Federal Court Cour fédérale

Date: 20221221

Docket: T-835-22

Citation: 2022 FC 1786

Toronto, Ontario, December 21, 2022

PRESENT: Madam Justice Go

BETWEEN:

HAYDN GEORGE

Applicant

and

HEILTSUK TRIBAL COUNCIL

Respondent

ORDER AND REASONS

I. Overview

[1] Heiltsuk Nation ["Heiltsuk" or the "Nation"] is a self-governing Indigenous nation. Heiltsuk is among the "aboriginal peoples" recognized by section 35 of the *Constitution Act*, 1982, Schedule B to the *Canada Act* 1982 (UK), 1982, c 11. The Nation is also a "band" pursuant to subsection 2(1) of the *Indian Act*, RSC 1985, c I-5 [*Indian Act*].

[2] Heiltsuk's traditional territories cover land and marine areas in the Central Coast region of what is now British Columbia, and the Nation has never surrendered its lands or ceded ownership or jurisdiction over its territory. Heiltsuk's territories also include "reserves" designated by the Crown under subsection 18(1) of the *Indian Act*, one of which is the Bella Bella Reserve No. 1 [Reserve]. The community of Bella Bella lies within the Reserve and is located on the eastern side of Campbell Island.

[3] The Applicant, Haydn George, is a former employee of the Bella Bella Community School [BBCS], and is not a member of the Heiltsuk. The school board terminated Mr. George's employment on October 1, 2021 pursuant to its authority over education delegated by the Respondent, the Heiltsuk Tribal Council [HTC].

[4] Employees of the BBCS are entitled to be on the Residency List controlled by the Heiltsuk Nation for the duration of their employment.

[5] The Applicant did not have other grounds to establish residency on the Reserve but remained in Bella Bella after his termination. At some point, the Applicant began working in an elementary school under the British Columbia School District #49 [District] about five to six km from Bella Bella.

[6] To prohibit the Applicant from Heiltsuk, the HTC issued a Band Council Resolution [BCR] dated December 17, 2021 and another one dated January 20, 2022 [together, the

"BCRs"]. The HTC also sent communications to the District encouraging the District to terminate its contractual relationship with the Applicant based on the BCRs.

[7] The Applicant submitted an application for this Court to judicially review these actions undertaken by the HTC [Application].

[8] HTC brought a motion asking this Court to summarily dismiss the Application [Motion]. HTC argues that the Applicant's claims on judicial review do not have any possibility of success because: (1) the impugned actions were not undertaken by a federally empowered decision-maker; and (2) the impugned actions are essentially private in nature, not public.

[9] The Applicant sought leave of the Court to file a sur-reply dated July 4, 2022 [Sur-Reply] and an affidavit sworn on July 4, 2022 [Affidavit] in support of the Sur-Reply, after receiving the Respondent's Reply.

[10] For the reasons set out below, I dismiss the Motion as I am of the view that the jurisdictional issues raised by the Applicant should be decided at the hearing of the Application on its merits. I grant the Applicant leave to file the Sur-Reply and Affidavit.

II. Background

Heiltsuk law and governance structure

[11] In support of the Motion, HTC submitted affidavit evidence of Chief Councillor K̓áwáziɬ Marilyn Slett [Chief Slett] and Ǧviúst̓izas Joann Green [Ms. Green]. The affidavit evidence provided detailed information about the law and governance structure of Heiltsuk.

[12] In Heiltsuk, Hím̓ás (hereditary chiefs) grant ownership and jurisdiction over sub-territories under Ǧvi̓ḷás (or Heiltsuk law). The applicability of Ǧvi̓ḷás, which embodies Heiltsuk legal principles, stems from the inherent jurisdiction flowing from the Heiltsuk's ownership of land and waters, which pursuant to Heiltsuk oral history, has existed long before contact or the assertion of Crown sovereignty in 1846.

[13] Heiltsuk Nation's modern governance structure consists of joint leadership by the Hím̓ás and the HTC [collectively, "Joint Leadership"], and has existed since 2002. The Hím̓ás created a Hereditary Table, which applies Ǧvi̓ḷás to matters of title and rights. When there are matters that require decisions on title and rights, the Hereditary Table and HTC meet as the Joint Leadership to discuss these matters.

[14] The HTC is a band council under the *Indian Act* and is the elected arm of Joint Leadership. Joint Leadership oversees the entirety of Heiltsuk territory, beyond the reserves. When HTC is not acting under its authority as a band council pursuant to the *Indian Act*, Joint Leadership governs pursuant to Ǧvi̓ḷás.

(1) *Band Council Resolutions*

[15] HTC decisions are recorded using a BCR template, originally provided by the Crown. HTC does not register its BCRs with the Crown unless required to do so by statute. Most, but not all BCRs are decisions of Joint Leadership. HTC uses the same BCR form whether it is exercising a power under the *Indian Act* or making a decision under Ǧvi̓ḷás.

(2) *Heiltsuk Residency*

[16] The Híṁás have authority to control or restrict access to Heiltsuk territory under Ǧvi̓ḷás. Non-members of the Nation are guests and have no right to stay in Heiltsuk territory under Ǧvi̓ḷás. Non-members must obtain permission from the Híṁás to enter and stay in the territory, and may be asked to leave when they outstay their permission or disrupt the harmony of the community.

