

Federal Court



Cour fédérale

Date: 20171019

Docket: T-1122-16

Citation: 2017 FC 934

[ENGLISH TRANSLATION]

Ottawa, Ontario, October 19, 2017

PRESENT: The Honourable Mr. Justice Annis

BETWEEN:

LE CONSEIL DES INNUS DE PESSAMIT

Applicant

and

YAN RIVERIN

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] This is an application for judicial review under subsection 18.1(1) of the *Federal Courts Act*, RSC (1985), c. F-7, of a decision on June 8, 2016, by Bruno Leclerc, acting as an adjudicator in an appeal by the applicant under Division XIV of Part III of the *Canada Labour Code*, RSC 1985, c. L-2 [the *Code*].

II. The facts

[2] The applicant [the Conseil or the employer] is a council within the meaning of the *Indian Act*, RSC 1985, c. I-5. Its mission is to protect and manage the interests of the Innu First Nation of Pessamit, whose lands are located to the east of Baie Comeau, Quebec.

[3] The Conseil consists of a Chief and six councillors elected for two years. At the relevant time, the First Nation's administrative structure consisted of General Directorate that reported directly to the Conseil, and ten sectoral branches that reported in turn to the General Directorate. One of the sectoral branches was economic affairs and natural resources. Decisions adopted by a majority of the Conseil were assigned to the General Directorate to be carried out.

[4] At the time of his termination, the respondent [Mr. Riverin or the respondent] had been Director of Economic Affairs and Natural Resources with the Conseil since 2009. The mandate of the Economic Affairs Branch included the promotion and oversight of the First Nation's economic activities both on its lands and on the ancestral lands known as *Nistassinan*. The Branch was also responsible for managing outfitters located on Conseil lands.

[5] From August 2002 to August 2012, Raphaël Picard was the Chief of the First Nation. The economic situation deteriorated under his mandate. Moreover, in January 2008, based on requirements from the Department of Indian Affairs, a co-manager was appointed to handle the organization's finances. No expenditures could be made without his approval.

[6] In 2011, corrective measures were taken. The number of employees and the length of the work week were reduced. Jean-Marie Vollant was the acting head of the General Directorate since 2010.

[7] On December 8, 2011, Mr. Riverin became a shareholder, director, and president of Uapats, a company operating in the silviculture industry in *Nistassinan* with the Conseil's economic partners.

[8] On May 3, 2012, Mr. Riverin represented the Conseil at a tripartite meeting with Résolu and Uapats. At that meeting, the parties discussed an agreement between Résolu and Uapats for silviculture work on Pessamit land and Uapat's use of the outfitter to house its workers. Mr. Riverin had disclosed his interests in Uapats to some members of the Conseil prior to that meeting, but at least one member present, Adélar Benjamin, was unaware of it.

[9] In June 2012, the Conseil approved the agreement between Résolu and Uapats, and Uapats began its activities. It was only then that Mr. Benjamin was advised of a potential conflict of interest. The situation was accepted because it allowed for the tacit employment of several members of the community, without a formal decision or minutes from the meeting of the Conseil in which the decision was made.

[10] On August 17, 2012, following an election, René Simon became Chief of the First Nation and there were several changes within the Conseil. Jean-Claude Vollant became the head of the General Directorate in September 2012, replacing Jean-Marie Vollant.

[11] Following the election in August 2012, Mr. Riverin took steps to disclose his potential conflict of interest to the new Conseil. No investigation or formal action was taken in response to the disclosure.

[12] Following the election, Chief Simon adopted policies and restrictive measures to improve transparency within the administration and eliminate conflicts of interest. All branches at the time, including Mr. Riverin's, were advised of this. During that same period, the First Nation's administration was restructured, leading to the elimination of five branches and the merger of five sectors, including economic affairs and natural resources.

[13] Between November 21 and December 18, 2012, relations between Mr. Riverin and the Director General were tense. At the time, the Director General advised Mr. Riverin that some of his duties would be taken from him. On December 6, Mr. Riverin advised the Director General that he was in a situation of psychological harassment. However, it seems that, following a long meeting on December 18, 2012, Mr. Riverin and the Director General were able to come to an agreement.

[14] On December 10, 2012, the Conseil received a complaint regarding Mr. Riverin's potential conflict of interest. In January 2013, the Conseil asked the General Directorate to begin an investigation into the matter.

[15] The Director General was unable to obtain information about Mr. Riverin's potential conflict of interest. On February 12, 2013, he formally called Mr. Riverin to a meeting the next day to submit any relevant documentation and information to him.

[16] In a letter dated February 13, 2013, Mr. Riverin refused to follow up on the Director General's request without written explanations clarifying the mandate and legal basis cited to investigate the affairs of a private company. He indicated that, if those explanations were not provided, he would bring his requests before the Conseil. That letter also called upon the General Directorate to cease the psychological harassment that he claimed to be facing since the discussions on December 6, 2012.

[17] On February 21, 2013, the General Directorate received a document showing that Mr. Riverin was a shareholder, director, and president of Uapats.

[18] On March 11, 2013, Mr. Riverin obtained a doctor's note prescribing one month off work. The next day, he filed a harassment complaint against the General Directorate with the Commission de santé et sécurité au travail [CSST].

[19] On March 14, 2013, the General Directorate sent the Chief and the Conseil a preliminary report regarding Mr. Riverin's conduct. That report proposed two possible recommendations:

[TRANSLATION]

The first is to offer Mr. Riverin the opportunity to remain within the organization in a different role and with lower-level responsibilities compared to his current ones in exchange for him giving up his activities or interests in the company UAPATS

PESSAMIT. The disciplinary measure applied would be demotion. However, the risk with that option is tacit recognition that an apparent or real conflict of interest could be acceptable to the organization and that that could be interpreted as setting a precedent.

The second option is more draconian. It consists of applying the harshest disciplinary measure, termination for good and sufficient cause. Clearly, in the specific case of Mr. Riverin and insofar as a real conflict can be demonstrated, it is the only possibility based on the public interest. Of course, it can always be done based on the principles of natural justice.

[20] According to the applicant, those recommendations could not be approved at that time by a resolution of the Conseil as the Conseil was unable to rule on the matter because certain elected members abstained for personal reasons that were in no way related to the merits of the issue of Mr. Riverin's conflict of interest.

[21] On April 4, 2013, the complaint of psychological harassment was dismissed in its entirety. On July 15, 2013, Mr. Riverin resumed his duties.

[22] In the spring of 2014, the Conseil asked Mr. Riverin to give the keys of one of his outfitters to one of his subordinates. According to Mr. Riverin, he did not have the keys.

[23] In May 2014, Mr. Riverin filed his candidacy as chief of the Conseil. On August 17, 2014, a new Conseil was elected and Mr. Riverin was defeated by Chief Simon.

[24] In September 2014, the Director General asked Mr. Riverin to give the keys of one of his outfitters to the Conseil's territorial agents, but Mr. Riverin refused to do so.

[25] On October 21, 2014, the Conseil adopted the following resolution:

[TRANSLATION]

Following a presentation by the Director General and explanations from Kenneth Gauthier [the Conseil's lawyer] regarding the matter of Yan Riverin, the Conseil decided to approve the recommendation resulting from that process.

The Director General having followed all steps in the employment policy and having advised the person in question of his failures, Mr. Yan Riverin did not take steps to correct his conduct. Despite numerous warnings regarding his failures, meetings with Mr. Riverin, and repeated requests to comply with instructions, the situation has not changed.

The Conseil authorizes the Director General to terminate Yan Riverin's employment as Director of Economic Development, effective October 31, 2014.

[26] On October 30, 2014, the Conseil sent Mr. Riverin a notice of termination citing the following grounds:

[TRANSLATION]

(a) You are a shareholder and director or officer of the company 9255-3601 Québec Inc., operating under the name Uapats Pessamit.

(b) That corporation, of which you have control, does business in areas in which the Conseil plays a key role, which places you in a conflict of interest.

(c) Despite several clear and formal requests, you have categorically refused to provide your immediate superior with information regarding your activities within that company and activities involving that company.

(d) You have been insubordinate toward your immediate superior by refusing to follow instructions that he has given you.

- (e) You have been insubordinate on numerous occasions, particularly in directly addressing the Conseil des Innus de Pessamit without following the line of authority.
- (f) You have breached orders and instructions from your immediate superior.
- (g) You filed a complaint against your immediate superior in bad faith, maliciously, and without justification.
- (h) You refused and/or failed to apply policies and/or directions indicated by your immediate superior.
- (i) You were repeatedly absent from your work and your duties without reasonable justification.
- (j) You refused to do your work by not submitting various DIAND reports and annual budgets, thus forcing other members of the Conseil or the organization to do your work.
- (k) You refused to give the keys to the facilities of an outfitter owned by the Conseil to the territorial agents despite numerous requests for such from the Conseil's Director General.
- (l) Your attitude, your conduct, and your activities that are incompatible with your duties are not consistent with the directions that the Conseil des Innus de Pessamit intends to take regarding Economic Affairs.
- (m) Certain situations described above had already been reported by previous Directors, but you did not change your conduct or attitudes.

[27] Mr. Riverin filed a complaint for unjust dismissal under section 240 of the *Code*.

[28] On June 8, 2016, Bruno Leclerc found that Mr. Riverin's dismissal was unjust within the meaning of the *Code* and that he was entitled to be reinstated to his position.

III. Impugned decision

[29] In his decision, Mr. Leclerc began by dismissing the Conseil's preliminary argument that Mr. Riverin cannot benefit from the provisions of Division XIV of the *Code*, as they do not apply to employees who are directors, and the adjudicator therefore does not have jurisdiction to hear the unjust dismissal complaint. That conclusion was not challenged in this application for judicial review.

[30] The adjudicator examined the grounds cited in the notice of termination on October 30, 2014 and began his analysis by describing the burden on the Conseil:

[TRANSLATION]

The many facts alleged in letter P-4, if proven, can justify the complainant's termination. Under the rule of law, the person seeking to invoke a right—in this case the right to termination the complainant's employment—must prove the facts that support their claims.

[31] The adjudicator then summarized the testimonies, the documentary evidence and the observations by the parties. In summarizing the Conseil's observations at paragraphs 135 to 138 of his reasons, the adjudicator described the Conseil's functions without referring to economic development, but mentioned that there is a contractual relationship between the Conseil and Uapats, that Mr. Riverin had no decision-making power, and that Mr. Riverin had disclosed his interests to the Conseil in 2010. He then stated the following at paragraph 145:

[TRANSLATION]

And, on this matter of the breach of his obligations, as with the allegation of conflict of interest, I agree with the arguments by counsel for the complainant.

[32] The adjudicator concluded his decision with a very brief four-paragraph analysis in which he concluded that the Conseil followed an inadequate procedure in dismissing Mr. Riverin. Based on arguments by Mr. Riverin regarding the allegations of conflict of interest and the issue of breach of his obligations, He added that the alleged acts of insubordination were in fact an attempt by Mr. Riverin to have his rights respected. Finally, he concluded that Mr. Riverin's employment was brought into question in 2012 under a false pretext and that he had been terminated in bad faith for political reasons.

