Federal Court Cour fédérale

Date: 20180608

Docket: T-990-18

Citation: 2018 FC 601

[ENGLISH TRANSLATION]

Ottawa, Ontario, June 8, 2018

PRESENT: The Honourable Mr. Justice Pentney

BETWEEN:

STÉPHANE LANDRY, DENIS LANDRY, HUGO LANDRY (minor), MAXIME LANDRY (minor), SHANONNE LANDRY, NORMAND CORRIVEAU, NORMAND BERNARD CORRIVEAU, NICOLAS ALEXIS LELAIDIER, and RÉAL GROLEAU

Applicants

and

THE ABÉNAKI COUNCIL OF WÔLINAK, MICHEL R. BERNARD as Chief of the Abénaki of Wôlinak Band Council, and RENÉ MILETTE and LUCIEN MILLETTE as Councillors on the Abénaki of Wôlinak Band Council

Respondents

ORDER AND REASONS

I. Introduction

[1] This is an interim injunction application filed by the applicants Stéphane Landry, Denis Landry, Hugo Landry, Maxime Landry, Shanonne Landry, Normand Corriveau, Normand Bernard Corriveau, Nicolas Lelaidier and Réal Groleau, to prevent the Abénaki of Wôlinak band councillor election, scheduled for June 10, 2018, from being held. The injunction application is associated with an application for judicial review of the decisions made by the band to change the membership code to cut back the list of members, thereby removing the names of the applicants, other members of the Landry family, and other people not recorded on the list of band members.

[2] This is the final chapter in a dispute that has gone on for decades and that has led to many cases before this Court. All the cases go back to the same fundamental question: are the members of the Landry family entitled to be listed in the band registry as descendants of band members? (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).

II. Background

[3] This dispute over the band membership code and the rights of members of the Landry family has a long and complex history, but a summary of the facts on the most recent story is sufficient for the purposes of this decision.

[4] Since 1987, membership in the Abénakis of Wôlinak First Nation has been governed by the band under the 1987 Membership Code, in accordance with section 10 of the *Indian Act*, RSC (1985), c I-5. This Code defines an [TRANSLATION] “ordinary member” as any person registered on the Abénaki of Wôlinak Band List in the Indian Register (the register maintained by the Department of Indian Affairs, according to subsection 5(1) of the *Indian Act*), as well as [TRANSLATION] “All Abénaki descended from an Abénaki who resided on the Abénaki of Wôlinak Reserve, who is not a member of another band” (paragraph 3(A)(2(a)).

[5] In 1996, the Indigenous and Northern Affairs Canada (INAC) Registrar concluded that its predecessor had erred with respect to the rights of certain members of the Landry family to be included in the register as members of the Abénaki of Wôlinak band. The removal of Indian status from certain members of the Landry family was confirmed by the INAC Registrar in 2011. Following that decision, the members appealed to the Superior Court of Quebec, as provided for in the *Indian Act*. The Landry family members were removed from the Abénaki of Wôlinak Band List by the Band Registrar. Then, in November 2016, the Chief at that time, Michel Bernard, issued a notice to the band members indicating that [TRANSLATION] “henceforth, only status members who have a numbered card will be able to vote in referendums, elections or any other type of vote. The Band List of the Department of Indigenous and Northern Affairs Canada is now the reference and prevails over any other list.”

[6] The next key event is the judgment rendered by the Honourable Justice Masse on February 7, 2017, allowing the appeal filed by the Landry family members and ordering that the appellants be registered on the Abénaki of Wôlinak Band List. (*Landry v Attorney General of Canada (Registrar of Indian Register)*, 2017 QCCS 433 [*Landry 2017*]. The decision was not

appealed, and it became enforceable upon the expiry of the rights of appeal, on or around March 27, 2017.

[7] During that period, the Band Council made a series of decisions on the rights of non-status members (namely, members not included in the INAC Indian Register). For example, in November 2011, the four members of the Council decided that all non-status members would be excluded from all referendums and elections. In February 2017, the band registrar issued a notice to all non-status members that they would be removed from the register. In March 2017, a general assembly was held to adopt changes to the Membership Code. Note that the members of the Landry family who were involved in the appeal before the Superior Court and other unregistered people were excluded from this assembly, and that changes to the Membership Code were adopted a few weeks before the decision rendered by Masse J. became enforceable.

