Federal Court  Cour fédérale

Date: 20231215

Docket: T-835-22

Citation: 2023 FC 1705

Ottawa, Ontario, December 15, 2023

PRESENT: Mr. Justice Sébastien Grammond

BETWEEN:

HAYDN GEORGE

Applicant

and

HEILTSUK TRIBAL COUNCIL

Respondent

JUDGMENT AND REASONS

[1] In this application for judicial review, Mr. George challenges two resolutions adopted by Heiltsuk Tribal Council. The first resolution asked him to leave Heiltsuk Nation's reserve at Bella Bella. The second resolution prohibited him from being present in Heiltsuk Nation's traditional territory, which includes not only the reserve but also the surrounding area. The Council adopted these resolutions after Mr. George, who is not Indigenous, lost his employment at Bella Bella's school and sought to remain in the community. Mr. George also seeks

declarations regarding the Council's dealings with his subsequent employer and, more generally, the Council's power to expel individuals from Heiltsuk Nation's traditional territory.

[2] Resolving this matter requires consideration of both Canadian law and Heiltsuk Nation's law or Ǧvi̓ḷás. The first resolution reflected Mr. George's loss of entitlement to reside on the reserve according to a by-law adopted by the Council. This raises an issue of Canadian law because the Council had adopted that by-law pursuant to federal legislation, the *Indian Act* . In adopting the second resolution, however, the Council relied only on Ǧvi̓ḷás, pursuant to which non-Heiltsuk people may be asked to leave the traditional territory. The Council has not sought the assistance of Canadian legal institutions for the enforcement of the two resolutions. It merely tried to persuade third parties to respect them voluntarily.

[3] I am dismissing Mr. George's application, essentially because this Court lacks jurisdiction. While the first resolution pertains to matters arising under Canadian law, it did not affect Mr. George's rights, because, pursuant to the by-law, his right to reside on the reserve had already ceased upon the termination of his employment. The second resolution, in contrast, is exclusively based on Ǧvi̓ḷás. In adopting it, the Council did not "exercise jurisdiction or powers conferred by or under an Act of Parliament," which is a condition precedent to this Court's judicial review jurisdiction. The Council's dealings with Mr. George's subsequent employer are a private matter that is not properly subject to judicial review. There is no need to issue a declaration regarding the scope of the Council's powers regarding its traditional territory pursuant to Canadian law, as the Council has not purported to exercise those powers.

I. Background

[4] Heiltsuk Nation is a First Nation whose traditional territory is located on the central coast of British Columbia. It has its own governance structures rooted in tradition. According to Ǧvi̓ḷás, or Heiltsuk law, five Hímás, or hereditary chiefs, have responsibility for each of its five constituent "tribes." Heiltsuk Nation is also recognized as a "band" under the *Indian Act*, RSC 1985, c I-5. The respondent, Heiltsuk Tribal Council [the Council], is the council of the band. For at least twenty years, it has worked with the Hímás in a system of joint leadership, combining authority flowing from Ǧvi̓ḷás and from the Canadian legal system.

[5] For more than a century, members of the Heiltsuk Nation have mainly resided in the community of Bella Bella, located on Campbell Island. That community is designated as a "reserve" pursuant to the *Indian Act*. Several other reserves have been set apart for Heiltsuk Nation in its traditional territory, but they are not relevant to the present matter and I will use reserve in the singular to refer to the Bella Bella reserve.

[6] Heiltsuk Nation's traditional territory also comprises communities that are not located within the Nation's reserves. Both Heiltsuk and non-Heiltsuk live in these communities. Shearwater, located on Denny Island, about six kilometres away from Bella Bella, is one of these communities.

[7] Section 81(1)(p.1) of the *Indian Act* empowers the council of a First Nation to make by-laws respecting "the residence of band members and other persons on the reserve." In 1992, the

Council adopted By-Law No 20 [the Residency By-Law], which sets out the categories of persons who may reside on the reserve, which may be broadly described as follows. Members of the Nation, their dependent children and employees of certain institutions located in Bella Bella are automatically entitled to reside on the reserve. Spouses of members, their children and members of other First Nations may apply for permission to reside on the reserve. Other persons who wish to reside on the reserve for a temporary purpose may apply for a limited stay permit.

[8] In the 1970s, Heiltsuk Nation took control of the education of its children and created the Bella Bella Community School. The school is operated by the Bella Bella Community School Society. The Council and the Society are separate entities, but the evidence does not disclose the details of the relationship between them.

[9] The applicant, Mr. George, was the principal of the school from 2019 to 2021. He is not a member of Heiltsuk Nation. His employment was terminated on October 1, 2021, expressly without cause.

[10] In December 2021, the Council became aware that Mr. George had not left Bella Bella, despite the end of his employment. Moreover, the school's new principal made a number of allegations regarding Mr. George. A joint meeting of the Council and the Hímás took place on December 16, 2021 to consider the matter. They decided to ask Mr. George to leave the community. This was recorded in a resolution signed by the members of the Council on December 17, 2021. Section B of the preamble of the resolution summarizes the allegations made by the school's new principal. The resolution reads as follows:

WHEREAS:

A. Heiltsuk Tribal Council ("HTC"), is committed to maintaining and protecting the wellbeing of Heiltsuk Nation members, including those living in Bella Bella;

B. The following information regarding Haydn George, a former principal of Bella Bella Community School, has come to the attention of HTC:

   I. He picked up a cheque from HTC issued to Bella Bella Community School, transferring funds from the Summer Work Experience Program intended to pay students to do work and did not deposit that cheque;

   II. He has been asked by the superintendent not to interfere with school board business;

   III. He recently contacted a student of Bella Bella Community School, and encouraged the student to "go after the school board", for money he said the student was owed for work they did;

