Federal Court  Cour fédérale

Date: 20151019

Docket: T-1992-14

Citation: 2015 FC 1180

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Ottawa, Ontario, October 19, 2015

PRESENT: The Honourable Mr. Justice Roy

BETWEEN:

MARIE MACHE RAMEAU

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

[1] Marie Mache Rameau (the applicant) says she is caught in a vicious circle. She had filed a complaint with the Canadian Human Rights Commission (the Commission) 12 years ago, but the case was supposedly resolved when the parties agreed to a settlement under the *Canadian Human Rights Act*, RSC, 1985, c H-6 (the Act). It appears that the settlement is now the subject of a dispute over its interpretation, and the applicant is looking for a decision-making body to cut this Gordian knot.

[2] To this end, the applicant is now turning to the Canadian Human Rights Tribunal (the Tribunal). In decision with reasons dated August 26, 2014, the Tribunal declined to deal with the case. The applicant seeks judicial review of that decision under section 18.1 of the *Federal Courts Act*, RSC, 1985, c F-7.

[3] The role of a court of law is to dispose of disputes that parties submit to it, not to provide legal opinions. In this case, the Court must find that the Tribunal's refusal to interpret a clause in a settlement to which it is not a party in any capacity, in the absence of a complaint filed with it, was appropriate. In my opinion, the Tribunal had no choice, particularly since the settlement became an order of this Court by a decision of Justice Pinard on May 29, 2012, in accordance with subsection 48(3) of the Act. The application for judicial review must therefore be dismissed.

I. Facts

[4] The facts in this case are unusual, so a timeline is provided to give a much-needed overview that aids in understanding the factual background:

- July 2003: The applicant filed a complaint with the Commission. In that complaint, she alleged that the Canadian International Development Agency (CIDA) had discriminated against her on the basis of race.

- December 23, 2005: Having completed its investigation, the Commission recommended that a tribunal be appointed to deal with the complaint, as permitted by the Act.

- November 29, 2006: The mediation suggested by the Tribunal, held in accordance with the Tribunal's internal procedures and with the consent of the parties, resulted in the drafting of minutes of settlement between the parties before the complaint could be dealt with. This is the settlement referred to above. This settlement provides that the Commission will monitor it [TRANSLATION] "to ensure the performance of the terms and conditions agreed herein" (para 14). The settlement includes a dispute resolution mechanism of its own, as Article 16 of the settlement expressly provides that [TRANSLATION] "[o]nce the settlement has been approved by the Commission, in the event of a disagreement concerning the performance of any of its conditions, the parties agree to resume mediation to renegotiate the points in dispute".

- January 16, 2007: The Commission confirmed that the settlement had been approved under subsection 48(1) of the Act. In a letter addressed to the Tribunal, a request was made to have the Tribunal issue a notice of discontinuance. The applicant was sent a carbon copy. Moreover, on December 8, 2006, the Tribunal had given direct notice that it would be issuing a letter staying the proceedings.

- January 17, 2007: The Tribunal notified the applicant that it was staying proceedings and closing her file.

- July 3, 2009: The settlement provides that the applicant shall be assigned to the Public Service Commission for 12 months at level PE-4, one level higher than the one she held at CIDA. The costs of this 12-month assignment were to be covered by CIDA. Said assignment one level higher was in an acting position. The

applicant remained at the Public Service Commission for two years. The costs of the second year were covered by the Public Service Commission. When she returned to CIDA in February 2009, the applicant requested a permanent appointment, as she was entitled to do, according to her interpretation of Clause 6 of the settlement. On July 3, she notified the Commission that CIDA was not complying with the settlement.

- June 23, 2010: The parties having agreed that the Commission would monitor the settlement and that, in the event of a disagreement regarding the performance of the settlement, they would resume mediation to renegotiate the points in dispute, the Commission asked the Tribunal on this day to preside over mediation session.

- September 24, 2010: After deliberating, the Tribunal concluded that it would be inappropriate for it to play this role. It noted that the file had been closed since January 17, 2007, that the member who had taken part in the original mediation several years ago was no longer with the Tribunal, and that the settlement had been approved by the Commission.

- March 7, 2012: After the Tribunal refused to act as mediator, a mediation session was held without the Tribunal's assistance until CIDA withdrew from it on March 7.

- May 29, 2012: On the applicant's initiative, the settlement between her and CIDA, approved by the Commission on November 29, 2006, was [TRANSLATION]

"made an order of the Federal Court" by order of Justice Pinard, of this Court, dated May 29, 2012.

