Federal Court  Cour fédérale

Date: 20181204

Docket: T-990-18

Citation: 2018 FC 1211

[UNREVISED CERTIFIED ENGLISH TRANSLATION]

Ottawa, Ontario, December 4, 2018

PRESENT: The Honourable Madam Justice Gagné

BETWEEN:

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

Applicants

and

THE COUNCIL OF THE ABÉNAKIS OF WÔLINAK
AND
MICHEL R. BERNARD, RENÉ MILETTE
AND
LUCIEN MILLETTE, ACTING AS CHIEF AND COUNCILLORS OF THE ABÉNAKIS OF WÔLINAK BAND COUNCIL

Respondents

JUDGMENT AND REASONS

I. Overview

[1] This application for judicial review is part of a long and unfortunate quarrel between two factions of the Première Nation des Abénakis de Wôlinak (Abénakis of Wôlinak First Nation) [the Band]: the extended Bernard family and the extended Landry family.

[2] The Applicants (the Landrys), who are all descendants of Clothilde Metzalabanlette (1879-1944), an Abénakis woman who resided on the Wôlinak reserve, and Antonio Landry (whose status will be discussed later), are contesting a large number of resolutions, decisions and initiatives adopted by the Band Council (controlled by the Bernards since June 2016), as well as certain amendments to the Membership Code of the Band adopted at a Special General Assembly held on December 16, 2017. Those measures all aim to exclude from the Band some 289 members, including the Applicants. The Applicants also request that the election of the Band's new Registrar, who has the mandate to implement the exclusion of the Applicants, be declared void.

[3] The application for judicial review requires that two separate rights be reviewed; the right to be registered on the list of Band members and the right to be registered as an Indian in the Register maintained by the Minister of Indian Affairs and Northern Development [Minister], pursuant to the *Indian Act*, RSC 1985, c I-5 [Act].

II. Facts

[4] The Applicants have been members of the Band since 1989 (except those who were not born at the time and subsequently became members).

[5] The Band Membership Code was adopted in 1987, shortly after the amendments to the Act came into force giving Indigenous Bands the power to determine Band membership. The Code provides the following regarding the standing to become an ordinary member:

> s. 8
>
> Has the right to "ordinary member" status:
>
> […]
>
> 2. If subscribing to each of the provisions of this Code, the following person:
>
> (a) Any Abénakis, descended from an Abénakis, who had resided on the Abénakis of Wôlinak reserve, who is not a member of another band.
>
> […]
>
> [Emphasis added.]

[6] The reasons invoked by the Applicants at that time for recognizing them as members of the Band are not entirely clear, but the evidence shows that there are two:

> In a short letter dated October 12, 1989, Chief Noel St-Aubin acknowledged "that Antoine (Antonio) Landry's parents, Joseph Landry and Vitaline Bernard, were Indians;"
>
> Clothilde Metzalabanlette (1879-1944), wife of Antonio Landry, was an Abénakis woman who lived on the Wôlinak reserve.

[7] However, following an investigation conducted by the Royal Canadian Mounted Police [RCMP] in the 1990s, it turned out that Antonio's mother was not Vitaline Bernard, but rather Marie-Adéline Hébert, the second wife of Joseph Landry, a non-Indigenous person. The investigation revealed that the Applicants and other descendants of Clothilde Metzalabanlette obtained Indian status with the Minister on the basis of a falsified baptismal certificate and third-party affidavits stating falsely that Vitaline, and not Marie-Adeline, was Antonio's mother.

[8] This distinction is of importance to the Applicants since section 6 of the Act provides that the children of an Indigenous women and a non-Indigenous man may have Indian status, but they cannot pass it on to their children. Since the Applicants are all Clothilde's and Antonio's grandchildren and great-grandchildren, Antonio's Indian status is necessary to confer Indian status on them.

[9] Based on the results of this investigation, some members of the Bernard family asked the Minister to remove from the descendants of Clothilde and Antonio their status as registered Indians. Invoking the fact that they also obtained their registration as members of the Band under false representations, they undertook several initiatives to remove them from the list of members.

[10] The Minister investigated and in 1994 he informed the Landry descendants of Clothilde and Antonio that he intended to remove them from the Indian Register. The persons concerned filed an application for judicial review in this Court and on March 22, 1996, Marc Nadon J. (then of this Court) dismissed the application on the basis that the position expressed in 1994 by the Minister's Registrar was not subject to judicial review. Only a final decision, after the Applicants

exercised their right to protest – the recourse provided for in subsection 14.2 (1) of the Act – would be likely to deprive them of the right to be registered in the Indian Register (*Yves Landry et al. v Indian Register Registrar, Indian and Northern Affairs Canada et al.*, 118 FTR 184 (FCTC).