   IV. His behaviour upset the student, especially because Mr. George no longer works at the school; and

   V. He has also been meeting with youth for unknown reasons, although he no longer works at the school.

C. Mr. George is not listed on the Heiltsuk Nation Residency List, is not entitled to have his named entered on the Residency List, and does not reside in Bella Bella pursuant to and in accordance with the terms of the Limited Stay Permit pursuant to the Heiltsuk Indian Band By-Law 20 (as amended) (the "Residence Bylaw"); and

D. The HTC is alarmed and concerned by Mr. George's behaviour and wishes to respondent appropriately.

HEILTSUK TRIBAL COUNCIL DOES HEREBY RESOLVE THAT:

1. Pursuant to Heiltsuk Nation's inherent right of self government, the Residency Bylaw, and applicable legislation, HTC declares Haydn George is not entitled to be on the Reserve.

2. HTC requests that Haydn George voluntarily leave Bella Bella and not return unless invited to do so by Heiltsuk Joint Leadership.

3. If Haydn George does not leave Bella Bella by December 22, 2021, then HTC will consider legal action to compel him to leave.

[11] The Council did not give notice to Mr. George that it would meet on December 16, 2021 and did not invite him to make submissions. Mr. George takes issue with the statements contained in section B of the preamble of the resolution and in the letter written by the school's new principal, which was disclosed to him in the course of this proceeding. He says that he volunteered on a regular basis for a community youth program operated by the Qqs (Eyes) Projects Society [Qqs] and continued to do so after the end of his employment, and that this is the context in which he met youth.

[12] After the termination of his employment, Mr. George moved to a float home anchored at Martin's Marina, in Bella Bella. While the marina is very much integrated in the community, the float home was anchored outside the reserve's boundaries. Mr. George also refrained from entering the reserve.

[13] On January 17, 2022, through counsel, Mr. George disclosed that he was living in a float home at the marina. He also requested that the Council give him permission to enter the reserve for certain specific purposes, in particular to continue to volunteer for Qqs. On the same date, the Executive Director of Qqs wrote to the Council to support this request and to praise Mr. George's volunteer work.

[14] This prompted the Council and the Hímás to consider Mr. George's situation again on January 18, 2022. Mr. George did not receive notice of that meeting nor was he invited to make submissions beyond what his counsel had already provided. This resulted in the adoption of a new resolution dated January 20, 2022, which reads as follows:

> WHEREAS:
>
> A. Heiltsuk Tribal Council ("HTC"), is committed to maintaining and protecting the wellbeing of Heiltsuk Nation members throughout Heiltsuk Territory;
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> B. On December 21, 2021, following the HTC's receipt of concerning information regarding Haydn George, a former principal of Bella Bella Community School, the HTC passed Band Council Resolution 21/22 ("BCR 21/22"), declaring that Mr. George is not entitled to be on the Reserve and requesting that Mr. George voluntarily leave Bella Bella;
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> C. The HTC was informed by counsel for Mr. George on January 17, 2022, that Mr. George has purported to comply with BCR 21/22 by residing in a float house in marine waters at Martin's Marina, outside the Reserve but in Bella Bella and in Heiltsuk Territory;
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> D. Because Mr. George's continued residence in the waters of Bella Bella, he has requested permission to access the Reserve for employment purposes and to obtain basic necessities;
>
> E. By continuing to reside in the waters of Bella Bella, Mr. George has not voluntarily left Bella Bella, despite the HTC's request for him to do so in BCR 21/22; and
>
> F. The HTC remains alarmed and concerned by Mr. George's behaviour.
>
> HEILTSUK TRIBAL COUNCIL DOES HEREBY RESOLVE THAT:
>
> 1. Pursuant to Heiltsuk Traditional Governance and ğvi̓ḷás, Haydn George is immediately prohibited from being on Heiltsuk Territory and may not enter Heiltsuk Territory without the express permission of Heiltsuk Joint Leadership;

2. If Haydn George does not immediately leave Heiltsuk Territory then the HTC will consider further legal action to compel him to leave.

[15] Counsel for Heiltsuk Nation transmitted this second resolution to counsel for Mr. George and invited the latter to apply for a limited stay permit pursuant to the Residency By-Law. Counsel for Mr. George replied that he had no intention of doing so, as he wished to reside in Bella Bella permanently and not for a temporary purpose.

[16] Upon receiving this second resolution, Mr. George ceased residing in a float home at Martin's Marina. He arranged to reside elsewhere on Heiltsuk traditional territory, but outside the Bella Bella reserve. The record does not disclose the precise nature of these arrangements.

[17] In January 2022, Mr. George began temporary employment with School District 49, which operates a school in Shearwater. He was replacing the school's only teacher, who was on medical leave. Upon learning of this, representatives of the Council communicated with representatives of the District to inform them of the two resolutions requiring Mr. George to leave Bella Bella and Heiltsuk territory. The District terminated Mr. George's employment on March 31, 2022, before the teacher returned from leave.

[18] Mr. George then initiated the present application for judicial review, seeking orders quashing both resolutions, a declaration to the effect that the Council's interactions with School District 49 were invalid and a declaration that the Council lacks the power to banish anyone from its traditional territory outside the reserves. He argues that the Council denied him procedural fairness, by failing to give notice of the meetings at which the resolutions were adopted. He also

asserts that the resolutions were unreasonable, because they were based on unreliable evidence and did not consider his version of the facts nor the support letter from the Executive Director of Qqs. Lastly, while he accepts that the Council has the power to prohibit non-members from residing on the reserve, he contends that the Council has no such power outside the reserve.