IV. Relevant law

[33] Mr. Riverin filed a complaint for unjust dismissal under subsection 240(1) of the *Code*:

Complaint to inspector for unjust dismissal

240 (1) Subject to subsections (2) and 242(3.1), any person

(a) who has completed twelve consecutive months of continuous employment by an employer, and

(b) who is not a member of

Plainte

240 (1) Sous réserve des paragraphes (2) et 242(3.1), toute personne qui se croit injustement congédiée peut déposer une plainte écrite auprès d'un inspecteur si :

a) d'une part, elle travaille sans interruption depuis au moins douze mois pour le même employeur;

b) d'autre part, elle ne fait

a group of employees subject to a collective agreement, may make a complaint in writing to an inspector if the employee has been dismissed and considers the dismissal to be unjust.

pas partie d'un groupe d'employés régis par une convention collective.

V. Issues

[34] The only issue is whether the adjudicator's decision is reasonable.

VI. Standard of review

[35] The standard of review regarding the adjudicator's findings of fact are set out in subsection 18.1(4) of the *Federal Courts Act*, RSC 1970, c. F-7: was the adjudicator's decision based on an erroneous finding of fact, made in a perverse or capricious manner or without regard for the material available to him? That standard requires a high degree of deference.

[36] The adjudicator's application of the legal criteria applicable to unjust dismissal is a mixed question of fact and law. We can thus assume that, as part of the review, we must seek to determine whether the adjudicator's decision was unreasonable. Moreover, the presence of a strong privative clause in section 243 of the *Code* also indicates that the standard of reasonableness must be applied and that a high degree of deference must be shown to the expertise of the adjudicator (see *Colistro v BMO Bank of Montreal*, 2008 FCA 154, at para 6, and *Canadian Imperial Bank of Commerce v Torre*, 2010 FC 105, at para 7).

VII. Parties' submissions

[37] The Conseil argued that a review of the decision shows that the adjudicator never conducted a true analysis of the reasons for termination, i.e. the existence of a conflict of interest and insubordination. The adjudicator gave no consideration to the important facts raised by the Conseil in support of its reasons for termination and conducted a partial analysis. Moreover, the adjudicator's decision was unreasonable because he failed to consider the relevant context. The decision was also unreasonable because the adjudicator did not address the allegations of insubordination. Finally, the adjudicator exceeded his jurisdiction by reviewing a resolution adopted by the Conseil instead of analyzing the reasons for termination cited by the Conseil.

[38] For his part, Mr. Riverin submitted that the adjudicator reasonably analyzed the merits of the relevant evidence regarding the allegations of conflict of interest and insubordination and that the Court must show deference to his expertise. Moreover, the adjudicator had the jurisdiction to analyze the legality of the decision made in the resolution by the Conseil.

VIII. Analysis

[39] The allegations against Mr. Riverin are, in my opinion, related primarily to the central issue of his conflict of interest with Uapats, but are categorized as follows: those related to the alleged conflict of interest and those related to his insubordination.

[40] The allegations contained in the termination letter regarding the conflict of interest with the Conseil are as follows:

[TRANSLATION]

Our client indicates that you are Director of Economic Development for Pessamit.

[...]

(a) You are a shareholder and director or officer of the company 9255-3601 Québec Inc., operating under the name Uapats Pessamit.

(b) That corporation, of which you have control, does business in areas in which the Conseil plays a key role, which puts you in a conflict of interest.

[...]

1) Your attitude, your conduct and your activities that are incompatible with your duties are not consistent with the directions that the Conseil des Innus de Pessamit intends to take regarding Economic Affairs.

[Emphasis added]

[41] The allegations regarding insubordination relevant to the issue of conflict of interest are as follows:

[TRANSLATION]

(c) Despite several clear and formal requests, you have categorically refused to provide your immediate superior with information regarding your activities within that company and activities involving that company.

[...]

(e) You have been insubordinate on numerous occasions, particularly in directly addressing the Conseil des Innus de Pessamit without following the line of authority.

[...]

g) You filed a complaint against your immediate superior in bad faith, maliciously, and without justification.

[...]

k) You refused to give the keys to the facilities of an outfitter owned by the Conseil to the territorial agents despite numerous requests for such from the Conseil's Director General.

[42] Paragraphs (c), (e) and (g) address Mr. Riverin's conduct in the spring of 2013, particularly the issue of whether he acted maliciously to hinder the investigation aimed at determining whether he was in a conflict of interest with the Conseil. The allegation in paragraph (k) is related to Mr. Riverin's refusal to turn over the keys to the Conseil's outfitter in September 2014. Uapats was using the outfitter to house its workers when they were working on Pessamit lands. Those allegations must not be confused with the ones related directly to the conflict of interest, but they are relevant to the allegations of insubordination in relation to the conflict of interest.

[43] My analysis will first examine the reasonableness of the adjudicator's reasons regarding Mr. Riverin's termination. I will then examine whether the decision to dismiss Mr. Riverin was flawed or made in bad faith.

A. *The adjudicator's analysis of the allegations of conflict of interest were unreasonable*

(1) Introduction

[44] Regarding the conflict of interest in question in this case, I am of the opinion that the adjudicator incorrectly interpreted the law. The key issue is whether the employee's private interests were incompatible with his duty to his employer. To determine whether there is such a

conflict of interest, the objective context of the employment must be examined without considering the employee's alleged misconduct. To distinguish that type of conflict of interest from the one involving misconduct by the employee, I refer to the first conflict of interest as situational, as opposed to a disciplinary or wrongful conflict of interest. In my opinion, the adjudicator did not understand or properly analyze the allegations by the Conseil that it had to terminate Mr. Riverin, as he was in a conflict of interest with the Conseil, but instead considered that the case was solely related to discipline.

[45] My analysis will be structured as follows. I will first examine the law regarding situational conflicts of interest, beginning with the jurisprudence cited by Mr. Riverin before the adjudicator. I will then lay out the reasoning behind my conclusion that the adjudicator misunderstood the relevant principles and instead conducted an analysis that was not relevant to conflictual irreconcilable interests. I will conclude by examining the evidence that was not examined by the adjudicator: first, Mr. Riverin's disclosure of his conflict of interest to the members of the previous Conseil; and secondly, the inability to reach a decision in that regard prior to the election of a new Conseil in the fall of 2014.

- (2) The Conseil argued that the respondent was in an irreconcilable conflict of interest.

[46] The adjudicator's reasons describing the Conseil's observations are not detailed, but the adjudicator nonetheless indicated that the Conseil cited the Federal Court of Appeal decision in *Canadian Imperial Bank of Commerce v Boisvert*, [1986] 2 FC 431 (FCA) [*Boisvert*]. In that case, the Court quashed the adjudicator's decision because he had concluded that all terminations

for “just cause” under the *Code* require a certain degree of fault or wrongful conduct by the employee. The decision also set out certain principles applicable to irreconcilable situational conflicts of interest.

[47] Writing for the majority in *Boisvert*, McGuigan J. did not subscribe to the proposition that there must be a wrongful act for an unjust dismissal due to conflict of interest to be just under the *Code*. He concluded that such a requirement would make the definition of conflict of interest too restrictive. I quote paragraphs 28 and 35 of *Boisvert* regarding these points:

[28] In its argument, the Bank invited this Court to conclude that the facts in the record showed that there was a conflict of interest between the respondent and the Bank. I feel that such a conclusion is too restrictive: the only question raised by the case at bar is whether, to use the words of Lord Esher, *supra*, “*he does anything incompatible with the due or faithful discharge of his duty to his master*”, and there are an incalculable number of situations which can establish such incompatibility. t is irrelevant whether the facts of the case at bar fall within the ordinary limits of conflict of interests, since incompatibility with the respondent’s duties to her employer will suffice.

[...]

[35] It is clear from this passage that the Adjudicator had an entirely mistaken view of the law. In his opinion, for just cause for dismissal to exist the respondent would have had herself to commit an act that is illegal or contrary to law. If that were the test, that would eliminate many conflict of interest situations. The true test of an employee’s misconduct, however, is that stated by Lord Esher, *supra*: it applies to acts of the employee which are “incompatible with the due or faithful discharge of his duty to his master”

[Emphasis added]

[48] I understand that, when the court referred to the “ordinary limits of a conflict of interests” in paragraph 28, it had in mind situations involving a wrongful act. In *Boisvert*, no fault was assigned to the employee of the bank because she had a spouse who had committed several bank robberies.

[49] In *Boisvert*, the Court described the other relevant factors regarding conflicts of interest as follows at paragraph 27:

[27] [...] Actual prejudice to the employer need not be proved. Potential harm is sufficient: *Empey v Coastal Towing Co. Ltd.*, [1977] 1 W.W.R. 673 (B.C.S.C.); *Tozer v Hutchinson* (1869), 12 N.B.R. 540 (C.A. W.-B.). As it was put by Meldrum J. in *Bursey v Acadia Motors Ltd.* (1979), 28 N.B.R. (2d) 361, at page 370, varied in another respect on appeal (1982), 35 N.B.R. (2d) 587):

There is no evidence that defendant was in any way harmed by the potential conflict of interest. Nevertheless, in conflict of interest situations, the rule of Caesar’s wife applies. It must not only be pure, it must be seen to be pure.

It is irrelevant that the employee’s conduct was designed to protect only his own interest and not intended to injure that of his employer: *Federal Supply and Cold Storage Co. of South Africa v. Anghrn & Piel* (1910), 80 LJPC 1; *Empey v Coastal Towing Co. Ltd.*, *supra*.

[50] In other words, the potential or apparent incompatibility between the employee’s interests and those of the employer is enough to show the existence of a conflict of interest. On the other hand, a situational conflict of interest does not require any wrongdoing or concern regarding the employee’s honesty.

[51] In his reasons, the adjudicator also referred to the decision by the Commission des relations du travail du Québec in *Bergeron c Agence métropolitaine de transport*, 2007 QCCRT 482 [*Bergeron*]. That decision provides a complete description of a situational conflict of interest, as well as a detailed analysis of the facts in a situation in which the employee was not accused of any misconduct.

[52] However, the adjudicator did not use that decision to clarify the principles related to situational conflicts of interest or as a model for analyzing such cases. He instead cited it, regarding the issue of determining the adjudicator's jurisdiction regarding an executive, to show a situation in which an employee had no decision-making power. In fact, in *Bergeron*, the employee was in a situational conflict of interest even though he had no decision-making power, which supports the Court's finding that the adjudicator misunderstood the nature of the conflict of interest before him.

