

FEDERAL COURT

B E T W E E N:

ATTORNEY GENERAL OF CANADA

Applicant

and

**FIRST NATIONS CHILD AND FAMILY CARING SOCIETY OF
CANADA, ASSEMBLY OF FIRST NATIONS, CANADIAN HUMAN
RIGHTS COMMISSION, CHIEFS OF ONTARIO, NISHNAWBE ASKI
NATION and AMNESTY INTERNATIONAL CANADA**

Respondents

**RESPONDENT'S RECORD OF
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October 9, 2026

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**MEMORANDUM OF FACT AND LAW OF THE RESPONDENT, ASSEMBLY OF
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October 9, 2026

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OVERVIEW

1. The effect of Canada’s Application, if granted, would be to delay the long-term reform process for First Nations Child and Family Services (“**FNCFS**”) that has been decades in the making, without identifying any error in the Tribunal's decision that would justify this Court's intervention. This conduct and Canada’s approach to Canada’s quasi-constitutional human rights obligations is entirely inappropriate and the Application ought to be dismissed.

2. Canada's liability is not in dispute. The Canadian Human Rights Tribunal found in 2016 that Canada discriminated against First Nations children and families through its funding and administration of FNCFS. The remaining question is remedial: Canada must remedy that discrimination in a way that is durable, national, and effective.

3. The decision under review, [2025 CHRT 80](#) (the “**Decision**”), is one step in that remedial process. It does not finally determine the remedy, but directs Canada, the Assembly of First Nations (“**AFN**”) and the First Nations Child and Family Caring Society of Canada (“**Caring Society**”) to develop and file long-term reform plans so the Tribunal can later decide the appropriate remedy in early 2027.

4. The question before this Honourable Court is whether an Application that (i) pleads no material facts and merely asserts unreasonableness or procedural unfairness in conclusory terms; (ii) is now moot; and (iii) challenges an interlocutory decision of a Tribunal; can succeed in frustrating a remedial process that has been decades in the making. The answer can and must only be: no.

5. The AFN submits that this Application should be dismissed for the following reasons.

6. First, a review of Canada's Notice of Application discloses no material facts capable of supporting the relief sought. It is a bald pleading. It asserts, in conclusory terms, that the Decision was procedurally unfair and unreasonable, without explaining what unfairness occurred, why the Decision was unreasonable, or what legal flaw infected the Tribunal's process. This is more than a pleading technicality: without material facts, the Respondents and the Court have no way of knowing the case they are required to meet. In so doing, Canada has abused this Court's process.

7. Second, and in the alternative, Canada's subsequent actions have rendered this Application moot. Canada did not seek a stay of the Decision. Instead, it complied with it: Canada filed its own long-term reform plan on December 22, 2025, confirming that the plan was prepared "in accordance with" [2025 CHRT 80](#). The remedial process has moved well beyond the stage the Decision directed, and success on this Application would have no practical effect on the parties.

8. Third, and in the further alternative, the Decision is purely interlocutory and the Application is premature. The Decision does not finally determine the long-term remedy; it sets out a process for getting there. The matter is now heading toward a final remedial hearing, with a ten-day evidentiary hearing scheduled for January 2027, followed by written submissions and oral argument in early 2027. Canada can, pursuant to the well-established jurisprudence on prematurity, raise any proper

objection before the Tribunal as the remedial process continues and, if it deems necessary, on judicial review *after* the Tribunal makes a final remedial determination.

9. The AFN supports the Caring Society's submissions in response to this Application and in its motion to strike. In this responding submission, the AFN has sought to avoid duplication where possible – in particular with respect to prematurity regarding an interlocutory proceeding.

10. For these reasons, this Application must be dismissed as further explained below. Furthermore, it is the AFN's respectful submission that this Application should not have been brought. It has the effect of causing further delay, cost, and disruption in a human rights matter that has already been going on for an inordinate amount of time involving serious harm to First Nations' children.

PART I - STATEMENT OF FACTS

A. Background

11. This case began in 2007, when the AFN and the Caring Society filed a complaint with the Canadian Human Rights Commission alleging that Canada discriminated against First Nations children and families by underfunding, and inequitably administering, the FNCFS program.

12. In 2016 CHRT 2, nearly a decade after the complaint was first filed, the Tribunal ruled that Canada had violated the *Canadian Human Rights Act* and

discriminated against First Nations children and families in the provision of First Nations child and family services.¹

13. The 2016 finding was publicly described as historic. Canada, notably, accepted the Tribunal’s decision: the then-Minister of Justice announced that Canada would not seek judicial review of that decision and that the decision was “pointing us in the right direction as a country.”²

14. The proceedings before the Tribunal have since focused on remedy. That remedial work is necessarily complex. It concerns national reform of programs and funding structures affecting First Nations children, families, and communities across the country. The purpose of the process is not to determine whether Canada discriminated. The purpose is to determine what Canada must do to remedy the discrimination already found.

15. The Tribunal adopted a phased approach to remedy, proceeding through immediate, mid-term, and long-term relief, so that immediate change could occur while further studies, data collection, and consultation with First Nations experts and communities informed a durable long-term remedy.³ On consent of the parties, the Tribunal issued long-term reform orders focused on prevention in 2022 CHRT 8, under

¹ *First Nations Child and Family Caring Society of Canada et al. v. Attorney General of Canada (Representing the Minister of Indian and Northern Affairs Canada)*, [2016 CHRT 2](#).

