Federal Court  Cour fédérale

Date: 20210416

Docket: T-922-20

Citation: 2021 FC 335

[ENGLISH TRANSLATION]

Ottawa, Ontario, April 16, 2021

PRESENT: The Honourable Associate Chief Justice Gagné

BETWEEN:

STEPHAN LANDRY, NATHALIE GROLEAU, KEVIN GAILLARDETZ-LANDRY, PIERRE-OLIVIER LANDRY-BERTHIAUME, SARAH LANDRY, JEAN LANDRY, DAREN LANDRY-GAGNON, SHAREEN LANDRY, LOUISE SAVARD, DENIS LANDRY, NATHALIE BERNARD, NORMAND CORRIVEAU, NORMAND JUNIOR BERNARD CORRIVEAU, PASCAL BERNARD CORRIVEAU, ANDRÉ MONTPLAISIR, DANIEL LANDRY, DANIEL ROCHELEAU AND EMMANUEL CLOUTIER

Applicants

and

THE COUNCIL OF THE ABÉNAKIS OF WÔLINAK, MICHEL R. BERNARD, RENÉ MILETTE, LUCIEN MILETTE AND CHRISTIAN TROTTIER

Respondents

ORDER AND REASONS

I. Overview

[1] In their application for the issuance of a writ of *quo warranto*, the applicants argue that the members of the Council of the Abénakis of Wôlinak usurped the offices of Chief and Councillor, by remaining in their positions after their terms of office ended, on June 14, 2020 (for Chief Michel R. Bernard) and June 18, 2018 (for the three councillors), respectively.

[2] It is important to note that the election for the positions of councillors, which was originally scheduled to be held on June 18, 2018, was postponed a number of times—and was never held, in particular for the following reasons:

- Some of the applicants sought and obtained from Justice William Pentney (docket T-990-18) an interlocutory injunction "preventing the Abénaki of Wôlinak Band Council from holding the vote for the band councillor election . . . until the application for judicial review is decided by Court order" (*Landry v Abénaki Council of Wôlinak*, 2018 FC 601 [***Interlocutory 1***]), which the undersigned did on December 4, 2018 (*Landry v Council of the Abénakis of Wôlinak*, 2018 FC 1211 [***Wôlinak 1***]).

- The issue in *Wôlinak 1*, namely the membership of non-status members in the Band and, as a result, their right to participate in the electoral process, was the subject of an appeal and then an abandonment of the appeal on March 12, 2020 (A-422-18).

- In the meantime, some of the applicants and respondents have, on both sides, instituted new proceedings (dockets T-1139-19 and T-1227-19) involving the creation of an electoral list and the right, this time, of the associate members to be registered on it. The Court's decision on these issues (*Landry v Wôlinak Abénaki First Nation*, 2020 FC 945 [***Wôlinak 2***]) is currently under appeal before the Federal Court of Appeal (A-271-20). • Since then, the applicants have sought and been denied an interlocutory injunction by Justice Pentney (in this docket) directing the respondents to hold elections for the positions of Chief and Councillor within a reasonable time (unreported decision [***Interlocutory 2***]. This decision is also being appealed before the Federal Court of Appeal (A-224-20).

[3] At a case management conference presided over by the undersigned, it became clear that while the applicants wanted elections to be held as soon as possible, they could challenge the outcome of that election if the Federal Court of Appeal ruled in favour of them in A-271-20, and reversed this Court's decision in *Wôlinak 2*.

[4] Moreover, in their application for the issuance of a writ of *quo warranto*, the applicants place a great deal of emphasis on an excerpt from the order of Justice Pentney in *Interlocutory 1*, where he explains, in the following terms, his refusal to issue certain ancillary conclusions sought by the applicants:

> [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.

[5] The applicants argue that all of the Council's actions since then have been governed by this excerpt from Justice Pentney's order and are illegal if they go beyond the mere current and urgent affairs of the Band. As for the respondents, they justify remaining in office until the next elections by the authority of this excerpt. In my view, the parties are wrong.

[6] First, this comment by Justice Pentney is not followed by any such conclusion. Moreover, even if there had been such a conclusion, it would only have been valid until the final judgment

of the Court on the application for judicial review, which is dated December 4, 2018. On the merits of the application for a writ of *quo warranto*, the Court will effectively determine what the Council could have or could not have done since June 18, 2018, but it will do so pursuant to the *Electoral Code of the Abénaki of Wôlinak*, the *Indian Act*, RSC, 1985, c I-5, and possibly the *First Nations Election Cancellation and Postponement Regulations (Prevention of Diseases)*, SOR/2020-84 (enacted in connection with the COVID-19 pandemic).