[17] HTC has a residency bylaw, Bylaw 20 [Residency Bylaw], which was passed prior to the establishment of the Joint Leadership structure and which relates only to the Reserve. The Residency Bylaw reflects Ǧvi̓ḷás' differential treatment of Heiltsuk members and non-members, limiting residency to those on the Nation's Residency List or those who have a Limited Stay Permit.

HTC's actions regarding the Applicant

(1) *The First BCR*

[18] The Nation's Joint Leadership consisting of Híṁás and elected councillors of the HTC held a meeting in December 2021 concerning the Applicant. They reviewed a letter from Anita

Hall, principal at BBCS, on some of the allegations and controversy surrounding the Applicant. Joint Leadership determined that the Applicant' actions both during and after his employment were of great concern, and that this concern was exacerbated in light of him remaining in Heiltsuk territory without permission.

[19] As a result, a declaration was issued on December 17, 2021 stating that the Applicant had no entitlement to be on the Reserve and requesting that the Applicant voluntarily leave Bella Bella [First BCR].

(2) *The Second BCR*

[20] The Applicant's counsel informed Joint Leadership that the Applicant would respect the First BCR and later revealed that the Applicant had moved to Martin's Marina. HTC considers Martin's Marina to be part of Bella Bella, a position contested by the Applicant.

[21] Joint Leadership met again on January 18, 2022 to discuss the Applicant's failure to comply with the First BCR. On January 20, 2022, Joint Leadership further resolved to prohibit the Applicant from Heiltsuk's traditional territory [Second BCR].

(3) *Communications to the District*

[22] Following the Second BCR, HTC found out that the Applicant had begun working at the nearby Shearwater Elementary School after being temporarily hired as a substitute teacher. HTC reached out to the Applicant on two occasions, the second of which was to invite him to apply

for a Limited Stay Permit under the Residency Bylaw. The Applicant declined through his counsel because he did not wish to reside in Bella Bella for a "temporary purpose."

[23] Joint Leadership corresponded with the District through counsel to explain that pursuant to the Second BCR, the Applicant was prohibited from Heiltsuk territory. HTC asked the District to respect the Nation's inherent right of self-government and wanted the District to explore the legal means of reassigning or terminating the Applicant.

[24] The District informed Joint Leadership that it issued an end-of-term notice to the Applicant on March 26, 2022.

The Applicant's Civil Claim

[25] Apart from the Application, the Applicant has filed a Notice of Civil Claim in the Supreme Court of British Columbia [BCSC] asserting wrongful dismissal by the BBCS' school board and various torts against HTC and the school board: *George v Bella Bella Community School Society and Heiltsuk Tribal Council*, BCSC File No 223881.

III. Preliminary Issues

[26] The Applicant filed his response to the Motion on June 23, 2022 [Applicant's Response]. The Respondent then filed a Reply dated June 29, 2022 to the Applicant's Response. The Applicant then sought leave of the Court to file the Sur-Reply and Affidavit.

[27] On July 6, 2022, Case Management Judge Coughlan, issued the following direction:

> The Sur-Reply and Affidavit in support of the Sur-Reply, tendered by the Applicant was referred to the Court for directions as to filing pursuant to Rule 72 of the Federal Courts Rules, as Rule 369 does not allow for sur-reply or sur-reply evidence. In this case, once the Registry is in receipt of proof of service from the Applicant, it is directed to "receive" (not file) the Sur-Reply and Sur-Reply affidavit on the Court file. The admissibility of the Sur-reply shall be a matter within the discretion of the Judge hearing the Respondent's motion for Summary Judgement.

[28] This Court has adopted a strict test for admissibility of reply evidence in an action: *Halford v Seed Hawk Inc*, 2003 FCT 141 at para 15.

[29] In *Abbott Laboratories et al v Canada (Minister of Health)*, 2003 FC 1512 [*Abbott Laboratories*], Justice Heneghan declined to apply the same restrictive test for reply evidence in actions to the filing of reply affidavit evidence with respect to applications. At paras 19 to 21, Justice Heneghan explained:

> [19] In my opinion, the strict test characterizing reply evidence in a trial does not necessarily apply in respect of proceedings taken under the Regulations. Such proceedings are dealt with by way of application; see *Bayer AG v. Canada (Minister of National Health and Welfare)* (1994), 58 C.P.R. (3d) 377 (F.C.T.D.). They are governed by Part 5 of the Rules.
>
> [20] Those Rules are silent about filing reply evidence but Rule 312 provides for the filing of additional affidavits. The issue was considered in the context of the former Rules of the Federal Court in *Eli Lilly Co. v. Apotex Inc.* (1997), 76 C.P.R. (3d) 15 (F.C.T.D.), where the Court identified three factors that will be considered when a party seeks to file additional affidavit evidence: will the further evidence serve the interests of justice, will it assist the Court and will it cause substantial or serious prejudice to the other parties.
>
> [21] Abbott here is attempting to impose a technical, legalistic meaning on the words "proper proceeding reply evidence" which is unwarranted. This is an application for judicial review, it is not a

> trial and the general rules concerning admissibility of evidence do not apply. The Prothonotary was adjudicating a motion to introduce further affidavits and in my opinion, she considered the appropriate factors as established in the existing jurisprudence.

