Federal Court Cour fédérale

Date: 20231227

Docket: T-1427-22

Citation: 2023 FC 1731

[ENGLISH TRANSLATION]

Montréal, Quebec, December 27, 2023

PRESENT: Madam Justice St-Louis

BETWEEN:

MARIE-CLAUDE SIOUI

Applicant

and

HURON-WENDAT NATION COUNCIL

Respondent

CORRECTED JUDGMENT AND REASONS

I. Introduction

[1] This is an application for judicial review, filed by Marie-Claude Sioui, of the arbitral award issued by Dominique-Anne Roy [the Tribunal] on June 15, 2022. The Tribunal, mandated by the parties to review the decision of the Huron-Wendat Nation Council [the Council] to terminate Ms. Sioui's employment contract, then denied Ms. Sioui's a remedy against her

termination as the Council's Chief of Staff and Communications Officer but further concluded that the Council had breached her contract in several respects.

[2] In its reasons, the Tribunal considers in particular its jurisdiction in view of the remedy sought. In particular, the Tribunal notes that a challenge regarding an aspect of the *Politique unifiée de gestion des cadres* [Unified Executive Management Policy], adopted by the Council by resolution on December 7, 2009, must be made through the mandatory private arbitration mechanism contractually agreed on by the parties, and that the decision will not be published.

[3] Before the Court, Ms. Sioui contends in particular that the Federal Court has jurisdiction to hear this application for judicial review. She argues that the Tribunal is a federal board, commission or other tribunal within the meaning of section 2 of the *Federal Courts Act*, RSC 1985, c F-7, and that the dispute concerns matters of public law. She adds that the Tribunal erred in deciding that the mandatory arbitration mechanism is private and contractual and in not allowing its decision to be published.

[4] The Council, the respondent in this proceeding, submits that the Federal Court does not have jurisdiction to hear this application because the Tribunal is not a federal board, commission or other tribunal within the meaning of the *Federal Courts Act*. It adds that, in the alternative, even if the Tribunal were to be recognized as a federal board, commission or other tribunal, the Federal Court does not have jurisdiction because the dispute relates to issues of private law.

[5] For the reasons set out below, I find that the application for judicial review does not fall within the jurisdiction of the Federal Court. In short, I conclude, first, that the Tribunal is not a federal board, commission or other tribunal within the meaning of the *Federal Courts Act* and,

second, that the Tribunal exercised private powers that cannot be subject to the Federal Court's judicial review jurisdiction. Therefore, I will dismiss the application for judicial review.

II. Background

[6] The Huron-Wendat Nation is a First Nation located on Wendake territory in Quebec. It is covered by the *Indian Act*, RSC 1985, c I-5 and administered by the Council. Ms. Sioui is a member of the Huron-Wendat Nation.

[7] On December 21, 2017, Ms. Sioui and the Council signed an initial one-year employment contract, confirming that Ms. Sioui would be serving as Political/Communications Attaché. This contract was then renewed.

[8] In June 2019, the Council gave Deloitte a mandate to assist in implementing a succession plan. Deloitte further recommended transforming the role of Political/Communications Attaché.

[9] On July 13, 2020, the Council adopted a resolution to establish the position of Chief of Staff and Communications Officer of the Office of the Grand Chief and to appoint Ms. Sioui to this new position. On July 17, 2020, the parties signed a new, indefinite-term contract that provided that Ms. Sioui would assume the duties of Chief of Staff and Communications Officer.

[10] In November 2020, a new Grand Chief was elected and sworn in. On November 23, 2020, citing an administrative restructuring, the Council adopted a resolution calling for the abolition of the position of Chief of Staff and Communications Officer. On November 26, 2020, the Director of Legal Services for the Band confirmed to Ms. Sioui there had been discussions

regarding the termination of her employment, the date on which her employment would end, and the compensation offer made to her.

[11] On December 11, 2020, the Council announced the restructuring and creation of two positions: a Communications Coordinator position reporting to the head of Human Resources and a position of Advisor to the Office of the Grand Chief. Ms. Sioui applied for the position of Communications Coordinator, and on January 20, 2021, her application was rejected on the grounds that she did not meet the requirements of the position. Ms. Sioui did not apply for the position of Advisor to the Office of the Grand Chief.