[8] The applicants in this case made a first application for judicial review in April 2017, seeking to reverse the decisions to remove the applicants from the Band List and prevent them from participating in voting (docket T-502-17). The respondents filed an application for consent judgment on January 15, 2018, asking the Court to issue an order declaring all changes made to the Membership Code null and void. The applicants did not consent to this application, in part because the Band Council called another special general assembly in December 2017 to adopt a new membership code. At this general assembly, the band distributed $600 to each member (funds in connection with the settlement of another case), but the band expressly excluded the members of the Landry family involved in the appeal before the Superior Court of Quebec.

[9] In February 2018, the Council held a referendum on the following question: [TRANSLATION] “Following the judgment rendered on February 7, 2017, in Landry v. Attorney General of Canada (Registrar of Indian Register), do you agree with the inclusion of the appellants as members of the Abénakis of Wôlinak First Nation?” The members of the Landry family and other unregistered people could not vote in that referendum.

[10] Finally, in April 2018, the band registrar, Dave Bernard, wrote to Denis Landry, indicating that the position of registrar had been vacant since 1994, that the member list contains many irregularities and that he had started updating the register. He asked Mr. Landry to give him documentation to prove his membership in the Abénakis of Wôlinak First Nation [TRANSLATION] “in order to resolve your status. In the meantime, please note that you are not registered in the band.”

[11] Following a case management conference, the parties agreed to take the following steps: the applicants will consent to the judgment in T-502-17; they will file another application for judicial review of the most recent decision on the new Membership Code; and the respondents indicated that they did not oppose the filing of this new application considering that the deadline in section 18.1 of the *Federal Courts Act*, RSC (1985), c F-7 was not met.

[12] On May 25, 2018, the applicants filed their new application for judicial review and this motion for interlocutory injunction to prevent the election scheduled on June 10, 2018.

III. Preliminary objections

[13] At the start of the hearing, the respondents advanced two preliminary objections on the admissibility of the application for judicial review underlying the motion for interlocutory injunction, and on the admissibility of the new evidence that the applicants tried to submit with their reply. I dismissed the first argument and part of the second argument for the following reasons.

[14] The respondents argue that the application for judicial review is not admissible because it does not comply with section 302 of the *Federal Courts Rules*, SOR/98-106, which provides that an application for judicial review shall be limited to a single decision. They also claim it is outside the 30-day time limit set out in subsection 18.1(2) of the *Federal Courts Act*. Moreover, the motion for injunction seeks findings and orders beyond the rights invoked in the application for judicial review. The applicants say that their application for judicial review is based on a single question – the same question at the root of the previous case (T-502-17), namely the decision to change the Membership Code to remove the members of the Landry family from the list of band members. All the other decisions had the same foundation.

[15] I dismissed the respondents' objection because the application for judicial review is founded on a fundamental question: was the process taken to modify the membership code valid or not? The other decisions made by the Band Council or its representatives are all linked to this issue. Moreover, I do not accept the objection based on the time limit, given the position taken by counsel for the respondents during the case management session.

[16] The second objection, based on the applicants' filing of an additional affidavit with their reply, is based on a failure to comply with the *Rules*, and the decision of the Federal Court of Appeal in *Amgen Canada Inc v Apotex Inc*, 2016 FCA 121 [*Amgen*]. Mr. Justice Stratas noted in his decision that the sections of the *Rules* that govern motions do not expressly authorize the filing of evidence in reply. However, considering the principles of procedural fairness and the need to make an appropriate decision, the Federal Courts have adopted guidelines on the admissibility of additional affidavits, in light of the interests of justice. According to the case law, the following elements must be considered: whether the evidence will help the Court; whether admitting the evidence caused serious harm to the other party; and whether the evidence was available when the affidavits were filed or if it could have been discovered by showing due diligence (see *Amgen*, at paragraph 13).

[17] Given all of the circumstances of the application before me, and considering that the documents must be assembled and presented within a short period of time, and that most of the documents produced in support of the affidavit (enclosures) are letters, emails or other documents already submitted to the Band, I decided to accept this evidence. However, in his affidavit, the applicant Stéphane Landry said: [TRANSLATION] "I would have run as a candidate in the elections to be held on June 10, 2018, had my name not been illegally removed from the list of band members." In light of the above, I decided not to accept this part of the affidavit considering that no explanation was given for the delay in submitting such an important piece of evidence and that there was no opportunity for cross-examination on this point.