- November 2, 2012: Claiming a breach of the settlement made an order of this Court, the applicant brought contempt of court proceedings against CIDA in the Federal Court. Justice Boivin dismissed the proceedings with costs. Essentially, Justice Boivin found that the order that had allegedly been breached, thus justifying a finding of contempt, was not as clear as it should be. The ambiguity in Clause 6 was such that there could not be a deliberate breach. The judge therefore found the clause to be vague, which was enough to conclude that the motion should be dismissed; he did not resolve the ambiguity. No appeal was filed against that decision.

- November 20, 2012: The applicant invited the respondent to resume mediation, but to no avail.

- January 18, 2013: The applicant asked the Tribunal to intervene [TRANSLATION] "to decide a limited question of interpretation regarding the application of the Minutes of Settlement".

- August 26, 2014: The Tribunal declared that it could not intervene.

II. Decision under review

[5] The decision under judicial review is the Tribunal decision dated August 26, 2014. The applicant wanted the Tribunal to deal with the disagreement over the scope and interpretation of Clause 6 of the Minutes of Settlement, which constitute the settlement approved by the Commission.

[6] Essentially, the Tribunal denied the request because it is of the opinion that it no longer has jurisdiction over the matter. It therefore declared itself to be *functus officio*. The settlement between the parties resulted in the Tribunal closing the file that had originally been submitted to it.

[7] In the Tribunal's opinion, its jurisdiction arose from a complaint that the Commission had referred to it, and no such complaint exists anymore. What is more, the settlement that the Commission had approved was made an order of the Federal Court by order of Justice Pinard. The Tribunal's decision is neatly summed up at paragraph 60 of that decision:

> [TRANSLATION]
> [60] In light of the relevant legal provisions and, more specifically, the provisions of subsection 48(1) and section 49 of the Act I referred to above, as well as the lack of any relevant provision in the minutes of settlement that would allow the Tribunal to retain jurisdiction, I find that the Tribunal cannot intervene in response to the request made by the complainant to resolve any dispute respecting the settlement between the parties dated November 29, 2006.

[8] In the end, the applicant raises public policy as a basis for the Tribunal's jurisdiction here. The Tribunal declines jurisdiction, noting that the applicant's argument is not supported by any authorities.

III. Standard of review

[9] The applicant alleges that the Tribunal made errors of law in its decision and seeks judicial review of that decision on the correctness standard. She concedes that the questions of mixed fact and law are subject to the reasonableness standard.

[10] The applicant relies on two decisions of the Federal Court of Appeal to support her argument that the correctness standard should prevail. In *Canada (Attorney General) v Johnstone*, 2014 FCA 110 [*Johnstone*], a panel of that Court concluded that the questions submitted to it in that case were subject to that standard despite the presumption that, on judicial review, the Court is required to show deference with regard to questions of law pertaining to the statute that an administrative tribunal is responsible for applying. The other case cited is *Canada (Attorney General) v Cruden*, 2014 FCA 131 (*Cruden*).

[11] In my view, these two judgments do not appear to be of any assistance to the applicant in her efforts to have the Tribunal's decision reviewed on the correctness standard. Moreover, the applicant did little to develop her argument based on the two judgments.

[12] Since *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 [*Dunsmuir*], it has been recognized that four types of questions are reviewed on the correctness standard:

i) a question of law that is of utmost importance for the legal system and that is outside the specialized area of expertise of the administrative tribunal;

ii) questions of law regarding the division of powers between Parliament and the provinces;

iii) questions of law truly concerning jurisdiction and constitutionality. The Court noted that "[j]urisdiction is intended in the narrow sense of whether or not the tribunal had the authority to make the inquiry. In other words, true jurisdiction questions arise where the tribunal must explicitly determine whether its statutory grant of power gives it the authority to decide a particular matter" [para 59];

iv) questions regarding the jurisdictional lines between two or more competing specialized tribunals will also be subject to the correctness standard.

In addition to these four types of questions, there is the case where an administrative tribunal and a court can rule at first instance on the same question of law. It would be inconsistent for the Court, on judicial review, to apply the reasonableness standard to such a decision by an administrative tribunal when an appeal from the Court's decision at first instance would be subject to the correctness standard. The Supreme Court therefore concluded in *Rogers Communications Inc v Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 35, [2012] 2 SCR 283 [*Rogers Communications*], that the correctness standard applies to a question of law decided by an administrative tribunal when the same question could be submitted to a court of law sitting as court of first instance.