[19] The Council brought a motion to strike the present application, based on this Court's alleged lack of jurisdiction. My colleague Justice Avvy Yao-Yao Go dismissed the motion: *George v Heiltsuk First Nation*, 2022 FC 1786, holding that jurisdictional issues should be decided together with the merits of the application.

[20] In parallel to the present application, Mr. George filed a grievance regarding the termination of his employment at School District 49, according to the provisions of the collective agreement. It appears that Mr. George and the District settled this grievance.

[21] Mr. George also began a civil action against the Council and Bella Bella Community School Society, alleging inducing breach of contract and defamation. The Council brought a motion for summary judgment. Justice Nitya Iyer of the British Columbia Supreme Court granted the motion in part: *George v Bella Bella Community School Society*, 2023 BCSC 1767. She found that the Council did not induce breach of contract in its discussions with School District 49. However, she found that the defamation allegations should go to trial, which is scheduled for January 2024.

II. Analysis

[22] I am dismissing Mr. George's application. The two resolutions challenged by Mr. George are not amenable to judicial review, but for different reasons. The first resolution is not reviewable because it did not affect Mr. George's rights. His legal entitlement to reside on the reserve ended with his employment, before the resolution was adopted. The second resolution was not made pursuant to powers granted or recognized by federal legislation and is therefore outside the jurisdiction of the Federal Court. As the matter is not amenable to judicial review, I need not consider Mr. George's submissions regarding procedural fairness and substantive unreasonableness.

[23] Moreover, I decline to issue the declarations sought by Mr. George. The interactions between the Council and School District 49 do not involve any public law power and are therefore not properly subject to judicial review, with the result that this Court lacks jurisdiction to issue a declaration regarding them. Lastly, there is no live controversy regarding Mr. George's request for a declaration that the Council lacks power to expel non-Heiltsuk persons from its traditional territory, because the proposed declaration pertains to Canadian law and the Council is not relying on Canadian law.

[24] Before explaining my reasons, I need to address one procedural issue. Mr. George is seeking leave to challenge more than one decision in a single application for judicial review, pursuant to rule 302 of the *Federal Courts Rules*, SOR/98-106. I am granting this request. The two resolutions and the subsequent conduct challenged in this application are closely

intertwined, even though they are based on different sources of authority and give rise to different issues. Moreover, it follows that Mr. George does not need to seek an extension of time to bring this application.

A. *General Principles*

[25] What makes this case unusual is that the application for judicial review targets decisions made pursuant to a combination of Indigenous law and Canadian law. For the proper understanding of these reasons, it is therefore necessary to begin by clarifying what is meant by Indigenous law and Canadian law and by outlining the basic principles governing the scope of the Federal Court's jurisdiction on judicial review.

(1) Indigenous Law and Canadian Law

[26] The concept of Canadian law does not need much elaboration, as it will be familiar to most readers of these reasons. At the risk of oversimplifying, it can be described as the body of rules that derive their authority and legitimacy from the Canadian constitution. Its written sources include, in hierarchical order, the Constitution, primary legislation, whether federal or provincial, and various forms of delegated legislation, such as regulations or by-laws. It also includes the common law, that is, the body of rules inferred from the decisions of the courts.

[27] One potential meaning of the concept of Indigenous law refers to any law made by Indigenous peoples, irrespective of its ultimate source of authority. In that sense, some Indigenous law may be part of Canadian law, if the latter delegates law-making authority to

Indigenous peoples. As mentioned earlier, this includes the power of the councils of First Nations to make by-laws pursuant to the *Indian Act*.

[28] In this case, however, the parties have used the phrase Indigenous law in a different sense. It refers to law the authority and legitimacy of which are rooted in Indigenous traditions, philosophies and worldviews instead of the Canadian constitution. In this sense, Indigenous law exists independently of any delegation of power from the Canadian legal system. Heiltsuk people use the term Ǧvi̓ḷás to describe this sort of Indigenous law. In her affidavit, Hímȧ́s Joann Green provides the following explanation:

> Ǧvi̓ḷás expresses spiritual values, principles, and beliefs about our ways of being, and embodies Heiltsuk legal principles. Ǧvi̓ḷás governs the relationship of Heiltsuk with each other and with the natural and spiritual world, and governs the responsibility of Heiltsuk to our resources, including our lands, our waters, and all living beings within Heiltsuk Territory. Ǧvi̓ḷás flows from Láxvái, which refers to the power or strength of the connection or inherent jurisdiction of the Hímȧ́s to their territory.

[29] Even though Indigenous law, in the latter sense, exists independently of Canadian law, there may be contact points between the two legal systems: see the discussion in *Linklater v Thunderchild First Nation*, 2020 FC 1065 at paragraphs 38–45; see also Ghislain Otis, Jean Leclair and Sophie Thériault, *Applied Legal Pluralism: Processes, Driving Forces and Effects* (New York: Routledge, 2023). For instance, the *Indian Act* recognizes that the leaders of certain First Nations are chosen according to "custom," which effectively means Indigenous law: *Pastion v Dene Tha' First Nation*, 2018 FC 648 at paragraphs 6–14, [2018] 4 FCR 467. Likewise, the common law and the legislation of several provinces and territories recognize Indigenous "customary" adoption. However, there are matters in respect of which there is no

contact point between Canadian and Indigenous law. At this juncture, it not necessary to discuss the interactions between Canadian and Indigenous law in more detail.

(2) Judicial Review in the Federal Court

[30] Judicial review has been described as "the means by which the courts supervise those who exercise statutory powers, to ensure that they do not overstep their legal authority": *Dunsmuir v New Brunswick,* 2008 SCC 9 at paragraph 28, [2008] 1 SCR 190. Stated otherwise, "the constitutional role of judicial review [is] to ensure that exercises of state power are subject to the rule of law": *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paragraph 82, [2019] 4 SCR 653. Judicial review is an essential, although by no means exclusive, manner for the courts to ensure that the executive branch acts in conformity with the law. It plays a crucial role in a free and democratic society.

