

Federal Court



Cour fédérale

Date: 20251021

Docket: T-2165-25

Citation: 2025 FC 1710

Vancouver, British Columbia, October 21, 2025

PRESENT: Madam Associate Judge Catherine A. Coughlan

BETWEEN:

SAHTU DIVISIONAL EDUCATION COUNCIL

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicant, Sahtu Divisional Education Council, is an education authority created under the Northwest Territories *Education Act*, SNWT 1995, c 28, and is responsible for the delivery of kindergarten to grade 12 programs in five communities in the Sahtu Region of the Northwest Territories. The Applicant filed eight Notices of Application (NOA) seeking judicial review of decisions made by Indigenous Services Canada (ISC) denying funding requests made under Jordan's Principle. That principle was established by an order of the Canadian Human Rights

Tribunal (CHRT) and is intended to ensure substantive equality in respect of the delivery of services to Indigenous children.

[2] On this motion and in motions filed on each of Court File Nos. T-2269-25, T-2271-25, T-2295-25, T-2297-25, T-2298-25, T-2382-25, and T-2539-25, the Respondent, Attorney General of Canada, moves to strike the NOAs on the basis of prematurity; the Respondent says that the administrative appeal processes established by ISC are still underway and ISC has not yet rendered decisions on the appeals filed by the Applicant in all eight requests. The Respondent argues that only when the appeal decision is issued, can the Applicant proceed to this Court.

[3] The Applicant opposes the motions to strike and argues that the applications are not bereft of any chance of success as asserted by the Respondent because they are not premature.

[4] For the reasons set out more fully below, I am satisfied that the motions must be granted and the NOAs filed in this matter and in each of the other Court files shall be struck without leave to amend.

II. Background

[5] While the parties filed separate motion records for each of the eight files, the evidence and arguments advanced on each are identical. The only difference amongst the eight is the nature of the funding request and the dates of the challenged decisions. As counsel advanced only one argument at the hearing of the motions, and little reference was made to the individual circumstances of each application, identical reasons will be issued on each of the eight files with the only difference being the specific funding request set out at paragraphs 6-9 herein.

[6] On June 12, 2023, the Applicant applied for Jordan's Principle funding from ISC to establish a more robust breakfast program. That request was approved on July 6, 2023.

[7] On December 2, 2024, the Applicant submitted a renewal application to fund the breakfast program for the 2024/2025 school year. On May 29, 2025, ISC notified the Applicant that the renewal request was denied (Denial Decision).

[8] On June 25, 2025, the Applicant submitted an appeal of the Denial Decision through ISC's internal Jordan's Principle appeals process.

[9] On June 27, 2025, the Applicant filed the within Notice of Application seeking judicial review of the Denial Decision.

[10] At the time of hearing, ISC had not issued a decision in the internal appeals process.

III. Relevant Legal Principles

[11] As a rule, applications for judicial review can be brought only after the administrative decision-maker has made its final decision: *Forner v Professional Institute of Public Service of Canada*, 2016 FCA 35 at paras 11-14. This rule, frequently referred to as the doctrine of exhaustion, ensures that administrative processes are permitted to run their course to a final decision without judicial interference.

[12] By virtue of its plenary jurisdiction to restrain the misuse or abuse of its processes, the Court has jurisdiction to strike a notice of application. The threshold for striking is high and the moving party bears a heavy onus to establish that the notice of application is "so clearly improper as to be bereft of any possibility of success." The moving party must demonstrate an obvious or

fatal flaw that strikes at the root of the Court's power to entertain the application: *David Bull Laboratories (Canada) Inc v Pharmacia Inc*, 1994 CanLII 3529 (FCA), [1995] 1 FC 588 (CA); *Canada (National Revenue) v JP Morgan Asset Management (Canada) Inc*, 2013 FCA 250 at paras 47-48 [*JP Morgan*].

[13] An applicant's failure to exhaust all the adequate remedial remedies available to them is such a fatal flaw that, absent exceptional circumstances, justifies a preliminary dismissal of the application: *Canada (Border Services Agency) v C.B. Powell Limited*, 2010 FCA 61 at para 31 [*C.B. Powell*]. This rule recognizes that judicial review offers remedies of last resort, and premature recourse to the Court can frustrate specialized statutory schemes enacted by Parliament and ultimately, cause delay: *JP Morgan* at paras 84-85.

