Canadian Human Rights Tribunal

Tribunal canadien des droits de la personne

Citation: 2026 CHRT 12
Date: February 10, 2026
File No.: T1340/7008

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 and Northern Affairs Canada)

Respondent

- and -

Chiefs of Ontario

- and -

Nishnawbe Aski Nation

- and -

Amnesty International

- and -

Chippewas of Georgina Island

- and -

Taykwa Tagamou Nation

Interested parties

Ruling

Members: Sophie Marchildon
Edward P. Lustig

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I. Context

[1] On December 10–12 and 15–16, 2025, the Tribunal held a cross-examination hearing in the Ontario Final Agreement motion (OFA). This joint motion arises out of an ongoing case in which the Tribunal determined that Canada engaged in systemic racial discrimination against First Nations children living on reserves and in the Yukon, not only by underfunding the First Nations Child and Family Services (FNCFS) Program but also through the way in which it was designed, managed, and controlled.

[2] As a result, the Tribunal ordered Canada to cease its discriminatory practices, implement measures to remedy the harm, prevent recurrence, and reform both the FNCFS Program and the 1965 Agreement in Ontario to reflect the findings of the Merits Decision. The Tribunal also determined that implementation would occur in phases—immediate, mid-term, and long-term relief—allowing for urgent changes first, followed by adjustments, and ultimately sustainable long-term solutions. These solutions would be guided by data collection, new studies, best practices identified by First Nations experts, the specific needs of First Nations communities and agencies, the National Advisory Committee on child and family services reform, and input from all parties involved.

[3] The Tribunal issued final, injunction-like general orders to cease the systemic racial discrimination it found and to prevent its recurrence. These important orders could not subsequently be abrogated, modified, or replaced. The Tribunal also issued a series of rulings providing immediate and mid-term relief, as well as final orders concerning compensation. It retained jurisdiction to ensure it could make long-term, sustainable orders once data collection and new studies were completed. This approach was requested by First Nations, who argued that updated information was necessary to inform long-term relief requests in accordance with best practices benefiting First Nations children at the time of the Merits Decision.

[4] In 2018 CHRT 4, the Tribunal found that it had entered the long-term remedy phase.

[5] In 2022 CHRT 8, the Tribunal made important long-term orders, on consent of the parties, regarding prevention services and funding.

[6] In 2023 CHRT 44, the Tribunal made final orders approving one of the largest settlement agreements on compensation in Canadian history for harms committed by Canada against First Nations children and families.

[7] On July 11, 2024, the Chiefs of Ontario (COO), the Nishnawbe Aski Nation (NAN), the Assembly of First Nations (AFN), and Canada announced a draft Final Agreement (the "national agreement").

[8] On October 9 and 10, 2024, respectively, the NAN Chiefs-in-Assembly and the Ontario Chiefs-in-Assembly ratified the national agreement at their Special Chiefs Assemblies.

[9] On October 17, 2024, at an Assembly of First Nations (AFN) Special Chiefs Assembly held in Calgary, the national agreement was put to a vote by the First Nations Chiefs-in-Assembly and was rejected.

[10] In November 2024, at the COO's Annual General Assembly, the Ontario Chiefs-in-Assembly mandated the COO to pursue an Ontario-specific agreement.

[11] On February 10, 2025, after five weeks of negotiations, the COO, the NAN, and Canada reached a provisional Ontario Final Agreement (OFA) and a provisional Trilateral Agreement.

[12] On February 25 and 26, 2025, the provisional OFA and the provisional Trilateral Agreement were ratified by the NAN Chiefs-in-Assembly and the Ontario Chiefs-in-Assembly, respectively.

[13] On February 26, 2025, the Ontario Chiefs-in-Assembly passed Resolution #25/02S affirming that they had expressed their will to move ahead with the reforms outlined in the OFA and the Trilateral Agreement. Resolution #25/02S also called on the other parties to the Tribunal proceedings to refrain from interfering with the approval or implementation of the OFA.

[14] On March 7, 2025, the COO and the NAN brought a joint motion for approval of the Final Agreement on Long-Term Reform of the First Nations Child and Family Services

Program in Ontario (the "OFA") and the Trilateral Agreement in Respect of Reforming the 1965 Agreement (the "Trilateral Agreement") (the "OFA Joint Motion"). According to the COO and the NAN, the OFA and the Trilateral Agreement represent the collective expression of the self-governance and self-determination rights of the 133 First Nations in Ontario through the COO and the NAN. If approved, both agreements would apply only to First Nations and FNCFS agencies within Ontario and would impact First Nations children, youth, and their families in Ontario.

[15] The OFA Tribunal hearing is scheduled to conclude on February 27, 2026, with February 26–27, 2026, reserved to hear final arguments from the parties.

[16] The cross-examination hearing was recorded, and the recordings were provided to the parties at the conclusion of the hearing.

[17] On January 8, 2026, the COO, on behalf of the Moving Parties, filed the transcripts with the Tribunal, indicating that some portions of the proceeding's audio were of insufficient quality to permit transcription [capitalization consistency]. In particular, Tab 3 (Transcript for December 10, 2025, Part 2 – Grand Chief Abram and Finn Simard) and Tab 7 (Transcript for December 12, 2025, Part 2 – Duncan Farthing-Nichol) contain numerous inaudible sections, including the redirect examination of Grand Chief Abram, the examination of Finn Simard, and the final third of the examination of Duncan Farthing-Nichol. Where it is not possible to cite the transcript due to these audio issues and a party seeks to rely on the affected testimony, the COO proposed that the party reference the witness and the day of testimony instead.