IV. Issues

[18] The issues to be resolved in the context of this application may be expressed as follows:

1. Was the criterion governing interlocutory injunctions respected?
2. Should the Court address the ancillary orders associated with the Council's conduct during the interim period until the final decision on the judicial review?

[19] The criterion for obtaining an interlocutory injunction or an interim injunction is stated by the Supreme Court of Canada in *RJR-Macdonald Inc v Canada (Attorney General)*, [1994] 1 SCR 311, 1994 CanLII 117 [*RJR-Macdonald*]. To obtain such an order, the party seeking it must demonstrate:

A. That it has a serious issue to be tried;
B. That it will suffer irreparable harm if the order is not granted;
C. That the balance of convenience favours making the order, considering all the circumstances of both parties.

[20] The elements are conjunctive; the applicant must satisfy all three to obtain an interlocutory injunction. Under the circumstances, there is no question as to the urgency of the situation — the motion was heard on June 5, 2018, in the context of an election to be held on June 10, 2018. However, it should be noted that an injunction is an extraordinary remedy that the Court grants only at its discretion and in certain specific cases to preserve the *status quo* to allow one of the litigants to obtain a decision regarding the right he is invoking.

A. *Serious issue to be tried*

[21] To determine whether there is a serious issue to be tried, the Supreme Court of Canada, in *RJR-Macdonald*, declared that "[t]here are no specific requirements which must be met in order to satisfy this test" and that the motions judge must make a preliminary assessment of the merits of the case.

[22] Given the low threshold of this element and the background summarized above, I have no doubt that the applicants have established a serious issue to be tried, in connection with the process wherein the Council changed the Membership Code of the Abénaki of Wôlinak, a decision that led to many more decisions, all of which had a direct and real impact on the applicants, as well as the other people affected by the changes made to the Membership Code. Note that the respondents did not place much emphasis on their argument against this finding.

B. *Irreparable harm*

[23] "Irreparable harm" refers to the nature of the harm suffered rather than its magnitude; It is harm which either cannot be quantified in monetary terms or which cannot be cured (*RJR-Macdonald* at page 341). Evidence of harm must be categorical and not speculative.

[24] In most of the cases cited, in which the Court granted an interlocutory injunction to delay a vote, the harm was associated with the situation of a person affected — namely a Chief or Councillor who was removed from the position and wants to delay the election to fill his position, or cases in which a person who wants to apply for a position wants to delay the election

while awaiting the resolution of a claim against the council or election chairperson: see *Myiow v Mohawk Council of Kahnawake*, 2009 FC 690; *Lower Nicola First Nation v The Council*, 2012 FC 103; *Buffalo v Rabbit*, 2011 FC 420; *Duncan v Behdzi Ahda First Nation*, 2002 FCT 581; *Francis v Mohawk Council of Akwesasne*, [1993] FCJ No. 369 (QL).

[25] However, in this case the applicants have no such evidence. The applicants claim that they will suffer irreparable harm because they cannot exercise their fundamental right to vote for the members of the band council. This is a type of harm that is not easily established with evidence. The applicants submitted the old list of electors produced by the band registrar on November 1, 2016, and they compared it with the list produced by the election chairperson on April 23, 2018 (according to the new Membership Code). More than 250 people are missing from the most recent list, including the members of the Landry family, among others.

[26] I accept the respondents' argument that the previous list reflects the lack of attention to the band register, and that some names must be removed from the list because some people are deceased or their addresses are unknown. However, it is clear that this does not explain all the differences, and, for example, all the appellants from the Landry family who were involved in the appeal before the Superior Court of Quebec are not on the most recent list.

[27] The applicants argued that if the elections are held on June 10, 2018, as scheduled, they will be deprived of their fundamental rights, rights that are recognized by the *Indian Act* (in sections 74 *et seq.*), the *Canadian Charter of Rights and Freedoms*, Part I, of the *Constitution Act, 1982*, which is Schedule B of the *Canada Act 1982* (UK), 1982, c 11, and the Quebec *Charter of Human Rights and Freedoms*, CQLR c C-12. Clearly, democratic rights, including the

right to vote in elections, are recognized and protected by the *Indian Act*, the *Indian Band Election Regulations*, CRC, c 952, and by their Electoral Code, adopted on June 11, 2008, and approved by the Minister of Indian and Northern Affairs on May 29, 2009 (see also *Corbiere v Canada (Minister of Indian and Northern Affairs)*, [1999] 2 SCR 203 at paragraphs 17, 80-81).