² *First Nations Child and Family Caring Society of Canada et al. v. Attorney General of Canada*, [2025 CHRT 80](#) at para [48](#).

³ *Ibid.* at paras [4-5](#).

which the parties had committed to a fully reformed program by March 2023; that timeline was not met.⁴

16. On August 20, 2025, the Tribunal issued the Decision to address the continuing delay in completing national FNCFS long-term reform outside Ontario. The Tribunal explained that the parties' earlier commitment to return with a national long-term agreement was overdue, that it was now "time for swift action" given that the Merits Decision of 2016 CHRT 2 had been decided, at that point, nearly ten years prior.⁵

B. Abuse of Process

17. Canada filed the present Application after receiving the Decision, which seeks (i) an order, in the nature of *certiorari*, setting aside the Decision; and (ii) an order requiring that the Decision be remitted to a differently constituted panel of the Tribunal.⁶

18. The *entirety* of the grounds included the Notice to support Canada's request for relief are reproduced below:

1. On August 20, 2025, the Tribunal issued the Decision following the parties' and interested parties' responses to the Tribunal's February 10, 2025 Direction related to Tribunal file number T1340/7008;
2. On September 12, 2025, the Tribunal issued Supplemental Reasons for the Decision;

⁴ *Ibid.* at paras [82](#) and [84](#).

⁵ *Ibid.* at paras [85](#) and [96](#).

⁶ *Attorney General of Canada v. First Nations Child and Family Caring Society of Canada et al.*, T-3594-25 (Notice of Application, Applicant's Record at page 6).

3. On September 17, 2025, the Tribunal amended its Decision;
4. On September 17, 2025, the Tribunal issued Further Supplemental Reasons for the Decision, in the form of an email and letter;
5. In issuing the Decision, the Tribunal breached natural justice and the duty of fairness;
6. The Decision was unreasonable because the Tribunal:
 - a. unreasonably interpreted its statutory authority;
 - b. ordered unreasonable remedies;
 - c. unreasonably exercised its discretion;
 - d. unreasonably failed to consider evidence and submissions;
7. *Federal Courts Act*, RSC 1985, c F-7, sections 18 and 18.1;
8. *Federal Courts Rules*, SOR/98-106;
9. *Canadian Human Rights Act*, RSC 1985, cH-6; and
10. Such further and other grounds as counsel may advise and this Honourable Court may permit.”⁷

C. Mootness

19. In the meantime, the Parties did what the Tribunal directed. Canada did *not* seek a stay of the Decision and the remedial process ordered by the Tribunal in the Decision continued. The AFN and the Caring Society filed their plan, the Loving Justice Plan, on December 22, 2025. The Loving Justice Plan was the result of extensive consultations led by the Caring Society and the NCCC; it is voluminous, comprehensive, and informed by the perspectives of First Nations.

⁷ *Ibid.* at pages 6-7.

20. Canada chose not to participate in the First Nations-led process, nor did it consent to the Loving Justice Plan. Instead, it filed a separate plan on the same date.⁸ Notably, Canada’s plan specifically stated that it was being submitted to the Tribunal “*with* prejudice to the outcome of Canada’s related judicial review application in [the present Application].”⁹ [emphasis added]

21. That next stage is already scheduled. The proceeding before the CHRT is now moving toward a final remedial hearing in early 2027. The Tribunal has fixed a ten-day evidentiary hearing beginning in January 2027, followed by substantial written submissions in February 2027 and three days of oral argument in March 2027. Those dates were scheduled earlier this year, with difficulty, following a period of multiple months given the number of parties involved and the complexity of the case.¹⁰

D. Prematurity

22. The Decision did not finally determine the long-term remedy. It established the process for getting there: the AFN and the Caring Society were directed to consult with the National Children’s Chiefs Commission, First Nations Chiefs, First Nations organizations, and other experts, and to file an evidence-based national long-term reform plan by December 22, 2025.¹¹ Canada, at the time of the Decision, was directed either to participate in that process or, if Canada declined to participate or consent to the First Nations-led plan, it could file its own plan by the same deadline.

⁸ Affidavit of Jasmine Kaur, affirmed, July 23, 2026 [*Kaur Affidavit*], at para 13 (Application Record of the Attorney General of Canada [*ARC*], Tab 3, p. 669).

⁹ *Ibid.* at para 13; Kaur Affidavit, Exhibit I (ARC, Tab 3, p. 739).

¹⁰ Kaur Affidavit at paras 14-21 (ARC, Tab 3, pp. 670-671).

¹¹ [2025 CHRT 80](#) at para [120](#).

PART II - POINTS IN ISSUE

23. This application for judicial review raises three issues:

- (a) Does the Application constitute an abuse of process?
- (b) In the alternative, is the Application moot?
- (c) In the further alternative, is the Application premature?