[13] Aside from these five types of questions, the presumption continues to apply. The applicant did not raise any of these categories in her memorandum of fact and law, relying instead on *Johnstone*, above. However, in my view, *Johnstone* is based on a line of reasoning that does not lend itself easily to the case under review.

[14] In *Johnstone*, the Court, relying on the fact that the presumption (*Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 SCR 654 (*Alberta Teachers'*)) that deference must be shown to an administrative tribunal's interpretation of its home statute is rebuttable, concluded that the meaning of "marital status", a prohibited ground of discrimination recognized by statute, and the definition of the test to be used to determine whether there is discrimination within the meaning of the legislation should be reviewed on the correctness standard. No comparable issue is at stake in the present case.

[15] Indeed, the Federal Court of Appeal noted that the two questions under review in that case concerned the scope of the protection afforded by a quasi-constitutional statute. According to the Court, the standard of review applicable to constitutional questions should prevail for a quasi-constitutional statute involving fundamental rights.

[16] Furthermore, many courts and administrative tribunals are called upon to apply such quasi-constitutional statutes, which suggests that the correctness standard should apply, as in *Rogers Communications*, above. Indeed, it would be unfortunate if divergent interpretations could be presented before different administrative tribunals and courts.

[17] The Federal Court of Appeal was also of the opinion that the two issues in that case were of central importance to the legal system (*Johnstone*, at para 51). Finally, the Federal Court of Appeal cited previous judgments favouring the correctness standard in cases involving a determination of the meaning and scope of "marital status".

[18] With respect, I have difficulty seeing how the questions raised in *Johnstone*, above, could be equated with those at issue here. It seems to me that we are far from the definition of "marital status" or what constitutes the test for determining where there is discrimination when we are dealing with the Tribunal's jurisdiction to dispose of issues beyond a complaint referred to it by the Commission. In my opinion, *Johnstone* cannot be cited in support of the proposition that any question of law that arises when interpreting the Act must be reviewed on the correctness standard.

[19] In *Cruden*, a decision of the Federal Court of Appeal rendered after *Johnstone*, above, a different panel of the Federal Court of Appeal (one of three judges sitting on two panels) cited *Johnstone* without approving it. This panel concluded instead that the standard of review was not important, since only one interpretation could prevail.

[20] As was recognized in *McLean v British Columbia (Securities Commission)*, 2013 SCC 67, [2013] 3 SCR 895 [*McLean*], it is possible for two reasonable legal interpretations to co-exist. It is therefore possible that a question of law can admit two different interpretations, both of them reasonable. But this will not always be the case (*McLean*, at para 38). In *Cruden*, above, the Federal Court of Appeal therefore decided that it did not have to rule on the standard of

review because the end result would be the same. There was only one valid and reasonable interpretation.

[21] In the case at hand, I would conclude as the Federal Court of Appeal did in *Cruden*. In my opinion, the Tribunal correctly stated that it could not dispose of the question of interpretation that the applicant wanted to submit to it. I cannot see how it could be otherwise. Its decision was correct. Whether the standard of review is correctness or reasonableness, the outcome is, in my view, the same.

[22] I would not be inclined to agree with the applicant's argument based solely on *Johnstone*, above. The issues decided in *Johnstone* are quite simply nothing like the one before this Court, such that it could be called a question of law of central importance to the legal system as a whole. In *Mouvement laïque québécois v Saguenay (City)*, 2015 SCC 16, the Supreme Court gave another example of this sort of question:

> [51] In her concurring reasons, Abella J. disagrees with this approach to the applicable standards of review in the instant case. In my opinion, in the context of this appeal, this Court's decisions, more specifically *Dunsmuir*, *Mowat* and *Rogers*, to which I have referred, support a separate application of the standard of correctness to the question of law concerning the scope of the state's duty of neutrality that flows from freedom of conscience and religion. I find that the importance of this question to the legal system, its broad and general scope and the need to decide it in a uniform and consistent manner are undeniable. Moreover, the jurisdiction the legislature conferred on the Tribunal in this regard in the *Quebec Charter* was intended to be non-exclusive; the Tribunal's jurisdiction is exercised concurrently with that of the ordinary courts. I am therefore of the view that the presumption of deference has been rebutted for this question. This Court confirmed in a recent case (*Tervita*, at paras. 24 and 34-40) that the applicable standards on judicial review of the conclusions of a specialized administrative tribunal can sometimes vary depending

> on whether the questions being analyzed are of law, of fact, or of mixed fact and law.