II. Summary of the parties' submissions

First Nations Child and Family Caring Society (Caring Society)

[18] The Caring Society acknowledges that this technical issue is an unfortunate exception to the Tribunal Registry's otherwise excellent preservation of the record throughout this lengthy proceeding. It also notes that, given the limited time remaining before

the Moving Parties' filing deadline, this correspondence and the proposed process set out below are being provided without an opportunity to circulate them among the other parties.

[19] The Caring Society submits that as stated in the COO's correspondence, the missing audio affects portions of the testimony of Duncan Farthing-Nichol and Grand Chief Abram, as well as the entirety of the cross-examination of Finn Simard. The majority of the missing segments arise from the Caring Society's cross-examination of witnesses, with the result that any resulting prejudice falls more heavily on the Caring Society.

[20] The Caring Society acknowledges that transcripts are not always necessary or produced in human rights proceedings and that it is often sufficient to refer to witness testimony without a transcript. However, in this instance, all participants, including the Tribunal, proceeded on the assumption that transcripts would be available. This expectation likely affected the standard of note-taking across all parties, particularly given that this is a systemic case involving evidence that is more detailed and technical than in many other proceedings.

> The Caring Society submits that the COO's proposal contemplates that written submissions will cite the name of the witness affected by the audio issue and the date of their testimony. It is presumed that any reliance on testimony affected by the audio issue would be identified in the same manner during oral submissions. The Caring Society agrees with this approach as an initial step and further suggests that the approximate time of the testimony be noted. A process must then be available to address any disagreement regarding the cited testimony, should one arise. The Caring Society's position is that this process should be established in advance of submissions being made and therefore proposes the following:
>
> For written submissions:
>
> Any party raising an issue with the accuracy of a reference to evidence affected by the audio issue in another party's written submissions will give notice of that objection within three business days of the submission in question having been filed, with a copy to the Tribunal.
>
> If such an objection is made in writing, the filing party will produce the notes it relies upon with respect to the cited testimony within two business days.
>
> If the parties can resolve the issue by reference to the notes, those notes will be entered into the record on consent, and the filing party will have leave to

> amend its reference to the evidence in its written submissions within two business days of the notes being produced.
>
> If the disagreement cannot be resolved between the parties based on the notes produced, the issue will be directed to the Panel for determination, including the possibility that the witness will be recalled.
>
> For oral submissions:
>
> Any party raising an issue with the accuracy of a reference to evidence affected by the audio issue in another party's oral submissions will make an oral objection as soon as possible.
>
> If such an objection is made, the hearing will be briefly adjourned to allow the party making submissions to provide its notes to the objecting party and for the parties to confer briefly based on their notes before returning to address the matter before the Panel.
>
> If the parties can resolve the issue by reference to the notes, those notes will be entered into the record on consent, with any revisions to the submission noted.
>
> If the disagreement cannot be resolved between the parties based on the notes produced, the issue will be directed to the Panel for determination, including the possibility that the witness will be recalled.

[21] The Caring Society's position is that any process for addressing prejudice arising from the audio issues affecting the above-named witnesses must be resolved before the Panel can rely on written submissions. The Caring Society acknowledges that the Moving Parties' submissions are due on January 16, 2026, and that Canada, supported by the COO and the NAN, is seeking an expedited hearing. The Caring Society will make best efforts to accommodate this objective. However, given the importance of ensuring the accuracy of the evidentiary record and maintaining procedural fairness, the Caring Society reserves the right to seek an extension of the written submissions filing deadline to address issues arising from testimony affected by the audio problems.

[22] The Taykwa Tagamou Nation (TTN) and the Chippewas of Georgina Island (CGI), as interested parties, support the proposal put forward by the Caring Society in their email dated January 12, 2026.

The Moving Parties

[23] The Moving Parties submit that there is no procedural unfairness arising from the absence of audio recordings and transcripts for a portion of the December 2025 examinations. Both Panel members were present for the entirety of the examinations and heard the testimony firsthand, as did all counsel.

[24] Any assumption that audio recordings and transcripts would be available does not relieve the parties of their responsibility to take notes during examinations. Audio issues have occurred previously, as noted by counsel for the Caring Society during the December 2025 examinations. All parties should therefore have anticipated this possibility and were responsible for taking their own notes.

[25] The Moving Parties submit that any prejudice is shared equally among all parties and that, contrary to the Caring Society's submissions, any prejudice resulting from the lack of audio recordings and transcripts is shared equally among all parties, as all rely on the same testimony. In any event, any such prejudice is limited, given that the Panel was present during the examinations and heard all testimony firsthand.

[26] The Moving Parties argue that the Caring Society's proposed process for disputing the accuracy of testimony affected by the audio issue is overly complex and would result in significant delay to the hearing process. In the interests of proportionality, efficiency, and fairness, the Moving Parties are prepared to proceed as proposed by the COO at the outset.

[27] Where it is not possible to cite a transcript due to audio issues and a party seeks to rely on that portion of the testimony, the party may reference the witness and the day of testimony.

[28] If another party disputes the accuracy or relevance of that non-transcribed evidence, the issue can be raised in responding written submissions or oral submissions, as applicable. The Panel can then rule on the evidence, having been present for all examinations and having heard the testimony directly. The Panel may resolve any such disputes based on its own notes and recollection.