PART III - STATEMENT OF SUBMISSIONS

E. Abuse of Process

24. Canada filed a Notice of Application that was devoid of material facts. It pleaded no particulars to substantiate its bald assertions of procedural unfairness and unreasonableness. It was, in substance, a placeholder – a phantom pleading. Then, nearly a year later, on September 9, 2026, Canada filed a Memorandum of Fact and Law that, for the first time, attempted to articulate the material facts and legal arguments that were conspicuously absent from its Notice.

25. That is precisely the conduct that the Federal Court of Appeal has condemned. More specifically, in *JP Morgan*, Justice Stratas held that it is “**an abuse of process to start proceedings and make entirely unsupported allegations in the hope that something will later turn up.**”¹² [emphasis added] Nor can an applicant file an inadequate pleading and later cure it through particulars, evidence, or submissions.¹³ Yet, that is precisely what Canada has done in this case.

¹² *JP Morgan Asset Management (Canada) Inc. v. Canada (National Revenue)*, [2013 FCA 250](#) at para [45](#) [*JP Morgan*].

¹³ *Mancuso v. Canada (National Health and Welfare)*, [2015 FCA 227](#) at paras [17](#) and [20](#), citing *AstraZeneca Canada Inc. v. Novopharm Limited*, [2010 FCA 112](#).

26. This is especially important within the context of an application for judicial review. Administrative law labels are easy to invoke. Procedural unfairness, unreasonableness, fettering, failure to consider evidence, and jurisdictional error are all legal conclusions. They become reviewable grounds only when tied to material facts explaining what the decision-maker did, what legal constraint applied, and how the alleged error could justify relief.¹⁴

27. Canada's Notice did not do that. It did not identify, for instance, what evidence the Tribunal wrongly refused to consider, what submissions Canada was denied the opportunity to make, or what aspect of the process was unfair in the circumstances. Nor did the Notice identify any reasoning failure, evidentiary gap, legal constraint, statutory misinterpretation, internal incoherence, or irrational chain of analysis. It simply asserted the decision was unreasonable and violated natural justice. Those are conclusions – not properly pleaded grounds.

28. The result was that the Respondents did not know the case they had to meet. There were no material facts pled whatsoever that could substantiate any of Canada's allegation or provide a basis upon which this Court could grant the relief sought. That is precisely what Rule 301 does not permit¹⁵ and this Court's jurisprudence confirms that such applications ought to be dismissed: "A judicial review or an onward appeal that is doomed to fail wastes resources and should be nipped in the bud."¹⁶

¹⁴ *JP Morgan* at para [43](#).

¹⁵ *Ibid.* at para [42](#).

¹⁶ *Lin v. Canada (Public Safety and Emergency Preparedness)*, [2021 FCA 81](#) at para [7](#).

29. In *Dadoun*, the applicant alleged that the Canada Revenue Agency was conducting a criminal or penal investigation under the guise of a civil audit. The Court dismissed the application because the pleading disclosed no material facts capable of substantiating the allegation.¹⁷ In *Allabadi*, the Court struck notices of application that failed to plead material facts explaining how the impugned decisions affected the applicants' legal rights, imposed legal obligations, or caused prejudicial effects. The Court held that the Notice of Application did not define clear legal issues or give fair notice of the case to be met. The applicant's case was bound to fail:

[34] Having carefully reviewed the Notices of Application, I am satisfied that they fail to meet the pleading requirements set out in Rule 301 of the *Rules*. The pleadings do not disclose the legal basis or the material facts that, if taken as true, will support granting the relief sought. They do not define any clear legal issues or give fair notice to the Respondents of the case that has to be met. **There is such a manifest lack of substance to the Notices of Application that they are clearly bound to fail, and they take on the character of a vexatious proceeding:** *Martinez v. Canada (Communications Security Establishment)*, [2019 FCA 282](#) at para 9.¹⁸ [emphasis added]

30. The broader context reinforces the point. Canada is not a self-represented individual litigant trying to navigate the complexities of the *Federal Courts Rules*. In this particular case, Canada has highly experienced and sophisticated counsel. The Attorney General of Canada is one of the country's oldest institutional litigants and is represented by the federal Department of Justice, with access to thousands of lawyers across the country. Canada had the Tribunal's decision, supplemental reasons, and amended reasons. If Canada had a reviewable procedural fairness or

¹⁷ *Dadoun v. Canada (Attorney General)*, [2021 FC 461](#) at paras 6 and 21.

¹⁸ *Allabadi v. Lahaie*, [2024 FC 1814](#) at para 34.

reasonableness ground, it was required to plead the material facts supporting that ground when it commenced the application.

31. Instead, Canada filed a skeletal Notice while the parties were required to keep working toward long-term reform. That imposed real litigation costs and uncertainty on the Respondents and on the remedial process, without advancing any properly pleaded legal dispute. Nearly a year later, on September 9, 2026, Canada filed a Memorandum of Fact and Law that, for the first time, attempts to articulate the material facts and legal arguments that were conspicuously absent from its Notice.

32. This conduct is particularly objectionable in the context of human rights proceedings. The *Canadian Human Rights Act* is quasi-constitutional legislation whose protections must be afforded a large and liberal interpretation.¹⁹ Filing a bald Notice of Application that introduces unnecessary delay into the remedy of breaches of that quasi-constitutional statute is incompatible with the purposes of the *Act* and with the Tribunal's mandate to resolve complaints informally and expeditiously.

