Federal Court  Cour fédérale

Date: 20190306

Docket: T-1202-18

Citation: 2019 FC 272

[UNREVISED CERTIFIED ENGLISH TRANSLATION]

Ottawa, Ontario, March 6, 2019

PRESENT: The Honourable Mr. Justice Roy

BETWEEN:

ENTREPRISE PUBLIQUE ÉCONOMIQUE AIR ALGÉRIE, MONTRÉAL, QUEBEC

Applicant

and

YACINE HAMAMOUCHE

Respondent

and

SOPHIE MIREAULT

Third Party

JUDGMENT AND REASONS

[1] Yacine Hamamouche filed a complaint under section 240 of the *Canada Labour Code*, RSC 1985, c L-2 [CLC], against an entity identified as Entreprise Publique Économique Air Algérie, Montréal, Quebec, for what he alleges to be an unjust dismissal. The complaint is dated June 13, 2017, and concerns an alleged dismissal on April 26, 2017.

[2] The Federal Mediation and Conciliation Service appointed the third party as the adjudicator to deal with the complaint. However, even before the case could be heard on its merits, the employer objected to the case being heard by an adjudicator, submitting that the adjudicator lacked jurisdiction. As counsel for the applicant repeatedly stated at the hearing before this Court, the applicant does not recognize the adjudicator's jurisdiction and should therefore be able to obtain that determination at this point. The adjudicator heard the parties on the preliminary objection and ruled on May 23. The adjudicator concluded that she had jurisdiction.

[3] The employer is seeking judicial review from this highly preliminary interlocutory decision before this Court, under section 18 of the *Federal Courts Act*, RSC 1985, c F-7. It follows, of course, that the Court is in no way called upon to consider the facts of this case and to decide whether there was a dismissal, or whether the dismissal was unjust. In fact, as will be seen, the Court ultimately has very little information on the factual basis for this case, which would render a decision inappropriate.

[4] At the heart of the debate is a temporary foreign duty assignment agreement between the parties. Mr. Hamamouche has a contract of employment with "Air Algérie", signed in

Algeria and, in all likelihood, under Algerian law, and an assignment agreement allowed him to come to work in Canada for the applicant entity. Clause 12 of this assignment agreement provides for a forum selection clause in the case of any [TRANSLATION] "dispute arising from the performance of this agreement" and that persists after an attempt to settle it amicably; the clause states that [TRANSLATION] "the Tribunal d'Alger/Section Sociale . . . has sole jurisdiction to decide any dispute inherent in the performance of this agreement". The applicant in this case argues that this clause takes precedence over the jurisdiction claimed by the adjudicator. It is seeking judicial review from this highly preliminary interlocutory decision.

I. Facts

[5] The only evidence before the Court on the facts underlying this case is the evidence provided by affidavit; it essentially consists of a history of the working relationship between Mr. Hamamouche and Air Algérie.

[6] Mr. Hamamouche, a citizen of Algeria, entered the service of Entreprise Publique Économique, Société par Actions EPE/SPA "Air Algérie" on March 8, 2004. We are told that this is the parent company of Entreprise Publique Economique Air Algerie, Montréal, Quebec, of which little is known. The one-and-a-half-page contract of employment was for an indefinite period of full-time work as a [TRANSLATION] "flight attendant". The contract could be terminated without notice in the event of medical incapacity, failure to comply with professional obligations and serious breaches of discipline.

[7] Until late 2014, Mr. Hamamouche's duties were performed from Algeria. The temporary foreign duty assignment agreement was dated January 4, 2015, but the assignment started that January 1. Mr. Hamamouche signed the agreement in Algiers on December 24. The respondent came to Montréal to serve as chief of business services at the Office of the General Representative for Canada/Montréal. That is all we know. The agreement was for a term of one year. On expiry of the term, the respondent was recalled to his duties in Algeria, Air Algérie reserving the right to renew the assignment depending on its needs.

[8] It appears that the respondent stayed in the position after the end of his agreement, that is beyond December 31, 2015, since he was only formally recalled in a decision dated May 12, 2016, and effective June 30, 2016, but the circumstances of this extension are unknown to this day. We do not know what happened, but the date of June 30 was not maintained either, as a new decision (July 31, 2016) by the employer continued the assignment from July 1, 2016, until the end of that year. The July 31 decision states as follows [TRANSLATION]: *"*This non-renewable decision takes effect from July 1, 2016, to December 31, 2016". An email dated January 8, 2017, well after the expiry of the renewal term that was supposedly [TRANSLATION] "non-renewable", reveals that Mr. Hamamouche's status was unknown; on January 12, it was reported that he had taken 10 days' leave as of December 21, 2016. He would have had five further days of leave to take. Nothing else is known about Mr. Hamamouche's status during the periods that are not covered by the decisions adduced before this Court. This is the case for the first months of 2016, and it is certainly the case for the first months of 2017.

[9] Nothing is said about the first months of 2017. The next decision is dated April 4, 2017, and states that the respondent was seconded [TRANSLATION] "to the Office of the General Representative for Canada/Montréal as chief of business services" from April 1, 2017, to January 31, 2018. This seems to correspond to the title of the position for which he was originally assigned to Montreal. But this decision did not last long since a final decision was made abruptly on April 26, 2017, with [TRANSLATION] "(1) the immediate recall to Algeria of Mr. Yacine Hamamouche", the decision taking [TRANSLATION] "effect from the date of its signature". Mr. Hamamouche was [TRANSLATION] "reassigned to the Flight Operations Branch".

[10] At this preliminary stage, it is unclear why the immediate recall following a one-year temporary assignment, which was extended following a process of which nothing is known in circumstances that are obscure, would constitute a dismissal when even the documentation indicates a reassignment to the Flight Operations Branch. In other words, nothing is known about the underlying facts. At most, we know that the applicant objected to the merits of the case being brought before the third party because of the third party's lack of jurisdiction in light of the forum selection clause in the assignment agreement.

[11] Added to the difficulty that the facts of the case are unknown is the absence of any decision on the scope of the forum selection clause in clause 12 of the temporary foreign duty assignment agreement. The applicant assumes at this stage that this clause means that the adjudicator who was supposed to consider whether the dismissal was unjust lacked jurisdiction since the parties had agreed that disputes relating to an assignment agreement would be heard by the Tribunal d'Alger/Section Sociale. However, it is not clear that this clause has any impact.

Indeed, Mr. Hamamouche alleges a (constructive) dismissal, that is to say an unjust end to his employment relationship with Air Algérie. What the forum selection clause provides is that the court of Algiers has sole jurisdiction to rule on disputes inherent in the performance of the assignment agreement. The question is whether an alleged dismissal is a dispute inherent in the performance of the assignment agreement. This question, which has not yet even been asked, does not have a clear answer at this stage given the absence of facts on the record.

II. Adjudicator's decision

[12] The adjudicator's decision is dated May 23, 2018.