[29] The Moving Parties cannot agree to produce their notes, which form part of their litigation brief.

[30] Similarly, the Moving Parties do not agree with recalling witnesses, as doing so would be disproportionate, risk conflicting testimony, and cause further delay.

[31] The Moving Parties agree that reliance on affected testimony should be identified in oral submissions in the same manner as in written submissions.

[32] With respect to the Caring Society's suggestion that approximate times be included when referencing affected testimony, this represents an unreasonable level of specificity and would be of limited assistance. The Moving Parties can, however, commit to indicating whether the testimony occurred in the morning or afternoon of the relevant hearing date.

[33] The Caring Society has indicated that it reserves the right to seek an extension of its January 30, 2026, filing deadline in relation to these transcript issues. The Moving Parties' position is that any such extension would prejudice them, given that they have relied on the existing schedule and arranged to obtain instructions in advance of their reply submissions deadline of February 6, 2026.

[34] Any alteration to the written submission deadlines could also affect the scheduled oral hearing dates, which the Moving Parties are keen to avoid given the disruption such changes would cause. The oral hearing is scheduled one year after the filing of the motion, and the Moving Parties do not agree that the matter has proceeded on an expedited basis.

[35] The Moving parties submit that there is no reasonable or principled basis for an extension. All parties face the same challenges arising from incomplete transcripts, and proceeding without transcripts is a normal procedure before the Tribunal.

[36] The Moving Parties are available for an urgent case management conference should the Panel consider it helpful. However, given the upcoming filing deadline of January 16, 2026, the Moving Parties would prefer that these issues be resolved in writing and as expeditiously as possible.

[37] Canada further requested that the Tribunal issue a direction in accordance with the Joint Moving Parties' submissions, as set out in the COO's email dated January 14, 2026.

[38] The Tribunal provided the video and audio links for the December 2025 hearing recordings and advised the parties of its intention to address the recording issue and, as a preliminary step, to resolve it to the extent possible. With respect to portions that were inaudible, the parties were asked to confirm whether they had attempted to slow the playback speed to 0.25, as this might improve clarity.

[39] The Tribunal was actively exploring potential solutions to address the recording issue; however, it was not possible to fully resolve the matter by the January 16, 2026, deadline for written submissions. Accordingly, the Tribunal did not require the Moving Parties to file their factums the following day. The Tribunal was of the view that any short delay could be accommodated and that the February 26–27, 2026 hearing dates could be preserved.

[40] The COO and the NAN acknowledged receipt of the video and audio links sent by the Tribunal. They confirmed that they, together with the transcriptionists they retained, had attempted playback at 0.25 speed; however, this did not resolve the inaudibility issues.

[41] Notwithstanding these challenges, the COO and the NAN indicated that they were prepared to file their factum on January 16, 2026, as planned. References to inaudible portions of the testimony in their written submissions were kept to a minimum and, where such references remained, the COO and the NAN indicated whether the testimony occurred during the morning or afternoon session, as well as time stamps where possible.

[42] The COO and the NAN further advised that, should the Tribunal subsequently identify a solution or issue directions regarding how parties should address inaudible testimony, they would promptly file an amended factum. Given the length of the factum, the COO and the NAN indicated that they proceeded with filing in order to ensure that all parties and the Tribunal had adequate time to review it.

[43] The COO and the NAN filed their submissions as planned on January 16, 2026. The AGC filed its submissions three days later, on January 19, 2026.

[44] Following receipt of the parties' submissions on this issue, the Tribunal held a case management conference, primarily to address another matter, and agreed to continue discussions regarding the recordings and transcripts issue during that conference.

[45] The Caring Society indicated that it had spent most of the week attempting to resolve this issue and continued to do so. In light of these efforts, the Caring Society requested an extension of time to file its submissions on the OFA motion to February 6, 2026, or, in the alternative, to February 2, 2026, given that the AGC filed its submissions late.

[46] The Moving Parties submitted that there was no unfairness and that any delay would be prejudicial to them, particularly as they had set aside time to prepare their reply submissions.

[47] The Panel agreed to receive the case law relied upon by the parties by the end of the calendar day without any additional submissions and indicated that it would rule shortly thereafter.

[48] The Panel also agreed to receive a report from the Caring Society by the end of the week regarding its ongoing efforts to have the inaudible recordings restored. At the end of the week, however, the Caring Society advised the Tribunal that those efforts had, to date, yielded no results.

[49] Upon consideration of the parties' written and oral submissions, including those made during the case management conference, as well as the case law submitted to the Tribunal, the Tribunal granted a three-day extension to the Caring Society and to the TTN and the CGI, following the TTN and the CGI's request for an extension to February 2, 2026, to file their written submissions. This extension reflected that the AGC also took three additional days to file its submissions and accounted, in part, for the difficulties with the transcripts and recordings. The Tribunal also extended the Moving Parties' reply deadline from February 6 to February 9, 2026.

[50] On January 27, 2026, the Tribunal wrote to the parties indicating that it was in the process of drafting a ruling on the issue of missing transcripts and the partial absence of adequate recordings.

[51] Given that the deadlines of February 2 and 9, 2026, were fast approaching, and in order to ensure that written submissions reflect the first stage of the process the Tribunal intends to adopt, the Tribunal directed as follows:

[52] At the first stage of this process, disputes relating to non-transcribed evidence, including issues arising from incomplete or inadequate recordings, must be raised clearly and in detail in written submissions. This direction applies to the responding submissions of the Caring Society and of TTN and CGI, as well as to the reply submissions of the Moving parties.

