

**Canadian Human
Rights Tribunal**



**Tribunal canadien
des droits de la personne**

Citation: 2025 CHRT 60

Date: June 16, 2025

File No.: T1810/4012

Between:

Mississaugas of the Credit First Nation

Complainant

- and -

Canadian Human Rights Commission

Commission

- and -

Attorney General of Canada

Respondent

Ruling

Chairperson: Jennifer Khurana

I. OVERVIEW

[1] The Canadian Human rights Commission (the “Commission”) referred this complaint to the Tribunal for an inquiry in 2012. The then Chairperson assigned the complaint to Tribunal Member Edward Lustig (“the current Member”).

[2] Tribunal Members are appointed by the Governor-in-Council for fixed terms. The current Member’s appointment expired on June 20, 2023. At that time, there were no other available Tribunal members who could take on this proceeding. The Tribunal was facing an unprecedented workload challenge, and the backlog for case management and hearings was growing. The Commission had referred 140 complaints to the Tribunal in 2022 and a further 34 in the first 5 months of 2023.

[3] At that time, I was unable to reassign this matter to a new Member. By the end of 2023, parties were waiting an average of 200 days to have their cases assigned to an adjudicator for a hearing due to the shortage of Members. To spare the parties considerable delays in waiting for a new Member to be assigned, I exercised my authority under s. 48.2(2) of the *Canadian Human Rights Act* (the ‘Act’) and the current Member was authorised to conclude the inquiry. When a Member whose term has expired is authorised to continue with the inquiry under s. 48.2(2) of the Act, they are deemed to be part-time members for remuneration purposes and are paid at a rate set by the Governor-in-Council.

[4] Since then, the situation at the Tribunal has changed considerably. In 2024, the government appointed 6 full-time members and one part-time member. The Tribunal currently has a total of 18 members, including 10 full-time salaried members who are able to take on new work. By the end of December 2024, the 200-day waiting period for an adjudicator to be assigned to a case had been eliminated.

[5] Given that the circumstances that existed in 2023 when I exercised my authority under s. 48.2(2) of the Act were no longer present, I consulted the parties about the possible reassignment of this inquiry, as the current Member had not yet begun the hearing.

[6] The Complainant, the Mississaugas of the Credit First Nation (MCFN), opposes the reassignment, asserting that it will cause delay, prejudice to all parties, and cites “Legal uncertainty”; it questions the Chairperson’s authority to reassign the complaint in these circumstances. The Commission does not take a position but asks that any decision be delayed until a pending motion is determined by the current Member. Ultimately, however, the Commission states that it defers to the MCFN on the question of reassignment.

[7] The Respondent, the Attorney General of Canada, does not take a position and made no submissions.

II. DECISION

[8] MCFN opposes the proposed change, expects the hearing to be set for September of this year, and asserts that a change would cause delay and prejudice to all parties. Based on the submissions I have received, I do not believe it appropriate to reassign the inquiry to a different Tribunal Member.

III. THE PARTIES’ POSITIONS ON THE POSSIBLE REASSIGNMENT

Chairperson’s June 9, 2025 communication to the parties.

[9] On June 9, 2025, I canvassed the parties about reassigning the file to an experienced full-time Member whose term is current, and who could take on the case management and hearing of this matter and proceed expeditiously and fairly.

[10] The following communication was sent to the parties:

Dear parties,

I am writing to seek your views on the possible reassignment of this file to a different Tribunal Member.

As you know, this matter is presently being case managed by Member Ed Lustig, whose mandate expired in June 2023. At the time, the Tribunal had just four full-time adjudicators with a full caseload, including the Chair and Vice-Chair, and a growing backlog of files to assign for case management and

hearing. In view of my inability to reassign this file at the time, and to spare the parties considerable delays, I exercised my discretion under s.48.2(2) of the *CHRA* and extended Member Lustig to continue case managing this proceeding in light of the lack of available Members.

The situation has changed considerably since then. The government appointed six new full-time members in 2024, and the Tribunal now has a full complement of Members who have the capacity to take on new work. I am reassigning files to rebalance the case load and to help ensure that proceedings advance expeditiously and fairly.

Given the above, I am also obligated to consider the financial implications of keeping a *per diem* member on this file when salaried full-time members are available to take on more cases. This is particularly relevant during the current period of fiscal restraint, and in light of all public officials' collective obligation to taxpayers to responsibly manage scarce public resources.