[31] Judicial review is a public law remedy. The significance of this is explained below. Nevertheless, private law remedies may also be used to hold governments accountable, as shown by the classic example of *Roncarelli v Duplessis*, [1959] SCR 121, or more recent examples of class actions related to a broad range of government policies or conduct.

[32] Judicial review normally falls within the jurisdiction of the provincial superior courts: *Crevier v Attorney-General (Québec)*, [1981] 2 SCR 220. However, the growth of the administrative state led Parliament to centralize judicial review of federal administrative bodies in the Federal Court: *Strickland v Canada (Attorney General)*, 2015 SCC 37 at paragraphs 16–18, [2015] 2 SCR 713.

[33] Three aspects of the law of judicial review must be explained for the proper understanding of these reasons. They are: (a) the nature of the decisions that may properly be challenged on judicial review; (b) the extent of the Federal Court's jurisdiction as opposed to that of provincial superior courts; and (c) the fact that judicial review is available only with respect to decisions that bear a public character.

[34] These three issues are interrelated to a certain extent. However, they are usually treated as separate issues in the case law and I will do the same.

(a) *What Decisions May Be Challenged?*

[35] An applicant may not challenge every aspect of the conduct of an administrative body. Judicial review is available only if the impugned decision affects the applicant's rights or legal situation. In contrast, "[w]ere administrative action does not affect an applicant's rights or carry legal consequences, it is not amenable to judicial review": *Democracy Watch v Conflicts of Interest and Ethics Commissioner*, 2009 FCA 15 at paragraph 10.

[36] In other words, to use a consecrated phrase, the decision challenged must affect the applicant's rights, impose obligations on them or cause them prejudice: *Forest Ethics Advocacy Association v Canada (National Energy Board)*, 2013 FCA 236 at paragraph 20 [*Forest Ethics*]; *Air Canada v Toronto Port Authority*, 2011 FCA 347 at paragraph 29, [2013] 3 FCR 605 [*Air Canada*]; *Taseko Mines Limited v Canada (Environment)*, 2019 FCA 319 at paragraph 36; *Democracy Watch v Canada (Attorney General)*, 2021 FCA 133 at paragraph 29. The fact that an applicant suffers inconvenience or indirect financial consequences from the decision or has a

moral interest in the matter is not sufficient: *Forest Ethics*, at paragraphs 26–29; *League for Human Rights of B'nai Brith Canada v Canada*, 2010 FCA 307 at paragraph 58, [2012] 2 FCR 312.

(b) *A "Federal Board, Commission or Other Tribunal"*

[37] Section 18 of the *Federal Courts Act*, RSC 1985, c F-7, grants exclusive jurisdiction to this Court with respect to the granting of certain administrative law remedies "against any federal board, commission or other tribunal." The latter phrase, in turn, is defined in section 2:

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** 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*.

[38] What matters, for the purposes of this definition, is the source of the powers of the body: *Anisman v Canada (Border Services Agency)*, 2010 FCA 52 at paragraph 29. In other words, the decision challenged must have been made, or purported to be made, pursuant to powers granted

by federal legislation. The fact that a body owes its existence to federal legislation is not sufficient.

[39] It is trite law that First Nations, their councils or bodies created by them are "federal boards, commissions or other tribunals" where they exercise powers conferred by the *Indian Act* or other federal legislation. This is also the case where they exercise powers conferred by Indigenous law regarding the selection of leaders, including what are often called "custom election codes:" *Canatonquin v Gabriel*, [1980] 2 FC 792 (CA). While our understanding of Indigenous law has changed considerably since 1980, the better explanation of this holding in today's context seems to be that the *Indian Act*'s recognition of Indigenous laws (or "customs") with respect to the selection of leaders is sufficient to conclude that these laws have been made pursuant to a "jurisdiction or powers conferred by or under an Act of Parliament."

[40] However, where the council of a First Nation exercises powers that are not granted or recognized by the *Indian Act* or other federal legislation, it does not act as a "federal board, commission or other tribunal" and its decisions are not reviewable in the Federal Court: *Devil's Gap Cottagers (1982) Ltd v Rat Portage Band No 38B*, 2008 FC 812 at paragraph 45, [2009] 2 FCR 276 [*Devil's Gap*].

(c) *Public or Private*

[41] Because judicial review is focused on the legality of administrative action, it is available only when the decision challenged is of a public nature. In *Highwood Congregation of Jehovah's*

Witnesses (Judicial Committee) v Wall, 2018 SCC 26 at paragraph 14, [2018] 1 SCR 750 [*Highwood*], the Supreme Court of Canada explains this requirement as follows:

> Judicial review is only available where there is an exercise of state authority and where that exercise is of a sufficiently public character. 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 . . . Such decisions do not involve concerns about the rule of law insofar as this refers to the exercise of delegated authority.

[42] It is notoriously difficult to draw a bright line between private and public decisions. In *Air Canada*, at paragraph 60, the Federal Court of Appeal noted that such a determination "depends on the facts of the case and the overall impression registered upon the Court." It went on to list factors considered in the case law to help in the analysis. Those factors are: the character of the matter, the nature of the decision maker, the basis for the decision, the body's relationship to government, the government's control over the body, the suitability of public law remedies, the existence of compulsory power and exceptional circumstances.