[12] Ms. Sioui initially filed a complaint under section 240 of the *Canada Labour Code,* RSC 1985, c L-2, but then withdrew it and used the dispute resolution procedure under the Unified Executive Management Policy.

[13] The Tribunal was appointed by mutual agreement of the parties and heard the parties. On June 15, 2022, it made its decision.

[14] In its reasons, the Tribunal (1) set out its jurisdiction in view of the remedy sought; (2) concluded that the evidence establishes that Ms. Sioui's position was not the subject of a fictitious abolition; (3) concluded that Ms. Sioui held a political position, for which extensive discretion is vested in the Council in respect of filling it; (4) concluded that the Council could terminate Ms. Sioui's employment, especially considering that she was still in the probation period, and that the payment of the indemnity in lieu of notice is the only consideration due—the right to reinstatement is not an available avenue; and (5) concluded that the Council erred in refusing to provide a reference letter and then failing to pay Ms. Sioui amounts due in

accordance with the Unified Executive Management Policy, noting that the quantum of damages would have to be determined at a later stage.

III. Relevant documents

A. *The employment contract between Ms. Sioui and the Council*

[15] On July 17, 2020, the Council and Ms. Sioui signed an indefinite-term employment contract with 20 clauses, to which was attached a job description. Note the following clauses in particular:

- Clause 1 provides that Ms. Sioui will perform the duties of Chief of Staff and Communications Officer. She will be an executive with indeterminate status whose working conditions are subject to the Unified Executive Management Policy.

- Clause 17 provides that the contract is not confidential.

- Clause 18 provides that the contract is the entire agreement between the parties.

- Clause 19 provides that the contract may be terminated in accordance with the terms defined in section 5 of the Unified Executive Management Policy.

- Clause 20 sets out the interpretation rule and provides in particular that the contract is governed by the *Canada Labour Code* and that its interpretation is subject to that law.

B. *Unified Executive Management Policy*

[16] On December 7, 2009, the Council adopted the *Unified Executive Management Policy* by resolution. Section 1.1 of the policy states that it [TRANSLATION] "establishes the rules governing the management and working conditions of Huron-Wendat Nation executives". The Unified Executive Management Policy contains 10 sections. Note the following sections in particular:

- Section 3.2 sets out the procedure for reassignment and administrative reorganization.

- Section 4 sets out the procedure for abolishing positions and the compensation to which an executive is entitled.

- Section 5 deals with continuous service, probation periods, and termination of employment; section 5.6 specifically provides for the only cases where executives lose their employment and rights; and section 5.7 provides for pay in lieu of notice in a context of termination or dismissal without just and sufficient cause;

- Section 9 provides for the dispute resolution process, which includes, at the second stage, the submission of the dispute to an arbitrator chosen by mutual agreement, and states that the arbitrator's decision is final and without appeal.

IV. Analysis

[17] In light of the parties' submissions, this application raises several issues, but one is enough to dispose of it, that being the Federal Court's jurisdiction to hear the application for judicial review.

A. *Positions of the parties*

[18] Ms. Sioui submits that the Court has jurisdiction to decide the application for judicial review. She submits that the Tribunal derives its jurisdiction from a by-law adopted by the Council, the Unified Executive Management Policy, and that there is no doubt that the Tribunal is therefore a "federal board, commission or other tribunal" within the meaning of the *Federal Courts Act*. Ms. Sioui submits, first, that an institution governed by the *Indian Act*, such as a band council, engages in activities that fall under federal legislative jurisdiction, and second, that the powers exercised in the case at hand cannot be considered to be purely private.

[19] Ms. Sioui therefore submits that, since the Unified Executive Management Policy is a legislative tool adopted under federal jurisdiction by a band council, it is clear that the source of the Tribunal's jurisdiction is federal. As an analogy, she notes that a band council's resolutions are also decisions within the meaning of the *Federal Courts Act* and can be subject to a judicial review application (*Vollant v Sioui*, 2006 FC 487 at para 25). She submits that, in other words, it would be against public order for Ms. Sioui to be disadvantaged and to have fewer rights than those provided for in the *Canada Labour Code* given the application of the Unified Executive Management Policy. She adds that a procedural mechanism that extends access to justice does not alter the basis of a remedy under federal law (*Bank of Montreal v Li*, 2020 FCA 22 at para 34).