[14] In *Wilson v Atomic Energy of Canada Limited*, 2015 FCA 17 at para 33 [*Wilson*], the Federal Court of Appeal observed that "[t]he force and pervasiveness of the general rule against premature judicial reviews and the need to discourage premature forays to reviewing courts means that the exceptions to the general rule are most rare and preliminary motions to strike are regularly entertained" [emphasis added]. More recently, in *Dugré v Canada (Attorney General)*, 2021 FCA 8 at para 37 [*Dugré*], the Federal Court of Appeal confirmed the non-availability of interlocutory relief is next to absolute, noting that "[a] less stringent criterion would only encourage premature forays into courts and a resurgence of the ills identified in *C.B. Powell*." The Court went on to caution that "recent attempts by the Federal Court to restate the settled test by refining the criteria for exceptions are ill-advised and should not be viewed as authoritative.... Although well-intentioned, these attempted restatements only serve to muddy the waters and compromise the rigour of the principle of non-interference."

[15] Accordingly, absent exceptional circumstances, courts should not interfere with ongoing administrative processes until they are completed, or until the available, effective remedies are exhausted: *C.B. Powell* at para 31.

[16] As to what amounts to exceptional circumstances, the Federal Court of Appeal instructs that very few circumstances qualify as “exceptional” and the threshold for exceptionality is high. “Concerns about procedural fairness or bias, the presence of an important legal or constitutional issue, or the fact that all parties have consented to early recourse to the courts are not exceptional circumstances allowing parties to bypass an administrative process, as long as that process allows the issues to be raised and an effective remedy to be granted”: *C.B. Powell* at para 33. Exceptional circumstances arise when public law values, normally supporting deference to internal processes, are outweighed, or when the effect of delay is immediate and significant: *Wilson* at para 33.

[17] As to the availability of motions to strike, the Federal Court of Appeal urges parties to raise potential bars to judicial review “at the earliest opportunity” to save resources including judicial resources: *Lin v Canada (Public Safety and Emergency Preparedness)*, 2021 FCA 81 at para 7 and para 9 [*Lin*].

IV. Preliminary Issue—Admissibility of Affidavit Evidence

[18] In its responding motion record, the Applicant filed three affidavits:

- (a) Affidavit of Danyla Cosme sworn August 26, 2025 (Cosme Affidavit), attaches the Denial Decision and correspondence between ISC and counsel for the Applicant concerning the status of the specific appeal. The Applicant claims that the Denial Decision and earlier correspondence is referred to in the Application, and the later

correspondence (post-dating the Application) is referred to in the Applicant's Draft Amended Application. This evidence, the Applicant asserts, is directly relevant to the adequacy of the alternative process raised by the Respondent.

- (b) Affidavit of Danyla Cosme sworn August 26, 2025 (Second Cosme Affidavit), appends documents providing information about the structure of Jordan's Principle, applicable policies, and decision-making at ISC. The Applicant claims these facts should be non-controversial and are directly relevant to the adequacy of the alternative process raised by the Respondent. At the hearing of the motions, counsel for the Applicant acknowledged that some of the exhibits to the affidavit are hearsay.
- (c) Affidavit of Jasmine Kaur affirmed August 27, 2025, provides further instances of ISC delays. The Applicant claims that the evidence is directly relevant to the adequacy of the alternative process raised by the Respondent.

[19] Apart from the Cosme Affidavit that appends the Denial Decision, which is referred to in the NOAs, the Respondent objects to the admission of the affidavits into evidence.

[20] As a general rule, affidavits are not admissible on a motion to strike an application for judicial review. The rationale for the rule is that a respondent bringing such a motion must identify an obvious and fatal flaw in the notice of application. A flaw that can only be shown with the assistance of affidavit evidence is not obvious: *JP Morgan* at paras 51-52.