[53] The second stage will follow the filing of the parties' written submissions, as explained below.

III. Applicable law

[54] There is no statutory requirement under the *Canadian Human Rights Act (CHRA)* to provide hearing transcripts to the parties. The *CHRA* does not contain any provision that requires: audio recording, video recording, or verbatim transcripts of hearings conducted under the *CHRA.*

[55] Instead, the *CHRA* focuses on procedural fairness, not the specific means of preserving the record:

[56] Section 48.9(1) of the *CHRA* provides that proceedings before the Tribunal shall be conducted as informally and expeditiously as the requirements of natural justice and the rules of procedure allow.

[57] This principle is reflected in the Tribunal's Rules of Procedure. This case was initiated under Rules of Procedure (03-05-04) (the "old Rules") and therefore continues to be governed by those Rules:

> Canadian Human Rights Tribunal rules of procedure (03-05-04):
>
> 1(1) These Rules are enacted to ensure that:
> (a) all parties to an inquiry have the full
> and ample opportunity to be heard;

(b) arguments and evidence be disclosed and presented in a timely and efficient manner; and
(c) all proceedings before the Tribunal be conducted as informally and expeditiously as possible.
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1(2) These Rules shall be liberally applied by each Panel to the case before it so as to advance the purposes set out in 1(1).
and the new Canadian Human Rights Tribunal Rules of Procedure, 2021 SOR/2021-137:
5 These Rules are to be interpreted and applied so as to secure the informal, expeditious and fair determination of every inquiry on its merits.

[58] The new rules also clearly describe what constitutes the Tribunal's Official Record:

Content
47 (1) For each inquiry, the Registrar must keep an official record that contains
(a) the complaint;
(b) the request to institute an inquiry by the Commission;
(c) the statements of particulars and any responses or replies;
(d) any motion materials;
(e) any correspondence between the Registrar and the parties;
(f) any summaries of case management conferences;
(g) any book of authorities;
(h) any written submissions;
(i) any orders, rulings or decisions;
(j) any exhibits;
(k) any recordings of the hearing and any transcripts of those recordings; and
(l) any other documents that are designated by the Panel.

[59] While not detailed in the old rules, the Tribunal customarily records hearings (usually audio) and has done so since the beginning of these proceedings.

[60] The relevant applicable case law will be discussed in the analysis below.

IV. Analysis

[61] The Caring Society relies on the following case law: *Adebiyi v Canada (Citizenship and Immigration)*, 2023 FC 901 at paragraphs 5 and 25 to 26; *Agbon v Canada (Minister of Citizenship and Immigration)*, 2004 FC 356 at paragraphs 2 to 5; *Goodman v Canada (Minister of Citizenship and Immigration)*, 2000 CanLII 14928 (FC) at paragraphs 86 to 87; and *Arroyo Benavides v Canada (Minister of Citizenship and Immigration)*, 2006 FC 323 at paragraphs 28 to 31.

[62] The Moving parties rely on the following case law: *Canadian Union of Public Employees, Local 301 v Montreal (City),* [1997] 1 SCR 793, (CUPE) at paragraphs 72-83; *Kandiah v Canada (Minister of Employment & Immigration)*, 1992 Carswell Nat 198, [1992] F.C.J. No. 321, 141 N.R. 232 (FCA) at paragraph 7; *Millbrook First Nation v Tabor*, 2016 FC 894 at paragraphs 37-42; *R v Hayes*, [1989], 1 SCR 44 at page 48.

[63] In paragraph 73 of *CUPE*, the Supreme Court of Canada emphasized that natural justice is concerned with the fundamental requirements of procedural fairness in administrative decision-making. To address this issue, one must begin with the basic principles underlying natural justice. Justice Dussault and Professor Borgeat describe the concept in the following terms:

> It is not an easy task for the purposes of judicial review of the legality of administrative action to delimit the notion of natural justice with any precision. It embodies the “basic principles of fair procedure which are an indispensable concept and the basis of the safeguards of individual rights in our judicial system”, but has been described as a concept “sadly lacking in precision” and “not easy to define” . . .
>
> Nonetheless, the concept of natural justice does contain two fundamental universally recognized principles: first, that no man be condemned unheard (audi alteram partem), and second, that no man be judge in his own cause (nemo judex in sua causa).
>
> Administrative Law: A Treatise (2nd ed. 1990), vol. 4, at pp. 244–45.

[64] In *R v Hayes*, [1989], 1 SCR 44, (Hayes), the Supreme Court found that a new trial is not required merely because a transcript is incomplete. As a general principle, an order for a new trial will only be justified where there is a serious possibility that an error occurred

in the missing portion of the transcript, or where the omission has deprived the appellant of a meaningful ground of appeal. The SCC found the first two gaps in the transcript were conversations between the trial judge and counsel therefore this could not have prejudiced the appellant. The third gap although found problematic given a portion of the judge's charge to the jury was missing. The SCC found this did not meet the test of a serious possibility that an error occurred and that it had no doubt the judge's notes were an accurate account of the charge it gave to the jury.