[20] In addition, Ms. Sioui submits that, given the nature and content of the Unified Executive Management Policy, it presents an important public interest element that is clearly distinct from cases involving [TRANSLATION] "purely commercial" matters *Pitawanakwat v Wikwemikong Tribal Police Service*, 2010 FC 917 [*Pitawanakwat*]). In fact, Ms. Sioui states that all

employment contracts entered into with the Council are public and contain a non-confidentiality clause and that this concept of a public employment contract is derived from the *Code de représentation de la Nation huronne-wendat*.

[21] Ms. Sioui notes that the arbitration process is provided for in the Unified Executive Management Policy, which is a by-law adopted by the Council in accordance with the provisions of the *Indian Act* and the *First Nations Elections Act*, SC 2014, c 5. She submits that the source of the Tribunal's jurisdiction is therefore federal and does not constitute private arbitration.

[22] Ms. Sioui notes that there is no other decision involving an arbitrator appointed by a Band Council by-law that provides for an employment dispute resolution system. However, Ms. Sioui cites several decisions involving a band council and applying the concept of "federal board, commission or other tribunal" and asks the Court to conclude that the Tribunal in the case at hand is indeed a federal board, commission or other tribunal: *Ratt v Matchewan*, 2010 FC 160; *Parisier v Ocean Man First Nation*, [1996] FCJ No 129 (FCTD), 108 FTR 297 [*Parisier*]; *Gabriel v Canatonquin*, [1978] 1 FC 124, 9 CNLC 74; *Ermineskin First Nation v Minde*, 2008 FCA 52; *Pitawanakwat*; *Maloney v Shubenacadie First Nation*, 2014 FC 129.

[23] The Council submits that the Court does not have jurisdiction to hear the application for judicial review of the decision in the case at hand, because the Tribunal is not a "federal board, commission or other tribunal" within the meaning of the *Federal Courts Act*. The Council submits that the Tribunal is not a federally incorporated entity, instead drawing its jurisdiction from the employment contract between the Council and Ms. Sioui, an internal policy and a consensual decision of the parties, and that its powers are private in nature (*Anisman v Canada (Border Services Agency)*, 2010 FCA 52 [*Anisman*] at paras 29–30). The Council submits that

the Unified Executive Management Policy is not a by-law adopted under the *Indian Act* and therefore cannot be equated with a federal statute.

[24] Alternatively, the Council submits that, even if the Tribunal derived its jurisdiction from federal law, the fact that it exercises private powers here ensures that its decision is not subject to the judicial review jurisdiction of the Federal Court. In particular, the Council submits that the Tribunal is a private decision maker that is not an agent of the Crown or of the federal government, that it was dealing with a private civil law matter and that, most importantly, its power was derived from a voluntary decision by Ms. Sioui to subject herself to its jurisdiction. Thus, it contends that the factors set out by the Federal Court of Appeal in *Air Canada v Toronto Port Authority*, 2011 FCA 347 [*Air Canada*] confirm in the case at hand that the Tribunal exercised a private power. The Council also cites judgments as an illustration of private decisions under private law, including *Cyr v Ojibway First Nation of Batchewana,* 2022 FCA 90 [*Cyr*] at paras 61 and 76 and *DRL Vacations Ltd v Halifax Port Authority*, 2005 FC 860 [*DRL Vacations Ltd*] at paras 48–62.