[53] *Bergeron* sets forth the guiding principles applicable to situational conflicts of interest and adopts the following passage from *Ville de Montréal c Syndicat des fonctionnaires municipaux de Montréal* (AZ-85142046), in which the adjudicator described the irreconcilable conflict of interest as follows:

[TRANSLATION]

A conflict of interest is a situation in which a person can or is required to choose between two interests.

Those two interests can be their own or that of their employer, or the interest of a friend or person they wish to serve and the interest of the person they must serve.

With such a definition, there is no need for the person to have to choose between two interests, but simply to be in a position to choose.

[54] After hearing the arguments related to situational conflicts of interest and having cited related jurisprudence, the adjudicator had to correctly apply the guiding principles and consider the relevant facts in his analysis.

- (3) The adjudicator did not examine the issue of conflict of interest in the public sector.

[55] As Director of Economic Affairs and Natural Resources, Mr. Riverin held a key public sector position in his community. Conflicts of interest in the public sector often raise issues of situational conflicts of interest. That context does not seem to have been examined by the adjudicator.

[56] The Conseil's policy expressly refers to the need to avoid conflicts of interest, as indicated in paragraph 2.2.4 of the Conseil's employment policies:

[TRANSLATION]

Obligation to avoid conflicts of interest:

A conflict of interest is a situation in which an employee has enough personal interest that it overrides, or could override, the public interest under which the employee exercises his or her duties.

The concept of conflict of interest is a very broad one. Indeed, for there to be a conflict of interest, there need simply be a potential situation of conflict, a real possibility that the personal interest, whether monetary or moral, is preferred over the public interest.

When in a situation in which they believe they are likely in a conflict of interest, employees must advise their superiors so the appropriate measures to be taken can be determined.

[Emphasis added]

[57] First, the obligation of advising the employer of conflicts of interest is a relevant consideration that was not examined by the adjudicator when he analyzed Mr. Riverin's refusal to provide information regarding his potential conflict of interest when the Director General asked him to do so in February 2013.

[58] Moreover, the Conseil's policies seem to be similar to those set out on pages 132 to 134 of René Dussault and Louis Borgeat's *Administrative Law: A Treatise* (2nd edition):

(b) *Conflict of interest*

Generally, conflict of interest may be defined as “a situation in which a public employee has a private or personal interest sufficient to influence or appear to influence the objective exercise of his official duties”.

[Note: The footnote related to this statement describes in detail the basis for non-disciplinary conflicts of interest based on the general principle of incompatible interests as follows:

The *Personnel Management Manual, supra*, note 143, vol. 1, c. 3, p. 1, defines conflict of interest as follows: “Actual or potential conflicts of interest can be defined as situations when employees' personal affairs or interests clash or appear to clash with their official duties and responsibilities, or which could affect their judgement to act in the best interests of the public service”.]

Conflict of interest arises primarily in three types of situations: when public servants are responsible for contracts, loans or

government grants and may thereby derive financial benefit; when they make use of their decision-making power or influence to the advantage of groups or persons with whom he or she has a relationship of a business, friendly or family nature; and where they may use information to which they have privileged access due to their employment for their personal advantage.

[...]

The second type of conflict, which may lead to exercise of undue influence, is of extreme gravity, given the extent of the repercussions it may have on all levels of the Administration, and especially on the decision-making process. In this situation, which violates the fundamental rule of natural justice, *nemo iudex in sua causa*, the public servant cannot avoid being biased in his decision.

[Note: The footnote related to the first sentence of this paragraph gives the following relevant example of undue influence over a decision-making process:

The author cites by way of example the case of an employee who has an interest in the business of a corporation or public agency (such as a municipality or school board) and who may influence the government's decision on an application for loans, grants, or other benefits advantages that corporation or agency may make.]

The third type of conflict of interest concerns the use of confidential information obtained by the public servant in the performance of his duties. "Misappropriation" of information for the benefit of private interests is explicitly prohibited in both jurisdictions.

[Notes omitted]

[59] As we will see later in more detail, the adjudicator did not examine or apply these guiding principles in his analysis of the respondent's situation as a public servant. According to the adjudicator, conflicts of interest seem instead to refer to situations in which an employee competes with the employer, which is not at all relevant to the issues before us.

- (4) The adjudicator misinterpreted and incorrectly applied the law regarding conflicts of interest.

[60] At paragraphs 135 to 137 of his decision, the adjudicator indicated that he agreed with the respondent's observations regarding both the law regarding conflicts of interest and the application of that law to the facts of the case. Consequently, the analysis consists primarily of stating and confirming the employee's observations in that regard.

[61] I am of the opinion that, in his analysis, the adjudicator misinterpreted and incorrectly applied the law regarding conflicts of interest and committed the following unreasonable errors in concluding that there was no conflict of interest:

- a) The adjudicator relied on the lack of competition between the Conseil and the respondent's corporation.
- b) The adjudicator did not describe the relevant interests of the Conseil.
- c) The adjudicator relied on the fact that the respondent had no decision-making power.
- d) The adjudicator relied on the lack of a contractual relationship between the Conseil and the respondent's corporation.
- e) The adjudicator relied on the respondent's disclosure of his interests in Uapats to the Conseil in 2010.

- a) *The adjudicator relied on the lack of competition between the Conseil and the respondent's corporation.*

[62] I find that the adjudicator committed an error by focusing on irrelevant issues related to the employee's obligation to avoid competing with the employer or unduly favouring his personal interests over those of the employer.

[63] That error can be seen in the adjudicator's finding in paragraph 135 of his decision, where he cites one of his own decisions, *Premier aviation centre de révision inc c Barbeau*, 2008 CanLII 50524, in which he quoted a work by Robert P. Gagnon on labour law that described the law applicable to conflicts of interest as follows:

[TRANSLATION]

[135] Was Mr. Riverin in a conflict of interest? First, counsel referred me to paragraphs [51] and [52] of my decision on August 25, 2008, in *Premier aviation centre de révision inc.* and *Yves Barbeau* in which, addressing this issue from a loyalty standpoint, I wrote:

[51] Robert P. Gagnon, in his work *Le droit du travail du Québec*, wrote the following regarding the duty of loyalty:

114 –Loyalty – Employee works for an employer in exchange for pay. That fact and the good faith that article 12375 of the CCQ requires in their conduct naturally require honesty and loyalty to the employer and his or her business. The degree of the duty of loyalty will vary based on the nature of the duties and responsibilities assigned to the employees, with those who have management responsibilities within the company or who are key employees being held to a greater duty, similar to the duty of mandatories to their mandator. In all cases, employees' conduct must not be dishonest toward their employer or harm the employer's reputation without valid reason. Similarly, they must avoid any conflict of interest, particularly by favouring a

competitor of their employer or unduly personally benefiting from their employment, to the employer's detriment.

Subject to that and if there is no non-competition clause, the employer cannot prohibit them from holding another job. Employees are also not prohibited, in principle, from preparing to eventually carrying on the same activity as their employer, either for another employer or on their own account, or from using the knowledge and experience acquired during their employment. However, they must abstain from any aggressive conduct against their employer's interests while employed by the employer and, in some regards, even after leaving their job.

[52] As indicated by this author, nothing prevents employees from eventually carrying on the same activity as their employer or using the knowledge and experience acquired during their employment, even through the training they received. They must, however, avoid conflicts of interest and situations that could lead them to compete directly or indirectly with their employer in the same line of business while still employed by the employer. Those are, in my opinion, the rules and guidelines that were presented to me by counsel for the parties and in reading the work by Mr. Gagnon."

[Notes omitted, emphasis added]

[64] At paragraph 136 of his reasons, the adjudicator pursues his analysis as follows, emphasizing the lack of competition between the respondent and the Conseil:

And, as his colleague stated in his arguments, the Conseil is not a commercial or industrial business, while Uapats is a business whose main activity is silviculture. How can those two entities compete?

[65] As has already been mentioned, the passage from Mr. Gagnon's work addresses general principles related to labour law and, indeed, the two passages cited above are the only references to the issue of conflict of interest in his entire decision. Those two short paragraphs only refer to circumstances in which employees are competing with their employer or are benefiting from their position to the detriment of their employer.

[66] As a public servant, Mr. Riverin was in a conflict of interest, but not competing with the Conseil. The conflict of interest instead stems from the incompatibility of his private interests and his duties as a senior executive within the Conseil. As a public service employee of the Conseil, he is subject to all three of the situations that can give rise to a conflict of interest in the public sector, as identified by Dussault and Borgeat, and the adjudicator did not examine any of them.

[67] First, as a third-party provider of services under the contractual relationship between Résolu and the Conseil, Uapats benefited financially from the respondent's position by carrying on forestry activities in Pessamit. Those arrangements were entered into on May 3, 2012, at a tripartite meeting involving the Conseil, Résolu (formerly Abitibi-Bowater), and Uapats. The respondent was at that meeting as a representative of the Conseil and had not disclosed his interests in Uapats.

[68] The respondent's situation also raises concerns regarding an apparent and potential conflict of interest related to the second and third types of conflict identified by Dussault and Borgeat for public servants. The respondent held a position as a senior executive within the

Conseil, which gave him direct access to confidential information and expertise regarding the Conseil's potential or ongoing economic development projects. His duties also allowed him to make recommendations and influence decisions related to economic development and the exploitation of natural resources that could have an impact on Uapats' activities and from which it could benefit. Moreover, as is seen in the complaint that the Conseil received in December 2012, the conflict of interest is obvious to members of the community, who found that the senior official responsible for economic development and the exploitation of natural resources was also president of a corporation carrying on activities in one of main resources sectors on their lands.

b) *The adjudicator did not describe the relevant interests of the Conseil.*

[69] The adjudicator failed to recognize that the promotion and development of economic activities related to Pessamit resources were among the duties and interests of the Conseil, which acted on behalf of the community. At paragraph 136 of his reasons, citing testimony by Jean-Claude Vollant, the former Director General (not to be confused with Jean-Marie Vollant, who replaced him), the adjudicator listed the following duties of the Conseil:

[TRANSLATION]

1. Protect and safeguard the interests of members of the community;
2. Promote traditional and cultural values; and
3. Provide services to the public.

[70] Given the issues in this case, the Court finds it hard to understand how the adjudicator could fail to consider the important role that the Conseil played on behalf of the community in

promoting economic development and the exploitation of resources. I find that we must take judicial notice that communities in Canada place great importance on promoting their economic development. Clearly, that is also true for the Conseil. It was made up of a Vice-Chief (former Vice-Chief Paul Vollant) and a Director (Mr. Riverin) whose mandate was to promote the economic development of the community.

[71] Given that he failed to include economic development in the duties of the Conseil, the adjudicator did not have any evidence to conclude that Mr. Riverin's private interests were incompatible with those of the Conseil. That is an unreasonable omission, which probably explains why the adjudicator did not analyze the incompatibility of the respondent's role as an employee of the Conseil responsible for promoting its interests related to economic development and the exploitation of natural resources, and his central role in Uapats, a corporation likely to benefit from the Conseil's decisions regarding economic development and the exploitation of resources.