[43] The decisions made by First Nations, their councils or bodies created by them are often of a public character and, for that reason, they are amenable to judicial review: see, for instance, *Jimmie v Council of the Squiala First Nation*, 2018 FC 190. But this is not always the case. Some decisions made by First Nations are private in nature. For instance, the eviction of a member from their house pursuant to a contractual agreement between that person and the First Nation was found to be a private decision: *Cyr v Batchewana First Nation of Ojibways*, 2022 FCA 90; *Cottrell v Chippewas of Rama Mnjikaning First Nation*, 2009 FC 261. A First Nation's decision not to extend a lease is also private in nature: *Devil's Gap*. Likewise, decisions regarding the choice of contracting partners are private if the First Nation's discretion in this

regard is not constrained by statutory or regulatory provisions: *Knibb Developments Ltd v Siksika First Nation*, 2021 FC 1214.

[44] With these principles in mind, we may now turn to the facts of this case and determine whether the decisions challenged are amenable to judicial review.

B. *First Resolution*

[45] The first resolution does not affect Mr. George's rights, impose obligations upon him or cause him prejudice. Therefore, it cannot be the subject of an application for judicial review. I reach this conclusion through an analysis of what the resolution seeks to achieve against the backdrop of the principles of the *Indian Act* regarding the rights of non-members of a First Nation and Heiltsuk Nation's Residency By-Law. The analysis is based solely on Canadian law, as the Residency By-Law was adopted pursuant to federal legislation and is sufficient to dispose of the issue.

[46] The starting point of the analysis is that members of the public do not have a right to reside or to be present in First Nations communities governed by the *Indian Act*, in contrast to what they may do in non-Indigenous communities. Section 18 of the *Indian Act* provides that "reserves are held by Her Majesty for the use and benefit of the respective bands for which they were set apart." Subsection 28(1) sets out the corollary of this principle: no one other than a member of a First Nation may acquire rights "to occupy or use a reserve or to reside or otherwise exercise any rights on a reserve," save in limited circumstances and for a defined period.

Therefore, Mr. George has no right to reside or to be present in Bella Bella apart from what is explicitly granted by Heiltsuk Nation.

[47] The Residency By-Law regulates the right to reside in Heiltsuk Nation's reserves. Section 4.01 grants an automatic right of residency to certain categories of persons, in particular Heiltsuk members and their children, as well as

> . . . persons employed by the Council, the Bella Bella Community School, R.W. Large Memorial Hospital, the Royal Canadian Mounted Police or the Pentecostal and United Churches situate on the Reserve, together with the spouse of any such person and the dependent children of such person or any children of whom he has custody, residing with him, for the duration of such employment.

[48] Other categories of persons, such as spouses of members and members of other First Nations, may apply for discretionary admission pursuant to section 4.02. Other persons wishing to reside on the Reserve for a temporary purpose may apply for a limited stay permit pursuant to section 5.01. In these cases, the decision is made by the Council after considering a series of factors listed in section 6.04.

[49] Given the structure of the Residency By-Law, Mr. George's entitlement to reside on the reserve arose automatically when he became employed by Bella Bella Community School and terminated automatically when his employment ended. No intervention of the Council was necessary to bring about this result. No discretionary decision was involved. In fact, Mr. George ceased to be entitled to reside on the reserve more than two months before the Council adopted the first resolution. In this Court, he did not seriously argue otherwise. In reality, the fact that he

arranged to reside immediately outside the boundaries of the reserve suggests that he was well aware of the principles embodied in the Residency By-Law.

[50] What, then, was the legal effect of the first resolution? In its operative part, it finds that Mr. George has no entitlement under the Residency By-Law, requests him to leave voluntarily and threatens legal proceedings if he does not comply. It does not purport to terminate Mr. George's right of residency; that had already occurred automatically pursuant to the Residency By-Law. Thus, the first resolution does not take away any rights that Mr. George previously had. It does not impose any new obligations upon him. It is a mere request to comply with a pre-existing prohibition.

[51] In this respect, this case is similar to other cases where courts found that judicial review was not available where the decision challenged did not create or modify the legal situation that is the real focus of the complaint. *Fort Nelson First Nation v British Columbia (Environmental Assessment Office)*, 2016 BCCA 500, is a case in point. The environmental assessment legislation in British Columbia sets forth objective criteria to decide whether a project has to undergo a full environmental assessment. It does not, however, establish a decision making process for that purpose. Rather, it is for the project proponent to determine if a project must undergo a full review. In that matter, the Environmental Assessment Officer sent a letter to the proponent expressing the view that a project was not reviewable. The British Columbia Court of Appeal held that this letter could not be the subject of an application for judicial review, because it did not have "any legal consequences" (at paragraph 45). Likewise, in *Air Canada*, the Federal Court of Appeal found that the real focus of Air Canada's application for judicial review was the

pre-existing allocation of take-off and landing slots at Billy Bishop Airport, which was not affected by the two decisions that were the subject of the application.

[52] Another manner of explaining this is to ask what Mr. George's legal situation would be if his application for judicial review were allowed and the first resolution quashed. Quashing the resolution would not entitle Mr. George to reside in Bella Bella. As explained above, his entitlement ceased when his employment at the school ended. Indeed, Mr. George is not asking the Court to send the matter back to the Council for redetermination. The Federal Court of Appeal performed a similar thought experiment in *Air Canada*, noting that the real focus of Air Canada's complaint would remain even if the application were granted (at paragraph 36).

[53] Mr. George relies on cases such as *Sheard v Chippewas of Rama First Nation Band Council*, [1997] 2 CNLR 182 (FCTD), and *Solomon v Garden River First Nation*, 2019 FC 1505, in which this Court reviewed decisions to banish persons from First Nations communities. As far as one can tell from the reasons, however, the decisions challenged in these cases purported to terminate the applicants' existing entitlement to reside on a reserve. Contrary to the present case, their entitlement did not automatically cease upon the termination of their employment or for similar reasons. The decisions challenged in those cases did affect the applicants' rights.