[23] Here, the issue to be decided falls squarely within those to be resolved by people who have the degree of expertise or field sensitivity of "those working day to day in the implementation of frequently complex administrative schemes" (*Dunsmuir*, above, at para 49). It is simply a matter of determining whether the Act permits a particular sort of question to be decided: the Tribunal must consider its purpose, the nature of the question and its expertise. The issue in this case is by no means outside the Tribunal's expertise with regard to its home statute. It had to be decided whether the Tribunal could deal with a question that did not come to it through the filing of a complaint. I would have expected its decision to be treated with deference.

[24] In her memorandum of fact and law before this Court, the applicant did not address the possibility that the issue in this case falls in the category of true questions of jurisdiction, other than to state at paragraph 33 that jurisdictional errors, when they are obvious, require that a decision be quashed.

[25] And yet the applicant made the issue of jurisdiction the central pillar of her case at the hearing. Relying on paragraphs 59 and 60 of *Dunsmuir*, the applicant argued that this case turns on a question of jurisdiction, even in the strict sense laid out in that judgment of "whether or not the tribunal had the authority to make the inquiry". As the majority wrote,

> [i]n other words, true jurisdiction questions arise where the tribunal must explicitly determine whether its statutory grant of power gives it the authority to decide a particular matter. The tribunal must interpret the grant of authority correctly or its action will be found to be *ultra vires* or to constitute a wrongful decline of jurisdiction . . . .

Dunsmuir, at para 59

[26] It would appear that the difficulty lies in the fact that the interpretation of an administrative tribunal's home statute must be afforded deference on judicial review. But jurisdictional questions are also questions of home statute interpretation. When does one sort of question become the other? Where is the line drawn? This is perhaps why the majority in *Alberta Teachers'* openly questioned whether questions of jurisdiction continue to exist since *Dunsmuir*:

> [34] The direction that the category of true questions of jurisdiction should be interpreted narrowly takes on particular importance when the tribunal is interpreting its home statute. In one sense, anything a tribunal does that involves the interpretation of its home statute involves the determination of whether it has the authority or jurisdiction to do what is being challenged on judicial review. However, since *Dunsmuir*, this Court has departed from that definition of jurisdiction. Indeed, in view of recent jurisprudence, it may be that the time has come to reconsider whether, for purposes of judicial review, the category of true questions of jurisdiction exists and is necessary to identifying the appropriate standard of review. However, in the absence of argument on the point in this case, it is sufficient in these reasons to say that, unless the situation is exceptional, and we have not seen such a situation since *Dunsmuir*, the interpretation by the tribunal of "its own statute or statutes closely connected to its function, with which it will have particular familiarity" should be presumed to be a question of statutory interpretation subject to deference on judicial review.
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> *Alberta Teachers'*, at para 34

[27] At the hearing, I asked counsel for the applicant if he could refer the Court to any authorities supporting his proposition that we were dealing with a question of jurisdiction according to paragraph 59 of *Dunsmuir*, despite paragraph 34 of *Alberta Teachers'*. (I note that the Court repeated its scepticism in *ATCO Gas and Pipelines Ltd. v Alberta (Utilities Commission*), 2015 SCC 45 at para 27). He was unable to provide any.

[28] As I have tried to explain regarding the argument half-heartedly made on the basis of *Johnstone*, the standard of review is of no importance in this case because only one solution is possible here. Even if the correctness standard is applied, the Tribunal had no jurisdiction to consider a clause in a settlement to which it was not a party.

IV. Analysis

[29] In this Court, the applicant presented the same arguments as it did before the Tribunal. She submits that her complaint is still before the Tribunal. For her, [TRANSLATION] "the issue is not one of reopening a Tribunal decision, but one of dealing with a question that is inextricably linked to the complaint's referral to the Tribunal" (Applicant's Memorandum of Fact and Law, at para 37). If I understand the argument correctly, because the complaint was not decided on the merits, it should be possible for a question stemming from the interpretation of the settlement ending the dispute between the applicant and CIDA to be nonetheless referred to the Tribunal for adjudication. The applicant would even have the burden of proof shifted to the respondent so that the respondent would have to prove that the Tribunal lacks jurisdiction. No authorities were cited in support of such an assertion.

