question regarding the Panel's authority before further substantive steps were taken. Efficiency is important, but expediency cannot determine questions of statutory authority. Resolving the issue now helps protect the legitimacy of future orders.

C. Canada requested the Panel's Reconstitution, not Member Marchildon's Removal

16. Canada's request concerns the Panel's composition, not the participation of any particular member. Canada requested that the Chairperson restore the Panel to its previous three-member composition, but did not propose that any specific member should or should not sit on a reconstituted panel, and did not ask that Member Marchildon be excluded.²¹

17. The Tribunal has repeatedly recognized that assignment and reassignment decisions belong to the Chairperson, not the parties: "It is not for the complainant or any other party to a Tribunal inquiry to decide which member will be assigned a complaint or whether a complaint should be reassigned. It is the responsibility of the Tribunal's chairperson to assign complaints to members."²²

18. Canada's request expressly recognizes and respects that framework. Canada has not attempted to select who should hear this matter or to influence the composition of any reconstituted panel. Any request from the parties to assign a specific panel member or members is improper, absent an express request from the Chairperson.

D. Continuity does not determine the Panel's authority or composition

19. The principal issue is whether the Panel retains authority to carry on. Questions of continuity, institutional knowledge and familiarity with the record do not resolve that issue. If the Panel is inquorate, continuity cannot cure the absence of legal authority.

²¹ *Contra* Member Marchildon's Submissions, pp 7–10, 15–16.

²² *Constantinescu v Correctional Service Canada*, 2022 CHRT 13 at para 156; see also *Hugie v T-Lane Transportation and Logistics*, 2020 CHRT 25 at para 33.

20. Continuity may be relevant to the Chairperson's determination of who should hear this ongoing inquiry. But it does not answer whether "the complexity of the complaint requires the inquiry to be conducted by three members".²³

21. Canada's request concerns panel composition, not the participation of any particular member. The identity of any member assigned to a reconstituted panel is a matter exclusively for the Chairperson, and Canada makes no submissions in that regard.

22. These proceedings are over a decade into the remedial stage, with the Panel retaining jurisdiction to supervise implementation of its orders over time. That jurisdiction belongs to the Tribunal as an institution, not to any particular member. Changes in panel membership are sometimes unavoidable in long-running proceedings and do not undermine the Tribunal's ability to act through a properly constituted panel.

23. The Tribunal can fairly and effectively adjudicate future matters through a properly constituted panel using the existing record, prior decisions and the parties' submissions. New members would not be asked to re-determine issues already decided. Rather, they would adjudicate future matters using the Tribunal's documented record, with the assistance of the parties' counsel.

E. Member Marchildon's views do not resolve the questions before the Chairperson

24. Canada recognizes Member Marchildon's lengthy service in this matter and does not question her commitment to First Nations children and families. However, several aspects of her response are not relevant to the questions before the Chairperson.

25. Member Marchildon repeatedly frames the issue as one concerning her personal removal from the proceeding, which is a request that Canada did not make. She further characterizes Canada's request as a "systemic obstruction", suggests that Canada relies upon "procedural technicalities",

²³ [CHRA](#), s [49\(2\)](#).

raises concerns regarding "judge shopping", and emphasizes that no party other than Canada raised concerns regarding panel composition.²⁴

26. Respectfully, these comments provide limited assistance in resolving the issues before the Chairperson. They proceed from assumptions concerning Canada's request that are not supported by its terms. Moreover, they focus on perceived motives, speculative consequences, and the continued participation of a particular member, rather than the legal questions before the Chairperson.

27. Those questions are whether the Panel retains statutory authority and whether “the complexity of the complaint requires the inquiry to be conducted by three members”.²⁵ These questions do not turn upon the number of parties supporting a particular legal position or whom they represent.²⁶ The quorum issue concerns the legal authority of the Panel and must be determined by reference to the governing statutory framework and legal context. Likewise, the panel composition issue concerns the appropriate exercise of the Chairperson’s statutory authority under section 49(2), not the continued participation of any particular member.

28. The Attorney General of Canada has a responsibility to act in the public interest and to ensure that statutory decision-makers exercise only the authority conferred upon them by Parliament. Canada's request reflects that responsibility, and arose solely because Member Lustig's resignation created a legal issue concerning the Panel's continuing authority and composition. Canada categorically rejects any suggestion that its request is obstructionist, tactical, or intended to delay the proceeding, impede remedies, disadvantage First Nations children and families, or influence the identity of the decision-maker.²⁷

²⁴ *Contra* Member Marchildon’s Submissions, pp 9–10, 15.

²⁵ *CHRA*, s 49(2).

²⁶ *Contra* Member Marchildon’s Submissions, p 10; Chiefs of Ontario and Nishnawbe Aski Nation’s August 7, 2026 Submissions, para 5.

²⁷ *Contra* Member Marchildon’s Submissions, pp 9–10, 15; *contra* Caring Society’s Submissions, paras 12–13, 16, 19–20, 23; *contra* AFN’s submissions, paras 17, 20–21.

29. The Panel previously recognized that legal questions raised by an interested party may have implications for panel composition and any resulting change in composition is a matter for the Chairperson.²⁸ The fact that a legal issue now raised by Canada may likewise have implications for panel composition does not make it obstructionist, tactical, or otherwise improper. Like any other legal issue, it should be resolved on its merits.

F. Conclusion

30. The Chairperson should find that the Panel, originally constituted as a three-member panel, no longer possesses quorum and cannot continue to exercise the authority assigned to it. To remedy the issue, the Chairperson should reassign the inquiry to a three-member panel pursuant to section 49(2) of the *CHRA*.

31. In the alternative, if the Chairperson concludes that she has already exercised her discretion to reassign the inquiry to a single-member, the Chairperson should nevertheless exercise her discretion to reassign it to a three-member panel, having regard to its complexity, significance, and continuing scope.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

DATED at the City of Winnipeg, in the Province of Manitoba, this 14th day of August, 2026.



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²⁸ [*First Nations Child and Family Caring Society of Canada and Assembly of First Nations v. Attorney General of Canada \(representing the Minister of Indigenous and Northern Affairs Canada\)*, 2026 CHRT 50 at paras 261–64 .](#)

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