[65] In *Kandiah v. Canada (Minister of Employment & Immigration)*, 1992 Carswell Nat 198, [1992] F.C.J. No. 321, 141 N.R. 232 (FCA), at paragraph 7, the Federal Court of Appeal held that the question to be answered therefore is : '' (…) whether the failure of the Refugee Division to make a verbatim record of its proceedings amounts to an error described in subs.82.3(1). Clearly, such a failure is not an error of the kind mentioned in para.(c); as clearly, it cannot be characterized either an error of law, since the law does not oblige the Refugee Division to make such a record, or as a jurisdictional error. Can it be said to amount, as Stone J.A. suggested in his reasons in *Tung*, to a failure to observe a principle of natural justice? I do not think so. The question whether or not a verbatim record of the proceedings before the Refugee Division was made or kept is not relevant to the quality of the hearing before that tribunal or of the decision it rendered. An otherwise fair hearing does not become unfair because it is not recorded; in other words, a verbatim record of the proceedings is not a condition precedent to a good trial and a good judgment''.

[66] The Supreme Court of Canada in *Canadian Union of Public Employees, Local 301 v. Montreal (City)*, 1997 CanLII 386 (SCC), [1997] 1 SCR 793 (CUPE) made further comments on the *Kandiah* and *Hayes* decisions above and their application.

[67] The Supreme Court held that the Council's failure to make a machine recording of the hearing did not breach the rules of natural justice. The Quebec Labour Code does not require hearings before the Council to be recorded, and in the absence of an express statutory obligation, the common law does not require administrative tribunals to produce verbatim transcripts or recordings of their proceedings. Traditionally, the record of an administrative decision consists of the document which initiated the proceedings and the

document containing the tribunal's adjudication and does not necessarily include the evidence adduced at the hearing or the reasons for decision.

[68] The Supreme Court stated that where no statutory right to a transcript exists, the reviewing court must determine whether the record before it is sufficient to permit meaningful appellate or judicial review. If it is, the absence of a transcript will not amount to a breach of natural justice. In this case, the affidavit evidence filed on the application for judicial review provided an adequate record to assess the Council's factual findings and to determine whether the union's challenge was well found.

[69] In *Kandiah*, the Federal Court of Appeal acknowledged the concern underlying the decision in *Tung,* that is, that an applicant may be deprived of his or her grounds of review or appeal given an absence of a transcript of what transpired at the impugned hearing. It held, however, that if the decision facing the court could be made on the basis of evidence established through other means, the principles of natural justice would not be infringed. The reviewing court should refrain from quashing the administrative order in such cases.

[70] Even in cases where the statute creates a right to a recording of the hearing, courts have found that the applicant must show a "serious possibility" of an error on the record or an error regarding which the lack of recording deprived the applicant of his or her grounds of review: *Cameron v. National Parole Board*, [1993] B.C.J. No. 1630 (S.C.), which follows *Desjardins v. National Parole Board* (1989), 29 F.T.R. 38(CUPE at, paragraph 77).

[71] The SCC found these decisions to be compatible with the test developed by the SCC in the criminal context in *R. v. Hayes*, 1989 CanLII 108 (SCC), [1989] 1 S.C.R. 44. As the SCC stated for the majority, at p. 48:

> A new trial need not be ordered for every gap in a transcript. As a general rule, there must be a serious possibility that there was an error in the missing portion of the transcript, or that the omission deprived the appellant of a ground of appeal.

[72] The Supreme Court held that the Labour Court jurisprudence is consistent with the principles set out in *Kandiah*. In those cases, the statutory appeal required the appellate tribunal to review factual findings and reweigh the evidence, a task that would be impossible

without a complete record of the testimony from the initial inquiry. Where no alternative means exist to reproduce that evidence, such cases fall within the exception identified in *Kandiah*, as the absence of a full record would substantially impair the appellate tribunal's ability to review the decision on its merits.

[73] The Supreme Court held that the decisions in *Kandiah* and *Hayes*, provide an excellent statement of the principles of natural justice as they apply to the record made of an administrative tribunal's hearing. In cases where the record is incomplete, the denial of justice allegedly arises from the inadequacy of the information upon which a reviewing court bases its decision. As a consequence, an appellant may be denied his or her grounds of appeal or review. The rules enunciated in these decisions prevent this unfortunate result. They also avoid the unnecessary encumbrance of administrative proceedings and needless repetition of a fact-finding inquiry long after the events in question have passed (*CUPE* at, paragraph 80).

[74] The Supreme Court further held that the absence of a transcript does not deny natural justice where other reliable means exist to determine what occurred at the hearing, including sworn affidavits describing the evidence relied upon by the tribunal. Unsupported assertions of a lack of evidence are insufficient, particularly where the party fails to challenge such affidavits. Finally, the Supreme Court reaffirmed the highly deferential standard applicable to administrative fact-finding, emphasizing that courts must not reweigh evidence and may intervene only where the evidence is incapable of supporting the Tribunal's conclusions.

[75] The Tribunal finds that there is no doubt that the Supreme Court of Canada's decision remains good law and continues to be relied upon by the Federal Court. While the decision's findings generally support the Moving Parties' position, the applicable principles must be applied to the specific factual and procedural context of this case. In doing so, additional considerations arise from the Federal Court's more recent application of the Supreme Court's guidance in *CUPE*, including the nuances and recognized exceptions discussed above. These considerations relate in particular to administrative tribunal proceedings that have no statutory requirement to provide recordings or transcripts, and to the manner in

which the Federal Court has interpreted the principles of natural justice and procedural fairness in that context. These considerations are discussed further below.