[30] More recently, in *Dzawada'enuxw First Nation v Canada*, 2021 FC 939 [*Dzawada'enuxw*] at para 23, Associate Justice Ring commented on the appropriate test for admitting sur-reply argument:

> While this Court has articulated the factors to consider in granting leave to file sur-reply evidence (see, for example, *Eli Lilly Canada Inc. v. Apotex Inc.*, 2006 FC 953), there is little jurisprudence regarding requests for leave to file sur-reply argument. In my view, sur-reply argument should only be permitted in special circumstances where considerations of procedural fairness and the need to make a proper determination require it. The Court should have regard to whether there is a demonstrated need to respond to a new matter that was raised for the first time in reply, that the sur-reply argument will assist the Court, and allowing the sur-reply argument will not cause substantial or serious prejudice to the opposing party.

[31] While not binding on me, I adopt Associate Justice Ring's proposed formulation in *Dzawada'enuxw* with respect to a test for admitting sur-reply argument, as I find it consistent with this Court's considerations for admitting reply affidavit evidence in an application. I will thus apply the considerations outlined in *Dzawada'enuxw* and those in *Abbott Laboratories* to assess whether to admit the Sur-Reply and the Affidavit.

[32] The Sur-Reply submissions and the Affidavit cover the following three issues:

a. The first is HTC's disclosure of new documents. The HTC had previously not provided notes from the meetings concerning the BCRs and had advised that no such notes existed. On June 29, 2022, the HTC disclosed to the Applicant two sets of meeting notes: one

from December 16, 2021 and a second from January 18, 2022 [Meeting Notes]. The Applicant seeks to submit these Meeting Notes as exhibits to the Affidavit.

b. The second issue goes to the procedural arguments raised by the Applicant in the Applicant's Response regarding the timing of the Motion. The Applicant submitted that the Court should not decide the jurisdictional issues on procedural grounds because the Applicant had not had the opportunity to cross-examine the HTC's affiants, and the HTC had not fulfilled its document disclosure obligations. The HTC responded to those submissions in its Reply. The Applicant states in the Sur-Reply that he was not previously aware of the HTC's position on the procedural matters and thus seeks the opportunity to respond. The Applicant argues that these submissions are in the nature of a reply and not a sur-reply, as this is his first opportunity to respond to HTC's position.

c. The third issue is that, in its Reply, the HTC cited two cases to support its position that the Federal Court has no jurisdiction over the HTC. The Applicant argues that the HTC relied on these two cases for a proposition that they manifestly do not stand for, and as such, it must be open to the Applicant to correct this error.

[33] Subsequent to the filing of the Sur-Reply and Affidavit, the procedural issues were dropped by the Applicant in his Further Submissions dated October 28, 2022. By then, the Applicant had conducted cross-examination of Chief Slett on September 9, 2022, and of Ms. Green on October 14, 2022. The Applicant was also given permission pursuant to a Court Order dated October 13, 2022 to make submissions on matters arising from the cross-examination of the affiants in his Further Submissions. The Respondent responded to the Applicant's Further Submissions through their Further Reply dated November 14, 2022.

[34] While two of the three issues underlying the Sur-Reply were resolved eventually, in my view, admitting the Sur-Reply and Affidavit concerning these two issues will assist the Court to

gain a better understanding of the parties' positions and the factual context for the matter in dispute.

[35] I will first address the Affidavit containing the Meeting Notes. While I acknowledge that the parties take different positions with regard to the meaning of the Meeting Notes, the parties' divergent viewpoints reflect their respective positions in the underlying jurisdictional debate at the core of the Motion, which the Court should be made aware of.

[36] The Applicant submits in the Sur-Reply that a lack of "discernable reference to Heiltsuk traditional laws or governance" in the Meeting Notes is evidence contradicting the "heart of HTC's position that the two band council resolutions were undertaken in furtherance of Heiltsuk traditional law." The Applicant also relied on the Meeting Notes during his cross-examination of the Respondent's affiants.

[37] HTC, by contrast, disputes the Applicant's characterization of the Meeting Notes as "minutes", and argues that omissions cannot be determinative in ascribing meaning to the Meeting Notes. HTC contends that the Meeting Notes are not "even close to complete records of the meetings." As such, HTC submits that the Applicant's Sur-Reply is not required and premised on a fundamental misunderstanding of this Motion for summary dismissal.

[38] Without deciding whose characterization of the Meeting Notes should prevail, the Meeting Notes, and the parties' arguments surrounding them, in my view, form part of the

contextual background that would assist the Court in assessing the nature of the BCRs in question.

[39] Allowing the Sur-Reply argument with respect to the procedural issues will also not cause substantial or serious prejudice to the HTC, especially since these issues are now resolved, thanks to the disclosure of the Meeting Notes and the subsequent cross-examination of the Respondent's affiants.

[40] I turn now to the third reason for the Sur-Reply, namely, the Applicant's submission responding to the two cases cited by the Respondent. The Applicant argues that the HTC mischaracterizes the case law at para 14 of its Reply in a manner that demands rectification by sur-reply. In its Reply, HTC was responding to para 35 of the Applicant's Response which states (emphasis in original):

> [35] HTC has not provided any cases where the Federal Court has found that it has no jurisdiction over a band council resolution because the band council was not acting as a "federal board, commission or other tribunal." In *Cyr v Batchewana First Nation of Ojibways*, 2022 FCA 90, relied on by the HTC and further discussed below, the Court expressly relied on the fact that the decision under review "is not in the form of a band council resolution" and signed by a Housing Manager – to find that the decision was the administration of a private contract and not reviewable by Federal Court: paras 41, 49, and 68, emphasis added.