[30] The Court cannot follow the applicant down this path. Both the Commission and the Tribunal are creatures of the Act. The parties seem to agree that the Tribunal's jurisdiction is dependent on the Commission filing a complaint with the Tribunal (paragraph 44(3) of the Act), following an investigation. But there is more. The Tribunal's jurisdiction is to institute an inquiry into a complaint. This is done in accordance with sections 49 and 55 of the Act. However, in the case at bar, there was no inquiry into the complaint. To speak in terms of "dealing with a

question that is inextricably linked to the complaint's referral to the Tribunal" simply skirts the issue. It is not enough that the complaint was referred. The complaint would also have to be still before the Tribunal, or the exercise that the Tribunal is asked to engage in would have to be an inquiry into the complaint or part of such an inquiry. Such is not the case, nor could it be.

[31] The reason for this is very simple. The parties chose to settle the matter as they are permitted to do. Section 48 of the Act reads as follows:

Referral of a settlement to Commission	Présentation des conditions de règlement à la Commission
48. (1) When, at any stage after the filing of a complaint and before the commencement of a hearing before a Human Rights Tribunal in respect thereof, a settlement is agreed on by the parties, the terms of the settlement shall be referred to the Commission for approval or rejection.	48. (1) Les parties qui conviennent d'un règlement à toute étape postérieure au dépôt de la plainte, mais avant le début de l'audience d'un tribunal des droits de la personne, en présentent les conditions à l'approbation de la Commission.
Certificate	Certificat
(2) If the Commission approves or rejects the terms of a settlement referred to in subsection (1), it shall so certify and notify the parties.	(2) Dans le cas prévu au paragraphe (1), la Commission certifie sa décision et la communique aux parties.
Enforcement of settlement	Exécution du règlement
(3) A settlement approved under this section may, for the purpose of enforcement, be made an order of the Federal Court on application to that Court by the Commission or a party to the settlement.	(3) Le règlement approuvé par la Commission peut, par requête d'une partie ou de la Commission à la Cour fédérale, être assimilé à une ordonnance de cette juridiction et être exécuté comme telle.

[32] Here, a settlement was reached. It was approved by the Commission. The applicant chose to apply to this Court to have the settlement "be made an order of the Federal Court". It should come as no surprise that the Tribunal closed her file, after notifying her.

[33] I am concerned not so much with the Tribunal's statement that the file is closed as with the fact that the dispute disappeared with the settlement between the parties. The language of the settlement is unambiguous. The applicant states at paragraph 10 of the settlement that [TRANSLATION] "[t]he complainant agrees that this settlement represents the final resolution of all the incidents alleged in complaint No. 20031234 and forever releases and discharges the respondent . . .". The parties having agreed that they accept no liability, it is stated at paragraph 12 that [TRANSLATION] "[t]he complainant acknowledges having taken part in the settlement of the complaint voluntarily, without duress or coercion, and fully understands the conditions to which she has agreed". It is difficult to understand how the complaint, being the subject of a full and final settlement, could still be active or even relevant.

[34] In fact, the Tribunal is in no way a party to the settlement; it is a matter for the parties, approved by the Commission. Strictly speaking, one wonders how the Tribunal could deal with a question of interpreting a settlement that, at law, could not be within its jurisdiction because it was signed before the Tribunal could conduct an inquiry. Indeed, as section 48 states, a settlement may be agreed on "before the commencement of a hearing before a Human Rights Tribunal". When the Supreme Court considered whether the Tribunal is sufficiently independent from the Commission, in constitutional terms, it noted that the Tribunal adjudicates complaints that have been referred to it by the Commission (*Bell Canada v Canadian Telephone Employees*

Association, 2003 SCC 36 at para 23, [2003] 1 SCR 884). The Tribunal is independent from the Commission, as it should be. But the jurisdiction is to institute inquiries into complaints. If there is no inquiry being conducted, the Tribunal has no jurisdiction.

[35] On the face of the language of the Act, the Tribunal institutes inquiries into complaints (sections 49 and 50). The settlement, which was signed before an inquiry into the complaint was instituted, is independent of the Tribunal and beyond its jurisdiction. What the Tribunal is being asked to do here is to deal with a question of law, that is, the interpretation to be given to a settlement in accordance with section 48 of the Act. On this point, the Act is clear: the settlement was signed before a Tribunal hearing could begin. The Tribunal inquires into complaints. There is no mixing and matching.