[21] At the same time, however, a notice of application may not be struck out as premature unless the Court is satisfied that there is indeed an alternative form of recourse that is adequate and

effective: *JP Morgan* at para 91. Thus, the Court has previously considered affidavit evidence on motions to strike where the basis for the motion is the existence of an adequate alternative remedy: *David Suzuki Foundation v Canada (Health)*, 2018 FC 380 at para 135 (CanLII); *Rose v Canada (Attorney General)*, 2011 FC 1495 at paras 3 and 28-34 (CanLII).

[22] Here, the Respondent argues that this line of jurisprudence has no application, and the evidence should be excluded because the Respondent has not asked the Court to decline jurisdiction in favour of another remedy in a different forum. Rather, the Respondent seeks to strike the NOAs because they are premature and to permit the internal appeals process to conclude.

[23] In making this submission, the Respondent argues that the Applicant has reframed its position and the relief it seeks in order to have the Court take jurisdiction and dismiss the motion.

[24] In response, the Applicant argues that there is no blanket prohibition on the use of affidavit evidence and while the facts can be found on the face of the NOAs, the evidence is useful. In particular, the Applicant says that the evidence shows that the appeals process does not provide an adequate remedy. For example, the Second Cosme Affidavit suggests that the appeals process is “opaque” in so far as ISC has made unilateral changes to the appeals process making it less transparent.

[25] Further, the Applicant argues that because there is no statutory framework supporting Jordan’s Principle funding, the admission of the evidence outlining the appeals process is necessary.

[26] From my review of the evidence, I find that it is overbroad and largely unnecessary. Indeed, as the Applicant conceded, some of it is hearsay. That aside, I am satisfied that the interests of

justice support the admission of the Applicant's affidavits to the extent that they provide background information or address the appeals process.

V. Position of the Parties

A. *Respondent's position*

[27] The Respondent argues that the application must be struck because it is premature, and the administrative appeals process has not yet run its course as required by *C.B. Powell*. Before me, the Respondent argued that the Applicant appears to invite the Court's supervision of the administrative organization at every stage, whether at denial or on appeal, which, the Respondent asserts, is not the proper role of the Court.

[28] Further, the Respondent submits that the administrative appeal provides an adequate and effective recourse. Allowing judicial review at this stage would fragment the administrative process and lead to unnecessary costs and delays, which the Federal Court of Appeal instructs against: *C.B. Powell* at para 32. The Applicant's dissatisfaction with the process, or its view that it may be flawed, does not, the Respondent says, justify bypassing the administrative appeals regime; rather, such issues must first be considered within the administrative regime itself.

[29] Further, the Respondent argues that the circumstances do not meet the high threshold for exceptional departure from the general rule. While acknowledging that Jordan's Principle funding requests are important, the Respondent notes that importance alone does not constitute exceptionality: *Lin* at para 6. In any case, the Respondent submits that the consequences of the Denial Decisions are not so "immediate and radical" that they call into question the rule of law: *Dugré* at para 35.

[30] The Respondent further contends that while the Applicant complains of delays within the administrative process, the fact that eight decisions must be reviewed justifies the time required to review all of them. In any case, concerns about delay should be addressed at the merits stage of the judicial review, not through interlocutory intervention.

[31] Finally, the Respondent notes that the absence of a statutory framework does not make this process unique, as other federal bodies operate without one, and this does not justify court intervention.

B. *Applicant's position*

[32] The Applicant acknowledges that recourse exists elsewhere but argues that the Court cannot strike a judicial review unless it is certain that (a) the recourse is adequate and effective (b) there are no exceptions that fit within the circumstances: *JP Morgan* para 91; *Bearspaw First Nation v Lefthand*, 2025 FCA 56 at para 9. Here, the Applicant asserts that the appeals process is neither adequate nor effective because it is not expeditious, and it is not an appropriate forum.

(1) Is the administrative appeals process adequate?

[33] The Applicant argues that ISC has a 30-day service standard for addressing appeals, but this standard is routinely breached. Indeed, the Applicant argues that appeal decisions can frequently take several months to issue, far beyond the stated standard. As an example, the Applicant points to *Isaac v Canada (Attorney General)*, 2025 CanLII 5805 (FC) [*Isaac*], where the delay between the funding request and appeal decision was approximately four months, while other Jordan's Principle appeals have taken even longer.