B. *Decision*

[25] As my colleague Grammond J. points out in his recent decision *George v Heiltsuk Tribal Council*, 2023 FC 1705 at para 32 [*George*], the Supreme Court of Canada reminds us, at paragraphs 16 to 18 of *Strickland v Canada (Attorney General)*, 2015 SCC 37, that prior to the coming into force of the *Federal Courts Act*, judicial review of federal administrative action was conducted by provincial superior courts as an aspect of their inherent jurisdiction. The Supreme Court also notes that the growth of federal regulatory regimes and administrative tribunals and a variety of other concerns led Parliament to consolidate judicial review of federal boards,

commissions and tribunals under the exclusive jurisdiction of the Federal Court (*Federal Courts Act* at s 18) and that Parliament hoped that this would ensure uniformity and prevent a multiplicity of proceedings (*Canada (Attorney General) v TeleZone Inc*., 2010 SCC 62, [2010] 3 SCR 585 at paras 49–50 [*TeleZone Inc.*]; *Canada (Human Rights Commission) v Canadian Liberty Net*, [1998] 1 SCR 626, 157 DLR (4th) 385 at para 35). Thus, in the words of the Supreme Court, by passing the *Federal Courts Act*, Parliament "remove[d] from the superior courts of the provinces the jurisdiction over prerogative writs, declarations, and injunctions against federal boards, commissions and other tribunals and . . . place[d] that jurisdiction (slightly modified) in a new federal court", citing *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12, [2009] 1 SCR 339 at para 34; *Canada Labour Relations Board et al. v Paul L'Anglais Inc. et al.*, [1983] 1 SCR 147, 146 DLR (3d) 202 at 154.

[26] The Federal Court must have the required jurisdiction to hear the application before it. Therefore, an application that is not allowed by the *Federal Courts Act* or does not concern public law may be quashed (*Air Passenger Rights v Canada (Transportation Agency)*, 2020 FCA 155 at para 25; *Wenham v Canada (Attorney General)*, 2018 FCA 199 at para 36). The Federal Court's jurisdiction with respect to an application for judicial review is set out in sections 18 and 18.1 of the *Federal Courts Act*.

[27] First, as set out in the *Federal Courts Act* and as noted by the Federal Court of Appeal in *Air Canada,* "[a]n application for judicial review under the Federal Courts Act can only be brought against a 'federal board, commission or other tribunal'" (*Air Canada* at para 44*).*

[28] The Court's jurisdiction here is therefore circumscribed by the definition of the term *federal board, commission or other tribunal* in section 2 of the *Federal Courts Act*, that is, "any

body, person or persons having, exercising or purporting to exercise jurisdiction or powers conferred by or under an Act of Parliament or by or under an order made under a prerogative of the Crown". In *TeleZone Inc*., the Supreme Court notes that the definition is "sweeping" and that the entities involved run the gamut "from the Prime Minister and major boards and agencies to the local border guard and customs official and everybody in between" (*TeleZone Inc.* at para 3). That said, the definition of federal board, commission or other tribunal is nonetheless not broad enough to include decisions made by all entities that are, even loosely, related to the federal Crown.

[29] The Federal Court of Appeal has stated that a two-step analysis is required to determine whether a body or person is a "federal board, commission or other tribunal". It is thus necessary, first, to determine the nature of the jurisdiction or power that the body or person seeks to exercise. Second, it is necessary to determine the source or origin of the jurisdiction or power that the body or person seeks to exercise. The fact that a body owes its existence to federal legislation is not sufficient (*Anisman* at para 29; *George* at para 38).

[30] It is well established that band councils established under the *Indian Act*, when they exercise their powers over band members under a federal statute, are a "federal board, commission or other tribunal" whose decisions are subject to judicial review under section 18.1 of the *Federal Courts Act* (*Horseman v Horse Lake First Nation*, 2013 FCA 159 at para 6; *Sebastian v Saugeen First Nation No. 29 (Council of) (C.A.)*, 2003 FCA 28 at para 51). This extends to bodies and persons exercising powers vested in them by the band council (*Parisier*; *Pitawanakwat*; *Cyr* at paras 41–44).