[54] Nevertheless, Mr. George argues that the first resolution deprived him of the right of access to the reserve independently of a right of residency. It is not in dispute that non-members regularly attend the reserve for various purposes and that the Council tolerates their presence, as long as they do not establish their residence there. An earlier version of the Residency By-Law

defined residence in a way that excluded short visits for "family, friendship, recreational or business purposes," but did not provide a positive right to attend the reserve for such purposes and did not displace Heiltsuk Nation's right to decide who can be present on the reserve. Under the *Indian Act* regime, this tolerance does not create a general right of access. In contrast, other Indigenous land regimes, such as chapter 6 of the Nisga'a Final Agreement, explicitly provide for rights of access for non-members. Thus, the first resolution did not deprive Mr. George of a right of access to the reserve, as he had no such right.

[55] Mr. George also argues that even if the first resolution did not affect his rights or impose obligations upon him, it nevertheless caused him prejudice. This would be sufficient to make the resolution subject to judicial review. In my view, however, the alleged prejudice is not the direct result of the resolution, but rather the consequence of Mr. George's loss of entitlement to reside in Bella Bella pursuant to the Residency By-Law.

[56] In his affidavit, Mr. George highlights a number of difficulties that resulted from his attempt to reside in the immediate vicinity of the community while avoiding to set foot on the reserve. More generally, Mr. George asserts he had an expectation that he could remain in Bella Bella indefinitely despite the end of his employment at the school. In his affidavit, he states, "I have developed a strong community in Bella Bella and I consider it home." His counsel wrote to the Council that he did not wish to reside in Bella Bella "for a temporary purpose," but "on an ongoing basis." He alleges that he was "extraordinarily distressed" when he learned that this would not be possible.

[57] These are all consequences of the termination of Mr. George's employment and entitlement to reside in Bella Bella, his attempts to circumvent that loss of entitlement and perhaps his realization that his expectation of long-term residency was ill founded. This prejudice does not flow from the first resolution. The first resolution was simply a request to comply with pre-existing obligations. A "decision" that merely requests the applicant to comply with the law does not amount to "prejudice" that makes the decision amenable to judicial review.

[58] A significant aspect of Mr. George's challenge to the first resolution pertains to the statements contained in section B of the preamble, which he says are false and defamatory. The mere presence of such statements in the preamble, however, does not give rise to prejudice that makes the decision amenable to judicial review. Such prejudice must flow from the operative part of the resolution. Moreover, the statements in section B of the preamble have no bearing on Mr. George's entitlement to reside on the reserve, which ceased before the resolution was adopted. To the extent that these statements caused harm to Mr. George when they were communicated to third parties, this may give rise to a cause of action in private law but not a ground for judicial review.

[59] In oral argument, Mr. George suggested that what he was really asking for was an exemption or exception from the strict application of the Residency By-Law and that the Council failed to consider this request. His application for judicial review, however, does not challenge this particular aspect of the Council's conduct. Most importantly, the Residency By-Law sets out a process for making exceptions, namely, to apply for a limited stay permit. Had Mr. George applied for such a permit, the Council would have had to consider his application, and the

decision would have been subject to judicial review. Despite being invited to do so, however, Mr. George declined to apply. He cannot blame the Council for not considering a request he never made.

C. *Second Resolution*

[60] The second resolution is not amenable to judicial review in this Court because it was made pursuant to a source of authority other than federal legislation. Before giving my reasons for this finding, it is useful to summarize the parties' submissions regarding the second resolution.

[61] Mr. George's main ground for challenging the second resolution is simple. Relying on *R v Lewis*, [1996] 1 SCR 921 at paragraph 78, he argues that the council of a First Nation has no authority outside the boundaries of its reserve and, for this reason, lacks the power to prohibit anyone from residing or being present in the part of its traditional territory that lies outside the reserve.

[62] The Council responds that it has not sought to do these things pursuant to Canadian law. Rather, the second resolution is based exclusively on Ǧviḷás, or Indigenous law. In contrast to the first resolution, there is no mention of any federal source of authority. Therefore, the Federal Court would lack jurisdiction, because the second resolution was not made pursuant to federal legislation and the Council was not acting as a "federal board, commission or other tribunal." For this reason, the Council takes the view that it is unnecessary to address the issue of the validity of the second resolution under Canadian law. Were it necessary to do so, however, it asserts that the

Heiltsuk Nation's aboriginal title empowers it to exclude persons from its traditional territory. Moreover, the Council argues that the second resolution was not the exercise of a power of a public character and is therefore not the proper subject of judicial review in any court.

[63] Mr. George replies that federal authority was sufficiently present to make the second resolution amenable to judicial review in the Federal Court. In the alternative, he argues that a decision made pursuant to Indigenous law is subject to judicial review in the Federal Court. He adds that the process leading to the decision was unfair and that the decision is substantively unreasonable.

[64] In my view, in making the second resolution, the Council was not exercising nor purporting to exercise powers flowing from federal legislation nor powers recognized by federal legislation. Therefore, it was not acting as a "federal board, commission or other tribunal" and the second resolution cannot be the subject of judicial review in the Federal Court. My reasons follow.

[65] It is increasingly accepted that the councils of First Nations derive their powers not only from federal legislation, such as the *Indian Act*, but also from Indigenous law: see, for example, *Bone v Sioux Valley Indian Band No 290 Council*, [1996] 3 CNLR 54 (FCTD) at paragraph 31; *Canadian Pacific Ltd v Matsqui Indian Band*, [2000] 1 FC 325 (CA) at paragraph 29; *Devil's Gap*, at paragraph 59; *Whalen v Fort McMurray No 468 First Nation*, 2019 FC 732 at paragraph 32, [2019] 4 FCR 217; *Kennedy v Carry the Kettle First Nation*, 2020 SKCA 32 at paragraph 7;

McCarthy v Whitefish Lake First Nation #128, 2023 FC 220 at paragraphs 117–125. The latter are often described as "inherent powers," in the sense that they do not depend on Canadian law.