[76] The Moving Parties also rely on *Millbrook First Nation v. Tabor*, 2016 FC 894 (CanLII) (Millbrook), a decision of Panel Chair Marchildon in a separate matter that was upheld by the Federal Court. That case, however, is distinguishable from the present proceedings. In *Millbrook*, the applicant challenged the adequacy of the audio recording of a hearing before the Canadian Human Rights Tribunal, arguing that deficiencies in the record prevented the Federal Court from properly and fully reviewing the Tribunal's decision. Relying on *CUPE*, the applicant submitted that the absence of a reliable and complete record left the Supreme Court with no alternative but to order a new hearing. In particular, the applicant emphasized that the extent of the inaudible portions of the recording was unknown, making it impossible to determine whether the gaps were limited to isolated words or instead affected substantial portions of the evidence.

[77] The Respondent distinguished the case at hand from *CUPE*, noting that, unlike in that case where the recording was entirely blank, the hearing before the Tribunal was largely recorded and formed part of a substantial evidentiary record. She argued that any inaudible portions constituted only a minor part of the record and that the Applicant had failed to identify any specific missing evidence or to demonstrate how any gaps in the recording prejudiced Millbrook's ability to pursue judicial review. The Respondent further observed that certain portions marked as "inaudible" in the transcript were, in fact, audible when the recording was reviewed, and suggested that the deficiencies in the transcript were attributable in part to the short timeline imposed by the Applicant for its preparation.

[78] The Federal Court agreed. It found that the Applicant had not identified any specific missing evidence or established that any gaps in the recording impaired its ability to seek judicial review. The Federal Court further noted that several passages identified as "inaudible" in the transcript could be clearly heard and understood upon listening to the audio recording provided by the Canadian Human Rights Tribunal.

[79] The Federal Court acknowledged that some portions of the recording were difficult to discern and that certain sections of the transcript were marked as "inaudible." However,

it emphasized that the mere presence of inaudible passages does not, without more, establish that the Tribunal failed to hear the evidence or that its decisions were procedurally unfair.

[80] The Federal Court further observed that several portions identified as “inaudible” in the transcript were, in fact, intelligible upon review of the audio recording. As a result, the Federal Court rejected the Applicant’s submission that the absence of a complete recording prevented meaningful judicial review. In light of the otherwise extensive evidentiary record, any inaudible portions were found to be insignificant and did not impair the Federal Court’s ability to review the Canadian Human Rights Tribunal’s decisions.

[81] The Federal Court has more recently applied the *CUPE* decision to decisions of administrative tribunals and did find breaches of procedural fairness based on the specific context of the case which will be discussed in turn below.

[82] In *Adebiyi v. Canada (MCI)*, 2023 FC 901, the Federal Court reviewed a decision of the Refugee Appeal Division (RAD) that upheld the Refugee Protection Division’s (RPD) rejection of a refugee claim based on the existence of an internal flight alternative in Nigeria. On judicial review, the Federal Court found that the RAD breached procedural fairness by relying on a transcript derived from an incomplete and inaccurate recording of the RPD hearing without reviewing the full audio record.

[83] The Federal Court held that technical difficulties during the hearing impaired the parties’ ability to hear one another, and that these issues were not reflected in the transcript. The transcript also omitted portions of counsel’s submissions relevant to the internal flight alternative analysis. By relying on this deficient record, the RAD made erroneous factual findings and failed to account for the impact of the technical problems on the principal applicant’s ability to testify.

[84] The Federal Court emphasized that a full and accurate evidentiary record is essential to permit meaningful appellate and judicial review. It held that reliance on an incomplete and inaccurate transcript undermined the integrity of the refugee determination process, deprived the applicants of procedural fairness, and risked denying meaningful appeal and

judicial review rights. As a result, the Federal Court allowed the application for judicial review and set aside the decision.

[85] In *Agbon v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 356, Mr. Agbon sought judicial review of a decision of the Immigration and Refugee Board dismissing his claim for refugee protection. The Refugee Board rejected his claim on the basis of adverse credibility findings and concluded that he could have obtained safe refuge within Nigeria, rather than seeking protection in Canada.

[86] In this case, the Refugee Board's adverse credibility finding rested largely on what it characterized as a "change in emphasis" in Mr. Agbon's evidence during cross-examination. In the absence of a transcript, however, the Federal Court was unable to assess whether this credibility finding was reasonably supported by the evidence.

[87] For the same reason, the Federal Court was also unable to meaningfully review the Refugee Board's conclusion that Mr. Agbon would likely be safe if he returned to Lagos. Without a complete record of the hearing, the reasonableness of this finding could not be determined. Accordingly, the application for judicial review was allowed, and the matter was remitted for re-hearing before a differently constituted panel of the Immigration and Refugee Board.

[88] At the judicial review hearing, counsel for Mr. Agbon informed the Federal Court that a complete transcript of the Refugee Board hearing was unavailable because one of the audio recordings was blank. As a result, significant portions of Mr. Agbon's testimony were missing from the record. Counsel argued that this deficiency undermined Mr. Agbon's ability to meaningfully challenge the Refugee Board's findings, particularly those grounded in his oral evidence, and that a new hearing was therefore required.