[11] It was not until January 28, 2011, that the Minister's Registrar made his final decision and confirmed the removal of Clothilde's and Antonio's descendants from the Indian Register.

[12] At the Band Council election of November 2010, Denis Landry was elected Chief of the Band. This election was contested by outgoing leader Raymond Bernard, who maintained *de facto* control of the Band Council until the reinstatement of elected officials was ordered on June 17, 2011 (*Landry v Savard*, 2011 FC 720). Denis Landry was re-elected as leader in June 2012, an election that was also contested without success (*Medzalabanleth v Abénakis of Wôlinak Council*, 2014 FC 508), such that the Landrys controlled the Band Council until June 2016.

[13] Shortly before Denis Landry's reinstatement order as Band Chief, Dave Bernard, then Band Registrar, sent a notice dated June 6, 2011, to all members of the Band informing them that the Minister's Registrar had [Translation] "removed the members of the Landry family from the Abénakis of Wôlinak Band".

[14] On June 21, 2011, Registrar Dave Bernard corrected the matter and advised Band members, with good reason, of the following: [Translation]

> […]
>
> I hereby wish to inform Band members that the decision of the Registrar of Indian Affairs concerned the Indian Register and not the Abénakis of Wôlinak Band List. Thus, a mistake was made, and we apologize for it. Indeed, registration in the Indian Register has no effect on member status in the Abénakis of Wôlinak Band, since it controls its membership.
>
> I also wish to confirm that, after transmitting my circular letter of June 6, I have received no instructions to strike from the Band List the persons mentioned in this letter. Therefore, I have not changed the Abénakis of Wôlinak Band List and those persons are still registered.

[15] The Respondents obviously argued that the reversal by Registrar Bernard was due to the change in control of the Band Council. That may be, but the fact remains that the position expressed on June 21, 2011, is consistent with the Act and the 1987 Membership Code which provides that to be an ordinary member of the Band, a person need not be registered in the Indian Register; it is enough simply to be the descendant of an Abénakis who lived on the reserve, a criterion which Clothilde meets without question.

[16] Following the Band Council elections of June 2012, 94 Landry family members appealed before Quebec Superior Court the decision of the Registrar of the Minister to strike them from the Indian Register, a recourse provided for in subsection 14.3(5) of the Act.

[17] This procedure, which pits the members of the Landry family against the Attorney General of Canada, resulted in a judgment by Chantal Masse, J.S.C., dated February 7, 2017, (*Landry v Attorney General of Canada (Registrar of the Indian Register)*, 2017 QCCS 433 (QL)) [Masse judgment]. Masse J. found that Joseph Landry was an Indian member of the Band,

irrespective of his marriage to Vitaline Bernard, and that the Indian status of Antonio born of an Indian father gave the Applicants the right to be entered in the Indian Register. She overruled the decision of January 28, 2011, by the Registrar of the Minister and ordered him to re-register the Applicants in the Indian Register.

[18] The Band Council, controlled since June 2016 by the Bernards, filed a motion to revoke the Masse judgment at the request of a third party, but this approach was abandoned after Masse J. tried in vain to reconcile the two groups.

[19] The Appellants before the Superior Court obtained funding for their appeal from the Band Council, while it was controlled by the Landrys. The Band Council, controlled since June 2016 by the Bernards, instituted proceedings before the Superior Court of Quebec in May 2017 (docket 400-17-004526-170), in order to recover the amount of $236,547.85 incurred in extrajudicial fees, plus $19,929.87 in lost interests. This fact bears little relevance in this case, but it certainly contributed to fueling the animosity that divides the two clans.

[20] Prior to the publication of the Masse judgment, the Band Council elected in June 2016 and led by Michel Bernard took a number of measures to expel Landry family members from the Band, including the Applicants;

> - Resolution RCB-2016-2017-055 of November 2, 2016, to "remove from the Abénakis of Wôlinak Band List all names of persons without Indian status recognized by Indian and Northern Affairs Canada." The resolution also provided that "all members of the Band without Indigenous status and presently on the Abénakis of Wôlinak Band List shall be excluded from any referendum or election vote to be held at Wôlinak."