[7] That said, it is within the context of this *quo warranto* remedy that the applicants have requested the production of the following documents from the respondents, under Rule 317 of the *Federal Courts Rules*:

- any resolution passed by the Council from June 12, 2016, to March 7, 2017, from May 2, 2018, to June 12, 2017, and from February 12, 2020, to date;
- any agreement, transaction or contract between the respondents and any third party relating to the completion of projects involving a casino, cannabis grow operations and the operation of a boxing ring;
- statements for bank accounts opened for and on behalf of the Abénaki of Wôlinak and the Council since June 10, 2018; and
- copies of any cheques or bank transfers drawn on any bank accounts opened for and on behalf of the Abénaki of Wôlinak and the Council.

[8] At first, the respondents opposed this request for production, calling it a fishing expedition, only to then fulfill said request in part. To date, they have provided the following documents:

- all of the resolutions passed by the Council since June 12, 2016;

- an affidavit from Dave Bernard, Director General of the Council, in which he detailed the status of projects involving a casino, cannabis grow operations and the operation of a boxing ring (or auditorium) on the reserve, the logging of a pine forest and the construction of a municipal garage,— along with a number of documents and agreements attached to the affidavit; and

- the audited financial statements of the Abenaki of Wôlinak Council for the fiscal years ending on March 31, 2018 and 2019, with an undertaking on the part of the respondents to provide those for 2020 and 2021, when they become available.

[9] The debate therefore rests primarily on the documents detailing all the banking transactions conducted by the Council since June 2018.

II. Analysis

[10] Rule 317 of the *Federal Courts Rules* provides as follows:

Material from tribunal	Matériel en la possession de l'office fédéral
317 (1) A party may request material relevant to an application that is in the possession of a tribunal whose order is the subject of the application and not in the possession of the party by serving on the tribunal and filing a written request, identifying the material requested.	317 (1) Toute partie peut demander la transmission des documents ou des éléments matériels pertinents quant à la demande, qu'elle n'a pas mais qui sont en la possession de l'office fédéral dont l'ordonnance fait l'objet de la demande, en signifiant à l'office une requête à cet effet puis en la déposant. La requête précise les documents ou les éléments matériels demandés.

[11] The documents sought must therefore be relevant to the dispute and be in the exclusive possession of a tribunal. The documents must be properly identified as a "noticeable lack of specificity alone is sufficient to dispose of [such a] motion" (*Maax Bath Inc v Almag Aluminum Inc*, 2009 FCA 204, at para 11).

[12] In *Tsleil-Waututh Nation v Canada (Attorney General)*, 2017 FCA 128, the Federal Court of Appeal set out certain guidelines to be followed in applying this Rule:

> [106] Rule 317 plays a limited role. As mentioned above, it allows applicants to obtain from the administrative decision-maker "material relevant to an application that is in the possession of [the decision-maker] . . . and not in [their] possession."
>
> [107] Rule 317 means what it says. The only material accessible under Rule 317 is that which is "relevant to an application" and is "in the possession" of the administrative decision-maker, not others. Rule 318(1) shows us that the material under Rule 317 must come from the administrative decision-maker, not others.
>
> [108] The material must be actually relevant. Material that "could be relevant in the hopes of later establishing relevance" does not fall within Rule 317: *Access Information Agency Inc. v. Canada (Attorney General)*, 2007 FCA 224, 66 Admin L.R. (4th) 83 at para. 21. The principles canvassed above—particularly those in section 18.4(1) of the *Federal Courts Act* and Rule 3 of the *Federal Courts Rules* relating to promptness and the orderly progression of judicial reviews—discourage fishing expeditions.
>
> [109] Relevance is defined by the grounds of review in the notice of application:
>
> > A document is relevant to an application for judicial review if it may affect the decision that the Court will make on the application. As the decision of the Court will deal only with the grounds of review invoked by the respondent, the relevance of the documents requested must necessarily be determined in relation to the grounds of review set forth in the originating notice of motion and the affidavit filed by the respondent.

> (*Canada (Human Rights Commission) v. Pathak*, [1995] 2 F.C. 455 at page 460 (C.A.).)
>
> [110] The grounds of review are to be read in order to obtain "a realistic appreciation" of their "essential character" by reading them holistically and practically without fastening onto matters of form: *Canada (National Revenue) v. JP Morgan Asset Management (Canada) Inc.*, 2013 FCA 250, [2014] 2 F.C.R. 557 at paras. 50 and 102; *Canadian National Railway Company v. Emerson Milling Inc.*, 2017 FCA 79 at para. 29.

[13] The rule is therefore clear and has been repeated numerous times: the documents must be relevant to the analysis of the issue that is actually before the Court, and not merely desired in the hopes of eventually establishing relevance. It is therefore necessary to realistically identify the underlying application.