[41] The Applicant submits that this part of his response addresses the HTC's argument that the Federal Court has no jurisdiction because the band council was not acting as a "federal board, commission or other tribunal" under section 2 of the *Federal Courts Act*, RSC 1985, c F-7. According to the Applicant, the Applicant's Response treats this argument separately from the

HTC's argument that the Federal Court has no jurisdiction over this matter because the HTC's treatment of the Applicant was private, and not public, in nature.

[42] In its Reply, HTC responded to the Applicant's argument as follows:

> [14] That this Court has reviewed BCRs is not in dispute. But *not all BCRs are reviewable.* Mr. George says that the Council "has not provided any cases where the Federal Court has found that it has no jurisdiction over a band council resolution because the band council was not acting as a "federal board, commission or other tribunal" (para 35 of the [Applicant's Response]). To the contrary, in *Knibb Developments Ltd. V Siksika First Nation*, 2021 FC 1214 (CanLII) ("*Knibb*"), cited at para 78 of the Motion Memo, the Court dismissed a judicial review of a BCR for want of jurisdiction. Similarly, in *Peace Hills Trust Co v Moccasin*, 2005 FC 1364 (CanLII), cited in *Devil's Gap Cottagers (1982) Ltd. V Rat Portage Band No. 38B*, 2008 FC 812 (CanLII), [2009] 2 FCR 276, the Court had no jurisdiction to review an impugned BCR, and said at para 60 that "[a] BCR can constitute a decision or order of a federal board…[h]owever, it does not follow that every BCR will lie within the jurisdiction of this Court…"
>
> [emphasis added]

[43] The Applicant argues that the HTC relies on *Knibb Developments Ltd v Siksika First Nation*, 2021 FC 1214 [*Knibb*] for a conclusion that the Court expressly declined to make, as the Court stated at para 22, "it is not necessary to determine whether Siksika Nation acted as a federal board, commission or other tribunal, within the meaning of section 2 of the *Federal Courts Act*." Similarly, the Applicant submits that in *Peace Hills Trust Co v Moccasin*, 2005 FC 1364 [*Peace Hills*], also cited by HTC, the matter was decided on the basis that it concerned a "commercial loan agreement", a matter of private law: at para 61.

[44] The Applicant further submits that the fact remains that the HTC is asking the Court to summarily decide a jurisdictional issue on a basis unsupported by precedent. The Applicant finally states that he understands that the HTC is also asking the Court to summarily decide the jurisdictional issue on the public/private distinction question, which was not addressed by para 35 of the Applicant's Response.

[45] With respect, I find the Applicant's justification to make sur-reply submissions based on the jurisdictional arguments puzzling. In my view, it is clear from the outset that the Motion is seeking to dismiss the Application on both grounds: first, that HTC was not acting as a federal board, commission or tribunal when it issued the BCRs, and second, that it was acting pursuant to "private" property rights.

[46] Indeed, the Applicant acknowledged the HTC's position and provided submissions with respect to both of these grounds. Thus, whether or not the HTC's Reply made additional submissions to the Applicant's Response at para 35 is of no import.

[47] Further, while the Applicant argues that the Sur-Reply is necessary because HTC raised two cases in its Reply, one of the two cases, *Knibb*, was already cited at para 78 of the Respondent's Memorandum of Fact and Law in support of the Motion. The Applicant could have commented on *Knibb* in the Applicant's Response.

[48] I also do not find that HTC's reliance on *Peace Hills*, on its own, could justify the allowance of the Sur-Reply, given the Applicant has already made clear his position with regard to the Respondent's arguments on jurisdictional issues.

[49] However, as I have found the Sur-Reply and Affidavit helpful to the Court for the reasons stated previously, I am not going to refuse leave to the filing of these documents simply because not every paragraph of the Sur-Reply submissions is useful or necessary. Nor do I find that the HTC would be prejudiced in any way, as the Applicant's position on the jurisdictional issues is already known to the HTC.

[50] In the context of this case, and applying the considerations outlined above in *Dzawada'enuxw* and *Abbott Laboratories*, I am satisfied that special circumstances exist that warrant a departure from the general rule prohibiting the filing of sur-reply argument and affidavit evidence. I therefore grant the Applicant leave to file the Sur-Reply and the Affidavit.

IV. Issues

[51] The determinative issue on this Motion for summary judgment is whether the impugned decisions are reviewable by this Court pursuant to its jurisdiction on the basis that:

a. the impugned actions were not undertaken by a federally empowered decision maker; and
b. the impugned actions are essentially private in nature, not public.

[52] HTC asks this Court to find that the Application has no reasonable prospect of success for want of jurisdiction, and requests that the Application be summarily dismissed. The

Applicant, on the other hand, asks this Court to summarily decide on the jurisdictional issue by dismissing the Motion and finding that the Court does have jurisdiction to hear the Application.

[53] The Respondent raises another threshold issue in their Motion, arguing that the limitation period for the Application has expired. The Applicant's Response notes that the Respondent does not rely on the limitation period argument as a separate ground for summary dismissal. The Applicant submits instead that limitation period issues are necessarily considered alongside the merits as they will determine what arguments are available to the Applicant on judicial review. The Respondent does not respond to these allegations in the Reply, and seeks to reserve the right to argue that the Application is time-barred at a later date if the Application survives the Motion. In light of the lack of substantive arguments on this point, I will not address the limitation period issue as a ground for summary dismissal.