[36] The applicant wants the Tribunal to assume jurisdiction to interpret a settlement to which it is not a party and which, by definition, came into being before the Tribunal could exercise its jurisdiction, which is to conduct inquiries into complaints. Not only does this place us at point in time before the exercise of the jurisdiction conferred by Parliament, but the applicant would have the Tribunal do something other than inquire into the complaint: she wants the Tribunal to interpret a settlement, specifically, the minutes of settlement, which constitute a contractual document that settles the dispute between the parties that gave rise to the complaint.

[37] The settlement itself could not be clearer regarding its effect. One need only read the introduction to the minutes of settlement, which sets out the scope of the settlement: [TRANSLATION] "The parties have discussed the issues concerning complaint number 20031234

and Tribunal file number T-1148-3006 in mediations and have decided to settle the complaint in accordance with the following terms" (emphasis added). I have already referred to paragraphs 10 and 12 of the settlement, which unequivocally confirm the intention of the complainant, that is, the applicant. To my mind, there is no room for conjecture. There is no complaint pending. But even if there was, the applicant is not asking for an inquiry into the complaint. She wants the Tribunal to interpret a settlement disposing of the complaint. This, in my view, is not a request that can receive a positive answer without the Tribunal exceeding the jurisdiction granted to it by Parliament.

[38] The Court is also of the opinion that some weight should be given to the fact that the settlement was made an order of this Court. The applicant did indeed try to challenge the decision of this Court, which refused to consider her contempt of court application. In a display of legal gymnastics, she tried to show that the refusal to deal with the contempt application because the provision in respect of which there was a breach of an order of this Court (namely, the settlement approved by the Commission, which the applicant had made into an order) is ambiguous and constitutes reason in itself for the Tribunal to assume jurisdiction.

[39] The picture that emerges is one of someone who would like to have an order of this Court interpreted by an administrative tribunal, failing which she could apply to this same Court for judicial review. In support of this argument, she raises the refusal of our Court to interpret the provision in dispute, in a proceeding with defined parameters, namely, a contempt of court proceeding.

[40] I see no point in muddying the waters; returning to the basic principles will do. While it is certainly true that this Court found ambiguity preventing contempt of court, it is unclear how confirming the ambiguity gives jurisdiction to a statutory body to interpret settlements that have been made orders of this Court. We are confronted with an order of this Court, signed by Justice Pinard, that transformed the settlement approved by the Commission into an order. That order was not carried out as sought in the contempt proceeding. That is all. The Canadian Human Rights Tribunal is not involved.

[41] Indeed, Justice Boivin's decision on the contempt proceeding merely points out that the recourse chosen by the applicant to have the order of this Court (*per* Justice Pinard) enforced is inappropriate because the obligation to be performed must be clear, not ambiguous. In other words, the breach must be deliberate. In my view, the applicant is mistaken in noting at paragraph 56 of her memorandum of fact and law that [TRANSLATION] "it is not surprising that the Federal Court would not interpret minutes of settlement that were not drafted by the Court itself". That is not the issue. The Court did not refuse to interpret the Minutes; it simply found them to be ambiguous, which was enough to shut the door on the contempt of court proceeding. The applicant chose an avenue that led her in the wrong direction. There is nothing else to be gained from this venture. This does not mean, by a sort of reverse logic, that the Tribunal must now have jurisdiction. It is still a matter of interpreting an order of this Court for enforcement purposes. It does not create any legal relationship with the Tribunal.

[42] I would add in passing that it is ironic to say the least that the applicant concedes that the Court was correct to not interpret a settlement that it did not draft while at the same time she

insists that the Tribunal should do just that, even though the Tribunal did not draft that settlement either. One would have thought that the same logic should apply.

[43] The applicant attacked the Tribunal's use of the *functus officio* doctrine in its decision. Neither the applicant nor the Tribunal defined this doctrine, such that it is difficult to glean from this anything more than an expression of the impossibility for the Tribunal to be forced to assume jurisdiction.

