Federal Court  Cour fédérale

Date: 20181217

Docket: T-502-17

Citation: 2018 FC 1270

[UNREVISED CERTIFIED ENGLISH TRANSLATION]

Toronto, Ontario, December 17, 2018

PRESENT: The Honourable Mr. Justice Pentney

BETWEEN:

STÉPHANE LANDRY, HUGO LANDRY, MAXIME LANDRY, SHARONNE LANDRY, NORMAND CORRIVEAU, NORMAND BERNARD CORRIVEAU, NICOLAS ALÉXIS LELAIDIER, RÉAL GROLEAU

Applicants

and

CONSEIL DES ABÉNAKIS DE WÔLINAK, MICHEL R. BERNARD, RENÉ MILETTE AND LUCIEN MILLETTE

Respondents

ORDER AND REASONS

[1] The issue here is whether the applicants will be awarded costs in this matter. While this is the last step in this file, it is not the final step in the dispute between the parties. This matter must be put into context before the submissions of both parties can be addressed.

[2] The case at bar began on April 6, 2017, that is, the date on which the applicants filed a Notice of Application for Judicial Review of a series of decisions made by the respondents concerning the *Code d'appartenance du Conseil des Abénakis de Wôlinak* [membership code of the Conseil des Abénakis de Wôlinak]. As this Court noted in another recent decision related to the same issues, namely, *Landry c Le Conseil des Abénakis de Wôlinak*, 2018 CF 601, at paragraph 2:

> [TRANSLATION]
> This is the final chapter in a debate that has lasted decades and has resulted in several cases before this Court. All the cases are related to the same basic question: do members of the Landry family have a right to be registered in the Band Register as descendants of members of the Band? (See *Fortin v Abénakis de Wôlinak (Band Council)* (1998), 82 ACWS (3d) 619, 1998 CanLII 8007 (FC); *Landry v Savard*, 2011 FC 334; *Landry v Savard*, 2011 FC 720; *Medzalabanleth v Abénaki of Wôlinak Council*, 2014 FC 508).

[3] I would also add another reference to the history of the parties, namely, the Consent Order dated December 15, 2011, in *Landry c Bernard*, Docket T-1111-11, which ordered the following:

> [TRANSLATION]
> 1. Any amendments made by the respondents to the Membership Code of the Conseil des Abénakis de Wôlinak between December 21, 2010, and June 17, 2011, are to be cancelled.

> 2. Any amendments made to the Membership Code of the Conseil des Abénakis de Wôlinak between December 21, 2010 and June 17, 2011 are to be declared null and of no effect.
>
> 3. The order of the Court is ordered enforceable notwithstanding appeal.
>
> 4. Without costs.

[4] In this file, the parties followed the steps in accordance with the *Federal Courts Rules*, SOR/98-106 [the Rules] between April and November 2017 (including multiple time extensions, affidavits and cross-examinations, and two specially managed proceedings). The parties have served their affidavits and completed the cross-examinations. On November 6, 2017, the applicants filed their applicants' record in accordance with section 309 of the Rules. According to the Rules, the respondents had until January 15 to produce their respondents' record. However, instead of filing their record, the respondents filed a motion record for judgment on January 15, 2018. In this motion record, the respondents indicated that

> [TRANSLATION]
> After reviewing the file and considering section 3 of the *Federal Courts Rules*, the respondents would like to dispose of this case in accordance with the Consent to Judgment signed by the respondents.

[5] Through this motion, the respondents indicated that they were prepared to consent to the rendering of a judgment, which would have the effect of cancelling and declaring null and of no effect any changes made to the Membership Code adopted by the Band Council between March and November 2017. The consent is based on the fourth point of the order, that is, "without costs".

[6] The problem with the resolution proposed by the respondents in their motion is that they did not obtain the applicants' consent to this judgment. The applicants noted that the Band Council had adopted new measures that had the same effect as the ones they were challenging in this file, namely, to continue excluding the applicants from the Band.

[7] On January 17, 2018, the applicants filed a motion seeking the Court's directions in order to determine how to react to the filing of that motion for consent to judgment, which they had never consented to. The respondents filed their reply on January 29, 2018.