[89] The Federal Court agreed. While the absence of a transcript does not automatically amount to a breach of procedural fairness, it may nonetheless prevent the Federal Court from properly adjudicating key issues on judicial review. Where the issue raised can only be assessed by reference to what was said at the hearing, the lack of a complete record precludes meaningful review. In such circumstances, an applicant is entitled to a new hearing, as established in : *Kandiah v. Canada (Minister of Employment and Immigration)*,

[1992] F.C.J. No. 321 (QL) (F.C.A.), (*Kandiah*); *Canadian Union of Public Employees, Local 301 v. Montreal*, 1997 CanLII 386 (SCC), [1997] 1 S.C.R. 793, (CUPE); *Goodman v. Canada (Minister of Citizenship and Immigration)*, [2000] F.C.J. No. 342 (QL) (T.D.), (Goodman). In particular, where the applicant raises an issue that can only be determined on the basis of a record of what was said at the hearing, the absence of a transcript prevents the Federal Court from addressing the issue properly: *Vergunov v. Canada (Minister of Citizenship and Immigration)*, [1999] F.C.J. No. 584 (QL) (T.D.), (*Vergunov*).

[90] In *Goodman*, the Federal Court considered the proper approach where a hearing transcript exists but contains gaps or defects. Relying expressly on the Supreme Court of Canada's decisions in CUPE and *Hayes*, the Federal Court held that transcript deficiencies do not automatically require a new hearing. Rather, the applicable test is whether the gaps or defects raise a serious possibility (not a probability) that the applicant has been denied a ground of appeal or judicial review.

[91] The Federal Court emphasized that this assessment must be conducted contextually and must take into account any other means used or available to determine what occurred at the hearing, including counsel's notes. The analysis must also consider the nature of the tribunal's decision, including whether it turned on credibility findings, factual findings, or legal interpretation, and must be undertaken separately for each ground of review advanced, as only a denied ground of review can amount to a breach of natural justice.

[92] Consistent with the Supreme Court's guidance in *CUPE* and *Hayes*, the Federal Court reiterated that not all transcript gaps will justify appellate intervention. The Federal Court identified the following non-exhaustive factors as central to determining whether transcript gaps raise a serious possibility of denying a ground of review:

> (1) the grounds for review advanced;
> (2) the importance of the impugned findings to Mr. Goodman's refugee claim;
> (3) the basis upon which the CRDD arrived at its conclusions or findings and by this I mean did the CRDD base its conclusions on findings of incredibility, or findings of fact or as a matter of legal interpretation;
> (4) what was the subject matter of the transcript gaps (was it direct evidence or cross-examination or, as in Hayes, supra, conversations between the trial judge and legal counsel as well as the judge's charge to the jury) and the

> significance of the transcript gap to the impugned findings, that is, how material was the subject matter or content of the transcript gap and what reliance did the tribunal place on it;
> (5) what other means did the tribunal use to fill the gap; and
> (6) what other means were available to the Court to determine what went on at the hearing.

[93] Applying this framework, the Federal Court found that the transcript gaps related to substantial portions of the Minister's cross-examination of Mr. Goodman. The Federal Court noted that Mr. Holland, counsel for the Minister, directly challenged Mr. Goodman on specific alleged crimes, and that no transcript existed for this critical cross-examination. As a result, the Federal Court concluded that the evidence relied upon by the tribunal was substantially derived from this unrecorded cross-examination. The missing portions were therefore crucial to the tribunal's exclusionary findings and were relied upon in a significant way.

[94] Further, the Federal Court found that the transcript gaps related to substantial portions of cross-examination that formed the evidentiary foundation for the tribunal's exclusionary findings.

[95] The Federal Court further held that counsel's notes were not an adequate substitute for a verbatim record, as they did not capture the substance of the applicant's testimony and were insufficient to permit meaningful judicial review. In these circumstances, the transcript defects raised a serious possibility that the applicant had been denied a ground of review, and the Federal Court therefore allowed the application for judicial review in part.

[96] In *Arroyo Benavides v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 323, the Federal Court considered whether an incomplete transcript of proceedings before the Immigration and Refugee Board resulted in a breach of natural justice. The applicants argued that the missing portions of the transcript were crucial to the determinative issue of state protection and that, without a complete record, the Federal Court was unable to assess whether the Refugee Board had committed a reviewable error.

[97] The Federal Court noted that the Refugee Board's decision turned on the availability of state protection, yet the portion of the transcript addressing that issue was missing. The

principal applicant was still testifying at the end of the available transcript, notwithstanding the Refugee Board's subsequent characterization of her evidence as "extremely vague."

[98] Relying on the Supreme Court of Canada's decision in *CUPE*, the Federal Court reaffirmed that the governing question is whether the record before the reviewing court permits it to properly dispose of the application for judicial review, and that defects or gaps in a transcript will justify intervention only where they raise a serious possibility that a party has been denied a ground of appeal or review.

[99] Applying the analytical framework articulated in *Goodman*, as discussed above, the Federal Court concluded that the absence of the transcript dealing with state protection rendered it impossible to assess the evidence relied upon by the Refugee Board or to determine what transpired at the hearing. The applicants were therefore denied procedural fairness. The application for judicial review was allowed, and the matter was remitted to a differently constituted panel of the Refugee Board for redetermination.

[100] Unlike the Federal Court, the Tribunal is not reviewing another decision or conducting a judicial review. However, the Federal Court's interpretation and application of Supreme Court of Canada jurisprudence, including the *CUPE* decision, to administrative tribunals informs the principle of procedural fairness that the Tribunal must follow. The Tribunal finds that the Federal Court's interpretation and test are applicable in this case and provide a detailed and helpful framework for administrative tribunals to assess how procedural fairness is to be ensured and how breaches may be avoided, particularly in contexts involving defective recordings or transcripts and their impact on both the Tribunal's decision-making and the parties' right to procedural fairness. This approach supports the case-by-case analysis adopted by the Tribunal. The Tribunal further finds that the existence of a breach of procedural fairness, and any resulting prejudice to one or more parties, must be determined having regard to the specific facts of each case.