[44] In Canada, the classic description of the doctrine is found in the reasons of Justice Sopinka, writing for the majority, in *Chandler v Alberta Association of Architects*, [1985] 2 SCR 848, at pages 861 and 862:

> 20 I do not understand Martland J. to go so far as to hold that *functus officio* has no application to administrative tribunals. Apart from the English practice which is based on a reluctance to amend or reopen formal judgments, there is a sound policy reason for recognizing the finality of proceedings before administrative tribunals. As a general rule, once such a tribunal has reached a final decision in respect to the matter that is before it in accordance with its enabling statute, that decision cannot be revisited because the tribunal has changed its mind, made an error within jurisdiction or because there has been a change of circumstances. It can only do so if authorized by statute or if there has been a slip or error within the exceptions enunciated in *Paper Machinery Ltd. v. J. O. Ross Engineering Corp.*, *supra*.
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> 21 To this extent, the principle of *functus officio* applies. It is based, however, on the policy ground which favours finality of proceedings rather than the rule which was developed with respect to formal judgments of a court whose decision was subject to a full appeal. For this reason I am of the opinion that its application must be more flexible and less formalistic in respect to the decisions of administrative tribunals which are subject to appeal only on a point of law. Justice may require the reopening of administrative proceedings in order to provide relief which would otherwise be available on appeal.

> 22 Accordingly, the principle should not be strictly applied where there are indications in the enabling statute that a decision can be reopened in order to enable the tribunal to discharge the function committed to it by enabling legislation. This was the situation in *Grillas*, *supra*.
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> 23 Furthermore, if the tribunal has failed to dispose of an issue which is fairly raised by the proceedings and of which the tribunal is empowered by its enabling statute to dispose, it ought to be allowed to complete its statutory task. If, however, the administrative entity is empowered to dispose of a matter by one or more specified remedies or by alternative remedies, the fact that one is selected does not entitle it to reopen proceedings to make another or further selection. Nor will reserving the right to do so preserve the continuing jurisdiction of the tribunal unless a power to make provisional or interim orders has been conferred on it by statute. See *Huneault v. Central Mortgage and Housing Corp.* (1981), 41 N.R. 214 (F.C.A.).
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> [Emphasis added.]

[45] Upon reading the Tribunal's decision in its entirety, it becomes clear that the words "*functus officio*" were used to refer to the lack of authority to act in respect of a settlement made an order of this Court. The Tribunal claims to be *functus* because the settlement disposed of the matter, and this settlement has now become an order of this Court.

[46] The Tribunal could have chosen its words better or explained them at greater length. However, the context in which they are used shows—clearly, in my view—that the Tribunal found that it did not have jurisdiction. My reading of paragraph 56 to 59 of the Tribunal's decision confirms for me that the Tribunal was merely noting its lack of jurisdiction.

[47] In my opinion, the cited passage from the Supreme Court's decision in *Chandler* is not in any way inconsistent with what the Tribunal decided. An administrative tribunal should be able to finish the job if it has "failed to dispose of an issue which is fairly raised by the proceedings

and of which the tribunal is empowered by its enabling statute to dispose". The issue that the applicant would like to see resolved by the Tribunal does not meet the stated conditions. This is by no means a matter of allowing the Tribunal to finish the job with which it is tasked under the Act.

[48] The applicant did indeed try to rely on the decision of this Court in *Elsipogtog First Nation Band Council v Peters*, 2012 FC 398 (*Peters*). In that case, unlike here, the decision under review had been rendered by an adjudicator who wanted to retain jurisdiction and did not want to be found to be *functus officio*. In *Peters*, however, the issue was whether the adjudicator was *functus officio* in respect of his own decision which left two issues open. The Court in *Peters* thus concluded that the adjudicator was not *functus* and that he was entitled to consider the issues left unresolved in his arbitral award.

[49] We have nothing of the sort in the present case. There is no Tribunal decision leaving anything whatsoever unresolved. The onus is on the person seeking judicial review of a decision to show that the Tribunal declined to exercise a jurisdiction granted to it. The applicant did not do so, so *Peters* is of no assistance to her. It is perhaps this inability to show how the Tribunal has jurisdiction to interpret a settlement to which it is not a party and which falls outside a proper inquiry into a complaint that led the applicant to claim, surprisingly, that [TRANSLATION] "the burden is on the respondent to prove that the Tribunal does not have jurisdiction to hear a question of interpretation regarding the minutes of settlement" (Memorandum of Fact and Law, para 38). No authorities were cited in support of this rather extraordinary proposition. The Court is not aware of any. The burden of proof lies on the person challenging a given interpretation

(*Wilson v British Columbia (Superintendent of Motor Vehicles)*, 2015 SCC 47 at para 41, citing *McLean*, above).

[50] The onus was on the applicant to demonstrate how the Tribunal could have had jurisdiction when no inquiry into a complaint had been instituted. The applicant would have imposed on the Tribunal the jurisdiction to interpret the settlement resolving the complaint. The applicant was unable to make an argument that would allow an administrative tribunal, whose jurisdiction derives from the language of the Act, to consider that issue.