[8] On February 7, 2018, the Court ordered that this motion continue as a specially managed proceeding in accordance with section 384 of the Rules. On April 4, 2018, I was assigned to serve as the judge responsible for the management of this case.

[9] On May 25, 2018, a case management conference was held. Two facts became clear during the conference: (i) the parties had not agreed on a way to resolve the conflict, and (ii) the Band Council had later adopted other measures, which had replaced those that were before the Court in these proceedings. The applicants now wanted to challenge the new measures and asked the Court for guidance as to whether they needed to amend their existing application or initiate new proceedings. The applicants indicated that they were seeking guidance from the Court in light of the circumstances. They proposed the following steps:

- Obtain a judgment on the basis of consent and an award of costs;
- Request an injunction to have the Band Registrar correct the membership list;
- Introduce a series of applications for judicial review in order to

- have the amendments to the Membership Code declared null;
- reverse the Registrar's notice that prevents "excluded" members from establishing their membership in the Band;
- have the general membership meeting, held on January 12, 2018, declared null because it failed to comply with the requirements in the *Indian Act*, R.S.C. 1985, c. I-5;
- have the meeting for the presentation of candidates for election to the Band Council declared null; and

- File a motion for injunction in order to prevent Band Council elections from being held; the elections were scheduled for June 10, 2018 (see *Landry c Le Conseil des Abénakis de Wôlinak*, 2018 CF 601).

[10] Given all these developments and in order to avoid the multiplication of proceedings before the Court, the parties agreed that

- the applicants would file their consent to judgment in accordance with the terms proposed by the respondents, excluding the issue of costs;
- the parties would try to resolve the issue of costs related to this application, and, in the absence of an agreement, the Court would render a decision on this aspect;
- the applicants would file a new application for judicial review of the Band Council's most recent decisions concerning the Membership Code, which affected their participation in Band affairs; and

- the respondents gave prior consent for an extension of time for filing a new application, in accordance with section 18.2 of the *Federal Courts Act*, RSC 1985, c F-7, so that the matter can be heard at a hearing as soon as possible.

[11] After the conference, the applicants filed a new application for judicial review (Docket T-990-18), and the case proceeded. However, the parties did not resolve the issue of costs related to the file in this case. That will be my focus here.

[12] The applicants claim that they cannot consent to a judgment without costs because (i) the respondents acted illegally by excluding them from the Band Register with full knowledge of the evidence; (ii) the filing of the motion record for judgment was a strategy to avoid having a decision rendered on the merits of a case that the respondents knew was not defensible; and (iii) there had not been any genuine offer to settle because the respondents wanted to continue to exclude the applicants from the register and from Band affairs.

[13] The applicants state that they are private individuals and that they do not have access to Band funds to pay their costs. The applicants were forced to accrue legal fees and other expenses in order to protect their rights, including expenses related to the production of a file containing 724 pages and several cross-examinations on affidavit, which the respondents forced them to conduct. The applicants were also required to file a request for directions because the respondents failed to follow the procedure established by the Rules in filing a motion for consent to judgment instead of the respondents' record.

[14] For all those reasons, the applicants claim that they cannot agree to resolve this matter without costs and are requesting authorization to produce their bill of costs and make representations concerning the method of assessment in accordance with conditions established by the Court.

[15] In contrast, the respondents are asking the Court to sanction the applicants' conduct by ordering them to pay their costs. They claim that the applicants filed their request for directions in January 2018 to ensure that a file for which the respondents had agreed to the conclusions sought would remain artificially active. They claim that the cross-examinations were necessary because the affidavits filed by the applicants contained [TRANSLATION] "several false, misleading or deceptive allegations".

[16] The respondents also allege that the applicants acted in a manner that raises serious concerns alleging, for example, that they continued to assert certain facts even though the respondents had established that the claims were unfounded.