[34] These delays, the Applicant argues, are particularly problematic given the purpose of Jordan’s Principle funding and the CHRT’s repeated emphasis on timeliness. The Applicant notes that the CHRT has rejected ISC’s attempts to replace clear deadlines with vague standards such as “without unreasonable delay”: *First Nations Child & Family Caring Society of Canada and Assembly of First Nations v Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada)*, 2025 CHRT 6 at para 60 (CanLII).

[35] As a result of the delays, applicants are forced either to forgo essential services or to locate alternative funding sources, contrary to the CHRT’s orders.

[36] Finally, the Applicant stresses that ISC has not disclosed backlog levels, timelines, or staffing information, despite repeated requests for this information. This lack of transparency, the Applicant argues, should leave the Court with significant uncertainty about whether the internal appeals process is adequate.

(2) Is the appeals process the appropriate forum?

[37] Further, the Applicant argues that the administrative appeals process is inadequate. For example, ISC introduced a new process in 2022 intended to enhance transparency and independence but has reverted to the old model where final decisions rest with the Senior Assistant Deputy Minister. The Applicant asserts that this change in the process was not publicly disclosed and only became apparent in the context of other litigation, including *Cully v Canada (Attorney General)*, 2025 FC 1132 at para 1 [*Cully*] and *Powless v Canada (Attorney General)*, 2025 FC 1227 at para 27.

[38] The Applicant argues that this change highlights a deeper structural problem: in the absence of a statutory regime, ISC has complete discretion to alter its appeals process without transparency or external review. While the CHRT offers limited oversight, the Applicant says that it is slow, reactive, and unavailable as a direct recourse to litigants. In consequence, only this Court can provide effective relief. Without intervention, the Applicant argues, school programs will be cut by the end of 2025, with lasting harm, all of which undermines Jordan's Principle.

[39] The Applicant further notes that this Court has previously overseen Jordan's Principle cases before an appeal decision was rendered, citing both *Cully* and *Isaac* as examples. Importantly, the Applicant notes that the Court is the only forum able to grant interlocutory relief, as in *Isaac*. Accordingly, ISC's administrative appeals process cannot be considered an adequate alternative remedy.

(3) Are there any exceptional circumstances?

[40] The Applicant argues that this case may involve "exceptional circumstances" justifying judicial intervention despite prematurity, because the process engages public law values including accountability and transparency.

[41] First, the Applicant notes that the administrative appeals process is non-statutory, allowing ISC to change key elements—including the identity of the decision-maker—without notice, undermining accountability and predictability. This absence of a legislative framework strengthens the need for Federal Court oversight, as concerns about separation of powers are less relevant.

[42] Second, transparency, a core public law value, is also lacking. The process is opaque, with unclear timelines and decision-making information, limiting oversight and public confidence.

[43] Finally, Jordan's Principle involves urgent and important rights, particularly for First Nations children in the Sahtu Region of the Northwest Territories, requiring timely intervention. As there is no existing jurisprudence on prematurity in this context, Federal Court oversight is required.

VI. Discussion

[44] The controlling issue on this motion is the question of prematurity; it is, in my view, the "knockout punch" in this case. Because the Applicant filed the within application for judicial review two days after submitting an internal appeal and without awaiting a final decision, there can be little doubt that the matter was still in the administrative process. Without a final appeal decision, the application is premature and subject to the presence of any exceptional circumstances, lacks any possibility of success: *JP Morgan* para 47.

A. *Are there any exceptional circumstances that warrant judicial intervention?*

[45] The Applicant invokes the importance of the Jordan's Principle funding regime as an exceptional circumstance. However, while there is no doubt that Jordan's Principle addresses serious matters of equity and access to care, importance is not synonymous with exceptionality. As the Federal Court of Appeal cautions, the mere importance of an issue does not itself amount to exceptional circumstances: *C.B. Powell* at para 32. Were it otherwise, applicants could routinely bypass internal appeal mechanisms as a matter of course, rendering the appeals process superfluous.

[46] The Respondent similarly acknowledges the significance of the issues but argues that interlocutory decisions are rarely so “immediate and radical” as to call into question the rule of law: *Dugré* at para 35. This is not such a case. Nor has the Applicant argued otherwise.