33. The fact that Canada proceeded in this fashion is entirely inappropriate. The effect of this Application is to *delay* justice to First Nations and First Nations children, which effectively *denies* justice. Indeed, Canada has now initiated two other proceedings (Court File No. T-2155-26 and T-3953-26) before this Court, which stem from the FNCFS proceedings before the CHRT.

¹⁹ *Canada (House of Commons) v. Vaid*, [2005 SCC 30](#) at para [80](#).

34. At a time when human rights protections and the rule of law face growing challenges around the world, Canada's decision to pursue this Application is troubling. The AFN respectfully requests that, in dismissing this Application, this Honourable Court make clear that this type of conduct has no place before this Court, particularly in matters involving vulnerable people and human rights violations that have already been found to be serious and established.

35. The AFN does not suggest that Canada – or any party – ought not to be able to advance certain interlocutory matters. But when an Application is bald, and the issues raised are moot and premature, what has occurred is inappropriate. The long-term reform process represents a significant step towards remedying systemic discrimination against some of the most vulnerable people in Canada – First Nations children in care. The importance of moving ahead with long-term reform in a timely manner cannot be overstated. The Parties' focus and attention should be on delivering clear outcomes and solutions for First Nations children in care; not litigating vexatious claims.

36. This is of real concern to the AFN. Unsubstantiated applications of this kind consume scarce judicial resources, as well as the limited resources of First Nations organizations and representatives who must respond to the formidable financial and institutional apparatus of the Government of Canada.

37. Granting applications such as this one would signal that respondents in human rights proceedings may launch interlocutory proceedings to delay and frustrate the timely resolution of human rights matters. That is precisely the mischief that the

Federal Courts Rules and Justice Stratas' reasons in *JP Morgan* were designed to prevent.

F. Mootness

38. In complying with the Decision and filing its long-term reform plan, Canada's own conduct has rendered the Application moot. The issues raised in Canada's Application are merely hypothetical and raise abstract questions that have no practical effects on its rights.²⁰ For this reason, pursuant to this Court's general policy and practice, Canada's Application ought to be dismissed.²¹

39. The law on mootness is well-established. First, it must be determined that there is no longer a live controversy that remains between the parties that affects or may affect the parties' rights. Second, if the matter is determined to be moot, the Court must determine whether it ought to nonetheless exercise its discretion to hear the application.²²

i. There is No Live Controversy

40. Canada's Application seeks an order quashing the Decision, which required the Parties to develop and file long-term reform plans. Canada has complied with that requirement. On December 22, 2025, Canada filed its long-term reform plan before the Tribunal, confirming in its covering letter that the submission was prepared "in accordance with the Tribunal's August 20, 2025 Ruling, 2025 CHRT 80."

²⁰ *Tetreault v. Canada (Attorney General)*, [2025 FC 1337](#) at para [57](#).

²¹ *Ibid.*

²² *Kakuev v. Canada*, [2022 FC 1465](#) at para [17](#); *Borowski v. Canada (Attorney General)*, [1989 CanLII 123 \(SCC\)](#).

41. Canada has therefore complied with the very Decision it now seeks to judicially review. The jurisprudence of this Court and the Federal Court of Appeal establishes that compliance with the decision or order under review renders an application moot.

42. In *Sherman v. Pfizer Canada Inc.*, the appellants challenged an order requiring it to produce certain documents to the respondents. Although the order was subsequently challenged, the appellants complied with the order and produced the vast majority of the documents contemplated in the order prior to the hearing of the appeal.²³ The Federal Court of Appeal unanimously ruled that the matter had been rendered moot by the appellants' compliance with the order:

[7] In my view, the Federal Court judge made no reviewable error in concluding that the matter was moot. The appellants had asked the Judge to set aside the order and "hold that Apotex need not produce documents falling in the above noted categories." **However, the appellants had complied with the order; they had done what the order required them to do. Setting aside all or portions of the order would not have undone the documentary production in question. Since the documents were already produced, success on appeal would have no practical effect on the parties.**²⁴ [emphasis added]

43. As in the present case, the appellants did *not* seek a stay of the order pending further judicial determination of the matter. Moreover, the appellants in *Sherman* had argued that the documents were produced to the respondents "without prejudice to their right to appeal."²⁵ The Court of Appeal expressly rejected that

²³ *Sherman v. Pfizer Canada Inc.*, [2015 FCA 107](#) at para [2](#) [*Sherman*].

²⁴ *Ibid.* at para [7](#).

²⁵ *Ibid.* at para [12](#).

position, holding that a reservation of appeal rights does not preserve a live controversy once the order has been complied with: “A unilateral assertion by one party that it is complying with an order without prejudice to its right to appeal does not preclude an argument that an appeal is moot.”²⁶

44. This Court’s recent decision in *Tetreault v. Canada (Attorney General)* confirms the point. Where an applicant has complied with the very decision it seeks to challenge, there is no longer a live controversy to resolve. In *Tetreault*, the applicant, who was a serving member of the Canadian Armed Forces, sought judicial review of three discrete directives requiring CAF members to be vaccinated against COVID-19. In that case, the applicant had, in fact, already complied with the CAF’s first directive and was vaccinated. He faced no consequences from the CAF as a result. Accordingly, the Court found that “the ‘live controversy’ arising from Directive #1 no longer exists and this application is therefore moot.”²⁷

45. These principles are instructive in this matter. Canada has done exactly what the Decision required: it filed its long-term reform plan on December 22, 2025, confirming in its covering letter that the plan was prepared “in accordance with” 2025 CHRT 80. It did not seek a stay. The Tribunal has subsequently scheduled, following an intensive and extensive period of negotiations between the Parties, a ten-day evidentiary hearing for January 2027 followed by written submissions and oral argument in early 2027.