[17] The Rules establish that the Court has full discretionary power over the awarding of costs: see Subsection 400(1). Subsection 400(3) establishes a list of factors the Court must consider, and I will address this list of factors in further detail below. However, first and foremost, it is important to recall the general principles concerning the awarding of costs. To do so, I will quote Justice Rothstein's comments in *Consorzio del prosciutto di Parma v. Maple Leaf Meats Inc.*, 2002 FCA 417, at paragraphs 9 and 10 (a decision recently cited with approval

in *Nova Chemicals Corporation v. Dow Chemical Company*, 2017 FCA 25, at para. 10 [*Nova Chemicals*]):

> . . . Rule 400(1) makes it clear that the first principle in the adjudication of costs is that the Court has "full discretionary power" as to the amount of costs. In exercising its discretion, the Court may fix the costs by reference to Tariff B or may depart from it. Column III of Tariff B is a default provision. It is only when the Court does not make a specific order otherwise that costs will be assessed in accordance with Column III of Tariff B.
>
> The Court, therefore, does have discretion to depart from the Tariff, especially where it considers an award of costs according to the Tariff to be unsatisfactory. … Discretion should be prudently exercised. However, it must be borne in mind that the award of costs is a matter of judgment as to what is appropriate and not an accounting exercise.
>
> [Emphasis added.]

[18] I agree that the most relevant factors for the case we are concerned with here are the following:

- Rule 400(3)(a) – The result of the proceeding
    - The case has been replaced by another – the issue instead is the question of unnecessary costs – see, for example, the discussion in *Milliken & Co v. Interface Flooring Systems (Canada) Inc*, 149 FTR 125, 1998 CanLII 7706 (CA).

      Therefore, this is not a typical situation where the awarding of costs follows a determination based on the merits, but I note that the Court has the power to award costs at any step of the proceedings – see Rule 400(6)(a)).
- Rule 400(3)(c) – the importance and complexity of the issues
    - The issues are fundamental for the applicants as well as for the Council – see the summary of their history, above, at paragraph 2, and the fact that controversy

continued in the guise of another application for judicial review (Docket T-990-18).

- Rule 400(3)(g) – The amount of work
    - This matter concerns an application for judicial review – and the parties followed the normal steps up to the point when the respondents were required to file their record; it is not a very complicated case, but affidavits were filed and there were cross-examinations.
- Rule 400(3)(i) – the conduct of a party
    - Here, the respondents claim that they tried to end these proceedings by filing a motion for consent to judgment – and they refer to sections 3, 4 and 369 of the *Rules*. However, as I noted above, the respondents did not obtain the consent of the applicants before filing their motion.
    - I note, in particular, the dates and the sequence of events: this application for judicial review was filed on April 7, 2017, and the parties proceeded with procedural steps between April and November 2017. In December 2017, the Council adopted the new membership rules, which continued to exclude members of the Landry family from the Band's Membership Code (this is the subject of the case in Docket T-990-18). In January 2018, the respondents filed their motion for consent to judgment, which had the effect of cancelling the decisions made by the Band Council up to November 2017, that is, those that were replaced by decisions that had already been made in December 2017.
    - It is not an [TRANSLATION] "offer to settle" and it is not reasonable for the respondents to believe that this step was a way to resolve the fundamental debate

between the parties. The new measures were adopted after this judicial review had started.

- Rule 400(3)(k) – whether any step in the proceeding was "improper, vexatious or unnecessary"
    - In the case we are concerned with here, the applicants claim that the filing of the motion for consent to judgment is a [TRANSLATION] "scheme" used by the respondents to avoid a negative decision on the merits of their efforts to exclude members of the Landry family from the Band register. However, the respondents claim that the applicants refused to give their consent to judgment because they wanted to ensure that they could keep the file artificially active, even though the respondents had consented to the conclusions sought.
    - At a minimum, it should be noted that the filing of a motion for consent to judgment was an "unnecessary" step because it did not end the matter or the debate between the parties concerning the fundamental issue.
- Rule 400(3)(o) – any other matter
    - It is important to note that the steps followed in this case were not completely unnecessary, in the sense that the facts and legal arguments are relevant to the merits (Docket T-990-18). Therefore, we are not referring to unnecessary expenses in the traditional sense of this expression; instead, they could be described as "duplicated" expenses. However, the fact remains that the applicants incurred expenses without obtaining a hearing on the merits.

[19] Considering all the circumstances, and in light of the discretion granted to the Court under section 400(1) of the *Rules*, I agree that the applicants deserve an award of costs. They followed the necessary steps for the purpose of defending their rights and interests before this Court, in accordance with the law and the Rules. They were required to initiate separate proceedings in order to obtain a decision on the merits for two reasons.