[13] Rather than returning to Algeria following his last recall, Mr. Hamamouche tried to avail himself of the CLC on June 30, 2017, by filing a complaint for his unjust dismissal (section 240), which allegedly took place on April 26, 2017, the day when his immediate recall to Algeria was decided. From the outset, the adjudication tribunal noted that as of August 14, 2017, the employer's general representative argued that Mr. Hamamouche had not been dismissed, but recalled, in accordance with clause 4 of the temporary foreign duty assignment agreement. In addition, the representative also submitted that clause 12 of this agreement expressly states that [TRANSLATION] "the Tribunal d'Alger/Section social has sole jurisdiction to rule on any dispute inherent in the performance of this assignment agreement" (Adjudicator's Decision, para 2). This is how the applicant described its position.

[14] The adjudication tribunal reviewed the evidence in this case for the purpose of disposing of the preliminary exception. An expert in Algerian law, called by the employer,

testified about the structure of Algerian courts to situate the Social Division of the Court of Algiers on which clause 12 of the temporary foreign duty assignment agreement confers jurisdiction. This agreement complies with the collective agreement signed by the employer and the representative labour organizations.

[15] It appears that the employer reserved the right to raise, during the review of the merits, arguments on the admissibility of the complaint (as opposed to the general jurisdiction to deal with a forum selection case). Under section 240 of the CLC, a person who has been dismissed and who considers the dismissal to be unjust cannot be "a member of a group of employees subject to a collective agreement". It is not unreasonable to believe that there may be other grounds for the admissibility of the complaint, but the record before the Court is not precise in this respect. I feel compelled to say that these issues are not before the Court. It appears that the employer is seeking to anticipate the issues that could be raised if the judicial review on jurisdiction fails.

[16] The preliminary issue raised, which is the subject of the interlocutory application for judicial review, was presented as one of jurisdiction of the adjudication tribunal, that is, whether the adjudication tribunal could decide the complaint despite clause 12 of the temporary foreign duty assignment agreement, a clause agreed on by the parties as to which forum would be used to ultimately settle a dispute regarding the assignment agreement.

[17] The applicant submits that the dispute should be examined in accordance with the assignment agreement since it concerned the application of that agreement to the decision to

repatriate Mr. Hamamouche. According to the applicant, article 3111 of the *Civil Code of Québec* [CCQ] confirmed that Algerian law applies. In addition, it stated that article 3148 of the CCQ confirmed the validity of a forum selection clause such as clause 12 of the agreement. Moreover, article 3149 of the CCQ, which the respondent was setting up against it, did not apply in this case, despite it providing, in the case of an action based on a contract of employment, that a worker's waiver of jurisdiction of the domestic court could not be set up against him or her. I reproduce this provision here:

3149. Québec authorities also have jurisdiction to hear an action based on a consumer contract or a contract of employment if the consumer or worker has his domicile or residence in Québec; the waiver of such jurisdiction by the consumer or worker may not be set up against him.	**3149**. Les autorités québécoises sont, en outre, compétentes pour connaître d'une action fondée sur un contrat de consommation ou sur un contrat de travail si le consommateur ou le travailleur à son domicile ou sa résidence au Québec; la renonciation du consommateur ou du travailleur à cette compétence ne peut lui être opposée.

The applicant's argument before the adjudicator was a textual argument: a complaint before an administrative tribunal is not an "action", and this administrative tribunal is not a "Quebec authority".

[18] Naturally, the respondent used article 3149 to argue that the forum selection clause could not be set up against the worker. According to the respondent, clause 12 did not in any way preclude the jurisdiction of the adjudication tribunal, thanks to the protection of the domestic jurisdiction conferred by article 3149.

[19] For the adjudication tribunal, the principle of complementarity of Quebec civil law to federal law was recognized by virtue of section 8.1 of the *Interpretation Act*, RSC 1985, c I-21, and it applied in this case. Essentially, if federal law was not enough to settle an issue, provincial civil law came into play. However, apart from citing this principle, the adjudication tribunal did not explain what it consisted of and how it applied in this case. Rather, it immediately examined certain provisions of Book Ten of the CCQ, which deals with private international law.

[20] The adjudication tribunal considered three articles of the CCQ in light of federal law's silence on the application of foreign law: articles 3118, 3148 and 3149 deal more specifically with the employment contract, and the adjudication tribunal's analysis was focussed on those provisions.

[21] As stated earlier, to counter the effect of article 3149 of the CCQ, the employer argued that a complaint made under the CLC could not be the action referred to in article 3149; similarly, an adjudication tribunal appointed under a federal statute could not be a Quebec authority under article 3149. These arguments were summarily rejected. Speaking somewhat succinctly, the adjudication tribunal declared that the case had to be analyzed in a [TRANSLATION] "suppletive law context", meaning that "this Tribunal . . . therefore [had to] be considered to fall within the category of 'Quebec authorities' within the meaning of article 3149 C.C.Q.". The tribunal added that the argument "[did] not stand up to scrutiny, especially when the applicability of article 3148 C.C.Q. [was] being argued" (Adjudicator's Decision, para 52). Similarly, the decision states that the "concept of an 'action' set out in article 3149 is to be understood broadly as a dispute arising from a contract of employment" (Adjudicator's Decision,

para 54). No authority was provided to support those conclusions. It was understood that the adjudication tribunal would make the necessary adjustments to the text of article 3149 for the suppletive law to operate. The applicant seemed to dissociate articles 3148 and 3149, which the adjudication tribunal criticized it for. The applicant used article 3148 to invoke the forum selection clause, but had to dispose of article 3149 to avoid its effect. However, article 3149 appears to be associated with article 3148 since article 3149 could well be an exception to the acceptance of a forum selection clause in article 3148, meaning that the ability to enter into a forum selection clause no longer holds if the agreement in question is a contract for employment. I reproduce article 3148 of the CCQ below:

3148. In personal actions of a patrimonial nature, Québec authorities have jurisdiction in the following cases:	**3148.** Dans les actions personnelles à caractère patrimonial, les autorités québécoises sont compétentes dans les cas suivants:
(1) the defendant has his domicile or his residence in Québec;	1° Le défendeur a son domicile ou sa résidence au Québec;
(2) the defendant is a legal person, is not domiciled in Québec but has an establishment in Québec, and the dispute relates to its activities in Québec;	2° Le défendeur est une personne morale qui n'est pas domiciliée au Québec mais y a un établissement et la contestation est relative à son activité au Québec;
(3) a fault was committed in Québec, injury was suffered in Québec, an injurious act or omission occurred in Québec or one of the obligations arising from a contract was to be performed in Québec;	3° Une faute a été commise au Québec, un préjudice y a été subi, un fait dommageable s'y est produit ou l'une des obligations découlant d'un contrat devait y être exécutée;
(4) the parties have by agreement submitted to them the present or future disputes between themselves arising out of a specific legal relationship;	4° Les parties, par convention, leur ont soumis les litiges nés ou à naître entre elles à l'occasion d'un rapport de droit déterminé;
(5) the defendant has submitted to their jurisdiction.	5° Le défendeur a reconnu leur compétence.