²⁶ *Ibid.*

²⁷ *Tetreault v. Canada (Attorney General)*, [2025 FC 1337](#) at para 66.

46. The remedial process has moved well beyond the stage the Decision directed. There is no live controversy. The Application is moot. As in *Sherman*, Canada “had complied with the order” and “had done what the order required them to do.” An order quashing the Decision now would not undo Canada’s filing, retract the reform plans already before the Tribunal, or reverse the consultations that informed Canada’s plan or the First Nations-filed Loving Justice Plan. Success on this Application would have no practical effect on the parties.

47. Nor does Canada’s reservation preserve a live controversy. Canada’s plan stated that it was submitted “*with* prejudice to the outcome of” this Application.²⁸ In other words, Canada filed its long-term reform plan unconditionally, accepting that its compliance with the Decision would affect the outcome of this proceeding since the controversy between the Parties is no longer live.

ii. There are No Exceptional Circumstances

48. Where a matter has been found to be moot, thereby rendering the dispute merely hypothetical or academic, the Supreme Court of Canada has established that courts must generally decline to hear the matter and ought only to exercise their discretion to do otherwise in exceptional circumstances.²⁹ There are no such exceptional circumstances in this case.

49. Three factors must guide this Court’s determination of its exercise of discretion: (1) the existence of an adversarial context; (2) judicial economy; and (3)

²⁸ Kaur Affidavit, Exhibit I (ARC, Tab 3, p. 739).

²⁹ *Taylor v. Newfoundland and Labrador*, [2026 SCC 5](#) at [para 42](#) [*Taylor*].

whether the Court would be intruding on the legislature's role by rendering a decision.³⁰ These factors ought to be considered holistically and do not operate as a stringent legal test, in which the existence of one factor, for instance, must necessarily lead the Court to hear an otherwise moot application.³¹ In the present case, the first and second factors weigh heavily towards non-intervention. The third factor is not applicable.

50. Although there remains a broader adversarial context between the Parties, there is no live controversy with respect to whether the Parties ought to file long-term reform plans pursuant to the Decision. In this respect, the Parties are aligned: Canada, the AFN and the Caring Society filed their long-term reform plans pursuant to the order of the Tribunal in December 2025.

51. Moreover, Canada's Application Record does not suggest that, if the matter were remitted to the Tribunal, Canada would alter its long-term reform plan in any meaningful way. Judicial intervention would not meaningfully alter Canada's approach to FNCFS reform. Notably, in its public-facing materials, Canada, through the Minister of Indigenous Services, stated that its long-term reform plan was "a historic turning point for First Nations children."³² The Minister did not conditionalize the execution of Canada's plan on the outcome of this application. Accordingly, given

³⁰ *Ibid.* at [para 44](#).

³¹ *Ibid.*

³² *Canada, Indigenous Services Canada, "Canada advances First Nations-led new path forward on long-term reform of the First Nations Child and Family Services Program" (22 December 2025), online: Canada.ca* <<https://www.canada.ca/en/indigenous-services-canada/news/2025/12/canada-advances-first-nations-led-new-path-forward-on-long-term-reform-of-the-first-nations-child-and-family-services-program.html>>.

that there is no practical effect on Canada's rights on the issue of the development of a long-term reform plan, an adversarial relationship no longer exists³³ - even if Canada holds a continued interest in continuing its litigation effort.³⁴

52. Given that there is no practical impact on parties' rights, amongst other things, judicial economy strongly favours non-intervention. Judicial economy is a particularly significant factor within the analysis, given the "recent encouragement given to reviewing courts to avoid needless hearings."³⁵ Nor could Canada satisfy the "additional ingredient" that *Borowski* requires before a court may hear a moot case: a social cost to leaving the matter undecided.³⁶ There is none. The reality is that the social cost runs the other way. Midstream judicial intervention would delay a remedial process designed to end discrimination against First Nations children.

53. The public interest lies in bringing this matter to a final conclusion swiftly. This litigation has continued for the better part of two decades. Considerable judicial and administrative resources have already been spent before this Court and the Tribunal. Hearing this Application now would only delay and fragment the remedial process, while requiring the parties to spend more time and resources on an academic dispute. First Nations children can ill afford to wait any longer for long-term reform.

³³ *Abel v. Canada (Citizenship and Immigration)*, [2021 FCA 131](#) at [para 17](#); see also: *Sherman* at [para 3](#).

³⁴ *Boland v. Canada (Attorney General)*, [2024 FC 11](#) at [para 27](#).

³⁵ *Domb v. Canada*, [2026 FC 7](#) at [para 25](#).