> - Letter from the Band Registrar dated November 7, 2016, addressed to all members of the Band and advising them that non-status members within the meaning of the Act would no longer have the right to vote in referendums, elections or any other vote.
>
> - Resolution RCB-2016-2017-079 of March 2, 2017, providing for the holding of a Special General Assembly to ratify the amendments made to the 1987 Membership Code, which would now only allow persons with Indian status to be members of the Band. The notice convening the Assembly was given only to the "members of the Abénakis of Wôlinak."
>
> - Following the Special General Assembly of March 4, 2017, during which the amendments to the 1987 Membership Code were ratified (66 for, 13 against), resolution RCB-2016-2017-080 of March 6, 2017, formally adopted the 2017 Membership Code.

[21] On February 27, 2017, prior to the expiry of the time limit for appealing the Masse judgment and possibly before serving its application for revocation of the judgment, the Band Council, through the Band Registrar, transmitted to the Applicants and other members of the Landry family a notice of removal from the list of Band members.

[22] On April 5, 2017, the Applicants filed an initial application for judicial review before this Court in docket T-502-17. In it, they asked for the cancellation of the resolutions listed above, as well as the cancellation of the amendments made to the 1987 Membership Code during the Special General Assembly of March 4, 2017. While this proceeding was being handled by Justice William F. Pentney, the Band Council filed an application on consent to judgment on January 15, 2018, while notifying the Court that new resolutions, without the procedural flaws alleged by the Applicants, had been adopted. Pentney J. remained seized of the record and gave the Applicants time to file a new application for judicial review of the new resolutions. Not surprisingly, the parties did not agree on the costs incurred in the first application for judicial

review and Pentney J. must render a judgment on this issue in docket T-502-17, which he had not yet made at the time of the hearing of this application.

[23] In any event, and contrary to what the Applicants argue, this proceeding does not concern the resolutions and impugned decisions in docket T-502-17 which are, for all intents and purposes, rescinded by the effect of the consent to judgment.

III. Impugned decisions

[24] On December 5, 2017, the Band Council adopted a new resolution amending the 1987 Membership Code and convened a Special General Assembly on December 16, 2017, to ratify the amendments. The notice of meeting was sent to some 268 members (out of 546 voting members contained in the electoral roll of November 1, 2016) that the Band Council then considered as having the right to vote. The Band Council offered all convened members an amount of $600 from a land claim settlement of the Band, which would be given to them at the Assembly. It was resolved that ordinary members who were not registered in the Indian Register would not be convened the General Assembly of December 16, 2017, and that the 94 appellants referred to in the Masse judgment, including the Applicants, would not be convened to the General Assembly of December 16, 2017, and would not receive the $600.

[25] At this Special General Assembly, 189 of the 268 persons convened were present and the amendments to the Membership Code were adopted with 117 votes in favor, 64 votes against and 8 votes rejected or canceled. The 2017 Membership Code stipulated that the Band now only included one class of members, namely, “the duly registered Abénakis who are validly registered

on the Abénakis of Wôlinak Band List in the Indian Register". Furthermore, an Abénakis was described as being any person of Abénakis descent. This new code also amended section 76 of the 1987 Membership Code and provided that the proportion of votes required to change the Membership Code was now 25% + 1, rather than 50% + 1.

[26] On December 20, 2017, the Band Council passed resolution RCB-2017-2018-062 to submit the following question to a referendum vote:

> "Following the judgment rendered on February 7, 2017, in the case of *Landry v. Attorney General of Canada (Registrar of the Indian Register)* [Masse judgment], do you agree with the inclusion of the appellants as members of the Première Nation des Abénakis de Wôlinak?"

[27] The electoral list drawn up by the Band Council for the purposes of that referendum contained 262 voters and again excluded members not registered in the Indian Register and the 94 Masse appellants, including the Applicants. 147 voters registered and the results of the referendum of February 8, 2018, were the following: 117 "NO", 28 "YES" and 2 canceled ballots.

[28] At a Special General Assembly held on January 12, 2018, Cindy Bernard was elected Band Registrar. However, since she could not hold office immediately, Dave Bernard was appointed Acting Registrar.

[29] On February 13, 2018, the Band Council passed resolution RCB-2017-2018-071, which provided for the holding of an election for the positions of Councillors on June 10, 2018. The electoral list drawn up by the Band Council included 257 names (rather than the 546 names that

were there on November 1, 2016) and excluded Band members not registered in the Indian Register and the Masse judgment appellants, including the Applicants.

[30] By letter dated April 17, 2018, the Band Registrar advised the members whose names were struck from the Band List and from the list of voters that they had to provide proof justifying their membership in the Band, and that, in the interim, they would be excluded.