However, Québec authorities have no jurisdiction where the parties have chosen by agreement to submit the present or future disputes between themselves relating to a specific legal relationship to a foreign authority or to an arbitrator, unless the defendant submits to the jurisdiction of the Québec authorities.	Cependant, les autorités québécoises ne sont pas compétentes lorsque les parties ont choisi, par convention, de soumettre les litiges nés ou à naître entre elles, à propos d'un rapport juridique déterminé, à une autorité étrangère ou à un arbitre, à moins que le défendeur n'ait reconnu la compétence des autorités québécoises.

[22] Moreover, with respect to the scope of article 3149, the adjudicator quoted lengthy passages from two Quebec Court of Appeal judgments dealing with unjust dismissals that were brought before the Superior Court. In those two cases (*Dominion Bridge Corporation v Knai*, 1997 CanLII 10221 and *Rees v Convergia*, 2005 QCCA 353), the Quebec Court of Appeal concluded that article 3149 of the CCQ should be interpreted in its fullest sense to give it the effect sought by the legislature. Thus, to the extent that there was an action based on a contract of employment involving a resident of Quebec, the Quebec authorities had jurisdiction and the worker's waiver of this jurisdiction could not be set up against him or her. Mr. Hamamouche submits that, with the necessary adaptations, he ought to benefit from the same regime before a federal adjudication tribunal given Parliament's silence. This was the adjudicator's finding.

[23] The adjudicator's decision concluded that "[g]iven the unambiguous text of article 3149 C.C.Q., this tribunal has jurisdiction to hear this matter" (Adjudicator's Decision, para 60). This means that the forum selection clause could not be validly set up against the worker. Since the applicant expressly requested that the adjudication tribunal not decline jurisdiction on the basis of article 3135 of the CCQ (*forum non conveniens*), all that remained was hearing the rest of the

case and to deal with the merits. The continuation of the proceedings before the adjudication tribunal was interrupted by the interlocutory application for judicial review.

III. Unjust dismissal under the CLC

[24] The CLC included various sections that deal with industrial relations (ss 3 to 121.5); occupational health and safety (ss 122 to 160); and standard hours, wages and holidays (ss 166 to 267). Division XIV of Part III of the CLC deals with unjust dismissal and contains section 240. To the extent that the CLC applies, a person who has been dismissed and who considers the dismissal to be unjust may file a complaint.

[25] Essentially, it is understood that the employer could, if it is not successful before this Court on the ground of the adjudication tribunal lacking jurisdiction, argue that the complaint is not admissible anyway because it does not meet essential conditions for the remedy under section 240 to apply. In other words, the availability of section 240 remains to be established since there would have to have been a dismissal and no collective agreement for section 240 to apply. These preliminary post-jurisdictional issues raised in this case have not been addressed. Section 240 reads as follows:

Complaint to inspector for unjust dismissal	**Plainte**
240 (1) Subject to subsections (2) and 242(3.1), any person	**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) who has completed twelve consecutive months of continuous employment by an employer, and	**a)** d'une part, elle travaille sans interruption depuis au moins douze mois pour le même employeur;
(b) who is not a member of a group of employees subject to a collective agreement,	**b)** d'autre part, elle ne fait pas partie d'un groupe d'employés régis par une convention collective.
may make a complaint in writing to an inspector if the employee has been dismissed and considers the dismissal to be unjust.	
Time for making complaint	**Délai**
(2) Subject to subsection (3), a complaint under subsection (1) shall be made within ninety days from the date on which the person making the complaint was dismissed.	**(2)** Sous réserve du paragraphe (3), la plainte doit être déposée dans les quatre-vingt-dix jours qui suivent la date du congédiement.
Extension of time	**Prorogation du délai**
(3) The Minister may extend the period of time referred to in subsection (2) where the Minister is satisfied that a complaint was made in that period to a government official who had no authority to deal with the complaint but that the person making the complaint believed the official had that authority. R.S., 1985, c. L-2, s. 240; R.S., 1985, c. 9 (1st Supp.), s. 15.	**3)** Le ministre peut proroger le délai fixé au paragraphe (2) dans les cas où il est convaincu que l'intéressé a déposé sa plainte à temps mais auprès d'un fonctionnaire qu'il croyait, à tort, habilité à la recevoir. L.R. (1985), ch. L-2, art. 240; L.R. R.S., 1985, c. 9 (1st), s. 15.

[Emphasis added.]

[26] There is no information on the record of the circumstances surrounding Mr. Hamamouche's employment and the extension of his temporary assignment. We have no

further information on what may have happened after the immediate recall decision of April 26, 2017.

[27] If the adjudicator did have jurisdiction to deal with the matter despite the employer's challenge and the complaint under section 240 of the CLC was admissible because Mr. Hamamouche was dismissed and was not a member of a group of employees subject to a collective agreement, she would then have to decide whether the dismissal was unjust (paragraph 242(3)(a) of the CLC); if the dismissal was found to be unjust, the adjudicator would have broad discretion as to the appropriate remedy. Subsection 242(4) of the CLC would apply:

Where unjust dismissal	**Cas de congédiement injuste**
242 (4) Where an adjudicator decides pursuant to subsection (3) that a person has been unjustly dismissed, the adjudicator may, by order, require the employer who dismissed the person to	**242 (4)** S'il décide que le congédiement était injuste, l'arbitre peut, par ordonnance, enjoindre à l'employeur:
(a) pay the person compensation not exceeding the amount of money that is equivalent to the remuneration that would, but for the dismissal, have been paid by the employer to the person;	**a)** de payer au plaignant une indemnité équivalant, au maximum, au salaire qu'il aurait normalement gagné s'il n'avait pas été congédié**;**
(b) reinstate the person in his employ; and	**b)** de réintégrer le plaignant dans son emploi;
(c) do any other like thing that it is equitable to require the employer to do in order to remedy or counteract any consequence of the dismissal.	**c)** de prendre toute autre mesure qu'il juge équitable de lui imposer et de nature à contrebalancer les effets du congédiement ou à y remédier.
R.S., 1985, c. L-2, s. 242; R.S., 1985, c. 9 (1st Supp.), s. 16; 1998, c. 26, s. 58.	L.R. (1985), ch. L-2, art. 242; L.R. (1985), ch. 9 (1er suppl.), art. 16; 1998, ch. 26, art. 58.