³⁶ *Taylor* at [para 57](#).

G. Prematurity

54. The Decision is not the Tribunal’s final remedial determination with respect to long-term reform of the FNCFS Program. It is an interlocutory step in the process leading to that determination. For this reason alone, the Application ought to be dismissed.

55. The doctrine of exhaustion requires litigants to refrain from seeking redress before the Court until the administrative process and the administrative decision-maker has completed their work. Put differently, “those who are dissatisfied with some matter arising in the ongoing administrative process must pursue all effective remedies that are available within that process; only when the administrative process has finished or when the administrative process affords no effective remedy can they proceed to court.”³⁷

56. To allow otherwise would be to permit midstream judicial review, which frustrates and undermines the critical need to preserve scarce judicial resources. This also ultimately fragments administrative processes, delays administrative proceedings, creates unnecessary costs for all parties, and deprives the Court of the benefit of the administrative decision-maker’s final reasons and the ultimate outcome of the administrative proceeding.³⁸

³⁷ *C.B. Powell Limited v. Canada (Border Services Agency)*, [2010 FCA 61](#) at para [31](#).

³⁸ *Ibid.* at para [32](#).

57. As such, the application of this rule is strict. Judicial intervention before a final administrative decision may only be justified in truly exceptional circumstances. As with mootness, there are no such exceptional circumstances in this case.

i. The Decision is Interlocutory

58. The present Application brought by Canada challenges a decision that determines collateral and procedural issues. 2025 CHRT 80 is an interlocutory decision. It does not finally decide the long-term remedy. It directs the parties to develop and file plans. It establishes a timetable. It organizes the next stage of the remedial process. The Tribunal has not yet decided what final long-term reform order should be made.

59. Where an administrative decision or order merely determines collateral or procedural rights, as opposed to substantive rights, that order is interlocutory.³⁹ For this reason alone, the Application ought to be dismissed. This Court reached a similar conclusion in *Tuharsky v. O'Chiese First Nation*. In that case, the applicant sought judicial review after proceedings were adjourned for further evidence on remedy. Since a decision had not been made on remedy pending further evidence, a judicial review of the decision was premature and the application was dismissed.⁴⁰

60. Similarly, Canada's concerns with the Decision can be raised within the confines of the Tribunal process, which, as a result of the Decision, specifically contemplates further steps, further evidence, further submissions, and a final remedial

³⁹ *National Benefit Authority Corporation v. Canada*, [2022 FCA 17](#) at para 11.

⁴⁰ *Tuharsky v. O'Chiese First Nation*, [2025 FC 1128](#) at para 36.

hearing. If Canada maintains that some aspect of the process or outcome is unlawful, it can raise that issue before the Tribunal and, if necessary, on judicial review after the Tribunal makes a final determination.

61. Canada should not be permitted to interrupt an ongoing remedial process before the Tribunal has completed its work, particularly on the basis of an Application that pleads no concrete error requiring this Court's immediate intervention.

ii. There are No Exceptional Circumstances

62. Canada has not identified any exceptionality that would require this Court to intervene in an ongoing administrative process. The reason that Canada has not done so, presumably, is because there are no exceptional circumstances to justify judicial intervention. Canada has not sought a stay of the proceedings. Nor has it identified any immediate, drastic, or irreparable consequences stemming from the Decision. Simply put, the effect of 2025 CHRT 80 is not one that is “so immediate and drastic that the Court’s concern about the rule of law is aroused.”⁴¹

63. In *Air Canada v. Lorenz*, this Court identified several factors – to be examined holistically and not as a stringent legal test – that may be considered when determining whether exceptional circumstances exist: (i) hardship to the applicant; (ii) waste of resources; (iii) delay; (iv) fragmentation of proceedings; (v) strength of the case; and (vi) the statutory context.⁴²

⁴¹ *Wilson v. Atomic Energy of Canada Limited*, [2015 FCA 17](#) at para 33.

⁴² *Air Canada v. Lorenz (T.D.)*, [1999 CanLII 9373 \(FCTTD\)](#) at paras 19-35.

64. None of these factors, when considered within the context of this case, favour midstream judicial intervention.

65. The Decision creates no hardship or prejudice to Canada. It merely establishes timelines for Canada's long-term reform plan to address systemic discrimination against First Nations children. The fact that Canada must remedy that discrimination is something that Canada has already acknowledged and accepted when it chose not to appeal or judicially review 2016 CHRT 2.

66. Judicial intervention at this stage would risk a serious waste of resources and further delays in a proceeding nearing its twentieth anniversary. The Tribunal process is already moving toward a January 2027 evidentiary hearing, with the parties required to prepare evidence and other materials on an expedited timetable between now and the end of 2026. If this Court intervenes midstream, the parties may be required to litigate this Application while simultaneously preparing for the very remedial hearing that the Decision was intended to advance. That duplication would consume scarce judicial, administrative, and party resources without advancing the final resolution of the remedy.

67. Moreover, midstream review would also fragment the proceeding: as this Court recognised in *Air Canada v. Lorenz*, fragmentation of the issues raised by an administrative proceeding “is wasteful of court resources and unduly burdens the administration of public programs.”⁴³ Permitting piecemeal challenges to interlocutory

⁴³ *Air Canada v. Lorenz (T.D.)*, [1999 CanLII 9373 \(FCTTD\)](#) at para [26](#).

steps, rather than a single review after the Tribunal's final determination, would splinter the process and encourage further litigation at every procedural turn.

