Date: 20110318

Docket: T-16-11

Citation: 2011 FC 334

[ENGLISH TRANSLATION]

Ottawa, Ontario, March 18, 2011

PRESENT: The Honourable Mr. Justice Scott

BETWEEN:

DENIS LANDRY, GAÉTAN LANDRY, CHRISTIAN TROTTIER, LUCIEN MILLETTE, DAVE LEFEBVRE

Applicants
Moving Parties

and

YVON SAVARD, LOUISE BERNARD, DIANE M'SADOQUES ET RAYMOND BERNARD, NAYAN BERNARD, KEVEN BERNARD, JACQUES BERNARD, RÉJEAN BONNEVILLE, JULES BERNARD CATHERINE BERNARD AND NELSON LEFEBVRE

Respondents

REASONS FOR ORDER AND ORDER

I. THE APPLICATION AND THE FACTS

[1] This is an application for an interim injunction submitted by applicants Denis Landry, Gaétan Landry, Christian Trottier, Lucien Millette and Dave Lefebvre, hereinafter the applicants, all members of the Conseil de bande des Abénakis de Wôlinak, who also filed an application for judicial review on January 6, 2011, against a decision by the Comité d'appel designated for the general election on November 14, 2010. The decision by the Comité d'appel on December 21, 2010, allowed the appeals filed by defeated candidates Raymond Bernard, Nayan Bernard, Keven Bernard, Réjean Bonneville, Jacques Bernard, Jules Bernard, Catherine Bernard, and Nelson Lefebvre, annulled the election on November 14, 2010, and ordered that new elections be held as soon as possible.

[2] In light of the provisions of the Code électoral des Abénakis de Wôlinak, more specifically article 8.8, 3rd paragraph, in fact, the Comité d'appel's decision kept the outgoing council in their positions on an interim basis. The council is composed of the following people: Raymond Bernard, chief, and the following councillors: Nayan Bernard, Keven Bernard, Christian Trottier and Lucien Millette to deal with ongoing management and administration issues.

[3] The applicants have appeared many times before this Court since January 6. On March 1, Justice Johanne Gauthier gave instructions to hear a motion by the applicants and ordered that a deadline be set so that the application for review would be heard on April 20, 2011, in Montréal.

[4] On March 7, Gauthier J. made an initial order in which she disposed of cross-motions filed by the respondents, deferred an initial application for *sine die* interim relief, given the discussions

between the parties, and set a definitive deadline that would lead to the hearing for the application for judicial review on April 20, 2011, in Montréal.

[5] On March 11, the applicants filed a new motion with the Court for interim relief in order to, *inter alia*, prevent a meeting of the Conseil de bande from being held as scheduled for Monday, March 14, on the ground that the agenda included adopting resolutions other than simple administrative resolutions.

[6] After hearing the parties, Justice François Lemieux made an interim order suspending the meeting of the Conseil de bande until the tabling of the resolutions at issue and the hearing of the motion for interim relief that is now before this Court.

II. ORDER SOUGHT

[7] Through an interim application filed under the terms of sections 8, 54, 55, 359 and 373 *et seq*. of the *Federal Courts Rules*, the applicants are seeking an order that aims to:

(a) PROHIBIT respondents Raymond Bernard, Nayan Bernard and Keven Bernard, as members of the outgoing Conseil de bande who are still in power following the decision by the Comité d'appel on December 21, 2010, from adopting any resolution other than for simple administration, until the Court determines the basis of the application for judicial review or if necessary, until new elections are held and a new Conseil de bande enters office;

(b) EXEMPT the moving parties from any security;

(c) ORDER enforcement, notwithstanding any appeal;

(d) ANY other order that the Court deems appropriate or fair; and

(e) the COSTS of the motion.

[8] At the start of the hearing, the applicants applied for leave to amend the findings sought in its Order so that Christine Trottier and Lucien Millette could be added as persons identified in the sought prohibition. Counsel for the respondents did not object and the Court authorized the amendment.

[9] With leave from the Court, counsel for the respondents amended paragraph 6 of its written representations in order to substitute the word [TRANSLATION] "entity" with "moral person".

[10] During the hearing, counsel for the applicants applied for leave to amend for a second time to the findings in its Order so as to include a specific reference to resolutions 46 to 78, except for resolution 69. Counsel for the respondents objected and the Court took it under advisement.

[11] In order to succeed with their motion, the applicants must establish that there is a serious question to decide upon in the underlying application for judicial review, that they will suffer irreparable harm if the application for interim relief is not granted and the balance of convenience is in favour of issuing the order sought. See *RJR-MacDonald Inc. v Canada* (*Attorney General*), [1994] 1 SCR 3. The test in *MacDonald* has been applied many times by this Court in electoral disputes among Indigenous peoples.

[12] Counsel for the respondents argues at length that the applicant failed to assign one of the respondents identified by their order, that being the Conseil de bande. In that matter, he maintains that the resolutions at issue can only be adopted by the Conseil and not by the respondents, even though he admits that they constitute a majority of the Conseil de bande, that the respondents have a quasi-fiduciary duty as members of the Conseil de bande, and that their personal interests may easily differ from the interests of the Conseil as an entity.