[72] The adjudicator's failure to consider that relevant and fundamental interest raises concerns regarding the transparency of his analysis of the facts in relation to his findings. Those concerns also extend to several other aspects of the analysis, where evidence that was incompatible with the adjudicator's findings and unfavourable to the respondent are not mentioned.

- c) *The adjudicator relied on the fact that the respondent had no decision-making power.*

[73] The adjudicator then concluded, at paragraph 137 of his reasons, that Mr. Riverin was not in a potential conflict of interest because he had no “decision-making power”:

[TRANSLATION]

[137] Can we talk about a potential conflict of interest when Mr. Riverin had no decision-making power? He argued that that possibility did not exist, citing the decision by Commissioner Arlette Berger in *Richard Bergeron c. Agence métropolitaine de transport*, who describes a potential conflict of interest as a situation in which the employee “would be likely to give precedence to his or her own interests or those of a third party over those of the employer”.

[Notes omitted, emphasis added]

[74] The fact that the respondent did not have decision-making power is irrelevant in this type of case. As observed by Dussault and Borgeat, “undue influence [...] is of extreme gravity, given the extent of the repercussions it may have on all levels of the Administration, and especially on the decision-making process.” The adjudicator should instead have asked whether, as Director of Economic Development for the Conseil and given his knowledge and expertise of the area for which he was responsible, Mr. Riverin was able to influence decisions by the Conseil or by other stakeholders involved in economic development in the area, or decisions by persons wanting to be involved in such projects. Instead of conducting a formal analysis, the adjudicator unreasonably concluded that, because there was no decision-making power, the respondent could not be in a conflict of interest.

[75] I have already noted the adjudicator's illogical reasoning in concluding that *Bergeron* could support the respondent's case. Here again, the issue of the existence of decision-making power was only raised in that case because the adjudicator was required to determine whether the employee could be considered "senior managerial personnel" within the meaning of subsection 3(6) of the *Act respecting labour standards*. However, despite the lack of decision-making power, the employee was found to be in a conflict of interest in a situation similar to that of the respondent.

[76] In short, I find that the adjudicator did not indicate in his reasons whether he had actually examined the issue of whether the respondent was in a conflict of interest with his employer. In other words, the adjudicator did not try to determine whether a reasonable person aware of the circumstances in question would find that Mr. Riverin had, may have had or seemed to have had personal interests that created a conflict with his obligations to the Conseil.

- d) *The adjudicator relied on the lack of a contractual relationship between the Conseil and the respondent's corporation.*

[77] At paragraph 136 of his reasons, the adjudicator relied on the lack of a contract between Uapats and the Conseil to conclude that the employee was not in a conflict of interest:

[TRANSLATION]

Based on the evidence, the Conseil did not contract out forestry work (Adélaré Benjamin and Raphaél Picard); Uapats never signed a contract with the Conseil (Raphaél Picard, Riverin, Arias); Mr. Riverin and Mr. Arias, partners in Uapats, agreed to not bid on contracts given out by the Conseil; and, according to Adélaré Benjamin, both Uapats and the Conseil stood to gain from Résolu

awarding contracts to Uapats because the important thing for the Conseil was employability.

[78] In my opinion, that is a misleading conclusion. The adjudicator ignored all the factual context that shows that the 2010 Conseil surreptitiously played a role similar to that of an active partner by helping the respondent create his conflict of interest and benefit from it.

- (i) The Conseil controlled who could carry on forestry operations on its lands.

[79] The adjudicator is right in stating that the Board did not award forestry contracts, but the evidence regarding a tripartite meeting on May 3, 2012, shows that the Conseil determined who could work on Pessamit lands and that there were businesses that challenged the allocation of work. The Conseil used that authority by exercising control over the certification of businesses taking part in the call for tenders. Without such certification, businesses could not carry on forestry activities on Pessamit land. The adjudicator did not mention that in his decision.

Following is an excerpt from page 2 of the minutes of the meeting on May 3, 2012:

[TRANSLATION]

Mr. Benjamin gave a serious warning to Résolu that he knew that, because it has FSC certification, Résolu must show that it has good relations with Pessamit. Pessamit wants its rights over the lands to be better recognized.

Mr. Villeneuve explained that, yes, Résolu is seeking to have the land certified under the FSC standard, but that there is no intention to force their hand. Mr. Villeneuve explained that Résolu cannot control how Pessamit responds to invitations and to the request for certification. However, people at Résolu control how they perceive Pessamit and, as such, people at Résolu rely on a respectful approach to Innu culture and to the needs of the Pessamit

community. The meeting today is a big step toward a good relationship.

[Emphasis added]

- (ii) The Chief in office in 2010 and the members of the Conseil surreptitiously supported the respondent.

[80] The ties between the respondent and Uapats go back to the creation of that corporation in December 2011. The respondent was appointed president of Uapats, in addition to being a director and a shareholder. The adjudicator stated that Mr. Riverin disclosed his interests in Uapats at that time, but only to Grand Chief Raphael Picard, Vice-Chief Paul Vollant, and Director General Jean-Marie Vollant. The evidence shows that none of those three individuals shared that information with other members of the Conseil, at least they did not discuss it with Vice-Chief Adélar Benjamin.

[81] Grand Chief Picard and Vice-Chief Vollant chose to act together with the respondent by allowing him to attend the tripartite meeting on May 3, 2012, as the Conseil's representative when he was also president of Uapats. Even though it was categorized as an information meeting, the purpose of that meeting was clearly to obtain the Conseil's agreement to allow Résolu and Rexforêt to enter into contracts to carry on forestry activities on Pessamit land. Indeed, they used Uapat's commitment to do a portion of the work to convince the Conseil to support their bid over other companies. As a result, although there was no contractual relationship between the Conseil and Uapats, arrangements were made at that meeting to allow Uapats, and thus the respondent, to receive financial gains.

[82] Vice-Chief Benjamin, one of the people at the meeting, testified that he had only been informed of the respondent's interests in Uapats in June or July 2012. That statement contradicted the affidavit from Mr. Arias of Uapats. The affidavit in question was admitted into evidence by consent because it was the testimony of its deponent. According to Mr. Arias, Mr. Riverin had indicated his interests in Uapats at the start of the meeting on May 3, 2012, but had stated that he was attending that meeting as the Conseil's representative.

[83] Despite that obvious and important contradiction in the evidence, the adjudicator did not try to determine when the respondent had advised Vice-Chief Benjamin of his interests in Uapats, but based his reasons on the respondent's testimony.

[84] I find that the issue of whether Vice-Chief Benjamin had been advised of the respondent's conflict of interest at the meeting on May 3, 2012, or whether he was only advised after Uapats began operations in June, is an important fact. The respondent could not at all ignore the fact that Vice-Chief Benjamin was unaware of his interests in Uapats when he attended the meeting on May 3, 2012. To conclude that the respondent failed to advise Vice Chief Benjamin of his interests would irrefutably establish his disloyalty to the Conseil.

[85] The evidence cited in the adjudicator's reasons strongly support the conclusion that Mr. Benjamin did not incorrectly testify that the respondent did not share any such information at the start of the meeting on May 3, 2012. First, the respondent did not testify that he had disclosed his conflict of interest at the start of the meeting. Clearly, it was up to him to testify in that regard at the hearing, as the affidavit constituted hearsay at that time and was inadmissible because it

was not the best evidence available. Second, the detailed notes from the meeting, particularly those regarding the parties' representatives, made no mention of such a statement, which should have been included. Third, Vice-Chief Benjamin was not cross-examined regarding the contradiction between his testimony and the affidavit evidence. He was only asked to confirm that he knew about the conflict of interest in June 2012, not in June or July as he said in his initial statement. That would apparently would apparently amount to approving an arrangement with Uapats before the company began operations in June. Logically, the "pitches" to Vice-Chief Benjamin—the only person at the meeting who was unaware of the respondent's conflict of interest—would have been much more complicated if the respondent had disclosed his interests in Uapats. It is also not very likely that Mr. Benjamin would have agreed to have the president of Uapats represent the Conseil given the nature of the discussions that took place. Regardless, the adjudicator did not consider all this evidence or its considerable contextual impact on future events.

[86] The respondent also had ties to Rexforêt as supervisor of forestry training operations. Rexforêt was presented as a non-profit organization supported by the Ministère des Ressources naturelles. Mr. Stéphane Vachon, who testified on behalf of the Conseil, worked at the Résolu site as foreman for Uapats in June and July 2012. He stated that he was hired by Mr. Riverin after he attended a silviculture course given by the respondent as supervisor of the Rexforêt training program. He added that, when he worked for Uapats, Mr. Riverin was his supervisor. Mr. Vachon also stated that Mr. Riverin, who had the same weekly work schedule from Monday to Friday as all employees of the Conseil, went to the site four or five times during the two months he worked there, and indicated that it probably took more than three hours to get to the

site. The adjudicator's analysis did not mention any of that information. That evidence clearly goes beyond a conflict of interest of interest, as they raise disciplinary issues. The fact remains, however, that it is a clear example of how the respondent had to regularly choose between the interests of the Conseil and his own interests in Uapats.

[87] Finally, to corroborate the fact that the three parties had entered into agreements that were signed a short time later, particularly to make the outfitter available to contractors, with the approval of the Conseil, the following are excerpts from pages 3 and 4 of the notes from the meeting on May 3, 2012:

[TRANSLATION]

At the meeting, Uapats-Pessamit also expressed its interest in site preparation.

[...]

For site preparation, Mr. Villeneuve [a representative of Uapats] proposed a level of 300ha. The areas in question are in the Touloustouc sector. There are already areas identified and the rest will be identified in the 2012 cuts. Workers could be housed at the Lac des Îles outfitter owned by Pessamit. The members of the Conseil present were very interested in that.

For site preparation, Mr. Villeneuve explained that an agreement would be entered into between Résolu and Rexforêt for Rexforêt to provide planning and monitoring of site preparation work. Rexforêt would also be responsible for signing a contract with Uapats-Pessamit for execution.

The agreement between Résolu and Rexforêt would be explicit regarding the level of site preparation to be assigned to Uapats-Pessamit.

To facilitate the funding procedures for Uapats-Pessamit, Résolu was asked to send a letter of intent setting forth the quantities offered.

Mr. Villeneuve noted that the people from Uapats-Pessamit accepted the quantities offered.

[Emphasis added]

[88] As a member of the Conseil who was [TRANSLATION] “greatly interested” in allowing Uapats workers to be housed at the Conseil’s outfitter, the respondent benefitted from the use of a Conseil property that generated income for which he was responsible as Director of Economic Affairs and Resources.

[89] The adjudicator did not consider any of this evidence that explains how Uapats, and thus the respondent, would benefit financially from agreements that the Conseil was invited to accept. As he previously mentioned, he felt that, because the Conseil had not entered into a contract directly with Uapats, there was no conflict of interest. That conclusion is clearly unreasonable.