68. The strength of Canada's case also weighs against early intervention. As detailed above, Canada's application is an abuse of process, and, as detailed in the submissions of the Caring Society, reveals no procedural unfairness or unreasonableness in the Decision.

69. Finally, the statutory context weighs heavily against permitting this Application to proceed. The *Canadian Human Rights Act* is quasi-constitutional legislation. Its protections must be afforded a large and liberal interpretation, as the Supreme Court has affirmed on numerous occasions.⁴⁴ Permitting Canada's Application to proceed would set a dangerous precedent. It would signal that Canada may avoid, or at least postpone, compliance with its constitutional and quasi-constitutional human rights obligations by exhausting every procedural avenue available in the administrative process and before this Court. That approach is inconsistent with the large and liberal interpretation owed to the *Canadian Human Rights Act*. It would allow delay to become a substitute for compliance. This Court should not permit that result.

⁴⁴ *Canada (House of Commons) v. Vaid*, [2005 SCC 30](#) at para [80](#).

PART IV - STATEMENT OF THE ORDER SOUGHT

70. In light of the above stated submissions, the Respondent Assembly of First Nations respectfully requests that this Honourable Court dismiss the application, with costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 9th day of October, 2026.



October 9, 2026

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PART V - LIST OF AUTHORITIES

1. *Abel v. Canada (Citizenship and Immigration)*, [2021 FCA 131](#).
2. *Air Canada v. Lorenz (T.D.)*, [1999 CanLII 9373 \(FCTTD\)](#).
3. *Allabadi v. Lahaie*, [2024 FC 1814](#).
4. *AstraZeneca Canada Inc. v. Novopharm Limited*, [2010 FCA 112](#).
5. *Boland v. Canada (Attorney General)*, [2024 FC 11](#).
6. *Borowski v. Canada (Attorney General)*, [1989 CanLII 123 \(SCC\)](#).
7. *Canada (House of Commons) v. Vaid*, [2005 SCC 30](#).
8. *C.B. Powell Limited v. Canada (Border Services Agency)*, [2010 FCA 61](#).
9. *Dadoun v. Canada (Attorney General)*, [2021 FC 461](#).
10. *Domb v. Canada*, [2026 FC 7](#).
11. *First Nations Child and Family Caring Society of Canada et al. v. Attorney General of Canada (Representing the Minister of Indian and Northern Affairs Canada)*, [2016 CHRT 2](#).
12. *First Nations Child and Family Caring Society of Canada et al. v. Attorney General of Canada*, [2025 CHRT 80](#).

13. *JP Morgan Asset Management (Canada) Inc. v. Canada (National Revenue)*, [2013 FCA 250](#).
14. *Kakuev v. Canada*, [2022 FC 1465](#).
15. *Lin v. Canada (Public Safety and Emergency Preparedness)*, [2021 FCA 81](#).
16. *Mancuso v. Canada (National Health and Welfare)*, [2015 FCA 227](#).
17. *Martinez v. Canada (Communications Security Establishment)*, [2019 FCA 282](#).
18. *National Benefit Authority Corporation v. Canada*, [2022 FCA 17](#).
19. *Sherman v. Pfizer Canada Inc.*, [2015 FCA 107](#).
20. *Taylor v. Newfoundland and Labrador*, [2026 SCC 5](#)
21. *Tetreault v. Canada (Attorney General)*, [2025 FC 1337](#).
22. *Tuharsky v. O'Chiese First Nation*, [2025 FC 1128](#).
23. *Wilson v. Atomic Energy of Canada Limited*, [2015 FCA 17](#).

APPENDIX A – STATUTES AND REGULATIONS

<u>Federal Courts Act, RSC 1985, c F-7, ss</u>	<u>Loi sur les Cours fédérales, L.R.C.</u>
<u>18 and 18.1</u>	<u>(1985), ch. F-7</u>
Extraordinary remedies, federal tribunals	Recours extraordinaires : offices fédéraux
18 (1) Subject to section 28 , the Federal Court has exclusive original jurisdiction	18 (1) Sous réserve de l' article 28 , la Cour fédérale a compétence exclusive,
(a) to issue an injunction, writ of <i>certiorari</i> , writ of prohibition, writ of <i>mandamus</i> or writ of <i>quo warranto</i> , or grant declaratory relief, against any federal board, commission or other tribunal; and	en première instance, pour : a) décerner une injonction, un bref de <i>certiorari</i> , de <i>mandamus</i> , de prohibition ou de <i>quo warranto</i> , ou pour rendre un jugement déclaratoire contre tout office fédéral;
(b) to hear and determine any application or other proceeding for relief in the nature of relief contemplated by paragraph (a), including any proceeding brought against the Attorney General of Canada, to obtain relief against a federal board, commission or other tribunal.	b) connaître de toute demande de réparation de la nature visée par l'alinéa a), et notamment de toute procédure engagée contre le procureur général du Canada afin d'obtenir réparation de la part d'un office fédéral.