[51] Finally, in a last ditch effort, the applicant claims that procedural fairness was violated because the Tribunal refused to interpret the Minutes of Settlement. She argues that it would be in the public interest to have the Tribunal deal with the issue of the interpretation of the settlement.

[52] The applicant does not cite any authorities in support of her claims, nor does she expand on what principle of procedural fairness would be at issue here. While procedural fairness has many facets, each facet has to be identified so that it can be demonstrated how the violation stems from rules of procedural fairness that were respected.

[53] As its name suggests, procedural fairness relates to the procedure to be followed. Brown and Evans, in *Judicial Review of Administrative Action in Canada* (Brown and Evans, *Judicial Review of Administrative Action in Canada*. Toronto, ON: Carswell, 2013 (loose-leaf), c 7 at 1100), describes as follows what is now called the "duty of fairness":

7 :1100 . . .

> Administrative action is subject to judicial review on the ground of procedural impropriety. In particular, many public decision-makers are under a legal duty to afford to interested persons a fair opportunity to participate in the decision-making process before any action is taken that is detrimental to their interests. These participatory rights may be found under different legal labels. At common law, the notions of "the rules of natural justice" and, more recently, "the duty of fairness," are frequently used to denote the several rules and principles that provide those participatory rights.

[54] The applicant is trying to create jurisdiction where there otherwise is none. Her attempt cannot succeed. An administrative tribunal does not have inherent jurisdiction. It derives its existence, and its jurisdiction, from the statute creating it. The applicant is not advancing her arguments any further by raising the principles of procedural fairness. She has simply raised two decisions of the Tribunal. If indeed these two decisions deal with procedural fairness, which I doubt, they are not relevant.

[55] The Tribunal's decision in *Berberi v Attorney General of Canada*, 2011 CHRT 23 [*Berberi*] is of absolutely no assistance here. In *Berberi*, the Tribunal merely agreed to decide a dispute in relation to a remedial order properly made by the Tribunal. An inquiry had been made into a complaint, but there was a persisting dispute over the remedy ordered. In our case, the Tribunal not only made no such order, but also was by no means in the process of making an inquiry into a complaint. What is being asked of the Tribunal in this case has nothing to do with an inquiry into a complaint; the complaint was settled, and it is this settlement, not the complaint, that is in issue.

[56] The applicant is equally mistaken in relying on the Tribunal's decision in *Powell v United Parcel Service Canada Ltd*, 2008 CHRT 43 [*Powell*]. In that case, the Tribunal continued its inquiry into a complaint after the parties reached an agreement in principle but failed to sign a final settlement. Absent a settlement, an inquiry had to be made. Such is clearly not the case here, where a settlement was signed and then made an order of this Court. *Powell* actually favours the decision in our case, where the Tribunal is consistent in refusing to go along with a remedy that does not stem from a complaint. Indeed, the applicant is not even trying to revive her complaint; she wants to claim that the Tribunal must hear the dispute over a settlement that, according to the very terms of the Minutes of Settlement, has resolved the complaint. At minimum, *Powell* concluded that, absent a settlement, the complaint itself had to be heard. *Powell* is consistent with the decision rendered by the Tribunal in our case.

V. Conclusion

[57] As I have tried to explain, the applicant cannot succeed. Her request for an interpretation cannot be part of an inquiry into a complaint that has been disposed of. Moreover, having tried to have the order that she obtained from this Court enforced, the applicant now wants to have the ambiguity resolved by a statutory tribunal that is neither a party to the settlement approved by the Commission nor a party to an order of a court. Much to the applicant's chagrin, she turned to a decision-making body that correctly declined her invitation to intervene. This Court must likewise refuse to intervene on judicial review.

[58] The application for judicial review must therefore be dismissed. The Tribunal, being a creature of statute, did not have jurisdiction to consider a settlement signed by the parties and

approved by the Commission. Essentially, the Tribunal was correct to rule itself out of the running to decide this matter. This settlement made an order of the Federal Court cannot be interpreted by the Tribunal unless Parliament provides that it may do so.

[59] The respondent sought costs. Costs are awarded to the respondent in the amount of $1,000, including disbursements.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that the application for judicial review is dismissed with costs in favour of the respondent in the amount of $1,000.00, including disbursements.

"Yvan Roy"
Judge

Certified true translation
Michael Palles

FEDERAL COURT

SOLICITORS OF RECORD

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