[28] Without commenting on the merits of the underlying application for judicial review, I note that the main issue is whether the members of the Landry family, including some of the applicants in this case, have the right to be included in the electoral list as registered members of the band because they have vested rights as band members. I also note that most of the applicants currently reside on the reserve. It is clear that some members of the Landry family have already been involved in the band council administration, including Denis Landry, who was elected Chief in 2012. I also note that there are many indications that the members of the Landry family want to continue to be a part of the band. For example, I note the email sent by Stéphane Landry to Dave Bernard, Director General of the Abénaki of Wôlinak Council, on March 23, 2017, in which Mr. Landry wrote: [TRANSLATION] "Please do what is necessary to re-register my name and the names of all my family members on the list of Abénaki of Wôlinak members." In response, Mr. Bernard said that [TRANSLATION] "the request will be sent to the Council, which will meet in early April. You will be sent a response after the Council meeting." The respondents admitted that the Council did not respond. So, it is clear that, at the very least, a few members of the Landry family, including the applicants, want to continue to be part of the band.

[29] At this stage, I must consider the harm that the applicants will suffer if the injunction is denied. The applicants claim that they will suffer irreparable harm because if the election is held

before their right to participate in it is resolved, they will be denied their fundamental rights, and will therefore be governed by an [TRANSLATION] “illegitimate” Council.

[30] However, the respondents argue that if the applicants suffer such harm, it is their own fault because they delayed in making this request. The elections were scheduled a long time ago, and the applicants knew when the elections would be held. Moreover, the respondents argue that nine applicants should not delay an election that will affect the interests of all the community members. The Court’s consideration of the harm suffered by the parties must be limited: *Beausejour v Yekooche First Nation*, 2003 FC 1213; *Dodge v Caldwell First Nation of Pointe-Pelée*, 2003 FCT 36. The applicants cannot speak on behalf of all the people not registered in the First Nation in the absence of evidence in that regard. They advance that there is only speculation and conjecture, and not the necessary evidence to establish irreparable harm.

[31] In this case, even though the applicants are not formally authorized to represent all the Landry family members, I cannot ignore the impact of the decisions made by the respondents on the rights of over 250 people, including 94 appellants who won a case before Masse J. in *Landry (2017)*. When a group that represents nearly half the old members of the First Nation is excluded from an election for the council that will make very important decisions for each person who resides on the reserve, it seems to me that there is irreparable harm. It is clear that most of the group members are not new arrivals or unknown; they are the same people who pursued their right to be recognized as band members for years. In all circumstances, and in light of the evidence before me, the applicants have established that they will suffer irreparable harm if the injunction is not granted.

C. *Balance of convenience*

[32] The balance of convenience is a “determination of which of the two parties will suffer the greater harm from the granting or refusal of an interlocutory injunction, pending a decision on the merits” (see *Manitoba (Attorney General) v Metropolitan Stores Ltd*, [1987] 1 SCR 110 at paragraph 36). In the context of motions for interlocutory injunctions to delay elections of First Nations councils, Justice Blanchard indicated: “In assessing the balance of convenience the Court must take into account the public interest which in this instance must be assessed by considering the needs and best interest of the Samson Cree Nation. . .” (*Buffalo v Bruno,* 2006 FC 1220 at paragraph 16).

[33] The applicants argue that the same considerations that apply to irreparable harm apply here. It is a matter of respecting their fundamental rights compared to the Council’s loss of a small amount of money should they have to organize an election a little later.

[34] The respondents argue that postponing the election will cause a lot of uncertainty for the band members and for third parties with whom the band negotiates trade agreements. They argue that the applicants cannot claim to speak on behalf of people who are not represented in these proceedings, and therefore it is only a question of the applicants’ private interests, and not the public interest of the band members.

[35] I noted above that the main question underlying this motion is whether the members of the Landry family and other unregistered individuals are band members with vested rights. I also note the story behind this case: the Landrys were removed from the list of band members

following the decision by the INAC Registrar because the band decided that band membership must be limited to registered persons. However, when the Landry family won their case before the Superior Court, the day before they were re-registered in the INAC Register, the Council urgently adopted a new membership code, a code that would exclude the appellants in the *Landry 2017* case. Moreover, at the special general assembly where this decision was confirmed with a vote, the Council distributed $600 to each band member (an amount in connection with another case); however, the Council expressly excluded all the appellants involved in the *Landry 2017* case.