[31] This application for judicial review concerns the following decisions:

> The Notice of removal of non-status members issued by the Band Registrar on February 27, 2017;
>
> Resolution RCB-2017-2018-056 adopted by the Band Council on December 5, 2017, to convene a Special General Assembly for December 16, 2017, in order to:
>
> > retake the vote of the General Assembly of March 4, 2017, ratifying the Membership Code proposed by the Band Council by its RCB-2016-2017-079 resolution, adopted on March 2, 2017;
> >
> > make an additional amendment to the Membership Code reducing the required majority to amend the Membership Code from 50% + 1 to 25% + 1;
> >
> > distribute $600 to the members present, excluding the appellants involved in the Masse judgment;
>
> Adoption without quorum, on December 16, 2017, by the General Assembly of members considered as registered in the Indian Register by the Band Council, of an amended Membership Code;
>
> Election of the Band Registrar, dated January 12, 2018, at a General Assembly, at which the members considered by the Band Council as not registered in the Indian Register were not convened;
>
> Notice from the Band Registrar sent on or about April 17, 2018, to certain members of the Landry family registered in the Indian Register, requiring proof of membership and informing them that

their name had been removed from the list of Band members in the interim;

Resolution RCB-2017-2018-071, adopted on February 13, 2018, for the purpose of holding an election on June 10, 2018, for the positions of three designated Councillors;

Resolution RCB-2018-2019-004, adopted on April 11, 2018, for the purpose of holding an election on June 10, 2018, for the positions of four Councillors;

Communication of an electoral list to the returning officer, from which 289 voters were removed from a total of some 546 voters.

IV. Issues

[32] This application for judicial review raises the following questions:

A. *Were the Band Council resolutions validly adopted at duly convened Band Council assemblies?*

B. *Was the Special General Assembly of December 16, 2017, validly convened and held, and were the decisions made valid?*

C. *Is the January 12, 2018, vote for electing a Registrar in accordance with subsection 2(3) of the Act?*

D. *Is the referendum poll held on February 8, 2018, in accordance with subsection 10(4) of the Act?*

E. *Were the elections scheduled for June 10, 2018, which were stayed by order of the Court in this case, valid?*

F. *Are the notices of removal issued by the Registrar on February 27, 2017, and April 18, 2018, valid and in accordance with subsections 10(8) and 10(9) of the Act?*

V. Preliminary issues

[33] The Respondents have raised two preliminary issues; they argue that this application for judicial review is inadmissible because it concerns more than one decision and that, in any event, the Applicants' claim is prescribed.

[34] Aside from the fact that this application involves several decisions, it seeks a variety of remedies for various entities, including the Band Council, Band members present at the December 16 Assembly, the Band Registrar and even the Returning Officer. Thus, according to the Respondents, this is not a case giving rise to the exception provided for in Rule 302 of *the Federal Courts Rules*, SOR/98-106 (*Crowchild v Nation Tsuu T'ina*, 2017 FC 861; *Whitehead v Pelican Lake First Nation*, 2009 FC 1270; *Servier Canada Inc v Canada (Health)*, 2007 FC 196; *Truehope Nutritional Support Ltd v Canada (Attorney General);* 2004 FC 658, *James Richardson International Ltd. v Canada*, 2004 FC 1577, *Puccini v Canada (Director General, Corporate Administration Services, Agriculture Canada)*, [1993] 3 FC 557).

[35] At the hearing of the case, the Court informed the parties that it was not inclined to accede to this plea given the time and resources already devoted by the parties and by the Court to the preparation of this hearing. In my opinion, this is a plea that is best handled at the interlocutory level to avoid misuse of judicial resources. Pentney J. did not consider it appropriate to deal with it during the management of the case, which, in my opinion, weighs in favour of rejecting this plea.

[36] In any event, I am of the opinion that the measures and decisions challenged by this application for judicial review are all intended to exclude the Applicants from the Band, that they are all attributable to the Band Council, that they have the same factual basis, raise the same legal issues and seek the same remedy. It is therefore in the interest of justice that all of the measures be subject to a single application for judicial review (*Whitehead, supra; Servier, supra; Puccini, supra*).

[37] If the Court concludes that the Band Council could not unilaterally remove the Applicants from the list of Band members and that it could not amend the Membership Code without this decision being ratified at a Special General Assembly where all members entitled to be present are duly convened, it follows that the referendum of February 8, 2018, and the election of the Band Registrar were not valid, no more than elections of June 10, 2018, were.