V. Analysis

Summary Judgments on Judicial Review

[54] Rule 4 of the *Federal Courts Rules*, SOR/98-106 [*Rules*] allows the Court to apply the rules relating to summary judgment (Rules 213-215) or the striking (Rule 221) of actions in the context of an application for judicial review:

Matters not provided for	**Cas non prévus**
4 On motion, the Court may provide for any procedural matter not provided for in these Rules or in an Act of Parliament by analogy to these Rules or by reference to the practice of the superior court of the province	**4** En cas de silence des présentes règles ou des lois fédérales, la Cour peut, sur requête, déterminer la procédure applicable par analogie avec les présentes règles ou par renvoi à la pratique de la cour supérieure de

to which the subject-matter of the proceeding most closely relates.	la province qui est la plus pertinente en l’espèce.

[55] Case law has established that this Court may accordingly summarily dismiss an application for want of jurisdiction.

[56] The Respondent relies on *Cyanamid Canada Inc v Canada (Commissioner of Patents)*, [1983] FCJ No 429, 74 CPR (2d) 133 [*Cyanamid*] for the proposition that “where there is… a clear question of jurisdiction which may determine the entire matter, common sense dictates, and [Rule 4] permits, that the Court deal with the preliminary objection in advance”: at para 3, affirmed in *Anisman v Canada (Border Services Agency)*, 2010 FCA 52 [*Anisman*].

[57] This proposition from *Cyanamid* was also applied in *David Bull Laboratories (Canada) Inc v Pharmacia Inc* [1995] 1 FC 588 (CA) [*David Bull*] when the Court stated that it does have jurisdiction through Rule 4 to summarily dismiss a notice of motion “which is so clearly improper as to be bereft of any possibility of success”: at para 15, as referred to in *Viorganica Laboratories Inc v Société de Produits Nestlé*, 2016 FC 431 at para 7.

[58] I will apply the test laid out in *David Bull*, to consider whether the Application should be dismissed for being “bereft of any possibility of success.”

Issue 1: Whether the Application should be dismissed summarily because the impugned actions were not undertaken by a federally empowered decision maker

[59] In the federal sphere of judicial review, the issue of state authority relies on whether the decision was made by a "federal board, commission or other tribunal" under the *Federal Courts Act*, as defined in subsection 2(1):

Definitions	**Définitions**
2 (1) In this Act,	**2 (1)** Les définitions qui suivent s'appliquent à la présente loi.
federal board, commission or other tribunal means 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, other than the Tax Court of Canada or any of its judges or associate judges, any such body constituted or established by or under a law of a province or any such person or persons appointed under or in accordance with a law of a province or under section 96 of the Constitution Act, 1867; (office fédéral)	***office fédéral*** Conseil, bureau, commission ou autre organisme, ou personne ou groupe de personnes, ayant, exerçant ou censé exercer une compétence ou des pouvoirs prévus par une loi fédérale ou par une ordonnance prise en vertu d'une prérogative royale, à l'exclusion de la Cour canadienne de l'impôt et ses juges et juges adjoints, d'un organisme constitué sous le régime d'une loi provinciale ou d'une personne ou d'un groupe de personnes nommées aux termes d'une loi provinciale ou de l'article 96 de la Loi constitutionnelle de 1867. (federal board, commission or other tribunal)

[60] The test for whether the Court has jurisdiction to judicially review a decision contains two requirements, as affirmed in the Supreme Court of Canada's [SCC] decision *Highwood Congregation of Jehovah's Witnesses (Judicial Committee) v Wall*, 2018 SCC 26 [*Wall*] at para 14:

> Judicial review is only available where there is an exercise of state authority and where that exercise is of a sufficiently public character.

[61] The Federal Court of Appeal [FCA] set out a two-step inquiry in *Anisman* to determine whether a body or person is a "federal board, commission or other tribunal" at para 29. This inquiry requires the Court to assess:

A. What jurisdiction or power the body or person seeks to exercise; and

B. What the source or the origin is of the jurisdiction or power which the body or person seeks to exercise.

[62] The Respondent submits that although HTC has the status of a band council under the *Indian Act*, it was not purporting to exercise powers under that statute as a "federal board." Rather, HTC was acting as part of the Heiltsuk First Nation's Indigenous government under its Joint Leadership table, and pursuant to Heiltsuk's Indigenous laws and inherent right of self-government over its traditional territory.

[63] The Respondent further submits that, under the federal law as it currently stands, an exercise of Indigenous law is not enforceable, and also not reviewable, by this Court.

[64] In support of its position that HTC was not acting as a federal board, commission or other tribunal, the Respondent raises several arguments concerning the nexus of common law administrative law principles, Aboriginal law, Indigenous law, and how they interact. Among others, the HTC argues that an expanded Indigenous government role for band council, which in this case flows from HTC's participation in a Joint Leadership table with the Nation's hereditary chiefs, is consistent with the Heiltsuk Nation's inherent right of self-determination and self-government, as recognized in Articles 3 and 4 of the *United Nations Declaration on the Rights of Indigenous Peoples* [UNDRIP].