[47] With respect to the Applicant’s complaints about delays in the administrative process, I am satisfied that those concerns are better addressed at the merits stage of judicial review rather than by interlocutory intervention.

[48] While the Applicant highlights the absence of a statutory framework and what it describes as an opaque appeal process, I am not persuaded that this amounts to exceptional circumstances. Indeed, I accept the Respondent’s position that other federal bodies operate and make decisions that are subject to judicial review without a statutory framework. That alone, does not render this process unique nor justify judicial intervention at this stage. This determination does not diminish the Applicant’s concerns about the opacity of the process but merely acknowledges that the proper place to raise those concerns is at the merits of the judicial review on a final decision.

[49] Finally, the Applicant urges the Court to supervise the administrative appeals process by allowing the application to proceed in step with the internal appeal. This parallel process, the Applicant says, would allow it to seek interlocutory orders as was done in *Isaac*. That aside, I am not persuaded that that is the proper role of the Court on judicial review. Rather, judicial review offers remedies of last resort. Owing to the deference to be paid to administrative decision-makers, judicial review is limited to assessing the lawfulness of the administrative decision-maker’s decision; it is not an appeal *de novo* nor can the Court substitute its own decision for that of the administrative decision-maker. The jurisprudence of this Court and the Federal Court of Appeal support judicial respect for administrative decision-makers, who, like judges, have

decision-making responsibilities to discharge: *C.B. Powell* at para 32, citing *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 48. Supervision by this Court would necessarily run counter to judicial respect for administrative decision-makers.

B. *There is effective recourse elsewhere*

[50] The Applicant argues that the Court must be certain that there is effective and adequate recourse elsewhere before striking the application. The difficulty with the Applicant's position and the various arguments advanced concerning the adequacy and effectiveness of the administrative appeals process is that it did avail itself of the administrative appeals process on June 25, 2025, but two days later filed the within judicial review. In short, the Applicant made no effort to exhaust the appeals process before coming to the Court. Indeed, the fact that the Applicant filed an appeal undercuts its arguments that the process is inadequate or ineffective. The Applicant simply did not wait for the process to conclude before coming to the Court for relief. I am satisfied that the Applicant filed the NOA in order to bring an interlocutory motion for relief as was done in *Issac*.

[51] However, it is noteworthy that in both *Cully* and *Isaac*, at the time those matters came on before the Court, the administrative appeals process had been completed. Here, the Applicant provides no examples where the internal appeals process had not been exhausted prior to coming before the Court. Rather, the Applicant seeks judicial review before the administrative appeal has been concluded and within days of filing that internal appeal. These circumstances do not permit the Court to conclude that there is no adequate alternative recourse.

C. *The recourse is adequate and effective*

[52] The Applicant further argues that the Jordan's Principle appeals process is slow and risks interrupting essential funding for vulnerable children. However, as the Respondent notes, the delays are at least partly attributable to the complexity of managing multiple applications and that such matters are best addressed within the internal process before engaging the Court. I agree. In my view, the internal appeals process provides an effective and adequate process.

VII. Conclusion

[53] For the reasons above, I am satisfied that the Notice of Application suffers from an obvious and fatal flaw—it is premature. The Applicant initiated an internal appeal and in the absence of exceptional circumstances that would permit the Court to depart from the doctrine of exhaustion, that process must be left to run its course. Allowing the application to proceed would undermine the appeals process. The motion to strike the Notice of Application must be granted.

VIII. Costs

[54] The Respondent seeks its costs of these motions. Indeed, the Respondent argues that because it was required to respond to eight motions rather than a test case motion, it should be awarded costs on each motion. I agree.

[55] As the successful party, the Respondent is entitled to its costs which will be calculated at the midpoint of Column III of Tariff B.

JUDGMENT in T-2165-25

THIS COURT'S JUDGMENT is that:

1. The motion is granted.
2. The Notice of Application is struck without leave to amend.
3. The Respondent shall have costs fixed at the midpoint of Column III of Tariff B.

"Catherine A. Coughlan"

Associate Judge

FEDERAL COURT
SOLICITORS OF RECORD

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