[66] In this case, the Council explicitly disclaimed federal law as a source of authority for the second resolution. Rather, it invoked its powers under Ğvi̓ḷás. Hím̓ás Green explains what Ğvi̓ḷás provides with respect to the presence of non-members on Heiltsuk territory :

> Non-Heiltsuk members have always had to obtain permission from the Hím̓ás to enter and stay in Heiltsuk Territory.
>
> . . .
>
> Unless a non-Heiltsuk member acquires rights and ties to the land through kinship with Heiltsuk, such as through marriage, permission relates to them attending in the community for specific purposes, such as fulfilling a traditional role (like a healer) or a modern role (such as a teacher), or attending at an event (like a potlatch). Non-Heiltsuk members who exceed or outstay their permission, or who disrupt the harmony of the community, may be asked to leave. Under Ğvi̓ḷás, a non-Heiltsuk member has no right to stay in Heiltsuk Territory.

[67] Moreover, the Council completely refrained from resorting to the processes or institutions of Canadian law for enforcing the resolution. Rather, it simply "requested third parties to voluntarily respect it," as counsel put it in their submissions. Hence, it never "exercise[ed] or purport[ed] to exercise jurisdiction or powers conferred by or under an Act of Parliament," which is a critical component of the definition of "federal board, commission or other tribunal." Seeking recognition under Canadian law may possibly be a basis for this Court's jurisdiction: *Linklater*, at paragraphs 41–43. However, the Council never sought to leverage Canadian law to assist in the enforcement of a decision made pursuant to Ğvi̓ḷás. Thus, I see no reason to disregard the Council's choice to base the second resolution exclusively on Ğvi̓ḷás.

[68] Mr. George argues that the Council's use of a form provided by the federal government for recording band council resolutions [BCRs] has the effect of bringing the second resolution under federal authority. I disagree. The mere use of that form says nothing about the source of authority for the decision it records.

[69] Mr. George also argues that the second resolution cannot be divorced from the first, which was clearly based on the *Indian Act* and the Residency By-Law. Once again, I cannot follow him. The two resolutions are clearly different in terms of their territorial reach and source of authority.

[70] I also reject Mr. George's submission that the fact that the second resolution was adopted by the Council and not the Hím̓ás proves that it was made pursuant to federal authority. As explained above, what matters is the source of the power, not the pedigree of the body exercising it. With respect to Indigenous law, the identity of the body exercising "inherent" powers would be a matter internal to the community. In this case, there was evidence that the Council and the Hím̓ás acted jointly, even though this is not recorded in the BCR form. In this respect, it would be very difficult to argue that the second resolution would be amenable to judicial review in the Federal Court had it been made by the Hím̓ás acting alone.

[71] Given these conclusions, it is unnecessary to address the issues of the scope of Canadian law's recognition of Indigenous law or whether the Canadian law of aboriginal title enables a First Nation to exclude non-members from its traditional territory. It is also unnecessary to decide whether the matter at issue is not amenable to judicial review because it is an inherently

private matter. Suffice it to say that the public or private characterization of decisions made pursuant to Indigenous law or aboriginal title was not at play in cases such as *Air Canada* or *Highwood*. Mapping the public/private distinction onto legal systems that fundamentally differ from Western ones raises difficult issues that cannot be adequately addressed in the context of this proceeding.

[72] I must nevertheless address briefly Mr. George's subsidiary argument to the effect that the Federal Court has jurisdiction to review decisions made pursuant to Indigenous law. Mr. George's submission is rooted in a concern for the rule of law: if this Court does not have jurisdiction, there would be no meaningful way of reviewing the Council's decisions.

[73] Mr. George's submission, however, is based on a misapprehension of the concept of "federal board, commission or other tribunal." As *Anisman* made clear, the fact that a body owes its existence to federal legislation is not enough to base this Court's jurisdiction. What matters is the source of its powers. In this regard, if I understand correctly, Mr. George argues that federal common law generally recognizes Indigenous law. Even assuming that this is a correct statement of the law, the common law is not an Act of Parliament for the purposes of the definition of "federal board, commission or other tribunal." To the extent that *Gamblin v Norway House Cree Nation*, 2012 FC 1536, suggests otherwise, I decline to follow it. Moreover, I fail to see why this Court should assume jurisdiction based on Canadian law's recognition of Indigenous law where the Council is not seeking such recognition.

[74] In my view, this Court cannot have jurisdiction to review decisions made solely pursuant to Indigenous law unless the *Federal Courts Act* is amended. Whether this would be desirable is not for me to decide. I simply note that there may be valid reasons why Indigenous communities would not want their laws, or certain categories of them, to be interpreted and applied by Canadian courts, including the courts' lack of familiarity with unwritten Indigenous laws and their philosophical background: see, for instance, *Louie v Canada (Indigenous Services),* 2021 FC 650 at paragraphs 46–47; *Bastien v Jackson,* 2022 FC 591 at paragraphs 25–29. Such concerns are reflected, for example, in the Nisga'a Final Agreement, which defines "law" as excluding *Ayuukhl Nisga'a* or *Ayuuk*, that is, the traditional laws and practices of the Nisga'a Nation. They also bear some resemblance to the concerns mentioned in *Highwood*, at paragraphs 32–39. These concerns buttress my conclusion that this Court does not have jurisdiction over decisions made solely pursuant to Indigenous law in the absence of an explicit provision to that effect in the *Federal Courts Act*.