[38] With respect to the Respondents' argument that the Applicants' claim is prescribed because it was not exercised within 30 days of the decision(s) at issue, I recall that the Applicants had to initiate a second application for judicial review following the Respondents' motion for consent to judgment in docket T-502-17. As a result of the Respondents' approach, Justice Pentney issued a directive that specifically provided that the Applicants be able to file a new application for judicial review.

[39] I am therefore of the opinion that the Applicants' claim is not prescribed.

VI. Analysis

A. *Were the Band Council resolutions validly adopted at duly convened Band Council Assemblies?*

[40] The Applicants argue that all the Band Council Resolutions referred to in these reasons are invalid since they were not adopted at duly convened Band Council Assemblies. The procedure generally followed by the Respondents is rather to have the Councillors sign separately and when a resolution has obtained three out of five signatures, it is ratified by the duly convened Band Council. This practice, the Applicants argue, is contrary to paragraph 2(3)(b) of the Act:

Exercise of powers conferred on band or council	**Exercice des pouvoirs conférés à une bande ou un conseil**
(3) Unless the context otherwise requires or this Act otherwise provides,	**(3)** Sauf indication contraire du contexte ou disposition expresse de la présente loi :
(a) a power conferred on a band shall be deemed not to be exercised unless it is exercised pursuant to the consent of a majority of the voters of the band; and	**a)** un pouvoir conféré à une bande est censé ne pas être exercé, à moins de l'être en vertu du consentement donné par une majorité des électeurs de la bande;
(b) a power conferred on the council of a band shall be deemed not to be exercised unless it is exercised pursuant to the consent of a majority of the councillors of the band present at a meeting of the council duly convened.	**b)** un pouvoir conféré au conseil d'une bande est censé ne pas être exercé à moins de l'être en vertu du consentement donné par une majorité des conseillers de la bande présents à une réunion du conseil dûment convoquée.

[41] The Applicants submit that the non-observance of this provision is fatal to the validity of the resolutions since they were not adopted after deliberation by the majority of the Councillors

assembled for that purpose (*Leonard and the Kamploops Indian Band et al v Gottfriedson*, 21 BCLR 326 (BCSC) (QL) at paras 49-50; *Heron Seismic Services Ltd. v Muscowpetung Indian Band*, 74 DLR (4th) 308 (SK QB) (QL) at paras 11-16; *Nicola Band et al v Trans-Canada Displays Ltd*, [2000] 4 CNLR 185 (BCSC) (QL) at paras 124-126; *Balfour v Norway House Cree Nation*, 2006 FC 616 at paras 49-55; *Gamblin v Council of the Cree Nation of Canada Norway House*, 2012 FC 1536 at paras 78-80, *Vollant v Sioui*, 2006 FC 487 at paras 35-37, 52-53, *Peguis First Nation v Bear*, 2017 FC 179 at paras 57-60).

[42] However, the evidence shows that the Respondents remedied the procedural flaws identified in the Applicants' first judicial review application and that most of the resolutions before me were adopted by a majority of Councillors present at Band Council Assemblies duly convened, pursuant to paragraph 2(3)(b) of the Act.

[43] For some resolutions, the evidence is simply insufficient to allow me to challenge their adoption process by the Band Council.

[44] It is true that certain minutes suggest that it is common for several resolutions to be adopted in a single short assembly. For example, for the April 21, 2018 Assembly, we note that eight resolutions were passed in just 13 minutes. However, that is not enough, in my opinion, to call into question the validity of those resolutions and the process for adopting those resolutions. The Applicants also filed an affidavit from Christian Trottier, a former Band Councillor, and despite the fact that he was in a good position to do so, he did not provide any clarification that would allow me to conclude that the process followed by the Band is flawed.

[45] I therefore conclude that the Applicants have not met their burden of convincing me, on the preponderance of evidence, that the Band Council Resolutions that are the subject of this application are invalid because they were not adopted in accordance with paragraph 2(3)(b) of the Act.

B. *Was the Special General Assembly of December 16, 2017, validly convened and held, and were the decisions made valid?*

[46] The Applicants first submitted that the notice of the Special General Assembly of December 16, 2017, was insufficient since it was only given on December 13, 2017. This issue was quickly dealt with as the Applicants' representative conceded that this notice was actually given on December 5, 2017, an appropriate period within the meaning of subsection 10(1) of the Act and within the meaning of the Band's General Assembly Policy.