IV. Positions of the parties

A. *Applicant*

[28] For the applicant, the adjudication tribunal assumes a jurisdiction that it does not have by declaring itself competent to examine the unjust dismissal complaint. The forum selection clause prevents it from doing so. This is an error of jurisdiction within the meaning of *Dunsmuir v New Brunswick*, 2008 SCC 9, 2008 1 SCR 190. The applicant referred to paragraph 50. It would probably have been better advised to point to paragraph 59, which seems to me to better describe the precise category among the four types of questions of law requiring the correctness standard of review (the others being questions that are of central importance to the legal system and outside the specialized area of expertise of the administrative decision maker; constitutional issues [including the division of powers]; and the jurisdictional lines between two or more competing specialized tribunals):

> [59] Administrative bodies must also be correct in their determinations of true questions of jurisdiction or *vires*. We mention true questions of *vires* to distance ourselves from the extended definitions adopted before *CUPE*. It is important here to take a robust view of jurisdiction. We neither wish nor intend to return to the jurisdiction/preliminary question doctrine that plagued the jurisprudence in this area for many years. "Jurisdiction" is intended in the narrow sense of whether or not the tribunal had the authority to make the inquiry. In other words, true jurisdiction questions arise where the tribunal must explicitly determine whether its statutory grant of power gives it the authority to decide a particular matter. The tribunal must interpret the grant of authority correctly or its action will be found to be *ultra vires* or to constitute a wrongful decline of jurisdiction: D. J. M. Brown and J. M. Evans, *Judicial Review of Administrative Action in Canada* (loose-leaf), at pp. 14-3 to 14-6. An example may be found in *United Taxi Drivers' Fellowship of Southern Alberta v. Calgary (City)*, [2004] 1 S.C.R. 485, 2004 SCC 19. In that case, the issue was whether the City of Calgary was authorized under the relevant municipal acts to enact bylaws limiting the number of taxi plate licences (para. 5, *per* Bastarache J.). That case involved the decision-making powers of a municipality and exemplifies a true question of jurisdiction or *vires*. These questions will be narrow.

> We reiterate the caution of Dickson J. in CUPE that reviewing judges must not brand as jurisdictional issues that are doubtfully so.
>
> [Emphasis added.]

It follows, according to the applicant, that the standard of review is that of correctness, which of course implies that the Court would not owe any deference to the decision of the adjudication tribunal, but would instead have to perform its own analysis leading to its agreeing or disagreeing with the administrative tribunal's decision.

[29] In any event, the applicant submits that the decision is unreasonable since the adjudication tribunal under the CLC cannot be a "Quebec authority", the expression used specifically in articles 3148 and 3149 of the CCQ.

[30] As to the merits of the case, the applicant sees a conflict of jurisdiction to hear the dispute between the adjudication tribunal and the Tribunal d'Alger/Section Sociale identified in a forum selection clause. Since the adjudication tribunal would not find any rule in the CLC governing such a conflict of jurisdiction should it be seized of the matter, the applicant accepts that the suppletive law is the civil law of Quebec. In this case, the applicant argues that the rules governing private international law should be used to resolve the conflict of jurisdiction. The applicant refers specifically to articles 3111, 3134, 3148 and 3149 of the CCQ.

[31] The applicant's argument is that [TRANSLATION] "the adjudication tribunal should have interpreted those articles of the CCQ immediately, for itself, as if they were part of the deficient federal law, which it did not do" (Memorandum of Fact and Law, para 56). This assertion leads

the applicant to submit that the terms “Québec authority” and “Québec authorities” used in those provisions instead of the more general “tribunal” cannot be adapted to include an adjudication tribunal acting under a federal statute such as the CLC. According to the applicant, the adjudication tribunal would have to be designated under a provincial law that would designate it as a Quebec authority (Memorandum of Fact and Law, paras 61 and 65).

[32] The acknowledgment that Quebec civil law is indeed suppletive in this case is a dead end in that it would not only require the adjudication tribunal to be designated a [TRANSLATION] “Québec authority”, but [TRANSLATION] “the Quebec legislature is not constitutionally competent to legislate over a federal board composed of an adjudicator appointed by a federal minister and empowered by a federal statute” (Memorandum of Fact and Law, para 66).

[33] The applicant therefore submits that the adjudication tribunal cannot be a “Québec authority”, and consequently, the supposedly suppletive provisions of the CCQ cannot be set up against it.

B. *Respondent*

[34] It is not disputed that the standard of review is that of correctness.

[35] The respondent believes that the suppletive Quebec law applicable in this case is article 3149 of the CCQ. Drawing from section 12 of the *Interpretation Act*, RSC 1985, c I-21, the respondent argues that the applicant’s interpretation of this suppletive law renders it

meaningless and therefore deprives it of its remedial purpose. Such an interpretation must therefore be rejected.

[36] Mr. Hamamouche notes that the Quebec Court of Appeal held that article 3149 of the CCQ should not be interpreted narrowly even if its effect is to restrict the use of forum selection clauses, which are otherwise permitted under article 3148.

[37] Thus, the expression "Québec authority" is used in Quebec private international law to distinguish it from the rest of domestic private law; such a distinction is obviously not required elsewhere in the CCQ. As a result, if the civil law is to be the suppletive law, the necessary adaptations must be made to the text. In fact, it could be argued that Title Three of Book Ten (private international law), which deals with the international jurisdiction of Quebec authorities (arts 3134 to 3154), would be completely eviscerated with respect to any federal matters since each article includes a reference to Quebec authorities.

V. Analysis

[38] In my opinion, the intervention of the Court at this highly preliminary stage, an interlocutory judicial review, would be inappropriate. Administrative law, as it is known to the federal courts, recognizes the great caution that must be exercised in such a matter. Indeed, many of the reasons given for this caution are present in this case. The Court stated at the beginning of the hearing that it considered the hearing of an application for judicial review to be premature: administrative proceedings should be allowed to follow their course, except in exceptional circumstances. These are not present here.

Factual background

[39] This case seems rather incongruous. An Algerian citizen, who had a work permit for Canada where he represented an Algerian company through a temporary foreign duty assignment agreement, claims to have been unjustly dismissed when his employer issued an immediate recall for him on April 26, 2017. But there seem to have been some twists and turns. The evidence on the record shows that the initial one-year agreement (January 2015 to December 2015) was extended, but in circumstances that remain unclear.

[40] Those extensions do not seem to have been simple. The record reveals that on May 12, 2016, Mr. Hamamouche was officially recalled to Algeria starting June 30, 2016. It is unclear under what circumstances he remained in his position after the expiry of the term on December 31, 2015. Clearly, the recall was not completed since a decision dated July 31, 2016, extended his employment in Canada retroactively from July 1 to December 31, 2016. The decision specifically stated that the extension was not renewable. It seems that Mr. Hamamouche did not return to Algeria at the end of December 2016 since the employer was seeking to know his [TRANSLATION] “status”. We do not know the circumstances that led to what appears to be an extension from April 1, 2017, to January 31, 2018 (nor do we know anything about Mr. Hamamouche’s status from January 1, 2017, to April 1, 2017), followed by the immediate recall dated April 26, 2017, just three weeks after the extension took effect on April 1, 2017.

Proposed issue

[41] The connection with Canada is ultimately tenuous: Mr. Hamamouche is a resident of Quebec who temporarily worked in Quebec under a contract of employment between two Algerian nationals, Mr. Hamamouche and Air Algérie. Despite this, the respondent in this case is availing himself of the *Canada Labour Code*, which allows the examination of allegations of unjust dismissal. He chose not to institute an action in Quebec as he could have done but rather decided to rely on the *Canada Labour Code*.

[42] The question submitted to the Court on judicial review is very narrow: can clause 12 of the temporary foreign duty assignment agreement be relied on, meaning that a dispute arising from the performance of said agreement must be brought before the Tribunal d'Alger/Section Sociale?