Extraordinary remedies, members of Canadian Forces (2) The Federal Court has exclusive original jurisdiction to hear and determine every application for a writ of <i>habeas corpus ad subjiciendum</i>, writ of <i>certiorari</i>, writ of prohibition or writ of <i>mandamus</i> in relation to any member of the Canadian Forces serving outside Canada.	Recours extraordinaires : Forces canadiennes (2) Elle a compétence exclusive, en première instance, dans le cas des demandes suivantes visant un membre des Forces canadiennes en poste à l'étranger : bref d'<i>habeas corpus ad subjiciendum</i>, de <i>certiorari</i>, de prohibition ou de <i>mandamus</i>.
Remedies to be obtained on application (3) The remedies provided for in subsections (1) and (2) may be obtained only on an application for judicial review made under section 18.1.	Exercice des recours (3) Les recours prévus aux paragraphes (1) ou (2) sont exercés par présentation d'une demande de contrôle judiciaire.
Application for judicial review 18.1 (1) An application for judicial review may be made by the Attorney General of Canada or by anyone directly affected by the matter in respect of which relief is sought.	Demande de contrôle judiciaire 18.1 (1) Une demande de contrôle judiciaire peut être présentée par le procureur général du Canada ou par quiconque est directement touché par l'objet de la demande.

Time limitation (2) An application for judicial review in respect of a decision or an order of a federal board, commission or other tribunal shall be made within 30 days after the time the decision or order was first communicated by the federal board, commission or other tribunal to the office of the Deputy Attorney General of Canada or to the party directly affected by it, or within any further time that a judge of the Federal Court may fix or allow before or after the end of those 30 days.	Délai de présentation (2) Les demandes de contrôle judiciaire sont à présenter dans les trente jours qui suivent la première communication, par l'office fédéral, de sa décision ou de son ordonnance au bureau du sous-procureur général du Canada ou à la partie concernée, ou dans le délai supplémentaire qu'un juge de la Cour fédérale peut, avant ou après l'expiration de ces trente jours, fixer ou accorder.
Powers of Federal Court (3) On an application for judicial review, the Federal Court may (a) order a federal board, commission or other tribunal to do any act or thing it has unlawfully failed or refused to do or has unreasonably delayed in doing; or	Pouvoirs de la Cour fédérale (3) Sur présentation d'une demande de contrôle judiciaire, la Cour fédérale peut : a) ordonner à l'office fédéral en cause d'accomplir tout acte qu'il a illégalement omis ou refusé d'accomplir ou dont il a retardé l'exécution de manière déraisonnable;

(b) declare invalid or unlawful, or quash, set aside or set aside and refer back for determination in accordance with such directions as it considers to be appropriate, prohibit or restrain, a decision, order, act or proceeding of a federal board, commission or other tribunal.	b) déclarer nul ou illégal, ou annuler, ou infirmer et renvoyer pour jugement conformément aux instructions qu'elle estime appropriées, ou prohiber ou encore restreindre toute décision, ordonnance, procédure ou tout autre acte de l'office fédéral.
Grounds of review (4) The Federal Court may grant relief under subsection (3) if it is satisfied that the federal board, commission or other tribunal (a) acted without jurisdiction, acted beyond its jurisdiction or refused to exercise its jurisdiction; (b) failed to observe a principle of natural justice, procedural fairness or other procedure that it was required by law to observe; (c) erred in law in making a decision or an order, whether or not the error appears on the face of the record;	Motifs (4) Les mesures prévues au paragraphe (3) sont prises si la Cour fédérale est convaincue que l'office fédéral, selon le cas : a) a agi sans compétence, outrepassé celle-ci ou refusé de l'exercer; b) n'a pas observé un principe de justice naturelle ou d'équité procédurale ou toute autre procédure qu'il était légalement tenu de respecter; c) a rendu une décision ou une ordonnance entachée d'une erreur de

	droit, que celle-ci soit manifeste ou non au vu du dossier;
(d) based its decision or order on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it;	d) a rendu une décision ou une ordonnance fondée sur une conclusion de fait erronée, tirée de façon abusive ou arbitraire ou sans tenir compte des éléments dont il dispose;
(e) acted, or failed to act, by reason of fraud or perjured evidence; or	e) a agi ou omis d'agir en raison d'une fraude ou de faux témoignages;
(f) acted in any other way that was contrary to law.	f) a agi de toute autre façon contraire à la loi.
Defect in form or technical irregularity	Vice de forme
(5) If the sole ground for relief established on an application for judicial review is a defect in form or a technical irregularity, the Federal Court may	(5) La Cour fédérale peut rejeter toute demande de contrôle judiciaire fondée uniquement sur un vice de forme si elle estime qu'en l'occurrence le vice
(a) refuse the relief if it finds that no substantial wrong or miscarriage of justice has occurred; and	n'entraîne aucun dommage important ni déni de justice et, le cas échéant, valider la décision ou l'ordonnance entachée du
(b) in the case of a defect in form or a technical irregularity in a decision or an order, make an order validating the	vice et donner effet à celle-ci selon les modalités de temps et autres qu'elle estime indiquées.

decision or order, to have effect from any time and on any terms that it considers appropriate. [...]	
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