Financial factors are not determinative. But they need to be considered, to the extent they are not outweighed by legal or operational factors. In this proceeding, Member Lustig has not yet begun the hearing, nor heard any evidence. In my view, it is therefore appropriate to consider whether the file could be reassigned to an experienced full-time Tribunal Member.

Given its complexity, I can advise that the matter would be reassigned to Member Colleen Harrington, who has been adjudicating matters on a full-time basis at the CHRT since 2018. The reassignment is not expected to create further delay in this matter as Member Harrington is available to review the file, determine the pending motion within a reasonable time, and set hearing dates.

Please send to the Registry **by no later than June 12, 2025**, any concerns you may have about this proposed approach.

MCFN opposes reassignment

[11] MCFN filed submissions on June 12, 2025. It opposes the reassignment to another Member. It says it will cause delay, prejudice and legal uncertainty. It takes issue with several statements I made in the communication I sent to the parties on June 9, 2025.

[12] First, MCFN argues reassignment will cause delay because “[t]his matter is on the cusp of a hearing and we expect that hearing dates will be scheduled for September or soon thereafter.” It says hearing logistics have been discussed, and it hopes that the parties will

set hearing dates at an upcoming June 20, 2025, case conference. MCFN says that a new Member would have to repeat some of those discussions.

[13] MCFN also relies on the fact that the current Member is on the panel for the ongoing *First Nations Child and Family Caring Society v. Attorney General of Canada* inquiry. It says that the decisions in that proceeding are key to MCFN's case because of the number of similarities between the two proceedings. It argues that because the current Member is deeply familiar with that proceeding, less time and effort will be required in the MCFN case. For similar reasons, MCFN says it will require less time and effort to present evidence to the current Member because both cases rely on important contextual evidence relating to intergenerational trauma with which he is already familiar.

[14] MCFN also takes issue with a new Member being able to efficiently and effectively address the pending scope motion that will also deal with the admissibility of evidence. It maintains that a new Member would need to catch up, would require MCFN to present more detailed submissions, would likely require a change to the motions schedule, and would likely result in more time being needed for its adjudication.

[15] In support of its argument that the appointment of a new Member would cause delay, MCFN relies on the fact that the current Member has been case managing this inquiry for more than 13 years. It argues that the current Member is aware of the issues in this case and its long procedural history, and that it would take time for a new Member to get up to speed.

[16] Finally, MCFN takes issue with my statement that the current Member has heard no evidence. Although the hearing has not yet begun in this proceeding, it argues that it sent hard copies of affidavits to the current Member, and that at least some portions of these documents would have been reviewed already.

[17] MCFN further submits that all of the parties will be prejudiced by the assignment of a new Member. It notes that during a February 21, 2023, case conference, the parties raised concerns that the current Member's term was ending in June of 2023, and that they expressed their hope that he would still be seized to conduct the hearing in this matter. MCFN submits that it would be particularly prejudiced by reassignment of the case because,

had it known a Member less familiar with the case was going to be presiding, it would have gone through specific findings of reports in more detail in submitting its evidence, and that filing additional contextual evidence now, even if allowed, would cause more delay. It also says that it is more financially prejudiced by delay than the Respondent because it has far fewer resources to litigate, and that any delay would prejudice First Nations children across the province.

[18] MCFN argues that the complaint alleges that First Nations children are not receiving equitable education services, which is an ongoing, day -to-day issue, and that future delay will have far more of a negative impact in this case than it would in a typical Tribunal matter, where discrimination may be alleged to have taken place in the past. Finally, it submits that delay is detrimental to the current cohort of First Nations students and their communities more broadly.

[19] MCFN does not currently take a position on my authority to reassign this proceeding, as it says it did not have enough time to research the question before the deadline I set for the parties to respond to the proposed reassignment. It nevertheless questions whether I have the authority to remove a Member without cause. More specifically, it takes issue with my jurisdiction to remove the current Member once authorisation to continue has been granted under s. 48.2(2) of the Act. It argues that while jurisdiction to withdraw that approval could be inferred, it is not explicitly provided for in the Act. It further submits that other sections are not entirely conclusive either. While it acknowledges that the Chairperson has supervision over and direction of the work of the Tribunal, including the allocation of work among the members and the management of the Tribunal's internal affairs under s. 48.4 of the Act, it is not clear to MCFN if that includes removing a member from an inquiry they are seized of in the current circumstances.