[43] Clause 12, which is part of the assignment agreement, but not the original employment contract signed by Mr. Hamamouche, reads as follows:

> [TRANSLATION]
>
> **CLAUSE 12:**
>
> In the event of a dispute inherent in the performance of this agreement, the parties agree to resolve it amicably.
>
> The parties agree that in the event of an enduring conflict between the Officer and the Employer, the Tribunal d'Alger/Section social located at Abane Ramdane Sidi M'hamed Street has sole jurisdiction to decide any dispute inherent in the performance of this foreign duty assignment agreement, under Algerian law as per clause 2 of this Agreement.
>
> [Emphasis added.]

As one can see, the forum selection clause applies only in relation to the adjudication of a "dispute arising from the performance of the agreement" or "any dispute inherent in the performance of the agreement". But the temporary foreign duty assignment agreement is not the employment contract between Air Algérie and Hamamouche. It is only part of the employment contract. This is clearly stated in clause 2 of the agreement:

> [TRANSLATION]
>
> **CLAUSE 2:**
>
> It is expressly agreed that the Employer is and will remain in all circumstances Entreprise Publique Économique– Société Par Actions EPE/SPA AIR ALGÉRIE, headquartered in Algiers, at 1 Place Maurice AUDIN.
>
> The temporary foreign duty assignment, the subject matter of this agreement, is within the purview of an employment relationship that was born on the date the officer was hired.
>
> This employment relationship is and will continue to be governed by
>
> - the amended and supplemented Statute 90.11 of April 21, 1990, governing labour relations;
> - the Collective Agreement and its annexes; and
> - the corporate by-laws and any amendments.
>
> [Emphasis added.]

[44] The alleged dismissal can only be a function of the employer-employee relationship, which in turn is the subject of an employment contract. This indefinite employment contract does not include any clauses relating to a competent court or tribunal at the exclusion of any other, contrary to clause 12 of the temporary foreign duty assignment agreement. In fact, the employment contract refers to the [TRANSLATION] "Collective Agreement" and sets out the conditions under which the employment contract may be terminated:

> [TRANSLATION]

> **5/ TERMINATION**
>
> This contract may be terminated without notice or compensation by the Company, for the following reasons:
>
> * medical incapacity to perform the duty for which the employee was hired;
>
> * failure to comply with professional obligations;
>
> * serious disciplinary offences.
>
> . . .

I would add that clause 5 of the temporary foreign duty assignment agreement could become a form of termination in addition to the grounds for termination in clause 5 of the employment contract because it considers an employee to have resigned if he or she has not responded to two formal notices to return to his workplace. It reads as follows:

> [TRANSLATION]
>
> **CLAUSE 5:**
>
> After a temporary foreign duty assignment or recall before term, the officer will be assigned to his or her original workplace or a workplace of the same classification to be determined by the decision referred to in clauses 3 and 4 above.
>
> If the officer does not return to his workplace, he will be considered as having resigned after two unsuccessful formal notices.

What is important to note for our purposes is that the evidence does not reveal anything about what in fact happened, and in particular from April 2017 onwards, where events seemed to come to a head. The applicant states that it recalled the respondent, as permitted by the assignment agreement. The respondent claims he was dismissed. What therefore happened on or around April 26, 2017?

[45] The employer's claim is ultimately simple. It may invoke the clause of the temporary foreign duty assignment agreement to avoid being subject to Quebec law and to "Québec authorities" with respect to an allegation of unjust dismissal, because the assignment agreement contains a valid forum selection clause. But it is unclear how such a clause, which is provided for one purpose (a dispute inherent in the performance of the assignment agreement), can become a forum selection clause for a dispute concerning a dismissal, if indeed there was a dismissal.

How to rely on the forum selection clause

[46] To rely on the forum selection clause, a legislative provision is needed to allow this since this clause is obviously foreign to domestic law, given that it is in an agreement passed between nationals of another country. The applicant had little so say about article 3148 of the CCQ before the Court, insisting on it more forcefully before the adjudication tribunal. Perhaps it realized that, in order for it to rely on this provision, the adjudication tribunal has to be a Quebec authority. In other words, the argument for avoiding article 3149 is that the adjudication tribunal is not a Quebec authority. But the same difficulty arises for its use of article 3148, which speaks solely of the jurisdiction of Quebec authorities. For convenience, here is the second paragraph of article 3148 again:

. . . However, Québec authorities have no jurisdiction where the parties have chosen by agreement to submit the present or future disputes between themselves relating to a specific legal relationship to a foreign authority or to an arbitrator, unless the defendant	[...] Cependant, les autorités québécoises ne sont pas compétentes lorsque les parties ont choisi, par convention, de soumettre les litiges nés ou à naître entre elles, à propos d'un rapport juridique déterminé, à une autorité étrangère ou à un arbitre, à moins que le

submits to the jurisdiction of the Québec authorities.	défendeur n'ait reconnu la compétence des autorités québécoises.

[47] As mentioned above, one question must be answered first. Does the forum selection clause apply to any dispute inherent in the performance of the agreement when its very text limits it to disputes arising from the performance of the assignment agreement? Could a disguised dismissal be one of those disputes arising out of an assignment agreement? Or is it a dispute that is not dealt with in clause 12 of the temporary foreign assignment agreement? The record does not even make it possible for the Court to attempt to resolve this issue. The facts are missing. It is therefore quite possible that the forum selection clause is not even at issue since it is only applicable in very particular circumstances. The question remained unresolved because the parties seemed to have taken for granted that the clause could apply to a dismissal, perhaps because this could be a [TRANSLATION] "dispute inherent in the performance of the assignment agreement". But it is not really clear why this should be so. The question does not have to be resolved if the forum selection clause cannot even be used if article 3148 is not the appropriate text for dealing with forum selection given the applicant's interpretation that the reference to "Québec authorities" excludes the federal adjudication tribunal.

[48] I would add that the question would not be resolved if the applicant tried to rely on article 3111 of the CCQ to introduce the forum selection clause into the proceedings. This provision reads as follows:

3111. A juridical act, whether or not it contains any foreign element, is governed by the law expressly designated in the	**3111**. L'acte juridique, qu'il présente ou non un élément d'extranéité, est régi par la loi désignée expressément dans

act or whose designation may be inferred with certainty from the terms of the act.	l'acte ou dont la désignation résulte d'une façon certaine des dispositions de cet acte
Where a juridical act contains no foreign element, it remains nevertheless subject to the mandatory provisions of the law of the State which would apply in the absence of a designation	Néanmoins, s'il ne présente aucun élément d'extranéité, il demeure soumis aux dispositions impératives de la loi de l'État qui s'appliquerait en l'absence de désignation
The law may be expressly designated as a part of a legal act.	On peut désigner expressément la loi applicable à la totalité ou à une partie seulement d'un acte juridique

First, it is doubtful that this article can apply to forum selection since it deals with juridical acts that may be governed by the laws expressly designated in those acts. Moreover, the reliance on this article suffers from the same difficulty as article 3148 since the juridical act in question is the assignment agreement even though what is at stake appears to be the dismissal, which may not arise from the assignment agreement, but rather from the employment contract.