[13] Counsel for the respondents reminds the Court that in most decisions, we find both individuals who are sitting on the council and the Conseil de bande itself as parties to the litigation, and that the applicants erred in their efforts because they seek to have an order made against an entity that is not party to the litigation.

III. EXISTENCE OF A SERIOUS QUESTION

[14] The Court is satisfied that the applicants raised serious questions in the underlying application for review, more specifically regarding allegations of irregularities. In this application for interim relief, this is to temporarily ensure good governance, that being until the Court disposes of the application for judicial review, in the best interests of a community beyond internecine strife. The affidavit from Christian Trottier tells of a notice of meeting issued at the chief's request, and draft resolutions that suffer from a lack of transparency and that deviate from the simple mandate of ongoing management and administration. The Court is satisfied that a serious question exists.

IV. THE BALANCE OF CONVENIENCE

[15] There is no doubt that article 8.8, paragraph 3 of the Code électoral de la Bande des Abénakis de Wôlinak aims to maintain the status quo following a disputed election and restricts the outgoing council members, who are once again sitting as an exception, to simple acts of ongoing administration and management. An overview of the resolutions that have been proposed to be adopted by the respondent members in the litigation leads us to find that it may in fact be followed by irreparable harm, as described by this Court's case law in similar disputes. The decision by Noël J., made on February 8 in *Lower Nicola Indian Band v Joe* [2011] FC 147 is very appropriate in the circumstances, particularly when it deals with "irreparable harm", about which it details at para 20: "Irreparable harm is not qualified as 'irreparable' because of the scope or importance of the harm caused. Rather, what must be shown is that, but for the injunctive relief sought, the harm caused could not be compensated through damages (*White v E.B.F. Manufacturing Ltd.*, 2001 FCT 1133 (FC) at para 13).

[16] The evidence submitted by the applicants regarding irreparable harm appears completely convincing to me, particularly regarding what they show for resolutions 059, 060 070, which seek to amend the band code and thus the status quo.

[17] In its assessment of the balance of convenience, the Court must consider the public interest, which in this case must be assessed in light of the greater needs and interests of the Abénakis de Wôlinak. The balance of convenience therefore brings us to establish which of the parties to the litigation will suffer the greatest prejudice.

[18] Presently in the community, there are various factions that have opposed each other for some time. That situation can only be aggravated by decisions that will have a major impact on the community's interests in the short and medium term, and that is why any resolutions that can be adopted will need to be limited to acts of ongoing administration, without changing either the signing authorities or making any administrative changes of importance.

[19] By granting an order for interim relief, the Court ensures that at the very least, there will be no decisions made by the Conseil de bande that irreparably changes the status quo. Dismissing the application would allow the Conseil to destroy that status quo by the time that the Court addresses the basis of the issue. The balance of convenience therefore favours the issuing of an order.

[20] Under Rule 104 of its rules of practice, at any time, the Court may "order that a person who ought to have been joined as a party or whose presence before the Court is necessary to ensure that all matters in dispute in the proceeding may be effectually and completely determined be added as a party …".

[21] In this case, the Court intends to order that as a party to this interim relief litigation, the Conseil de bande des Abénakis de Wöjinak shall be constituted as a federal board, commission or other tribunal under section 2 of the *Federal Courts Act*, R.S.C., 1985, c. F-7, under which a federal board, commission or other tribunal "means any body, person or persons having, exercising or purporting to exercise jurisdiction or powers conferred by or under an Act of Parliament or by or under an order made pursuant to a prerogative of the Crown (…)". The applicant's application for interim relief is therefore amended in that regard. As part of this application, since the respondents

effectively make up the majority of the Conseil de bande, I do not see how that would prejudice them. The Court also ensures that the interests of all parties identified by the Order will be adequately protected. Moreover, the application for amendment presented by counsel for the applicants to amend the findings of the Order is dismissed.

V. CONCLUSION

[22] Being satisfied that the applicants have met the criteria in *MacDonald*, above, the Court is allowing the application for interim relief and makes the following order.

ORDER

THE COURT ORDERS the following:

1. THAT the application for interim relief be amended to include the Conseil de bande des Abénakis de Wöjinak as a party to this application;

2. THAT the outgoing Conseil de bande des Abénakis de Wôlinak, which is still in office following the decision on December 21, 2010, be prohibited from adopting any resolution other than for simple administration, until this Court rules on the basis of the application for judicial review or, if necessary, until new elections are held and a new Conseil de bande takes office;

3. That the applicants are exempted from any security; and

4. That this order be enforced, any appeals notwithstanding.

With costs in the cause of the application for judicial review.

"André F.J. Scott"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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PLACE OF HEARING:	Ottawa, Ontario
DATE OF HEARING:	March 18, 2011
REASONS FOR ORDER AND ORDER:	SCOTT J.
DATED:	March 18, 2011

APPEARANCES:

Paul-Yvan Martin and Marie-Paule Boucher	FOR THE APPLICANTS
Eric Oliver	FOR THE RESPONDENTS

SOLICITORS OF RECORD:

Martin, Camirand, Pelletier senc. Lawyers Montréal, Quebec	FOR THE APPLICANTS
Myles J. Kirvan Deputy Attorney General of Canada Montréal, Quebec	FOR THE RESPONDENTS