The Commission defers to the views of MCFN

[20] The Commission states that it takes no position on the possible reassignment, but it does take a position on the timing of the proposed change. It asks that if the Chairperson were to reassign the file, that the change be made after the current Member determines the

pending motion, because of his contextual knowledge of the matters underlying the motion. It argues that continuity may promote judicial economy. The Commission also says that it defers to the views and perspective of the MCFN as the Indigenous party who represents the rightsholders in this proceeding, and that it does so recognizing the importance of reconciliation and the timeliness of outcomes to end discrimination for Indigenous children and families.

The Attorney General of Canada took no position

[21] As set out above, the Attorney-General of Canada takes no position on the possible reassignment and elected to make no submissions.

IV. ANALYSIS

[22] As the Tribunal Chairperson and a public official, my decisions can have a significant impact on the expenditure of taxpayer funds. In my view, it was incumbent on me to explore the option of reassignment and to canvass the parties on this possibility. This is because of the serious cost ramifications of files being heard by part-time *per diem* members as opposed to full-time salaried appointees. As I set out in my June 9, 2025 communication to the parties, an experienced full-time member, Member Harrington, is available to review the file and adjudicate the case. The reassignment was not expected to create further delay, as I believe she would be well-placed to determine the pending motion within a reasonable time and to set hearing dates.

[23] However, having heard from the parties, and in view of the positions taken, I do not believe that it would be in the interests of justice to give further consideration to reassigning the case.

[24] In *Canada (Attorney General) v. Montreuil*, 2009 FC 22, the Federal Court allowed the application for judicial review of the then Chairperson's decision not to exercise his discretion under s. 48.2((2) of the Act to permit the Member to complete the inquiry in *Montreuil v. Canadian Forces*, T1047/2805. In *Montreuil*, the Chairperson had decided to reassign the inquiry to a new Member after 97 days of hearing and had not consulted the

parties before doing so. Among its reasons for overturning the decision, the Court held that while the Chairperson had considered a number of relevant factors, he neglected one, namely the interests of the parties to the proceeding, who would have had to commit both financial and non-financial resources to the relitigation of a lengthy, complex matter.

[25] In this proceeding, the hearing has not yet begun, and the parties would not have to restart the hearing, as was the case in *Montreuil*. Furthermore, even bearing in mind the need for additional context-specific evidence, I am not convinced that the reassignment of this case to the proposed Tribunal Member, who is highly experienced, would cause significant delay.

[26] While I have decided, based on the submissions received, not to reassign the file, this decision should not be seen as endorsing the MCFN's reservations regarding the Chairperson's jurisdiction to reassign a case after exercising her s. 48.2(2) authority.

[27] However, MCFN has strenuously argued that prejudice would result to First Nations children if I reassigned the file to another Member, even if I had the jurisdiction to do so. It has noted that the alleged discrimination is ongoing, and that delay is "detrimental to the current cohort of First Nations students and to their communities more broadly". In addition, while no hearing dates have yet been set, MCFN says that "the matter is on the cusp of a hearing" 13 years after having been assigned to a member for inquiry. It has argued that removing the current Member would represent a major setback from a procedural perspective, and would disrupt immediate next steps, with the greatest harm falling on the lesser-resourced First Nations complainant. The Commission has similarly recognized the importance of timeliness of outcomes to end discrimination for Indigenous children and families and has also argued that 'continuity may promote judicial economy'. These parties are better placed than I to evaluate the logistical implications of reassignment, so deference to their views is appropriate (see *Montreuil* at para 23).

[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).

[29] In addition, given the parties' commitment to an imminent hearing, I am persuaded that their immediate next steps are in keeping with s. 48.9(1) of the Act and its exhortation to proceed expeditiously. MCFN's submissions indicate that it expects the hearing to be scheduled for September 2025, or soon thereafter. Further, MCFN has asserted that it will be more efficient and effective for the current Member to determine the motion.

[30] As indicated above, in the assignment of cases to members, financial factors need to be considered, but they are not determinative.

[31] For these reasons and having regard to the fact that no party expressly supported the proposal I communicated on June 9, 2025, I am not proceeding with reassignment.

Signed by

Jennifer Khurana
Chairperson

Ottawa, ON
June 16, 2025

Canadian Human Rights Tribunal

Parties of Record

File No.: T1810/4012

Style of Cause: Mississaugas of the Credit First Nation v. Attorney General of Canada

Ruling of the Tribunal Dated: June 16, 2025

Written representations by:

Kent Elson, for the Complainant

Anshumala Juyal, Christine Singh and Khizer Pervez, for the Canadian Human Rights Commission

Dan Luxat, for the Respondent