- e) *The adjudicator did not consider facts surrounding the respondent’s disclosure of his interests to the 2010 Conseil or the latter’s acceptance of the respondent’s conflict of interest.*

[90] At paragraph 128 of his reasons, the adjudicator indicates his conclusion that the respondent could not be in a real or perceived conflict of interest situation because he had disclosed his interests in Uapats when the corporation was created, and had received authorization from the 2010 Conseil and the 2012 Conseil:

[TRANSLATION]

[138] Finally, when his company was incorporated, Mr. Riverin disclosed his involvement in Uapats to Grand Chief Raphaël Picard, Vice-Chief Paul Vollant, and Director General Jean-Marie Vollant. Moreover, Adélar Benjamin always supported Uapats in

obtaining contracts with Résolu or Rexforêt. He submitted that the code of ethics, Exhibit P-6, was respected because Mr. Riverin met his informational requirement. It is therefore hard to see, based on the evidence, how or to what degree Mr. Riverin is potentially or actually in a conflict of interest.

[91] In fact, the adjudicator failed to consider the relevant facts surrounding the respondent's disclosure and the apparent acceptance of that situation by the 2010 and 2012 Conseils.

- (i) Acceptance of the respondent's conflict of interest by the 2010 Conseil

[92] I have already noted that the adjudicator did not consider any of the aforementioned evidence regarding Mr. Riverin's targeted and limited disclosure to the Grand Chief and other individuals in December 2011, or the surreptitious support Mr. Riverin received from the members of the Conseil for his agreements between Résolu and Rexforêt in order to obtain approval from the Conseil and allow activities to begin in June 2012. The evidence shows that the adjudicator turned a blind eye to those facts in concluding that the respondent had met his obligation to disclose his interests even though certain members were not informed until June 2012, when Uapats became operational.

The 2010 Conseil was facing a done deal

[93] The adjudicator was correct in stating that Vice-Chief Benjamin supported Uapats by allowing it to obtain the contract with Résolu or Rexforêt, but it seems that, when he learned about the existence of a conflict of interest in June 2012, he was facing a done deal. Indeed, the evidence shows that, when Vice-Chief Benjamin agreed to the respondent's situation, Uapats had

already begun its activities or was able to begin its activities as soon as it received authorization to do so.

[94] Although he does not mention it explicitly, in reaching his conclusions regarding the respondent's disclosure, the adjudicator relied in part on the testimony given by Adélar Benjamin on behalf of the Conseil, described at paragraphs 97 to 100 of his reasons:

[TRANSLATION]

[97] According to the minutes submitted by the witnesses Exhibit E-33, the purpose of the meeting was to discuss the economic opportunity and review the main requirements of the FSC Boreal Standard. He was invited to that meeting by Paul Vollant, Vice-Chief responsible for Economic Development. It was there that he learned about Uapats and met its representatives for the first time. He did not know that Mr. Riverin was a shareholder in Uapats. Regarding Résolu, he stated that the company always does work on land claimed by the Innu, land that borders the North Shore and Saguenay — Lac Saint-Jean.

[98] At that time, the community was experiencing a problem of employability and the Conseil wanted to be involved in forestry, both in terms of silviculture and the product plant. There were meetings with several forestry companies, which seems to be an obligation under the FSC standard.

[99] In recognizing Uapats, the Conseil found a benefit because it provides employment to members of the community and that allows Uapats to obtain forestry contracts. According to the witness, it was normal to do business with Uapats because it was the only indigenous company involved in silviculture. Only silviculture companies can obtain forestry contracts.

[100] He learned in June or July that Mr. Riverin was a shareholder in Uapats-Pessamit. He asked him to come explain his role in the company to the new Conseil following the election in August 2012. Mr. Riverin came because he wanted to clarify his situation so he would not be uncomfortable with the new organization.

[Emphasis added]

[95] The evidence shows that Uapats was operational in the month following the meeting on May 3, 2012. Mr. Vachon's testimony in that regard was not contradicted. It seems that the 2010 Conseil issued the necessary approvals for Résolu's and Uapats' activities at about the same time, in June 2012. No explanation was given as to why Chief Picard, other members of the Conseil and the Director General only revealed their prior knowledge of the respondent's conflict of interest in June 2012, when Uapats had already begun its activities. The adjudicator made no observations in this regard.

The 2010 Conseil's acceptance of the conflict of interest was not official and was based on incomplete information

[96] According to the evidence, even when Vice-Chief Benjamin learned of the respondent's interest in Uapats in June 2012, he was told that the respondent was a shareholder in the corporation. There is no indication that Vice-Chief Benjamin was aware that the respondent also held positions as president and director of the corporation.

[97] It also seems that, when he became the new Director General in September 2012, Jean-Claude Vollant was not aware of all the respondent's interests in Uapats. Following the respondent's refusal to provide information in February 2013, he only learned about those interests from the enterprise register. That indicates that the entire disclosure process was by word of mouth and that the Conseil had never made a formal decision. Chief Picard confirmed this to some extent in stating that there was no band council resolution [BCR], no minutes, and no written recommendation by the Director General at meetings at which the Conseil approved the activities by Uapats on Pessamit lands. There is also no indication that the issue was the subject of a legal opinion. Here again, this was not mentioned by the adjudicator.

[98] Although the adjudicator did not mention the lack of written corroboration of the Conseil's apparent acceptance of the respondent's conflict of interest, I must note that he seems to indicate that the lack of a BCR or written dismissal recommendation from the Director General suggested that the Conseil had acted in bad faith in dismissing the respondent. The allegation of bad faith was made even though the decision was recorded in the minutes of the Conseil meeting and that, according to the testimonies, the issue was discussed with the Director General and a lawyer for more than an hour before the Conseil unanimously decided to dismiss the respondent.

The 2010 Conseil accepted the conflict of interest without having evaluated the relevant principles in that regard

[99] Chief Picard stated that the 2010 Conseil felt that the circumstances did not result in a real or potential conflict of interest. It must be noted that, despite his family relationship with the respondent because of his grandson, the Chief had also concluded that the Conseil's policy seemed to be limited to direct filiation. Clearly, that is a very interesting opinion because it is universally recognized that grandparents have great affection for their grandchildren. Moreover, regarding the conflict of interest, Chief Picard confirmed that Mr. Riverin was responsible for economic development in particular because he facilitated the start-up of new businesses in the community. He also confirmed that Mr. Riverin was responsible for deciding where timber would be harvested as part of the Conseil's forestry management plan. Mr. Riverin's duties also included the management of outfitters, which were used to house Uapats workers. The adjudicator ignored all this evidence that made it possible to conclude that the 2010 Conseil had accepted the respondent's conflict of interest without having assessed the relevant principles.

The 2010 Conseil gave its support to Uapats because the corporation employed members of the community.

[100] Chief Picard testified that he supported Uapats, as did Vice-Chief Benjamin, because the corporation offered jobs to a dozen people in the community. I find it hard to accept that explanation for various reasons, none of which were examined by the adjudicator. First, there is no reason to believe that those job opportunities would have disappeared if the respondent were dismissed or required to dispose of his interests in Uapats. The agreement between Résolu and Uapats established an economically viable and profitable relationship for the two companies and it is not very likely to have ended if the respondent's situation had changed.

[101] Second, without a competitive process to allow other companies to submit bids to enter into similar contracts to provide jobs in the community, there is no way of knowing whether better agreements could have been reached. The evidence strongly suggests that the purpose of concealing the respondent's interests in Uapats was to present the Conseil with a done deal: an agreement already entered into that would immediately employ members of the community to prevent the Conseil from considering other competitors.

[102] Third, and possibly the most relevant element, the fact that the respondent offered members of the community jobs in his company only complicated the conflict of interest in the small community governed by the Conseil. That conclusion is confirmed by the testimony of Mr. Hervieux regarding the 2012 Conseil, which will be addressed later. According to Mr. Hervieux, the recommendations made by the Director General in 2013 regarding the dismissal of

Mr. Riverin due to the conflict of interest went unanswered, as certain chiefs refused to vote against Mr. Riverin because Uapats employed several of their family members.

[103] Regarding the respondent's ability to influence or impede the Conseil's decisions, it is logical to think that the greater the number of band members working for Uapats in a small community, the greater the respondent's influence within the Conseil, hence the apparent or potential conflict of interest, which complicates the existing conflict of interest.

Conclusion

[104] The evidence does not show any examination of the respondent's conflict of interest by the 2010 Conseil. It instead shows that a faction of the 2010 Conseil, led by a Grand Chief who was related to the respondent, surreptitiously supported him, resulting in an irreconcilable conflict of interest by allowing Uapats to obtain contracts to carry on forestry activities on Pessamit lands. That situation was incompatible with the respondent's duties within the Conseil as Director of Economic Affairs and Natural Resources. The adjudicator did not mention or analyze the evidence that allowed for that conclusion. I feel that it is unreasonable for the adjudicator to conclude that the respondent's disclosure to the 2010 Conseil regarding his conflict of interest and the Conseil's decision to allow the respondent's company to carry on activities on Pessamit land showed that the respondent was not [TRANSLATION] "in a real or potential conflict of interest".

B. *The 2012 Conseil was influenced by the respondent*

[105] The evidence shows that the 2012 Conseil received a complaint in December of that year regarding the respondent's conflict of interest. The Conseil followed up on that complaint, but the respondent refused to cooperate by not providing the requested information regarding his role within Uapats or his interests in the corporation. After obtaining information from the enterprise register regarding the respondent's duties as president, director, and shareholder in Uapats, the Director General concluded that there was a real or perceived conflict of interest and recommended, in particular, that the respondent be dismissed. The evidence also shows that the majority of members of the 2012 Conseil were not prepared to follow up on the Director General's recommendation for personal reasons, as Uapats employed several of their family members.

[106] In his analysis, the adjudicator did not seek to determine why the Director General's recommendation was not accepted, but stated that it took 18 months and the formation of a new Conseil for the dismissal to finally be carried out. The adjudicator thus failed to recognize that much of the delay (16 months) was caused by personal and political circumstances. The adjudicator also did not seek to determine whether it was appropriate for the respondent to refuse to cooperate with the Director General by not providing the requested information regarding his interests in Uapats. He also seemed to show tolerance in that regard, mentioning that the respondent [TRANSLATION] "simply exercised his rights and tried to have them respected". I find that those conclusions are unreasonable and that, regardless, they did not justify the adjudicator

not seeking to determine whether or not, at the time of his dismissal, the respondent was in an irreconcilable conflict of interest.

[107] Immediately after the elections in 2012, the respondent advised the new Conseil of his interests in Uapats. His intervention did not change the decision by the former Conseil to tolerate the existence of the conflict of interest. There is no indication in the evidence of what the respondent said to the 2012 Conseil or why the Conseil did not take any measures at the time regarding the conflict of interest. It was probably the same personal reasons for which the Conseil refused to follow up on the Director General's recommendation to dismiss him in March 2013.