[65] HTC also argues that this Court has not yet recognized Indigenous laws as an "effectual" part of Canadian common law without more: *Alderville First Nation v Canada*, 2014 FC 747 at para 40 [*Alderville*]. As such, HTC submits that the Court cannot both refuse to recognize Indigenous laws as laws to which courts may give effect, yet also take jurisdiction to review exercises of powers under Indigenous laws on the basis that they reflect state authority.

[66] I agree with the Respondent that there are "difficult questions" that the Court has to grapple with when it comes to recognizing Indigenous laws and legal traditions. Nor has this Court had the occasion of analysing the role UNDRIP plays when deciding whether and how to give effect to Indigenous laws, and whether to decline jurisdiction in recognition of the right to self-determination and self-government under Articles 3 and 4 of UNDRIP. The same precedential limits are true of this Court's consideration of how the federal *United Nations Declaration on the Rights of Indigenous Peoples Act*, SC 2021, c 14 [*UNDRIPA*] would apply in a case like this, or generally its implications on this Court's jurisdiction.

[67] However, I disagree with the Respondent's proposition that this Court has not yet recognized Indigenous laws as an "effectual" part of Canadian common law. The Respondent, in my view, has taken the comment by Justice Mandamin, as he then was, in *Alderville* out of context.

[68] The issue before Justice Mandamin in *Alderville* was the admissibility of a statement by an expert witness for the plaintiff with respect to the First Nations' historical regard for their hunting grounds. Justice Mandamin began his analysis by considering the relationship of

Indigenous legal systems in Canadian law. He examined specific instances of Indigenous law as "Aboriginal customary law" and the recognition of such law in "common law decisions, statutory enactments, and more recently, Section 35 Aboriginal rights and title jurisprudence": *Alderville* at paras 22-25.

[69] After an extensive review, Justice Mandamin concluded at para 39:

> [39] In all of the above, it would appear that Aboriginal customary law which has not been extinguished is given legal effect in Canadian domestic law through Court declarations, including Aboriginal title or right jurisprudence, or by statutory provisions. I would also suggest Aboriginal customary law may also be given legal effect by incorporation into Indian treaties. It may be that there are other means by which Aboriginal customary law could be recognized but that is not a question for me to address here.

[70] Thus, far from refusing to recognize Indigenous laws as an "effectual" part of Canadian common law, *Alderville* examines the various ways through which Indigenous laws are given legal effect in Canadian domestic law including "through Court declarations."

[71] Justice Mandamin's observation that Aboriginal customary laws "are not an effectual part of Canadian common law or Canadian domestic law" must be read in conjunction with the rest of his comment that there needs to be "some means or process by which the Aboriginal customary law is recognized as part of Canadian domestic law": at para 40. Acknowledging that such recognition "may at times have the effect of altering or transforming the Aboriginal customary law so that it and Canadian law are aligned", Justice Mandamin ended by noting at para 40:

> It seems to me this is an aspect of reconciliation as discussed in recent post section 35 Aboriginal jurisprudence.

[72] As the process of reconciliation continues, the jurisprudence also continues to evolve, resulting in an increasing recognition of Indigenous legal traditions by this and other Canadian Courts. As Justice Grammond noted in *Pastion v Dene Tha' First Nation*, 2018 FC 648 at para 8:

> Indigenous legal traditions are among Canada's legal traditions. They form part of the law of the land. Chief Justice McLachlin of the Supreme Court of Canada wrote, more than fifteen years ago, that "aboriginal interests and customary laws were presumed to survive the assertion of sovereignty" (*Mitchell v MRN*, 2001 SCC 33 at para 10, [2001] 1 SCR 911). In a long line of cases, from *Connolly v Woolrich* (1867), [1867] Q.J. No. 1, 11 LCJ 197, 17 RJRQ 75 (Que SC), aff'd (1869), 17 RJRQ 266, 1 CNLC 151 (Que QB), to *Casimel v Insurance Corp of BC* (1993), 106 DLR (4th) 720 (BCCA), Canadian courts have recognized the existence of Indigenous legal traditions and have given effect to situations created by Indigenous law, particularly in matters involving family relationships (for a survey, see Sébastien Grammond, *Terms of Coexistence: Indigenous Peoples and Canadian Law* (Toronto: Carswell, 2013) at 374-385; see also *Alderville Indian Band v Canada*, 2014 FC 747).

[73] A recent article by Justice Grammond provides a conceptual framework for recognizing Indigenous law in the Canadian legal system: Sébastien Grammond, "Recognizing Indigenous Law: A Conceptual Framework" (2022) 100:1 Can Bar Rev. Justice Grammond proposes different models for Canadian courts to recognize Indigenous peoples' pre-existing, or inherent, law-making powers and to analyse the interface between the Indigenous and Canadian legal systems: at 9-22. Justice Grammond also describes how Canadian courts judicially review decisions made by Indigenous decision-makers regarding Indigenous law: at 22-24. He notes that courts have begun to develop principles to help delineate the jurisdiction of Indigenous decision-makers, and that respect for Indigenous self-government has become a factor considered by judges when assessing various aspects of judicial review: at 24.

[74] Thus, contrary to the Respondent's submission, this Court has recognized the existence of Indigenous legal traditions and has given effect to Indigenous law in certain situations. The question is whether the impugned actions raised by the Application fall under those situations.