[31] However, the decision before the Court in the case at hand is not one by the Council, but one by the Tribunal, and this finding therefore does not apply. The Tribunal is appointed pursuant to section 9 of the Unified Executive Management Policy and is empowered by the parties to resolve their disputes. The Tribunal's jurisdiction is not derived from federal legislation, although the Council passed the resolution adopting the policy. Thus, in this regard, I agree with the Council's position; the Tribunal's power stems from the Unified Executive Management Policy, which is not a by-law and does not stem from the *Indian Act* or another federal law such as the *Canada Labour Code,* and also arises from the employment contract and the consensual decision of the parties. The Tribunal does not derive its powers from federal legislation or an order made under a prerogative of the federal Crown (*Anisman* at para 30) and is therefore not a federal board, commission or other tribunal within the meaning of the *Federal Courts Act*. The statement in the employment contract between Ms. Sioui and the Council that the contract is governed by the *Canada Labour Code* and that its interpretation is subject to that same law has no impact in the case at hand because the *Canada Labour Code* could not apply.

[32] Furthermore, the Federal Court does not have jurisdiction because the Tribunal is exercising a private power here, and the decision therefore cannot be subject to judicial review.

[33] As noted by the parties, decisions of a purely private nature, or under private law, are outside the control of the courts and, in the case at hand, outside that of the Federal Court (*Highwood Congregation of Jehovah's Witnesses (Judicial Committee) v Wall*, 2018 SCC 26 at para 14; *Air Canada*; *Peace Hill Trust Company v Moccasin*, 2005 FC 1364).

[34] In *Air Canada*, the Federal Court of Appeal notes that the question of what is public or private is, of course, tricky and that in *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR

190 and *Canada (Attorney General) v Mavi*, 2011 SCC 30, [2011] 2 SCR 504, the Supreme Court, while it considered this question, did not provide a comprehensive answer (*Air Canada* at para 56).

[35] Also in *Air Canada*, the Federal Court of Appeal notes that in order to decide whether a measure is public or private, all the circumstances must be weighed. It lists a number of factors that must be considered when determining whether a matter is coloured with a public element, flavour or character sufficient to bring it within the purview of public law. It adds that the question of whether any one factor or a combination of particular factors tips the balance and makes a matter "public" depends on the facts of the case and the overall impression registered upon the Court. These factors are as follows:

(1) the character of the matter for which review is sought;

(2) the nature of the decision maker and its responsibilities;

(3) the extent to which a decision is founded in and shaped by law as opposed to private discretion;

(4) the body's relationship to other statutory schemes or other parts of government;

(5) the extent to which a decision maker is an agent of government or is directed, controlled or significantly influenced by a public entity;

(6) the suitability of public law remedies;

(7) the existence of compulsory power; and

[36] an “exceptional” category of cases where the conduct has attained a serious public dimension (*Air Canada* at para 60).

[37] In the case at hand, I note that (i) the application concerns the Tribunal’s decision, not a decision by the Council; (ii) Ms. Sioui voluntarily subjected herself to the Tribunal’s jurisdiction; (iii) this is a private matter, even though it is not confidential for band members; (iv) the Tribunal is selected and mandated by the parties to resolve their dispute and does not represent the Crown or an administrative body; (v) the *Canada Labour Code* does not apply, and the Tribunal must interpret and apply the terms of the employment contract between the parties, the Unified Executive Management Policy adopted by the Council, and the *Civil Code of Québec*; (vi) there is no indication that the Tribunal chosen by the parties under the policy is integrated into a government network; and (vii) there is no indication that the Tribunal is required to have policies, by-laws or other matters approved or controlled by the government or that it is controlled by a public entity.

[38] My review of the factors set out by the Federal Court of Appeal leads me to conclude that the Tribunal dealt with a matter of private law and that its decision is therefore not subject to judicial review before this Court (*Cyr*; *DRL Vacations Ltd*).

V. Conclusion

[39] I find that the Tribunal is not a federal board, commission or other tribunal within the meaning of the *Federal Courts Act*. Alternatively, I find that the Tribunal exercised private powers that cannot be subject to the judicial review jurisdiction of this Court. Therefore, the

Federal Court does not have jurisdiction to consider the application for judicial review, and the application will be dismissed.

JUDGMENT in T-1427-22

THIS COURT'S JUDGMENT is as follows:

1. The application for judicial review is dismissed.

2. Costs are awarded to the respondent under rule 407 of the *Federal Courts Rules,* SOR/98-106.

"Martine St-Louis"
Judge

Certified true translation
Michael Palles

FEDERAL COURT

SOLICITORS OF RECORD

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