[108] However, following a complaint filed in December 2012, the Director General was called upon to investigate the matter. He finally obtained the requested information on his own after the respondent refused to answer his request for information. On March 13, 2013, the Director General sent a letter to the Grand Chief recommending that the respondent be dismissed due to a conflict of interest.

[109] The Conseil refused to consider the Director General's recommendation to dismiss the respondent. At paragraph 108 of his reasons, the adjudicator explained, based the testimony by Mr. Hervieux, that the personal interests of the majority of the Conseil's members prevented them from following up on the recommendation:

[TRANSLATION]

[108] In 2012, he was elected to the Conseil at the same time as Mr. René Simon in a very difficult financial context that he

described. The Conseil then decided to combat these situations that were undermining life in the community. More transparency was thus required, but four councillors had relatives who were working with Mr. Riverin. The Conseil did not want to give full management of the matters to the General Directorate. In 2014, with the election of the Conseil, the actors changed and René Simon's party obtained a majority on the Conseil. Use of the General Directorate was therefore maximized.

[Emphasis added]

[110] This explains why, in March 2013, there was no follow-up on the Director General's recommendation to dismiss the respondent. As noted by the adjudicator, the testimony by the Director General, summarized at paragraph 94, was somewhat different and not as clear, but was to the same effect. According to the Director General, his recommendation was not adopted because the majority of the members of the Conseil did not support the motion for personal reasons that were unrelated to their duties:

[TRANSLATION]

The Chief could not rule on the matter because the spouse of the fisheries coordinator on the Conseil, Mr. Benjamin, a councillor, had supported Mr. Riverin and another councillor, Éric Canapé, had cited as a reason that he worked with or had worked with Mr. Riverin.

[111] It was therefore unreasonable for the adjudicator to conclude that the respondent's disclosure to the 2012 Conseil or the failure of the Conseil to follow up on the Director General's recommendation meant that there was no real or perceived conflict of interest. The acceptance of the respondent's obvious conflict of interest, both by the 2010 Conseil and the 2012 Conseil, is explained by the personal favouritism shown him by the members, which was unrelated to their

duties as members of the Conseil. This evidence cannot reasonably allow for a conclusion that the respondent's conflict of interest was appropriately examined and that the 2014 Conseil was not entitled to re-examine the issue based on its merits with the assistance of legal counsel.

[112] Alternatively, the adjudicator cited the fact that the respondent was dismissed 18 months after the Director General made his recommendation in that regard to justify his conclusion regarding the abusive and political nature of the dismissal. In my opinion, because he did not adequately consider the context or the uncontradicted evidence that the 2010 and 2012 Conseils were not prepared to take action against the respondent regarding his conflict of interest due to the personal interests of their members, the adjudicator was unable to understand the circular nature of the conflict of interest.

[113] It was in fact because of the Director's conflict of interest that Uapats was authorized to hire workers from the community (and because of personal relationships or relationships that the Director had with certain members of the Conseil) that the respondent was able to influence the Conseil's decisions, which would otherwise have ruled against the conflict of interest. It was only after a major change in the composition of the Conseil in 2014 that the respondent was no longer able to influence its decision was subject to an impartial decision regarding his obvious conflict of interest. Consequently, 16 of the 18 months needed for the Conseil to take action regarding the respondent's conflict of interest following the Director General's recommendation in March 2013 are attributable to the conflict of interest itself. The adjudicator unreasonably set aside evidence that could explain that the lapse of time before the Conseil took action was attributable to the respondent's influence over the former Conseils and he went in the complete

opposite direction by accusing the Conseil of acting in bad faith when it finally acted on the respondent's conflict of interest.

- (1) The respondent should have provided information regarding his interests in Uapats when the Director General asked him for it, which sanctioned the Conseil's unilateral action regarding his conflict of interest.

[114] The issue of the conflict of interest was revived in February 2013 by an incident beyond the Director General's control: two members of the community filed a complaint with the Conseil in December 2012 regarding the respondent's conflict of interest. In January or February, the newly formed Conseil asked the Director General to follow up and report on the complaint. After informally requesting information from the respondent several times regarding his interests in Uapats and receiving no response, the Director General finally sent him a letter on February 12, 2013, asking him to attend a meeting to provide the requested information and to bring any documents regarding his interests in Uapats.

[115] In essence, the letter stated the following:

[TRANSLATION]

The Conseil des Innus de Pessamit has been informed that you were a shareholder and director of the company 9255-3601 Québec Inc., operating under the business name Uapats.

Based on that information on complaints received by the Conseil regarding your activities within the Conseil and your activities within Uapats, the Conseil has asked me to address these complaints and report to it on the situation.

Given that mandate, I previously asked you during a meeting to provide me with further information and documents regarding the matters that I discussed with you.

I see that, at this time, and despite my clear and formal requests for such, I have yet to receive anything and you have failed or refused to provide me with the relevant documents and information.

We remind you that the Conseil and the General Directorate are concerned about the code of ethics that the various branches of the Conseil must follow.

[Emphasis added]

[116] Information regarding the potential conflict of interest was clearly requested in the letter. This was a non-disciplinary matter that required an examination of the respondent's interests and those of the Conseil ("regarding your activities within the Conseil and your activities within Uapats"). That request was subsequent to other requests to obtain information.

[117] The adjudicator dismissed the argument that the respondent had acted improperly by not responding to that letter and by taking other actions after receiving that letter:

[TRANSLATION]

[146] Regarding the allegations of insubordination that Jean-Claude Vollant took from the demand that Yan Riverin sent him on February #3, 2013, Exhibit E-24 reproduced at paragraph [81] herein, and his refusal to accept orders from his superior, having attempted to interfere with the line of authority and having filed a malicious complaint in bad faith against him, without justification, the evidence shows that Yan Riverin simply exercised his rights and tried to have them respected.

[Emphasis added]

[118] I find that that response to the series of issues examined in the paragraph is unreasonable given the poor analysis of the evidence in that regard and the conclusions that contradict the evidence presented.

[119] Regarding the issue of the potential conflict of interest, the employee should have sought to proactively disclose his interests to the employer in accordance with paragraph 2.2.4 of the employment policy:

[TRANSLATION]

When in a situation in which they believe they are likely in a conflict of interest, employees must advise their superiors so the appropriate measures to be taken can be determined.

[120] The respondent should have been aware that the issue of his conflict of interest was still not resolved, even though there was no complaint from members of the community. The tortuous context of the initial proactive disclosure of his role at the meeting on May 3, 2012, and the deceitful conduct of the members of the Conseil that allowed him to obtain the forestry contract on Pessamit lands were the source of his obvious conflict of interest. Moreover, he felt obliged to meet with the new members of the 2012 Conseil immediately after the election to explain his role in Uapats.

[121] Although the 2010 and 2012 Conseils accepted his conflict of interest, there was never any written evidence to corroborate the information that he provided to the Conseil and on which it based its decisions. This is an important point. Mr. Hervieux simply mentioned that the respondent was a shareholder in Uapats. More importantly, the only information mentioned in the request letter from the Director General was that Mr. Riverin was a shareholder and director of Uapats. I think that we can assume that, if the Director General had known that the respondent was president and CEO of Uapats, he would have mentioned it, as that is the additional

information that he obtained from Quebec's enterprise register and on which he based his conclusion that the respondent was in a real and perceived conflict of interest with the Conseil.

[122] I am also convinced that the respondent was fully aware of the fact that his conflict of interest was, as stated by the Director General in his recommendation to the Conseil, [TRANSLATION] "fraught with consequence". I am also firmly of the opinion that it was entirely in the respondent's interest to give evasive answers to the Director General to avoid having to provide the requested information and to discourage the Conseil from seriously re-examining his conflict of interest. As we will see, I feel that that is exactly what his reply letter on February 13, 2012 did.

[123] In his letter, the respondent imposed four conditions on the Director General before agreeing to his request for information regarding his interests in Uapats:

[TRANSLATION]

To allow me to appropriately follow up on your request, I ask that you provide me with the following information in writing:

- The official document from the Conseil des Innus de Pessamit asking you to take action in my regard
- The exact nature of the alleged facts in a narrative or report
- Your analysis or report that supports your intrusion in the affairs of a private business
- The regulation by which I am required to provide you with confidential and personal documents

[Emphasis added]

[124] In my opinion, an employee at a director level cannot reasonably require to see the Director General's mandate authorizing him to request information regarding conflicts of interest, particularly when the Conseil's policy clearly sets forth a proactive obligation to provide such information at the first opportunity. Moreover, there is nothing to justify the respondent asking the Director General for an analysis of any kind to justify him in providing information on a private business with activities on Pessamit lands. Even more inappropriate is the respondent's attempt to qualify the requested information as confidential and personal by citing privacy legislation. As we have seen, the information was requested "regarding your activities within the Conseil and your activities within Uapats". That is exactly the type of information that he was required to provide under the Conseil's policies.

[125] Regarding the respondent's request to obtain a report on "exact nature of the alleged facts", it must be noted that this case was not a disciplinary issue, but a conflict of interest in relation to Uapats regarding the compatibility of the respondent's duties within Uapats and his duties as a Director of Economic Affairs and Resources.

[126] For these reasons, I conclude that it was unreasonable for the adjudicator to conclude that the respondent's refusal to provide information regarding his conflict of interest was simply the exercise of his rights. I reach that conclusion without regard to the harassment complaint or the unsupported allegations of insubordination that would justify such a clear violation of the respondent's obligation to provide the requested information, issues that I will now examine.

a) *There was no justification for the respondent's harassment complaint*

[127] The respondent's refusal to provide the information in his letter dated February 13, 2013, clearly included a threat of legal action based on an allegation of psychological harassment by the Director General and the Conseil:

[TRANSLATION]

In the meantime, regarding the various correspondence that has been exchanged since December 6, 2012 and the lack of attention to my complaints of psychological harassment, I am forced to demand that you immediately cease such abusive conduct toward me.

[128] The threat of a harassment complaint was carried out after the Director General obtained the relevant information on his own indicating that the respondent was the president of Uapats, which the Director General seemed to be unaware of prior to that.

[129] The respondent went on sick leave on March 12, 2013 and filed a harassment complaint the next day with the Commission de santé et sécurité au travail [CSST] against the Director General and the Conseil. The fact that this occurred in this way just before the letter from the Director General on March 14, 2013, recommending that the respondent be dismissed by a council whose members were favourable to the respondent's interests would be a major coincidence.

[130] The CSST and the Commission responsible for the review did not uphold any aspects of Mr. Riverin's complaint, which was dismissed by both. The final conclusions of the panel sitting in review were as follows:

[TRANSLATION]

Under those circumstances, the evidence does not show that the worker was constantly subject to repeated and escalating attacks by the employer. The worker's perception regarding the harassing, humiliating and denigrating nature of the employer's conduct is not corroborated by the objective facts available.