[101] In the case at hand, the inaudible portions of the recordings are extensive. Upon reviewing the transcripts, the Tribunal has identified 643 instances in which portions of the recorded proceedings were not transcribed due to inaudibility. These instances appear in the Transcript brief containing the examinations conducted between December 10 and 15,

filed by the COO on January 8, 2026. The inaudible portions occur primarily during the cross-examinations of affiants who were called to testify, at which time opposing parties were testing the evidence before the Tribunal.

[102] The process adopted by the parties and the Tribunal was as follows: affidavits were filed; affiants were called at the request of a party; the affiants did not testify in chief beyond providing general introductions to the Panel; and the parties were then afforded the opportunity to cross-examine and re-examine the affiants.

[103] At the cross-examination hearing, the Moving Parties were represented by at least five counsel at all times, many of whom were taking notes, while the opposing parties were represented by two or three counsel. It is also true that a small number of inaudible portions relate to procedural aspects of the hearing and may have no impact on the evidentiary record, and that some inaudible portions occur during re-examinations. However, the majority of the inaudible portions occurred during the cross-examinations of affiants who were called to testify, at a time when their evidence was being tested.

[104] The Tribunal heard the evidence firsthand. However, in a case of this complexity, recordings are an important tool to supplement and complete the Tribunal Panel's notes. This is not a simple, credibility-based discrimination matter, but a complex proceeding involving extensive and technical evidence.

[105] This motion effectively seeks to bring the Tribunal's jurisdiction to an end by requesting approval of an extensive settlement agreement, described by the Moving Parties as the result of years of negotiation. Where some of the missing recordings relate to cross-examinations and re-examinations, it is not possible at this stage of the proceedings to fully assess the extent to which the inaudible portions may affect the evidentiary record, the parties, or the Tribunal's decision-making process.

[106] As mentioned above, the Tribunal has directed the parties to clearly identify the impacts of the missing transcripts on their respective positions. At the first stage of this process, disputes relating to non-transcribed evidence, including issues arising from incomplete or inadequate recordings, must be raised clearly and in detail in written

submissions. This direction applies to the responding submissions of the Caring Society and of the TTN and the CGI, as well as to the reply submissions of the Moving Parties.

[107] At this stage of the proceedings, the Tribunal is aware that the joint OFA submissions of the COO and the NAN rely, in several instances, on testimonial evidence for which no transcript exists. The Tribunal is also aware of disputes between the Caring Society, the COO, and the NAN concerning their respective recollections of certain testimonial evidence. The Tribunal has received the Caring Society's written submissions dated February 2, 2026, which indicate, for example, a disagreement regarding the substance of Mr. Duncan-Farthing Nichol's testimony in circumstances where the audio recording is not audible and no transcript is available. The Tribunal has also received the Moving Parties' reply submissions dated February 9, 2026. The AGC filed its reply submissions, and the COO and the NAN filed joint reply submissions. None of the parties raised any further issues concerning transcripts or recordings in their reply submissions. While the AGC addressed the disputed portion of Mr. Duncan-Farthing Nichol's testimony, it did not advance any additional submissions concerning transcript or recording issues.

[108] Therefore, the full impact of these circumstances is not yet known. At this stage, certain of the *Goodman* factors referenced above cannot fully inform the Tribunal's approach, as it would be premature to assess the importance of the Tribunal's eventual findings or the basis upon which the Tribunal may reach its conclusions, whether those conclusions involve findings of credibility, findings of fact, or determinations based on legal interpretation, prior to the hearing, deliberations, and decision. The Tribunal considers the entirety of the evidence in its deliberations and cannot predetermine the full impact of the missing portions of recordings and transcripts on its decision.

[109] However, factors (4) and (5) identified in Goodman assist in informing the Tribunal's preliminary approach to avoiding any potential prejudice to the parties:

> (4) the subject matter of the transcript gaps, including whether the missing portions relate to direct evidence or cross-examination, and the significance of those gaps to the findings under review, including the extent to which the tribunal relied on the missing evidence; and
> (5) the other means available to the tribunal to address or fill the gaps in the record. (emphasis added).

[110] As in *Goodman*, substantial portions of certain cross-examinations are missing as a result of corrupted audio recordings. While it is too early to determine the precise impact of those missing portions, it is reasonable to conclude that potential issues of procedural fairness may arise.

[111] Accordingly, as a second step, the Tribunal will hear concise and focused submissions from the parties on this issue during the upcoming oral arguments hearing and will determine whether further steps are required. For these reasons, the Tribunal has adopted only certain aspects of the procedural approaches proposed by the parties.

V. Order

[112] As a second step, at the beginning of the hearing scheduled for February 26-27, 2026, the parties shall clearly and concisely identify for the Tribunal any outstanding disagreements concerning the content of testimonial evidence for which recordings or transcripts are missing, as part of their oral arguments for the Tribunal's consideration. Pending completion of this second step, the Tribunal reserves the right to order any additional steps it considers necessary.

Signed by

Sophie Marchildon
Panel Chair

Edward P. Lustig
Tribunal Member

Ottawa, Ontario
February 10, 2026

Canadian Human Rights Tribunal

Parties of Record

Tribunal File: T1340/7008

Style of Cause: 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)

Ruling of the Tribunal Dated: February 10, 2026

Motion dealt with in writing without appearance of parties

Written representations by:

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