[47] More substantially, the Applicants submit that the notice of the Special General Assembly of December 16 is invalid since it was not sent to all the members of the Band having a right to vote under the section 18 of the 1987 Membership Code, or to all members entitled to be present and to speak under its section 17. These provisions specify that:

> s. 17
>
> > The ordinary member has the right to attend all General and Special Assemblies and has the right to speak.
>
> s. 18
>
> > Only the ordinary adult member, registered in the Indian Register, and domiciled on the reserve, has the right to vote at General and Special Assemblies of the members of the Abénakis of Wôlinak Band.

[48] Note that the parties before me considered the residency requirement on the reserve as unwritten in light of the Supreme Court of Canada decision in *Corbiere v Canada (Minister of Indian Affairs and Northern Development)*, [1999] 2 SCR 203. However, they did not otherwise challenge the validity of those provisions despite the Minister's warning at the time of the adoption of the 1987 Membership Code that the provisions of this chapter could relate to subjects unrelated to the Band's membership and, in some cases, overstep its powers. I will not comment on the validity of section 18 and its compliance with section 10 of the Act.

[49] That said, the Respondents are of the opinion that the notice of meeting is in order, essentially because the Applicants were informed of the holding of this meeting by a letter sent to their counsel by Masse J. on December 4, 2017, and by a notice posted on the Band Council's Facebook page. In both cases, it cannot be considered a sufficient notice of meeting, nor that the Applicants — or those who were aware of the Assembly without being convened — must bear the consequences of their decision not to attend to avoid confrontation.

[50] That said, the Respondents mainly argued that the Applicants were not entitled to be called to the December 16, 2017 Assembly: (i) because they had not demonstrated, as of December 5, 2017, that they were registered in the Indian Register, and (ii) because, in any event, they were removed from the list of Band members by notice of the Band Registrar dated February 27, 2017, and had not demonstrated, by December 5, 2017, their right to be re-registered.

[51] When the Court asked the Respondents' counsel when, in their view, the Applicants lost their right to be on the list of Band members, they replied that it was by the notice of removal of February 27, 2017, a decision confirmed or ratified, or made valid by the adoption, on December 16, 2017, of the 2017 Membership Code.

[52] This argument is circular to say the least. The Band Council unilaterally removed nearly half of its members from the list of Band members and then was able to amend the Membership Code without opposition and thus justify the removal.

[53] The Respondents also submit that the Applicants cannot be ordinary Band members registered in the Indian Register, since they obtained their registration fraudulently.

[54] However, neither the RCMP, which investigated in the 1990s, nor Masse J. concluded that this fraud was perpetrated by the Applicants. It should be kept in mind that Masse J. concluded Joseph Landry's Indian status, regardless of his marriage to Vitaline. The fact that Marie-Adéline and not Vitaline is Antonio's mother does not, therefore, affect the Applicants' Indian status.

[55] We will discuss below the invalidity of the notice of removal sent on February 27, 2017 to the Applicants and to other appellants before Justice Masse, but it is sufficient to say, at this point, that on December 5, 2017, the Applicants were ordinary members of the Band, registered in the Indian Register and that the majority of them were adults. They are therefore not only

entitled to be present and to speak at any General and Special Assembly of the Band, but those who are adults have the right to vote.

[56] The Indian Act defines an Indian as "a person who, pursuant to this Act, is registered as an Indian or is entitled to be registered as an Indian."

[57] The 1987 Membership Code, for its part, defines an Indian as an Indigenous person, a term that is defined as "anyone entitled to be registered in the Indian Register held by the Registrar of Indigenous and Northern Affairs Canada and any person on a legally-maintained Band List".

[58] The Applicants are Indians who have been registered in the Indian Register since 1990. Their temporary removal from 1996 to 2017 did not cause them to lose the right to be registered, which Masse J. unequivocally confirmed when she overruled the decision of the Minister's Registrar and ordered him to reinstate the appellants entitled to it, including the Applicants.

[59] Adult Applicants and all other adult members of the Band entitled to be registered in the Indian Register had to be convened to the Special General Assembly of December 16, 2017; they had a right to speak and they had the right to vote.

[60] In so concluding, the Court does not abuse the Abénakis of Wôlinak's right to self-governance or its right to determine membership in its Band. The Abénakis of Wôlinak adopted the 1987 Membership Code and they must respect it.

[61] Counsel for the Respondents argued that, on reading the 1987 Membership Code, it is clear that the intent of the Abénakis at Wôlinak was to create two classes of ordinary members, the Indians registered on the Minister's Register, who have the right to vote at General Assemblies and to seek a position as "designated" councillor, and non-registered members who do not have those rights.