In review, the Commission is of the opinion that the psychological harm diagnosed in the worker is related to his difficulty with the employer's management rights and difficulties that can be found in any workplace. Although they are not desirable, those difficulties do not constitute per se a sudden and unexpected event and are not subject to the law.

Moreover, in review, the Commission finds that the medical evidence is clearly insufficient to explain in a satisfactory manner the causation of the psychological harm.

[Emphasis added]

[131] I read these conclusions as indicating that there is no objective evidence to support the complaint and that the medical basis for the claim of psychological harassment is questioned, namely the good faith of the allegation of emotional distress. Once again, I find that the adjudicator did not examine all the evidence, which indicated that the respondent's employment was never in question, that the reduction in his duties was not based on a pretext, and that those actions were not contrary to the Conseil's policies. The adjudicator also failed to examine the Conseil's argument that the respondent's harassment complaint was malicious.

- b) *The adjudicator failed to examine all the evidence regarding the reduction in the respondent's duties*

[132] The adjudicator seems to have concluded that the reduction in the respondent's duties in the fall of 2012 was a form of constructive dismissal carried out on the pretext that the Conseil was having financial difficulties, as set out at paragraph 148 of his reasons.

[TRANSLATION]

[148] In this regard, the complainant was justified in questioning his future with the organization following the significant change in his working conditions imposed on him, in the fall of 2012 by the Director General in removing his duties and responsibilities as representative of the Conseil with the CDEM and other organizations, without justification or apparent reason, contrary to his employment contract defined in P-7 and P-8, under the pretext that the new Conseil led by René Simon was in a difficult financial situation and had to adopt new directions.

[Emphasis added]

[133] I will first examine the Conseil's employment policy. Paragraph 8.1.3 of that policy explains that demotion occurs when there is a reduction in responsibilities and in salary. The respondent's salary was not reduced and he could not have claimed the existence of constructive dismissal.

[134] Moreover, the evidence does not show that the respondent's job was ever in jeopardy prior to his refusal to provide the information regarding the conflict of interest. According to the letter from the Director General on March 14, 2013, Mr. Riverin had questioned his future with the Conseil before his duties were reduced, suggesting at their first meeting in September that a negotiated agreement should be reached for his departure. Moreover, in his letter to the

respondent on December 18, 2012, the Director General assured him that there was no justification for concluding that his reputation would be harmed and that the changes to his duties as a representative were minimal, as they did not affect his main duties, which remained unchanged. He also reassured the respondent that his position was not in jeopardy. It must be noted that there was no suggestion at the time that his position within the Conseil was in jeopardy because of his conflict of interest, which had been accepted since August 2012.

[135] Indeed, the CSST dismissed those allegations regarding the reduction of the respondent's duties in December 2012, supported by in-depth reasons. As we have seen previously, it concluded that [TRANSLATION] "[t]he worker's perception regarding the harassing, humiliating, and denigrating nature of the employer's conduct is not corroborated by the objective facts available".

[136] The Director General replied to the respondent's complaint regarding the reduction in his duties by explaining that the withdrawal of representative duties was due to the Conseil's new organizational context and was part of the employer's right to exercise its discretion in placing people in various positions. That explanation seems reasonable with regard to the change in guard following the departure of the former Chief who had been in that position for 12 years, particularly in the context in which he had favoured the interests of the father of his grandson.

[137] It must be noted that, according to the uncontradicted evidence from the Director General, the issues related to the reduction in the respondent's duties were resolved during a two-hour meeting that concluded with a handshake and mutual holiday wishes.

[138] Finally, there is nothing to contradict the testimonies given by Jean-Paul Vollant and Mr. Hervieux that the 2012 Conseil had economic problems that stricter management was needed to correct the situation and resolve other problems, such as the lack of transparency regarding the Conseil's activities.

- c) *The adjudicator failed to examine the Conseil's allegation that the respondent's harassment complaint was malicious*

[139] My conclusion that the adjudicator failed to adequately examine the evidence before him is also supported by his failure to examine the Conseil's allegation that the respondent's harassment complaint was malicious, particularly in light of the CSST's categorical dismissal of that complaint. I feel that the most relevant question that must be answered is whether the complaint was filed by the respondent to obstruct and intimidate the Conseil so that it would not take action regarding the conflict of interest.

[140] The Conseil seriously argued this allegation, citing in support numerous Quebec employment cases in which it was found that false allegations of harassment constituted a valid reason to terminate a person's employment in similar situations. In those cases, the employee had been warned of the risks associated with false statements, but did not withdraw them and the allegations were entirely dismissed. I note that the adjudicator said nothing about the CSST's conclusion that there was no basis for the respondent's allegations of psychological difficulties, not even a cause and effect relationship.

[141] I find the adjudicator's conclusion to be unreasonable in a single sentence at paragraph 146 of his reasons that the respondent's allegation of harassment was simply the exercise of his rights and was aimed at having those rights respected. If the case was to be referred for a new hearing before another adjudicator, I would order that this issue be re-examined because, under Quebec labour laws, it is valid grounds for dismissal.

- (2) The respondent has an irreconcilable conflict of interest related to his duties with the Conseil

[142] The adjudicator did not attempt to analyze the respondent's interests and those of the Conseil to determine if there was an irreconcilable conflict. Even though he did not do so, I am convinced that the evidence on record allows me to reach a conclusion in that regard. Indeed, I conclude that it is clear that the respondent had an irreconcilable difference with the Conseil that constituted "valid grounds" for dismissal in October 2014.

[143] The respondent was in a real conflict of interest, as he received a financial benefit from Uapats. He holds significant interests in Uapats and holds a senior executive position in the company. Uapats carries on resource harvesting in the Pessamit forests that the respondent, as a senior manager with the Conseil, must develop based on the economic interests of the community.

[144] Among the duties carried out for the Conseil, the respondent was required to control and manage Uapats' activities on Pessamit lands. For instance, he was required to determine which forests the company could exploit. Given his personal interest in Uapats and his duties with the

Conseil, I conclude that the respondent's conflict of interest corresponds to the first category of conflicts of interest described in the text by Dussault and Borgeat: "when public servants are responsible for contracts, loans or government grants and may thereby derive financial benefit".

[145] He also has a potential perceived conflict of interest that corresponds to the second and third categories mentioned by the authors: "make use of their decision-making power or influence to the advantage of groups or persons with whom he or she has a relationship of a business, friendly or family nature" and "use information to which they have privileged access due to their employment for their personal advantage".

[146] The respondent has shown his desire to benefit from his forestry expertise and his position as Director of Economic Affairs. In terms of the Conseil's interests, he is the key person who has the information and expertise regarding the community's economic development and resources, which puts him in a privileged situation to influence the Conseil little-known or unrecognized ways that could favour his interests in Uapats and his relationship with Résolu and Rexforêt.

[147] As Director of Economic Affairs, the respondent encourages new companies to carry on activities on the lands governed by the Conseil, which requires that he work closely with new or existing resource companies to help them, particularly in their exploitation of the community's important forestry resources. The position gives the respondent the ability to work with those businesses, particularly to obtain their confidential financial information, to help them work with government agencies and financial institutions to obtain financial support, and to generally offer

his expertise on matters related to economic development and resources. On occasion, his role includes helping new companies develop business and feasibility plans, particularly in the field of forestry activities, in which he has considerable expertise and significant responsibilities.

[148] Uapats also depends on contracts obtained by the Conseil and other economic relationships with Résolu and Rexforêt due to the profits from them. The scope of the potential conflicts of interest with the respondent therefore go beyond Uapats' possible competitors to also include companies that compete with Résolu and Rexforêt or, on the other hand, companies that work with them on projects related to the Innu community of Pessamit. The possible complications regarding Uapats' relationships with Résolu and Rexforêt increase the scope and risk of the conflict between the interests of those companies and those of the Conseil.

[149] There could also be unforeseen drawbacks for the Conseil due to the unknown and uncertain deterrent effects associated with the fact that the Conseil's Director of Economic Affairs and Resources heads a private forestry company that carries on activities on Pessamit land. The situation could discourage new companies that discover that Mr. Riverin is wearing two hats from undertaking development activities. Once again, the deterrent effect also serves the respondent's financial interest stemming from Uapats' relationship with Résolu and Rexforêt.

[150] The situation also presents a problem for the community in terms of equity and the respondent's ability to influence decisions by the Conseil or subordinates, as he is at once director and president of Uapats and has numerous employees under him.

[151] The way the Director uses his time during the work week can present a problem. Indeed, the activities of the Conseil and of Uapats take place at the same time and no one is able to know how the respondent is using his work time. It can often be difficult to know if he is acting on behalf of the Conseil or Uapats.

[152] Finally, the respondent showed why he cannot retain his position as Director in March 2013 when four members of the Conseil were not prepared to follow the Director General's recommendation to dismiss him reasons unrelated to the conflict of interest.

[153] I therefore conclude that the Director had an irreconcilable conflict of interest with the Conseil and that that conflict constituted valid grounds for his dismissal by the Conseil.

C. *The decision to dismiss the respondent was not procedurally flawed or made in bad faith*

[154] At paragraphs 143 to 145 of his reasons, the adjudicator criticized the Conseil for what I would call its peremptory and unsupported process. The paragraphs in question read as follows:

[TRANSLATION]

[144] Referring me to passages from the notes by Iacobucci J., counsel for the complainant asked me about the method used by the Employer to dismiss Yan Riverin and the reasons cited for doing so.

[145] The Conseil, like any corporation or public entity, speaks by way of resolution. The resolution authorizing the Director General "to dismiss Yan Riverin", submitted as Exhibit E-31 and cited at length at paragraph [94], is cryptic. The first paragraph reads as follows:

“After the presentation by the Director General and the explanations provided by Mr. Kenneth Gauthier regarding the matter of Yan Riverin, the Conseil has decided to approve the recommendation arising from that process.” (Emphasis added)

What was the recommendation that resulted from that process? I find nothing in the evidence submitted that resembles a recommendation, other than the report dated March 14, 2013 by Jean-Claude Vollant, Exhibit E-26, addressed directly to Chief René Simon, which was clearly discussed by the Conseil, as no resolution by the Conseil regarding Yan Riverin’s conduct from September 2012 to October 2014 was submitted as evidence.

In the second paragraph of the resolution in E-31, Yan Riverin is accused of breaches and faults, without further explaining them.

- (1) The respondent refused to turn over the keys to the outfitter when asked to do so in September 2014

[155] As another reason demonstrating his persistent insubordination regarding his conflict of interest, the Conseil alleged that the respondent refused to turn over the keys to the outfitter in September 2014, which I interpret as meaning that he refused to hand over control of the outfitter to the Conseil. That allegation is relevant to the decision-making process because it links the events of March 2013, when the Conseil refused to dismiss him, and his dismissal in October 2014.