[49] Forum selection is very different from the choice of the law applicable to the content of juridical acts. The place where a dispute is heard appears to be very different from the law to be applied. Articles 3111 and 3148 appear to cover different situations, one describing the choice of law applicable to a juridical act and the other dealing with the forum where the dispute will be settled. Professor Patrick Glenn saw a big difference when he wrote the following, on behalf of the Barreau du Québec and the Quebec Chambre des notaires, in his chapter on private international law in *La réforme du Code civil* (The University Press) Laval, 1993, at number 44:

> [TRANSLATION]

> The parties' choice can be made expressly or "inferred with certainty from the terms of that act" (article 3111, para. 1). An [TRANSLATION] "implicit" choice resulting, for example, from the choice of forum, is therefore not an option.

The choice of forum is not the choice of the law expressly designated as governing the juridical act.

[50] Forum and content should not be confused. Article 3111 deals with content, the law to be applied to a given juridical act. Forum selection is another matter. In my opinion, clause 2 of the temporary foreign duty assignment agreement specifically provides for the law applicable to this agreement. Thus, the choice of Algerian law, as described in clause 2, could be invoked in this case by virtue of article 3111. Forum selection falls under clause 12 of the assignment agreement. But there should be no confusion. Article 3111 has one purpose, allowing parties to choose the law applicable to a juridical act, and article 3148 has another, allowing parties to choose the forum where a dispute is to be heard.

[51] The parties to the dispute before the adjudication tribunal did not submit any evidence as to the circumstances of the recall to Algeria from the employer's perspective or of the dismissal from the employee's perspective. The dispute was not allowed to develop enough to allow the parties to provide essential details. Without determining the scope of the forum selection clause, the parties immediately turned to private international law to attempt to include or exclude it under the private international law rules in the CCQ.

[52] The CLC does not provide any rules on the impact of foreign law on a problem presented to a Canadian tribunal under the CLC. This is why the parties agree on drawing on the rules of provincial civil law, relying of course on section 8.1 of the *Interpretation Act*, but also on the decision in *Canada (Attorney General) v St Hilaire*, 2001 FCA 63, [2001] 4 FC 289 [*St-Hilaire*], which is authoritative in this respect. Paragraph 37 of *St-Hilaire* reads as follows:

> [37] A Quebec litigant involved in an action pertaining to his civil rights under a federal enactment that is silent in this regard is entitled to expect that his civil rights will be defined by the Quebec civil law, even if the adverse party is the federal government. As Professor Morel clearly states, in "Harmonizing Federal Legislation with the Civil Code of Québec: Why and Wherefore?", a study published in the Department of Justice Canada collection (*supra*, par. 25):
>
> The complementarity of federal private law legislation with Quebec civil law -- as with the basic law of every province -- is the rule both in principle and, if only because Parliament rarely interferes with it, in practice.

The applicant's interpretation of article 3149 of the CCQ must also, it seems to me, have the same limitations as article 3148, which permits the forum selection clause. The applicant's interpretation of the Civil Code's private international law rules suggests that, despite section 8.1 of the *Interpretation Act* and *St-Hilaire*, there is a legal vacuum.

The issue is premature

[53] As noted by the Supreme Court of Canada in a case involving private international law, an accurate identification of the issues to be resolved is not without significance. In *Boucher v Stelco Inc.*, 2005 SCC 64, [2005] 3 SCR 279 [*Stelco Inc.*], one reads as follows:

> 16 The outcome of this appeal depends on an accurate identification of the decisive legal issues in the case. The hearing before this Court was largely devoted to a debate on the definition and characterization of the issues in dispute. Far more than questions of contract law or private international law, the case raises, first and foremost, issues of procedure, administrative law, and judicial review. It should be noted here that the parties have not raised the question of the application of a collective agreement or the exercise of a concurrent arbitral jurisdiction in relation to the rights in issue and the individuals claiming them.

The hearing before this Court was also largely devoted to identifying the issue in a case that is in its infancy, to the point where virtually nothing is known about the facts.

[54] Not unlike *Stelco Inc.*, on closer inspection, the first issue here is one of administrative law and judicial review. The applicant recognized in its application for judicial review that exceptional circumstances were required to obtain the immediate intervention of the Court (notice of application for judicial review, para 31). This is an interlocutory application. No such exceptional circumstances have been alleged, let alone demonstrated, and this is a problem in this case.

[55] Simply speaking, the applicant objects to the adjudication tribunal's jurisdiction to consider the unjust dismissal complaint because of a forum selection clause that might, or might not, affect an unjust dismissal complaint. After all, this forum selection clause only applies to [TRANSLATION] "dispute[s] inherent in the performance of this assignment agreement". Who determined that this clause could affect a constructive unjust dismissal? It is certainly not up to this Court to do that. When the employer's general representative set out his position in a letter to the inspector then responsible for the file, on August 14, 2017 (the complaint was filed six weeks

earlier, on June 30, 2017), he clearly distinguished between a dismissal and a recall, as revealed in the following excerpt from the employer's response to paragraph 2 of the adjudicator's decision:

> [TRANSLATION]
>
> . . .
>
> In response to your email of Friday, July 28, 2017, regarding the abovementioned file, we would like to bring to your attention that Mr. Yacine HAMAMOUCHE was not unjustly dismissed, but was recalled to Algeria in accordance with clause 4, paragraph 1 of the temporary foreign duty assignment agreement duly read and approved by Mr. Hamamouche (see copy).
>
> Moreover, it is expressly specified in clause 12 of the same agreement that the Tribunal d'Alger/Section social has sole jurisdiction to rule on any dispute inherent in the performance of this assignment agreement, under the Algerian legislation cited in clause 2 of this assignment agreement.
>
> . . .

[56] It is obvious that the employer simply wants this to be a recall. If that is the case, it may seek to rely on the forum selection clause in respect of a dispute relating to the assignment agreement. However, it would still have to be determined that it was a recall and not a constructive dismissal. Moreover, we still do not know how the forum selection clause fits into this debate. Is this clause relevant in dealing with a dismissal, given that this falls outside the scope of a clause concerning disputes relating to Mr. Hamamouche's assignment? The record does not contain any information on the circumstances in which the [TRANSLATION] "recall" may have occurred on April 26, 2017.

[57] This type of situation seems to be a clear demonstration of why superior courts decline to intervene while an administrative tribunal is carrying out its review. The leading case in this regard is *Canada (Border Services Agency) v C.B. Powell Limited*, 2010 FCA 61, [2011] 2 FCR 332 [*C.B. Powell Limited*], where the Court holds that access to the court system should only be granted once the administrative process has been completed. The Court of Appeal is quite explicit about this in its reasons, with paragraph 31 reading as follows:

> [31] Administrative law judgments and textbooks describe this rule in many ways: the doctrine of exhaustion, the doctrine of adequate alternative remedies, the doctrine against fragmentation or bifurcation of administrative proceedings, the rule against interlocutory judicial reviews and the objection against premature judicial reviews. All of these express the same concept: absent exceptional circumstances, parties cannot proceed to the court system until the administrative process has run its course. This means that, absent exceptional circumstances, those who are dissatisfied with some matter arising in the ongoing administrative process must pursue all effective remedies that are available within that process; only when the administrative process has finished or when the administrative process affords no effective remedy can they proceed to court. Put another way, absent exceptional circumstances, courts should not interfere with ongoing administrative processes until after they are completed, or until the available, effective remedies are exhausted.