[75] This does not leave Mr. George without redress. As mentioned above, private law remedies may contribute to hold governments accountable and safeguard the rule of law. The Council has sought to implement both resolutions by attempting to persuade third parties to respect them voluntarily. If, out of respect for Ǧviḷás, a third party acts in a way that complies with both Ǧviḷás and Canadian law, Mr. George cannot complain. If, however, the Council or a third party committed a civil wrong in acting in conformity with Ǧviḷás, Mr. George may have a private law claim against them.

D. *Declaratory Judgment*

[76] In addition to orders quashing the two resolutions, Mr. George is seeking declarations that the Council's dealings with School District 49 were "invalid" and that the Council "has no authority to expel or banish any person from Heiltsuk traditional territory outside of Bella Bella."

[77] In *Daniels v Canada (Indian Affairs and Northern Development)*, 2016 SCC 12 at paragraph 11, [2016] 1 SCR 99, the Supreme Court of Canada described the situations in which it is appropriate to issue a declaratory judgment:

> The party seeking relief must establish that the court has jurisdiction to hear the issue, that the question is real and not theoretical, and that the party raising the issue has a genuine interest in its resolution. A declaration can only be granted if it will have practical utility, that is, if it will settle a "live controversy" between the parties . . .

[78] I would also observe that section 18 of the *Federal Courts Act* grants this Court exclusive jurisdiction to issue declaratory relief against a federal board, commission or other tribunal. It follows that even though declaratory relief is by nature more flexible than other remedies, this Court can only grant it if it pertains to the exercise of a power flowing from an Act of Parliament and, of course, having a public character.

(1) Communications with School District 49

[79] Mr. George seeks a declaration to the effect that the Council's interactions with School District 49 were "invalid." He no longer seeks a declaration that these interactions were "unlawful." I assume that by withdrawing the latter, Mr. George wishes to focus his request on

administrative law grounds that might render this conduct invalid instead of private law causes of action that would make it unlawful.

[80] Yet, there is nothing of a public character in the Council's dealings with School District 49. What the Council did is to inform the District of its resolution prohibiting Mr. George from being present in Heiltsuk traditional territory and to seek the District's cooperation in giving effect to this resolution. In doing so, the Council did not exercise any compulsory power over the District, but simply relied on persuasion. It did not act pursuant to a clearly defined statutory scheme. Traditional public law remedies are unsuited to the matter; rather, Mr. George brought an action for damages concerning the same facts. These considerations, identified in *Air Canada*, tend to show that the impugned conduct is of a private character and therefore not amenable to judicial review, even where the remedy sought is a declaration.

(2) Power to Banish or Expel

[81] Lastly, Mr. George seeks a declaration that the Council "has no authority to expel or banish any person from Heiltsuk traditional territory outside of Bella Bella Reservation No. 1." This declaration surely pertains to Canadian law, as Mr. George's memorandum of argument relies on older case law stating that First Nations are merely creatures of the *Indian Act* and lack any authority outside reserves. Indeed, this Court would not have jurisdiction to issue a declaration pertaining solely to Ǧvi̓ḷás. Mr. George takes no position regarding the Council's assertion that Ǧvi̓ḷás empowers the Council or the Hímȧ́s to refuse access to non-Heiltsuk persons to Heiltsuk traditional territory.

[82] As we have seen above, the Council does not rely on Canadian law for the enforcement of its resolutions. If it were necessary to decide the issue, the Council takes the position that its aboriginal title includes the right to determine who has access to its traditional territory and to expel non-Heiltsuk persons from it. It has filed evidence tending to prove its aboriginal title, at least with respect to Campbell Island and Denny Island, where Bella Bella and Shearwater are respectively located. Nevertheless, it recognizes that it is unlikely that Canadian authorities would recognize this incident of aboriginal title in the absence of a declaration by a court, which explains why it chose not to rely on Canadian law in adopting the second resolution nor seek the assistance of Canadian authorities in enforcing it.

[83] These positions do not contradict each other. The Council purports to act pursuant to Ğviḷás, but Mr. George does not deny that Ğviḷás empowers the Council to expel him. Rather, Mr. George asserts that Canadian law does not confer a power of expulsion upon the Council, but the Council is not invoking such a power flowing from Canadian law. Therefore, there is no live controversy between the parties regarding these issues and no need for a declaratory judgment.

[84] It would be unwise, and a waste of judicial resources, to try to solve the complex issues raised by Mr. George's request for declaratory relief in the absence of a true adversarial context. Moreover, at the hearing, he recognized that no purpose would be served by issuing a declaratory judgment if the two resolutions are not quashed. Accordingly, his request is denied.

III. Disposition

[85] For these reasons, I conclude that this Court does not have jurisdiction to review the conduct challenged by Mr. George's application. Hence, the application for judicial review will be dismissed.

[86] The parties have requested that the issue of costs be addressed at a later stage. Accordingly, they will be given the opportunity to make submissions regarding this issue.

JUDGMENT in T-835-22

THIS COURT'S JUDGMENT is that

1. The applicant is granted leave to bring this application against more than one decision.
2. The application for judicial review is dismissed.
3. The respondent will serve and file its submissions regarding costs, not to exceed ten pages in length, no later than 30 days after the date of this judgment.
4. The applicant will serve and file his submissions regarding costs, not to exceed ten pages in length, no later than 15 days after the date on which the respondent serves its submissions.

"Sébastien Grammond"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-835-22
STYLE OF CAUSE:	HAYDN GEORGE v HEILTSUK TRIBAL COUNCIL
PLACE OF HEARING:	VANCOUVER, BRITISH COLUMBIA
DATE OF HEARING:	NOVEMBER 6 AND 7, 2023
JUDGMENT AND REASONS:	GRAMMOND J.
DATED:	DEEMBER 15, 2023

APPEARANCES:

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