[20] First, the Council adopted the other measures and rules which prevented the Landry family from being recognized as members of the Band. I will not offer any comments on the merits of this action since the matter is still before this Court in another file (T-990-18). However, even considering the fact that at this very moment the Council is named as the respondent in that other file directly related to this issue, the Council cannot avoid the consequences of its actions with respect to the file that is before me. One such consequence is the liability to pay the applicants' costs.

[21] Second, the applicants were required to file another application for judicial review because they were prevented from having a hearing on the merits of their initial application. As noted, the respondents chose not to file their record as provided in the Rules, but instead opted to file a motion for consent to judgment. This was the approach chosen by the respondents, and, accordingly, their decision leads to certain consequences.

[22] Therefore, considering the facts and the law, and given the discretion granted under Rule 400(1) and the principles set out in the case law, I agree that the applicants must be awarded a portion of their costs. They incurred expenses in seeking to assert their rights, and they followed

the appropriate steps in accordance with the Rules. The case did not proceed to a hearing on the merits due to the actions of the respondents. I am therefore awarding a portion of the costs because the expenses were not completely unnecessary – part of the work was necessary and reused in the other file.

[23] With respect to the amount, the applicants requested [TRANSLATION] "authorization to produce their bill of costs and to make representations concerning the method of assessment, in accordance with conditions to be determined by the Court". I agree that it is not necessary to follow all these steps. It must be noted that the issue at hand is the award of a portion of the costs in the context of a judicial review – a process that must be simple and efficient. Moreover, this is not a situation where I must decide this issue after a hearing on the merits. Instead, it is a situation where the case was interrupted and replaced by another.

[24] It is important to remember the words of Rothstein J.A. cited above that "it must be borne in mind that the award of costs is a matter of judgment as to what is appropriate and not an accounting exercise", and that the Court may fix a lump sum instead of adhering to Tariff B (see subsection 400(4) of the Rules and the discussion in *Nova Chemicals*). It is therefore appropriate in this case to award a lump sum. In light of all these circumstances, and with regard for the standards established in Tariff B, I agree that the lump sum should be set at $1,500.

[25] For all these reasons, I order the respondents to pay part of the applicants' costs, namely, a lump sum of $1,500, including costs and expenses.

[26] I must add one more comment before concluding. I note that both parties used regrettable language against the other party in their documents. I note this with regret, and I could not express myself any better than by quoting the words of Chief Justice Paul Crampton in *Forde v Canada (Public Safety and Emergency Preparedness*), 2018 FC 1029. Even though those comments were made in a different legal context, they are also applicable here:

> [69] Before concluding, I consider it necessary to comment upon the use of hyperbole. I and other members of the Court have discouraged its use in several presentations to the bar in recent years. However, such language continues to be used. For example, the written submissions of one of the parties to this proceeding are replete with terms such as "deeply flawed," "gross inadequacy of the Officer's assessment," "profoundly unreasonable," "glaring example," "dire situation," and references to a family being "plunged into poverty". Such language does not assist to advance a party's case.

ORDER in Docket T-502-17

THE COURT ORDERS that the respondents must pay the applicants' costs in the lump sum of $1,500, including interest and disbursements.

"William F. Pentney"
Judge

Certified true translation
This 4th day of January 2019

Margarita Gorbounova, Reviser

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-502-17
STYLE OF CAUSE:	STÉPHANE LANDRY, HUGO LANDRY, MAXIME LANDRY, SHARONNE LANDRY, NORMAND CORRIVEAU, NORMAND BERNARD CORRIVEAU, NICOLAS ALÉXIS LELAIDIER, RÉAL GROLEAU v CONSEIL DES ABÉNAKIS DE WÔLINAK, MICHEL R. BERNARD, RENÉ MILETTE AND LUCIEN MILLETTE

MOTION IN WRITING PURSUANT TOTHE *FEDERAL COURTS RULES*, SOR/98-106, CONSIDERED IN TORONTO, ONTARIO.

ORDER AND REASONS:	PENTNEY J.
DATED:	DECEMBER 17, 2018

APPEARANCES:

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