[58] The Court was equally clear on the justification for prohibiting interlocutory judicial review as requested in this case.

> [32] This prevents fragmentation of the administrative process and piecemeal court proceedings, eliminates the large costs and delays associated with premature forays to court and avoids the waste associated with hearing an interlocutory judicial review when the applicant for judicial review may succeed at the end of the administrative process anyway: see, *e.g.*, *Consolidated Maybrun*, *supra* at paragraph 38; *Greater Moncton International Airport Authority v. Public Service Alliance of Canada*, 2008 FCA 68 at paragraph 1; *Ontario College of Art v. Ontario (Human Rights Commission)* (1992), 99 D.L.R. (4th) 738 (Ont. Div. Ct.).

> Further, only at the end of the administrative process will a reviewing court have all of the administrative decision-maker's findings; these findings may be suffused with expertise, legitimate policy judgments and valuable regulatory experience: see, *e.g.*, *Consolidated Maybrun*, *supra* at paragraph 43; *Delmas v. Vancouver Stock Exchange* (1994), 119 D.L.R. (4th) 136 (B.C.S.C.), aff'd (1995), 130 D.L.R. (4th) 461 (B.C.C.A.); *Jafine v. College of Veterinarians (Ontario)* (1991), 5 O.R. (3d) 439 (Gen. Div.). Finally, this approach is consistent with and supports the concept of judicial respect for administrative decision-makers who, like judges, have decision-making responsibilities to discharge: *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190 at paragraph 48.

[59] I have already discussed the difficulty that arises before we can deal with the issue of jurisdiction should the forum selection clause not apply to this dispute presented before the Canadian judicial system. But once the issue of jurisdiction is dealt with, the applicant could succeed in the administrative process if, for example, the complaint under section 240 of the CLC is not admissible because it does not satisfy the conditions set out in the Code, or, if the respondent was dismissed, the dismissal was not unjust. The dispute could therefore be disposed of through other arguments, such as whether the conditions for a remedy under section 240 of the CLC have been met or not; at the very least, the Court would have the complete factual framework if the administrative process is completed and the case is brought before this Court. The courts have consistently held that unless there are exceptional circumstances, the administrative process must be allowed to follow its course. We see why here.

[60] I spoke of prohibiting interlocutory judicial review because Justice Stratas, writing for the Court of Appeal, noted that the courts "have enforced the general principle of non-interference with ongoing administrative processes vigorously. This is shown by the narrowness of the 'exceptional circumstances' exception" (para 33). The principle of non-interference with

administrative processes may not be a prohibition in the penal sense of the term, but it is certainly a rigorously applied principle. The facts of this proceeding persuade me that this is the only course of action unless exceptional circumstances are identified. However, the question raised here is the jurisdiction of the adjudication tribunal given the existence of a forum selection clause. *C.B. Powell Limited* holds that "the presence of so-called jurisdictional issues is not an exceptional circumstance justifying early recourse to courts" (para 33).

[61] The Federal Court of Appeal has not changed its view since. In *Black v Canada (Attorney General),* 2013 FCA 201, the Court essentially reiterated the decision in *C.B. Powell Limited* in a case where Mr. Black argued that an adjudication board lacked jurisdiction; he then contended that this was an exceptional circumstance because a decision allowing a judicial review would put an end to the dispute, sooner rather than later, an argument that was also made at the hearing of this case before the Court. The Court of Appeal rejected this argument, citing, among other things, paragraph 45 of *C.B. Powell Limited*, which I reproduce below:

> [45] It is not surprising, then, that courts all across Canada have repeatedly eschewed interference with intermediate or interlocutory administrative rulings and have forbidden interlocutory forays to court, even where the decision appears to be a so-called "jurisdictional" issue: see *e.g.*, *Matsqui Indian Band*, *supra*; *Greater Moncton International Airport Authority*, *supra* at paragraph 1; *Lorenz v. Air Canada*, [2000] 1 F.C. 452 (T.D.) at paragraphs 12 and 13; *Delmas, supra*; *Myers v. Law Society of Newfoundland* (1998), 163 D.L.R. (4th) 62 (Nfld. C.A.); *Canadian National Railway Co. v. Winnipeg City Assessor* (1998), 131 Man. R. (2d) 310 (C.A.); *Dowd v. New Brunswick Dental Society* (1999), 210 N.B.R. (2d) 386, 536 A.P.R. 386 (C.A.).
>
> [Emphasis added.]

[62] In 2012, the Court was more expeditious in *Chief Pensions Advocate v Veterans Review and Appeal Board*, 2012 FCA 249, simply deciding as follows:

> [1] In view of the Supreme Court of Canada's decision in *Halifax (Regional Municipality) v. Nova Scotia (Human Rights Commission)*, 2012 SCC 10, [2012] 1 S.C.R. 364, our decision in *The President of the Canada Border Services Agency and the Attorney General of Canada v. C.B. Powell Ltd*., 2010 FCA 61, February 23, 2010, and that of the *Ontario Court of Appeal in Oleg Volochay v. College of Massage Therapists of Ontario*, 2012 ONCA 541, August 20, 2012, we see no basis to interfere with the decision of Mactavish J. dismissing the appellant's judicial review application on the ground that it was premature.
>
> [2] In the end, the process should follow its regular course, and upon completion thereof, the appellant will no doubt have the opportunity, if not satisfied with the result, of challenging by way of a judicial review application the Veterans Review and Appeal Board's decision, and of raising the issue which it says should be decided now.

[63] The reasons why interlocutory judicial reviews should be condemned were reflected in a decision of the Supreme Court of Canada not so long ago. Justice Gascon, writing with the agreement of three colleagues in *Commission scolaire de Laval v Syndicat de l'enseignement de la région de Laval*, 2016 SCC 8, [2016] 1 SCR 29, held as follows:

> [74] In concluding, I must make one final comment. In my humble opinion, it is most unfortunate that, more than six years after filing a grievance with respect to a dismissal, the Union has not yet been able to begin presenting its evidence. The mission of the grievance arbitration system, that is, to provide employers and employees with justice that is accessible, expeditious and effective, has been forgotten. I would note the importance of the sensible rule that, with only a few exceptions, a grievance arbitrator's interlocutory decision, in particular one concerning evidence and procedure, is not subject to judicial review: *Syndicat des salariés de Béton St-Hubert — CSN v. Béton St‑Hubert inc*., 2010 QCCA 2270, at para. 23 (CanLII); *Sûreté du Québec v. Lussier*, [1994] R.D.J. 470 (C.A.); *Collège d'enseignement général et*

> *professionnel de Valleyfield v. Gauthier Cashman*, [1984] R.D.J. 385 (C.A.). The courts of several provinces have taken a similar deferential approach to interlocutory decisions of arbitrators: *Lethbridge Regional Police Service v. Lethbridge Police Association*, 2013 ABCA 47, 542 A.R. 252, at para. 21; *Canadian Nuclear Laboratories v. Int'l Union of Operating Engineers, Local 772*, 2015 ONSC 3436 (CanLII), at paras. 5-7 and 11 (CanLII); *Blass v. University of Regina Faculty Assn.*, 2007 SKQB 470, 76 Admin. L.R. (4th) 262, at para. 82. In the instant case, the arbitrator had offered to hear the testimony of the executive committee's members in camera (para. 22). That would in all probability have obviated any risk of consequences that would be impossible to correct at the time of the final award. The lengthy judicial review proceedings at the stage of an interlocutory decision that are now drawing to a close could then have been avoided.