[75] The issues of Indigenous rights to self-government and self-determination, and what the affirmation of these rights means for jurisdictional boundaries, will no doubt continue to pose challenging questions for this Court. However, I do not think that the Court should dodge these challenging questions and refuse to hear the Application altogether just because the issues raised by the parties are difficult, and the hearing may be complex and lengthy, as the Respondent suggests. On the contrary, the complexity is precisely why the Application should be heard on its merits, instead of being dismissed on a summary basis.

[76] As this Court is increasingly called upon to create space for Indigenous law within our jurisdiction, the Court will endeavour to delineate its jurisdictional boundary in a manner that is respectful of Indigenous peoples and their legal traditions, while taking into account their assertion of self-government and the Government of Canada's endorsement of the UNDRIP through the federal *UNDRIPA*.

[77] This is by no means an easy task. But it is also not the first time that the Court has been asked to tackle this issue.

[78] Indeed, the Court has, as the Respondent submits, acknowledged that a band council does not depend upon Parliament for its existence, and that powers of band councils are not conferred

exclusively by the *Indian Act*: *Devil's Gap Cottagers (1982) Ltd v Rat Portage Band No 38B*, 2008 FC 812, [*Devil's Gap*] at para 58-59, citing *Wood Mountain First Nation No 160 Council v Canada (Attorney General)* (2006), 2006 FC 1297 at para 8.

[79] Further, contrary to what the Applicant submits, the jurisprudence does not support his position that band council resolutions are always reviewable by the Federal Court.

[80] In *Des Roches v Wasauksing First Nation*, 2014 FC 1126 [*Des Roches*], the Court held that it had no jurisdiction to review the impugned actions of a band council because it was not acting as a federal board. Instead, Justice Kane found that the source of the authority being exercised by the First Nation to impose a surcharge on cigarettes was a provincial statute, and that the surcharge was a contractual manner pursuant to a Tobacco Retailer Agreement. Before coming to this conclusion, Justice Kane noted at para 51:

> While decisions made by a First Nations Band Council often come within the meaning of subsection 2(1) of the *Federal Courts Act*, this is not always the case (*Minde v. Ermineskin Cree Nation*, 2008 FCA 52 (F.C.A.)). As I noted in 2014 FC 1125 (F.C.), the two-stage analysis established by the Federal Court of Appeal in *Anisman* is necessary and the source of the power or authority being exercised is the determinative consideration.

[81] *Des Roches* is just one of many cases that demonstrate the meticulous approach that this Court adopts when determining whether a particular decision by a band council falls within its jurisdiction, which necessitates a highly contextual analysis. This analysis requires the Court to fully take into account not only the relevant law but also the factual circumstances of each case, and in the process, ensure that due respect is paid to the Indigenous legal traditions in question.

[82] I note that in the context of this Application, as the Applicant points out, the First BCR concerns the Bella Bella Reserve, which is governed by the *Indian Act*. The First BCR states that it was enacted in part pursuant to the "Residency Bylaw and applicable legislation."

[83] According to the Respondent, the Residency Bylaw was passed before the Joint Leadership structure came into place, and only relates to the Reserve. At the same time, HTC submits that its interest in reserve lands does not depend on any delegated authority of the Crown, as this interest pre-dates the assertion of Crown sovereignty, relying on Justice Dickson's (as he then was) comment in *Guerin v the Queen*, [1984] 2 SCR 335 at 379.

[84] HTC argues therefore that unless a specific exercise of authority over reserve land is based on a bylaw under the *Indian Act* (or pursuant to some other federal legislation), any exercise of authority against a trespasser on reserve lands is not an exercise of state authority.

[85] Adopting the HTC's own argument, the question of whether or not the Court has jurisdiction over the First BCR will depend on whether the Court finds that it was issued pursuant to a bylaw under the *Indian Act*.

[86] In this case, the Residency Bylaw, under which the First BCR was issued, contains the following preamble (emphasis in original):

> Being a by-law respecting the residency of the Heiltsuk Indian Band members and other persons on the reserves of the Heiltsuk Indian Band (the *Band*).
>
> WHEREAS sections 81(1)(p.1) and (p.2) of the <u>Indian Act</u> empower the Council of a band of Indians to make by-laws respecting the residence of band members and other persons on the reserve of the

> Band and the rights of spouses and children who reside with members of the band on the reserve;
>
> AND WHEREAS the council of the Band desires to make by-law governing residency on the reserves of the Band in order to maintain and protect the cultural heritage, health, safety, good order and advancement of the people of the Band;
>
> NOW THEREFORE the Council of the Heiltsuk Band of Indians hereby enacts as a by-law thereof as follows:

[87] As the preamble demonstrates, the Residency Bylaw specifically refers to the *Indian Act* as a source of power for HTC to enact bylaws respecting residency.

[88] Since the Residency Bylaw upon which the First BCR was enacted was based, at least in part, on the *Indian Act*, there may be grounds to support the Applicant's position that the impugned actions were undertaken by HTC pursuant to power granted under federal legislation. As such, I am unable to find that the Application is "bereft of any possibility of success."