[36] Once again, an injunction is an extraordinary remedy, and I agree with the recommendation of Justice Barnes who said that "the Court should be cautious about treading unduly into the political affairs of a First Nations band." *Basil v Lower Nicola First Nation*, 2009 FC 1039 at paragraph 5. However, in certain cases, the Court granted injunctions to postpone an election, and in those cases the circumstances are essentially the same — the Court agreed that there was a shadow of uncertainty over the election given the possibility that the applicants might win their case for judicial review, and therefore the legitimacy of the council or chief elected under such circumstances would be in question, which could create more uncertainty for the community, and increase division within the First Nation.

[37] In this case, I will adopt the language of Justice Blanchard in *Buffalo v Bruno*, 2006 FC 1220 at paragraph 19:

> In my view, while the present circumstances are less than ideal, the situation would be far more uncertain if the elections were held and the Applicants were ultimately successful in the their underlying application. In that event questions as to the legitimacy of the election, otherwise validly and democratically held, would

> be raised. Further uncertainty and disruption would result regarding the status of the newly elected Council in the Samson Cree Nation, not to mention issues that may arise regarding the status of the Council elected following the May 19, 2005 election.

[38] We must consider the interests of the band members and councillors who applied for this election and are expecting the vote to take place on June 10, 2018. However, we must also consider the interests and rights of the applicants and other unregistered members who will not be allowed to participate in the election. I must consider the interests of the First Nation overall. In my opinion, holding the vote under the circumstances could create a worse situation than if the vote were delayed for a short period of time.

[39] I note that the parties agree that the outgoing Council can continue to function, pursuant to section 8.8 of the Abénaki of Wôlinak Election Code, which addresses the situation in which the results of an election are appealed. Section 8.8 states that if an appeal is filed, [TRANSLATION] "The elected Chief and Councillors shall remain in office during the appeal proceedings." However, the section also indicates that the councillors [TRANSLATION] "will be able to make urgent decisions" and that [TRANSLATION] "the outgoing Council will continue to handle current management and administration responsibilities." Given this provision, there is no need to address the second issue regarding ancillary orders requested by the applicants.

V. Conclusion

[40] Given the circumstances, I find that I must maintain the *status quo* until the question of the legitimacy of the decisions on the Membership Code are decided and therefore grant the

applicants the interim order requested. However, I must stress that the order is limited to the election scheduled for June 10, 2018. I do not allow the other remedies they sought.

[41] In exercising my discretion under section 400 of the *Rules*, I award the applicants their costs.

[42] I am granting an interlocutory injunction, but I want to point out to the parties and their counsel that they must do what is necessary to ensure that the judicial review is heard as soon as possible.

[43] Finally, after reading all the documentation and hearing the motion, I recall the words in the preamble of the Membership Code of the Abénaki of Wôlinak First Nation, which notes the sad history of the Abénaki Nation since the French and English arrived on their ancestral lands and the divisions in the Abénaki community resulting from this history. The document also states that: [TRANSLATION] "We need to change this situation and work to bring all the Abénaki people together because what sets us apart individually, together, is the starting point for renewed social, economic and cultural progress for the Abénaki Nation."

ORDER

THIS COURT ORDERS that:

1. An interlocutory injunction preventing the Abénaki of Wôlinak Band Council from holding the vote for the band councillor election scheduled for June 10, 2018, until the application for judicial review is decided by Court order is granted;

2. The costs of this motion are awarded to the applicants.

"William F. Pentney"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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STYLE OF CAUSE:	STÉPHANE LANDRY, DENIS LANDRY, HUGO LANDRY (MINOR), MAXIME LANDRY (MINOR), SHANONNE LANDRY, NORMAND CORRIVEAU, NORMAND BERNARD CORRIVEAU, NICOLAS ALEXIS LELAIDIER, RÉAL GROLEAU v ABÉNAKI COUNCIL OF WÔLINAK, MICHEL R. BERNARD AS CHIEF OF THE ABÉNAKI OF WÔLINAK BAND COUNCIL, AND RENÉ MILETTE AND LUCIEN MILLETTE AS COUNCILLORS OF THE ABÉNAKI OF WÔLINAK BAND COUNCIL
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