The following year, the Supreme Court allowed the courts to exercise some discretion prior to the completion of the administrative process, but held that "they should exercise restraint before doing so" (*Tran v Canada (Public Safety and Emergency Preparedness)*, 2017 SCC 50, [2017] 2 SCR 289 at para 22).

[64] In the case before me, there is no doubt that the applicant is seeking interlocutory judicial review. No reason is given other than avoiding an unnecessary administrative process, and the application for judicial review is therefore premature. In fact, it is the absence of facts that would have made this exercise particularly random.

VI. Postscript: the argument relating to articles 3148 and 3149 of the CCQ

[65] It is not desirable to attempt to have a dispute disposed of when it is premature and the facts are lacking. However, the applicant has created a legal dead end, and it may be in order to comment on the inherent difficulty of the applicant's argument.

[66] Ultimately, the applicant seems to have created a legal vacuum with its argument: it gives with one hand, but takes with the other. It accepts the CCQ as being the suppletive law. It seeks to benefit from article 3148, *in limine*, which recognizes forum selection clauses. But it is quick to deny the application of article 3149, which provides that the forum selection clause, which it nonetheless wishes to invoke in some way, cannot be set up against the worker in an action based on a contract of employment. This argument is based on a textual argument: article 3149 speaks of a "Québec authority" and an "action", whereas the dispute has been submitted to a federal adjudicator in a proceeding that began with a complaint.

[67] But article 3148 does just as much since in its very language, the provision recognizes the forum selection clause only for Quebec authorities, which are without jurisdiction when such a forum selection clause exists. Consequently, by its interpretation, the applicant cannot rely on Quebec's civil law to introduce its forum selection clause. What then is the suppletive law?

[68] Not only is it difficult to see how articles 3148 and 3149 cannot be read together since they appear to be complementary, but in seeking to exclude the effect of article 3149, the applicant could well be preventing itself from being able to introduce the forum selection clause. Article 3148 would be no more applicable, without the same necessary adaptations than those required for article 3149 to apply. The applicant seems to want to have its cake and eat it. It excludes article 3149 at its own expense because it could only apply if Quebec authorities are involved; but the net closes in on the applicant when it attempts to rely on article 3148, which suffers from the same deficiency: it concerns the jurisdiction of Quebec authorities. As noted at the hearing, if article 3148 cannot be relied on by the applicant because it is seeking to apply a

text that applies to Quebec authorities (of which the federal arbitration tribunal is not a part of), how can the forum selection clause be used before the federal arbitration tribunal? Under which rule of law could the applicant claim that the adjudicator lacks jurisdiction because the parties have chosen another forum if it is not article 3148? I doubt that it is article 3111.

[69] The textual argument might also be short. Section 8.1 of the *Interpretation Act*, which relates to the use of provincial law on a suppletive basis, makes it possible to make "reference . . . to the rules, principles and concepts in force in [a] province". This wording could perhaps allow the necessary adjustments to the articles at issue in this case.

[70] While the forum selection clause ostensibly provides for the settlement of disputes relating to the assignment agreement and the allegation involves a dismissal, which falls under the employment contract, I have my doubts, despite the truncated file before the Court, that the applicant can escape articles 3148 and 3149. Thus, without seeking to resolve the issue in the absence of full knowledge of the facts, it seems to me that the applicant would be faced with a binary choice. The first choice is that articles 3148 and 3149 of the CCQ must be read together, and it is far from clear that the forum selection clause can be set up against Mr. Hamamouche in this case if he was dismissed under an employment contract. Article 3149 would apply, and the forum selection clause could not be set up against Mr. Hamamouche. The second choice is that article 3149 does not apply because it only concerns Quebec authorities; but if that is the case, the same limitation should logically and legally be imposed on article 3148, meaning that the applicant must find an alternative way of introducing the forum selection clause before the adjudication tribunal. The concession that the CCQ constitutes the suppletive law loses all

meaning when one declares that the provisions cannot apply to a federal tribunal. The applicant did not attempt to call the common law to the rescue. Rather, it tried to present article 3111 as an alternative for introducing its forum selection clause. It is not possible to reconcile article 3111, with its well-defined purpose, with the very specific article 3148 on forum selection. Forum selection and the choice of the law designated in an act to govern it are two distinct things.

[71] One might think that, if the adjudication tribunal finds that the conditions for the remedy under section 240 of the CLC have been fulfilled, it will also have to resolve the issue of the applicable law given that the parties are Algerian and the assignment agreement was concluded in Algeria with a clause expressly designating elements of Algerian law (clause 2 of the assignment agreement and articles 3111 and 3112 of the CCQ) as governing the juridical act. Another question to be resolved when the facts are known.

VII. Conclusion

[72] It is obviously not for this Court to try to answer these questions. Rather, it must confirm the danger of not resisting the temptation to consider an interlocutory application for judicial review when the facts are unknown and important issues, including the conditions for the application of section 240 of the CLC, have not been addressed.

[73] Ultimately, the Court must dismiss the interlocutory application for judicial review. The matter must be referred back to the third party for further consideration. The respondent is entitled to his costs (*Federal Courts Rules*, SOR/98-106). The applicant stated at the hearing that it would not seek costs should it succeed. The respondent claims costs in the amount of

$3,661.05. The applicant allegedly reduced the number of units claimed by the respondent and came to a total of $2,100. In my opinion, costs of $2,500, including taxes and disbursements, are appropriate in the circumstances.

JUDGMENT in T-1202-18

THE COURT'S JUDGMENT is that:

1. The interlocutory application for judicial review is dismissed.

2. Costs of $2,500, including taxes and disbursements, are awarded to the respondent.

"Yvan Roy"
Judge

Certified true translation
This 17th day of May 2019.

Johanna Kratz, Translator

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1202-18
SYTLE OF CAUSE:	ENTREPRISE PUBLIQUE ÉCONOMIQUE AIR ALGÉRIE, MONTRÉAL, QUEBEC v YACINE HAMAMOUCHE and SOPHIE MIREAULT
PLACE OF HEARING:	MONTRÉAL, QUEBEC
DATE OF HEARING:	JANUARY 15, 2019
JUDGMENT AND REASONS:	ROY J.
DATED:	MARCH 6, 2019

APPEARANCES:

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