[14] The writ of *quo warranto* is one of the extraordinary remedies for which jurisdiction is granted to this Court under paragraph 18(1)(a) of the *Federal Courts Act*, RSC 1985, c F-7. It is available to challenge the right of a public office holder to hold that office (*Salt River First Nation #195 v Martselos*, 2009 FC 25 at para 13 [*Salt River*]; *Marie v Wanderingspirit*, 2003 FCA 385 at para 20).

[15] As previously mentioned, the applicants have taken the position that the respondents may indeed exercise the offices of Chief and Councillor of the First Nation, but that, for now, their powers are limited to simply handling current management. Again, it will be up to the Court to determine whether the respondents are lawfully exercising their office, and the nature of the actions they could have taken or could take since the end of their term of office. The documents

produced to date will allow the Court to determine, once the legality of the exercise of that office has been determined, whether they exceeded their powers.

[16] However, the applicants are seeking several remedies that go beyond the scope of a *quo warranto* remedy. They are requesting that the Court:

> [TRANSLATION]
>
> QUASH all resolutions passed by the respondents since June 10, 2018, or alternatively, RESERVE THE RIGHTS of the Band Council to be elected in the near future to quash them as it deems appropriate;
>
> DECLARE null and void any contract, understanding, agreement or transaction between the respondents and their representatives, agent or employee, on behalf of the Abénaki of Wôlinak, with any third party since June 10, 2018, or alternatively, RESERVE THE RIGHTS of the Band Council to be elected in the near future to quash them as it deems appropriate;
>
> more specifically, DECLARE null and void any termination of a lease, termination agreement or notice to evict Carrefour Wôlinak tenants, located at . . . , property of the Abénaki of Wôlinak Band Council, specifically and among others, the space opposed by [a third party];
>
> ORDER the stoppage of all work undertaken for the purposes of completing the projects involving a casino, cannabis factories, a boxing ring and a municipal garage;
>
> ORDER the respondents to suspend any payments except for those authorized by the Court or owing under programs funded by the federal government and currently managed by the third-party manager appointed by Indigenous Services Canada;
>
> APPOINT a receiver to perform the duties of the Band Council until a new band council is elected, except for the duties falling within the purview of the third-party manager appointed by Indigenous Services Canada, and confer upon him or her the responsibility of holding elections in accordance with the Band's Election Code, while ensuring that the members of the Appeal Board appointed meet the competency criteria set out in the Election Code and that they are independent and impartial;

> ORDER the holding of elections for the positions of non-status Chief and Councillor as soon as it is reasonably possible to hold them, in accordance with the custom of the Abénaki of Wôlinak as described in the Election Code in force;
>
> MAKE any order or declaration as the Court may deem appropriate and just;
>
> ORDER the respondents Michel Bernard, René Milette, Lucien Milette and Christian Trottier to pay the costs of this application; and
>
> ORDER that the costs of this application be payable by the applicants personally on a full indemnity scale (solicitor and client costs).

[17] It is apparent from this collection of conclusions that the applicants' remedy is one of declaratory relief, injunction and disguised judicial review of a number of decisions taken by the Council since June 2018. They also include conclusions of nullity that necessarily affect the rights of third parties that are not party to the proceedings before this Court.

[18] In *Salt River,* Justice Judith Snider had to examine the legitimacy of the actions of a band council's members and determine whether a writ of *quo warranto* was the appropriate remedy. As is in this case, the judge noted that the applicants were challenging more than one decision taken by the council, which Rule 302 does not allow them to do. She also concluded that the legality of the actions of a band council's members whose right to hold office is not being challenged does not fall within the *quo warranto* remedy.

[19] It will be up to the judge who will hear the merits of the case to determine the jurisdiction of the Court to grant the full range of remedies sought by the applicants. For the purposes of the decision to be made here today, I note that the essence of the application before the Court is to

circumscribe the nature of the powers the respondents can exercise when their term of office expires. I fail to see how all the bank statements, copies of cheques and evidence of bank transfers since June 2018 would assist the Court in doing so. We are talking here about the voluminous documents required in the hopes of finding some that are relevant. That is the very nature of a fishing expedition.

[20] I am therefore of the view that the documents produced by the respondents will provide the desired insight into the respondents' actions since June 2018 and, in that sense, they are complete and sufficient. The applicants' motion is therefore dismissed.

ORDER in T-922-20

THIS COURT'S ORDER is as follows:

1. The applicants' motion is dismissed.

2. Costs are awarded to the respondents.

"Jocelyne Gagné"
Associate Chief Justice

Certified true translation
Michael Palles, Reviser

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-922-20
STYLE OF CAUSE:	STEPHAN LANDRY ET AL v MICHEL R. BERNARD ET AL
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ORDER AND REASONS:	GAGNÉ A.C.J.
DATED:	APRIL 16, 2021

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