[62] Certainly, but it also emerges from the preamble of the 1987 Membership Code that the Abénakis of Wôlinak wanted to be very inclusive, and that they wanted to group together, within the same Band, all the descendants of Abénakis scattered over the territory by the arrival of non-Indigenous people.

[63] They could not, without disrespecting the rules they had adopted for themselves, eliminate one or more categories of members, as they attempted to do by adopting the 2017 Membership Code.

[64] It follows that the notice of meeting of December 16, 2017, should have been sent to all members of the Band (registered or not in the Minister's Register) and that the major Applicants and all major appellants whose Indian status was confirmed by Masse J., had the right to vote. The quorum required for the vote held at the assembly to be valid is at least half of the members eligible to vote. Given the number of people duly convened in relation to the total membership of the Band (before the list of members was illegally truncated), there was no quorum and the vote taken was invalid.

[65] The Membership Code could only be amended by a majority of the members having the right to vote, assembled at a General Assembly convened for that purpose. The amendments made were therefore not validly adopted.

[66] With respect to the distribution of an amount of $600 to each of the Band members convened and present at the Assembly of December 16, 2017, the Respondents admitted that the appellants before Masse J. will be entitled to this sum if they are recognized as members of the Band.

[67] As a result, I do not think there is a need for specific intervention in this regard.

C. *Is the January 12, 2018, vote for electing a Registrar in accordance with subsection 2(3) of the Act?*

[68] Article 40 of the 1987 Membership Code provides that the Band Registrar is elected at a General Assembly specially convened for that purpose.

[69] Since the Respondents again admit that the notice of meeting for the Special General Assembly of January 12, 2018, was not sent to the Applicants or to the other appellants before Masse J. in respect of which she had confirmed Indian status, I am of opinion that this Assembly was irregularly convened and held, and that the vote taken there was invalid.

D. *Is the referendum poll held on February 8, 2018, in accordance with subsection 10(4) of the Act?*

[70] In addition to their 1987 Membership Code, the Abénakis of Wôlinak have an Electoral Code that defines a voter as "a person who is (a) listed on the Première Nation des Abénakis de Wôlinak Band List", or who has the right to be; (b) is eighteen (18) years old on voting day, and (c) has not lost the right to vote in the elections of the First Nation."

[71] Contrary to section 18 of the 1987 Membership Code for General Assemblies, there is no need to be registered in the Indian Register maintained by the Minister to be entitled to vote in elections.

[72] It does not matter which of the Membership Code or the Electoral Code applies to the holding of a referendum, since at a minimum, the adult Applicants and all adult appellants in the Masse Judgment who were on the list of Band members or who should have been on February 8, 2018, should have been invited to vote on the referendum question formulated by the Band Council.

[73] Since they were not, the vote is invalid.

E. *Were the elections scheduled for June 10, 2018, which were stayed by order of the Court in this case, valid?*

[74] Since I have concluded that the 2017 Membership Code had not been validly adopted, the adult ordinary members of the Band are all voters under the Abénakis of Wôlinak Electoral

Code. All adult members of the Band, regardless of their status as Registered Indians, must be on the list sent by the Band Registrar to the Returning Officer.

[75] If the elections of June 10, 2018, had taken place on the basis of the electoral list prepared for that purpose, the holding and the result of those elections would have been invalid.

F. *Are the notices of removal issued by the Registrar on February 27, 2017, and April 18, 2018, valid and in accordance with subsections 10(8) and 10(9) of the Act?*

[76] The Applicants submit that the notices of removal of February 27, 2017, and April 18, 2018, are illegal and contrary to section 10(8) of the Act. They do not respect the provisions of the 1987 Membership Code and contravene the acquired rights established in subsections 10(4) and 10(5) of the Act.

[77] The power to add or remove a name from the Band List is vested in the Band under paragraph 2(3)(a) and subsection 10(10) of the Act. The Band elected to delegate this function to a Registrar elected in accordance with section 40 of the 1987 Membership Code, but the Registrar has no discretionary power; he/she only applies the membership rules duly adopted by the Band.

[78] The evidence before me shows that since May 30, 1994, no Registrar has been elected in accordance with the procedure set out in the 1987 Membership Code and that the list of Band members has never been rigorously maintained in that the registration date, the presence or

absence of Indian status in the Minister's Register and the names of the ascendants of the members have not been properly collated.