[156] According to the adjudicator, the period of 18 months showed that the dismissal was in bad faith and was motivated by political considerations following the respondent’s loss in the election to Grand Chief Simon in August 2014, but the Conseil argued that Mr. Riverin’s refusal to turn over the keys in September 2014 was a culmination, or, as I would put it, a trigger that led to the decision to dismiss him. The adjudicator did not reach a conclusion regarding that

incident, meaning that the time that passed before the Conseil took steps to dismiss the respondent in October 2014 does not seem to be related to any recent events.

[157] The only evidence presented regarding this issue is at paragraph 92 of the reasons, where the adjudicator refers to a memorandum dated February 11, 2014 (Exhibit E-30) in which Mr. Riverin was informed that [TRANSLATION] “the territorial agents service will now take over the supervision of the Lac des Îles outfitter”. The Director General testified that, when asked to turn over the keys to the outfitter, Mr. Riverin replied that he did not have them.

[158] I have already said that his responsibilities as Director of Natural Resources included managing the outfitter, which was apparently an income-generating property. That responsibility would involve him ensuring control of access to the facilities at all times, or that he ensure that employees under him are able to do so. The Conseil therefore considered it inappropriate for him to respond that he did not have the keys. He should have immediately taken steps to find out where they were or changed the locks to ensure control of the facilities. These facts occurred when the 2012 Conseil was in office.

[159] In any event, the request to turn over the keys in February 2014 was apparently unrelated to the actions taken against the respondent, but were instead related to the events of September 2014. The Conseil stated that the Director General knew at the time that Uapats workers were housed at the Lac St-Pierre outfitter without authorization. Mr. Riverin allegedly refused to turn over the keys without any justification.

[160] As we have seen, the adjudicator did not mention the evidence regarding that incident or the Conseil's observations in his reasons. The only mention is in the last sentence of paragraph 140 of the reasons: [TRANSLATION] "counsel for the complainant concluded by stating that the evidence does not show a trigger element that could justify such a disciplinary measure in 2014 imposed without any prior warning to Mr. Riverin, who has a clean disciplinary record." Thus, the respondent apparently did not claim that the incident did not occur, but only that there was no key evidence to justify his dismissal without any prior notice, given the absence of past disciplinary actions against him by the Conseil. I accept that that is the conclusion that the adjudicator failed to reach.

[161] Moreover, assuming that the Conseil could have demonstrated that a repeated refusal by Mr. Riverin since February 2014 to turn over the keys to the outfitter, or that Mr. Riverin continued to house workers at the outfitter after being ordered to turn over the keys, such brazen insubordination by an employee in an executive position and in a conflict of interest situation could constitute valid grounds for dismissal in the context of the conflict of interest before us.

- (2) The way in which the respondent was dismissed is irrelevant and was not carried out in bad faith

[162] The lengthy passage cited by the adjudicator at paragraph 143 (*McKinley v BC Tel*, 2001 SCC 38 [*McKinley*], which cites *Wallace v United Grain Growers Ltd*, [1997] 3 SCR 701 [*Wallace*]), is among doctrine regarding bad faith dismissals under common law. According to that doctrine, employees who are subjected to callous and insensitive treatment by their employers when they are dismissed should receive grossed-up pay in lieu of notice.

[163] The adjudicator decried the way in which Mr. Riverin was dismissednamely: the lack of a formal resolution by the band council authorizing the dismissal, as the adjudicator seems to have concluded that the mention of the decision in the minutes of the Conseil's meeting was insufficient; the lack of evidence regarding the existence of a recommendation to dismiss, as the recommendation by the Director General in March 2013 did not meet that objective because it was never followed up on; and the lack of details regarding Mr. Riverin's misconduct in the minutes from the Conseil's meeting on October 21, 2014.

[164] Like the adjudicator, I feel that the decision to terminate Mr. Riverin's employment does not seem to be supported by internal documentation such as the documentation provided by the Director General in March 2013. The Director General testified that he discussed the reasons for the dismissal with the Conseil's lawyer for an hour at the meeting, but the minutes of the Conseil's meeting only include the note mentioned above in the summary of facts regarding the unanimous decision to dismiss the respondent. The Conseil clearly left it to the Director General to work with the Conseil's lawyer to formulate the allegations on which Mr. Riverin's dismissal would be based. The respondent was advised of those allegations in the letter from the lawyer dated October 29, 2014.

[165] I was not presented with any jurisprudence to support the proposal that the unexpected nature of the dismissal of an employee is a factor to justify a conclusion of bad faith and an order for the employer to pay grossed-up compensation, or that the way in which the dismissal was conducted is a factor that must be considered under section 240 of the *Code*.

[166] Moreover, none of the factors cited by the adjudicator are comparable to grounds justifying compensation based on the principles set out in *Wallace*. Gross-ups are normally granted with regard to the notice period when an employee is treated callously after the decision to dismiss the employee has been made, not with regard to the way in which the employer reached the decision. Such facts are related to the duty to act fairly, an issue that is not disputed in this case. Indeed, there is no indication that the employer did not follow its employment policies, breached principles of equity, or did not follow a required procedure in dismissing the respondent.

[167] The latter point above would have been of considerable importance. When a dismissal is based on a conflict of interest, the employee is in a situation in which he must choose between the employer's interests and his personal interests that conflict with those of the employer. Consequently, if a dismissal is based on such grounds, I believe that the employee must be given the opportunity to eliminate the conflict, or even that accommodations must be proposed to the employee, depending on the circumstances. However, such measures would probably not apply to an employee at the director level.

[168] I have no jurisprudence on this issue, but I imagine that the situation would be even more complicated in the case of an employee who is dismissed both for irreconcilable conflict of interest and for disciplinary reasons, such as the refusal in this case to turn over the keys to the outfitter. In such circumstances, I would logically think that the notice of dismissal should first address the non-disciplinary issues by offering the employee the opportunity to eliminate the conflict by terminating his interests in Uapats and then mention, in the same letter, other

disciplinary reasons for dismissal, such as the threats to take legal action against the Conseil based on allegations of psychological harassment.

[169] In this case, I conclude that the evidence shows that the respondent was not prepared to provide the information requested by the Director General. Given the duty to proactively provide the information, the respondent was responsible for fulfilling that duty prior to his dismissal. His refusal to do so justified the Conseil in unilaterally dismissing him. Moreover, as we have seen, the issue was not raised before the adjudicator. Under the circumstances, it would be overly prejudicial to the Conseil for me to examine this issue at this stage.

- (3) The insufficient reasons to support the decision to dismiss with cause does not justify overturning the decision or a finding of bad faith

[170] I agree with the Conseil's assertions that the adjudicator seems to have conducted a form of judicial review of the Conseil's decision to dismiss the respondent. In my opinion, the adjudicator considered the criticisms regarding the way in which the dismissal took place as evidence of the employer's bad faith, as in the jurisprudence he cited, namely *McKinley*.

[171] In my opinion, the failure to extensively justify the decision to terminate Mr. Riverin's employment is not a factor that must be considered in reviewing an unjust dismissal, or evidence of bad faith or callous treatment of the employee in the circumstances of this case. The evidence shows that the members of the Conseil were informed of the reasons for Mr. Riverin's dismissal during the hour they spent with the lawyer and that they unanimously decided that his employment needed to be terminated. There is no criticism of the dismissal letter per se for not

providing specific reasons for the dismissal. Moreover, the employer's conduct after the dismissal is relevant in this case. I conclude that it was unreasonable for the adjudicator to consider the way in which the decision was made as evidence of the Conseil's bad faith.

[172] For all these reasons, I find that it was unreasonable to find that Grand Chief Simon and his Conseil had acted in bad faith. Given the respondent's conduct since 2012, the method used to dismiss him, namely by an admittedly peremptory and brief process, does not justify an allegation of bad faith. There is also no reason to conclude that the respondent's employment was in jeopardy at any time prior to the re-examination of the conflict of interest in the spring of 2013 or that the reduction in his duties breached the Conseil's employment policies.

[173] Finally, I find unreasonable the unsupported hypothetical conclusions that Grand Chief Simon intentionally used the pretext of the Conseil's new orientations and financial difficulties to threaten to terminate the respondent's employment or, ultimately, to dismiss him as retaliation for having unsuccessfully tried to replace him as Grand Chief.

IX. Conclusion

[174] In summary, two serious grounds lead me to conclude that the adjudicator's decision was unreasonable. First, he did not recognize the applicable legal principles that govern conflicts of interest and thus did not conduct an adequate analysis of the relevant facts related to those principles. Second, and in a somewhat similar vein, he unreasonably concluded that the Conseil had acted in bad faith and thus summarily dismissed, with no true analysis, the allegations of

insubordination, particularly the allegation that the respondent's complaint of harassment was malicious.

[175] I find that the adjudicator's decision that Mr. Riverin was not in a conflict of interest must be set aside. Moreover, the evidence available to the Court is sufficient for it to rule on the respondent's conflict of interest, particularly as the passage of time requires the finality of this case. I find that the respondent had an irreconcilable conflict of interest with his employer, as we have seen previously, and that that situation justified his dismissal. I further find, without regard to the issue of insubordination, that his unjustified refusal to cooperate with the Conseil by refusing to provide it with information regarding his conflict of interest limited the Conseil's options for how to terminate his employment, an issue that was, however, not raised in this case.

[176] My order is therefore similar to the one issued by McGuigan J. in *Boisvert*. I grant the application, I set aside the adjudicator's decision, and I refer the matter back to him in that the situation in which the respondent put himself, in which his interests were incompatible with those of his employer, constituted valid grounds for dismissal without prior notice.

[177] Had I not reached that conclusion, I would nonetheless have set aside the decision and would have referred it to another adjudicator with instructions to determine whether the respondent's conduct, particularly his harassment complaint, his refusal to provide information regarding his conflict of interest, and his refusal to turn over the keys to the outfitter, constituted insubordination.

[178] In the further alternative, I would also have set aside the adjudicator's decision regarding the remedy. I conclude that it is unreasonable to order that the respondent be reinstated to his position as a senior executive within the Conseil on the grounds that the latter had acted in bad faith, meaning that a different adjudicator must order an appropriate remedy.

[179] The applicant should be entitled to its costs in this case. They shall be calculated in accordance with column III of the table to Tariff B. If the parties do not agree on costs, the matter shall be deferred to a taxing officer for decision.

JUDGMENT

THE COURT ORDERS:

1. The application is allowed.
2. The adjudicator's decision is set aside.
3. The case is referred back to the adjudicator, as the situation in which the respondent put himself, in which his interests were incompatible with those of his employer, constituted valid grounds for dismissal without prior notice.
4. The applicant's costs should be calculated in accordance with column III of the table for Tariff B and, if the parties do not agree on costs, they shall be assessed.

"Peter Annis"
Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-1122-16

STYLE OF CAUSE: LE CONSEIL DES INNUS DE PESSAMIT v YAN RIVERIN

PLACE OF HEARING: QUÉBEC CITY, QUEBEC

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JUDGMENT AND REASONS: ANNIS J.

DATED: OCTOBER 19, 2017

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