[89] As for the Second BCR, it appears to be related to Heiltsuk's traditional territory and as such may not have been issued pursuant to the *Indian Act*. However, as the FCA noted in *876947 Ontario Ltd (RPR Environmental) v Canada (Attorney General)*, 2013 FCA 156, at para 10:

> In my view, particular caution is required on a motion to strike when only a portion of a notice of application is impugned, and that portion is integrally related to the remaining portion of the application. As noted in *David Bull*, objections to the application can be dealt with promptly and efficiently in the context of consideration of the merits of the case, particularly where a portion of the application is to proceed to hearing in any event. As well, the Judge hearing the application may be constrained if integrally related portions of the application have been struck out.

[90] In this case, the Applicant is challenging both BCRs, and other decisions taken by the HTC. These decisions appear to be integrally related. I therefore find that the Respondent's objections will be more effectively dealt with in consideration of the merits of the Application as a whole.

Issue 2: Whether the Application should be dismissed summarily because the impugned actions are essentially private in nature, not public

[91] If it is found that the impugned decisions were carried out by a state authority, the second step in the test to determine whether the Court has review jurisdiction requires an analysis of the nature of the exercise of authority. For the Court to have jurisdiction, the acts in question must be sufficiently public in nature. The SCC in *Wall* noted at para 14 that:

> Even public bodies make some decisions that are private in nature — such as renting premises and hiring staff — and such decisions are not subject to judicial review… In making these contractual decisions, the public body is not exercising "a power central to the administrative mandate given to it by Parliament", but is rather exercising a private power. Such decisions do not involve concerns about the rule of law insofar as this refers to the exercise of delegated authority.
>
> [citations omitted]

[92] In *Air Canada v Toronto Port Authority Et Al*, 2011 FCA 347 [*Air Canada*], the FCA enumerated eight (non-exhaustive) factors to determine if a process fell within the purview of public law so as to satisfy the second part of the test for jurisdiction, at para 60:

A. The character of the matter for which review is sought;
B. The nature of the decision-maker and its responsibilities;
C. The extent to which a decision is founded in and shaped by law as opposed to private discretion;
D. The body's relationship to other statutory schemes or other parts of government;

- **E.** The extent to which a decision-maker is an agent of government or is directed, controlled or significantly influenced by a public entity;
- **F.** The suitability of public law remedies;
- **G.** The existence of compulsory power; and
- **H.** An "exceptional" category of cases where the conduct has attained a serious public dimension.

[93] The Respondent submits that even if the impugned acts are accepted as an exercise of state authority, such authority would nevertheless be exercises of property rights relating to reserve and title lands, which are quintessentially "private" in nature. In support of its position, HTC cites cases confirming that a reserve interest is, like many private interests in land, sufficient to ground a claim in trespass: see for example *Joe v Findlay*, [1981] BCJ No 366 (QL), 1981 CanLII 401 (BCCA). HTC also relies on *Devil's Gap*, which found that a decision respecting a lease of reserve lands is not a reviewable decision: at para 41.

[94] HTC asserts that its rights to its reserves and its rights over Heiltsuk territory, both under Heiltsuk law and under Crown law, are "private" in nature, as they do not emanate from federal Crown authority. HTC also wants to make clear that should the Court decide such authority arguably originates from the Crown (for purposes of summary dismissal), HTC intends to prove Aboriginal title as against the Applicant, for the limited purpose of opposing a declaration that HTC has no "authority" outside of the Bella Bella Reserve.

[95] In my view, the very essence of HTC's alternative argument would mitigate against dismissing the Application on a summary basis. The assertion of Aboriginal title places this matter more appropriately within the purview of public law than private law: *Air Canada* at para 60.

[96] I note further that the HTC's argument that the actions in question are "private" in nature relies in part on its assertion that the decisions were not based on a statutory power. As I have already concluded that the issue of whether HTC was exercising a statutory power remains an issue to be determined, I find that the related issue of whether the impugned actions are private in nature must also be determined at a full hearing of the Application.

[97] The Respondent cites several decisions in support of its position that the impugned conduct falls under the domain law: *Cyr v Batchewana First Nation of Ojibways*, 2022 FCA 90 and *Devil's Gap*. I note that in these cases cited by the Respondent, the impugned decisions were found by the Court to have been made pursuant to a private contract or an agreement between the parties. The Respondent has not pointed to any agreement or contract signed between the HTC and the Applicant as the source of its decisions.

[98] I further note that the Court has assumed jurisdiction in decisions dealing with banishment and removal of individuals under residency bylaws enacted by band councils pursuant to the *Indian Act*: see *Solomon v Garden River First Nation*, 2019 FC 1505.

[99] Based on all of the above, I conclude that the Application for judicial review shall proceed on the merits in its entirety. I therefore dismiss the Motion.

VI. Costs

[100] Given I have not come to any determinative findings on the jurisdictional issues raised by the HTC, I do not find it appropriate to make a cost order at this point. Costs, if any, are therefore deferred until the final determination of this matter on merits.

VII. Conclusion

[101] The Respondent's Motion is dismissed.

[102] Cost in the cause to follow.

ORDER in T-835-22

THIS COURT ORDERS that:

1. The Respondent's Motion is dismissed.
2. Costs, if any, are to be deferred until the final determination of this matter on the merits.

"Avvy Yao-Yao Go"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-835-22
STYLE OF CAUSE:	HAYDN GEORGE v HEILTSUK TRIBAL COUNCIL

MOTION IN WRITING CONSIDERED AT TORONTO, ONTARIO

ORDER AND REASONS:	GO J.
DATED:	DECEMBER 21, 2022

WRITTEN SUBMISSIONS:

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