[79] The relevant provisions of the Act read as follows:

Effective date of band's membership rules	**Date d'entrée en vigueur des règles d'appartenance**
(8) Where a band assumes control of its membership under this section, the membership rules established by the band shall have effect from the day on which notice is given to the Minister under subsection (6), and any additions to or deletions from the Band List of the band by the Registrar on or after that day are of no effect unless they are in accordance with the membership rules established by the band.	**(8)** Lorsque la bande décide de l'appartenance à ses effectifs en vertu du présent article, les règles d'appartenance fixées par celle-ci entrent en vigueur à compter de la date où l'avis au ministre a été donné en vertu du paragraphe (6); les additions ou retranchements effectués par le registraire à l'égard de la liste de la bande après cette date ne sont valides que s'ils sont effectués conformément à ces règles.
[…]	[…]
Deletions and additions	**Additions et retranchements**
(10) A band may at any time add to or delete from a Band List maintained by it the name of any person who, in accordance with the membership rules of the band, is entitled or not entitled, as the case may be, to have his name included in that list.	**(10)** La bande peut ajouter à la liste de bande tenue par elle, ou en retrancher, le nom de la personne qui, aux termes des règles d'appartenance de la bande, a ou n'a pas droit, selon le cas, à l'inclusion de son nom dans la liste. (je souligne)
[Emphasis added.]	[Je souligne.]

[80] Since the Court has concluded that the Band's membership rules have remained unchanged, registered Indian status in the Minister's Register is not a prerequisite for being a member of the Band. It follows that, at all relevant times, the Applicants were entitled to be ordinary members of the Band, in particular because they are all descendants of Clothilde Metzalabanlette, and the adult Applicants were voters within the meaning of the Electoral Code of the Band.

[81] In addition, under the terms of the Masse judgment, they are also ordinary members registered in the Indian Register, who are entitled to vote at General Assemblies of the Band and to seek a position as "designated" councillor in the Band Council.

[82] I conclude that a removal that is contrary to the 1987 Membership Code is simply illegal.

[83] Respondents have every opportunity to elect a Registrar, to give him/her the mandate to complete the list(s) of Band members (including the removal of any person not entitled to be registered), to amend the rules of membership in the Band, to hold a referendum or an election for its Band Council, insofar as they respect the rules with the Band has adopted for itself, which can be found in the 1987 Membership Code and the Electoral Code.

[84] Contrary to what the Respondents submit, the Applicants do not have to apply to be members of the Band with supporting documentary evidence for these reasons: they have been on the Band's List for many years, they are entitled to be under the 1987 Membership Code, and the removal notices they received are invalid.

VII. Conclusion

[85] For the reasons given herein, I conclude that the notices of removal from the Band List sent to the Applicants are invalid, and that consequently, both the notice of meeting and the decisions taken at the Special General Assembly of December 16, 2017, are invalid. The election of the Registrar on January 12, 2018, and the referendum vote of February 8, 2018, are also invalid and the elections of June 10, 2018, if held as planned, would have been invalid.

JUGEMENT in Docket T-990-18

THE COURT'S JUDGMENT is that:

1. The application for judicial review is allowed in part;
2. Resolutions RCB-2017-2018-056 of December 5, 2017, and RCB-2017-2018-059 of December 12, 2017, are declared invalid;
3. Decisions made at the Special General Assembly of December 16, 2017, and Resolution RCB-2017-2018-066 of January 23, 2018, amending the 1987 Membership Code of the Abénakis of Wôlinak, are declared invalid;
4. Resolution RCB-2017-2018-062 of December 20, 2017, and the referendum of February 8, 2018, are declared invalid;
5. The election of the Registrar of the Première Nation des Abénakis de Wôlinak, dated January 12, 2018, is declared invalid;
6. Resolution RCB-2017-2018-071 of February 13, 2018, is declared void, as would have been the elections scheduled for June 10, 2018;
7. The notices of removal sent to Applicants on February 27, 2017, and April 18, 2018, are declared invalid and Respondents are required to re-register the Applicants on the list of Band members of the Première Nation des Abénakis de Wôlinak;
8. The title of the case is amended to remove the addresses of the parties;

9. Counsel for the parties has 30 days from the date hereof to file written submissions of no more than five pages as to the costs to be awarded in this matter.

"Jocelyne Gagné"
Judge

FEDERAL COURT

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	T-990-18
SYTLE OF CAUSE:	STÉPHANE LANDRY ET AL v THE COUNCIL OF THE ABÉNAKIS OF WÔLINAK ET AL
PLACE OF HEARING:	MONTRÉAL, QUEBEC
DATE OF HEARING:	NOVEMBER 5, 2018
JUDGMENT AND REASONS:	GAGNÉ J.
DATE OF REASONS:	DECEMBER 4, 2018

APPEARANCES:

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