Federal Court of Appeal  Cour d'appel fédérale

Date: 20211006

Dockets: A-224-20
A-271-20

Citation: 2021 FCA 197

[ENGLISH TRANSLATION]

CORAM: **BOIVIN J.A.**
DE MONTIGNY J.A.
LOCKE J.A.

Docket: A-224-20

BETWEEN:

STÉPHANE LANDRY, NATHALIE GROLEAU, KEVIN GAILLARDETZ-LANDRY, PIERRE-OLIVIER BERTHIAUME, SARAH LANDRYLANDRY-GAGNON, LANDRY-GAGNON, DAREN SHAREEN LANDRY, LOUISE SAVARD, DENIS LANDRY, NATHALIE BERNARD, NORMAND CORRIVEAU, NORMAND JUNIOR CORRIVEAU, PASCAL BERNARD CORRIVEAU, ANDRE MONTPLAISIR, DANIEL LANDRY, DANIEL ROCHELEAU, EMMANUEL CLOUTIER

Appellants

and

THE BAND COUNCIL OF THE ABÉNAKIS OF WÔLINAK, MICHEL R. BERNARD, RENE MILETTE, LUCIEN MILETTE, CHRISTIAN TROTTIER

Respondents

Docket: A-271-20

AND BETWEEN:

STÉPHANE LANDRY, DENIS LANDRY, HUGO LANDRY, MAXIME LANDRY, SHANNONE LANDRY, NORMAND CORRIVEAU, NORMAND BERNARD CORRIVEAU, NICOLAS ALEXIS LELAIDIER AND REAL GROLEAU

Appellants

and

**THE BAND COUNCIL OF THE ABÉNAKIS OF WÔLINAK,
MICHEL R. BERNARD, RENE MILETTE, LUCIEN MILETTE,
THE REGISTRAR OF THE ABÉNAKIS OF WÔLINAK FIRST NATION**

Respondents

Heard by online videoconference hosted by the registry on May 19, 2021.

Judgment delivered at Ottawa, Ontario, on October 6, 2021.

REASONS FOR JUDGMENT BY: DE MONTIGNY J.A.

CONCURRED IN BY: BOIVIN J.A.
LOCKE J.A.

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REASONS FOR JUDGMENT

DE MONTIGNY J.A.

I. Overview

[1] These two appeals are part of what can now be described as a lengthy saga involving two rival clans within the Abénakis of Wôlinak First Nation (the Abénakis or the Band), an Indian band within the meaning of subsection 2(1) of the *Indian Act*, R.S.C. 1985, c. I-5 (the Act). The core issue in these disputes is whether an associate member of the Band, i.e., a non-Indigenous person married to an ordinary member or a non-Indigenous child adopted by an ordinary member, can participate in the electoral process as a candidate or a voter.

[2] The first appeal (A-271-20) was brought against a decision on two applications for judicial review that was rendered on October 1, 2020, by Associate Chief Justice Gagné of the Federal Court: *Landry v. Wôlinak Abenaki First Nation*, 2020 FC 945, 2020 CarswellNat 6992 (WL Can) (*Gagné*).

[3] In the first case before it (T-1139-20), the Federal Court dismissed the appellants' application for judicial review seeking to quash Resolution RCB-2019-2020-010 of the Band Council (the Council), which suspended an election for the positions of four councillors that was scheduled to be held on August 11, 2019, and seeking an order that elections be held within a reasonable time in accordance with the Band's Electoral Code. In the opinion of the Court, even if Resolution RCB-2019-2020-010 had been duly adopted by the Council, the issue had become moot because the August 11, 2019, elections were not held and no decision that the Court might render could remedy this fact and the consequences that flowed from it.

[4] In the second case (T-1227-19), the Court allowed in part the Council's application for judicial review seeking to correct the Band Register and the list of Band members. The Court ordered the Band Registrar to provide an updated list of Band members that identified or excluded associate members. This order was based on the Court's finding that the appellants had failed to prove that there was a customary norm allowing associate members to vote in elections for the positions of chief and councillor; on the contrary, according to the Band Membership Code, associate members are not allowed to participate in such an electoral process.

[5] The second appeal (A-224-20) involves an order made by Justice Pentney in Federal Court docket T-922-20on September 15, 2020 (*Pentney*) in which he dismissed a motion seeking, in particular, to obtain an interlocutory injunction that would have prohibited the Council from taking any action or adopting any resolution that went beyond mere administration until a receiver was appointed or a Council was legitimately elected. In doing so, the applicants sought to prevent the Council from carrying out certain projects, such as building a casino and a

municipal garage, as well as logging a protected forest area. The application for judicial review underlying this injunction motion was based on the premise that the terms of office of the Chief and of the members of the Council had expired. Justice Pentney found that the applicants had failed to establish that they would suffer irreparable harm if the interlocutory injunction were not granted.

[6] For the reasons that follow, I am of the opinion that these two appeals should be dismissed.

II. Background

[7] Following the 1985 amendment to section 10 of the Act, which authorized a band to establish its own rules for the purpose of deciding its own membership, the Abénakis adopted a Membership Code in 1987. According to its preamble, the purpose of this Code, which received the approval of the Minister pursuant to subsection 10(7) of the Act (Appeal Book A-271-20 (A.B. A-271-20), at 1174), is [TRANSLATION] "to facilitate the integration of the Abénakis into the Band" (A.B. A-271-20, at 1176). This Code created three categories of members: ordinary members, associate members, and honorary members.

[8] To ensure inclusiveness, the Membership Code recognized as an ordinary member any person who was (or who had the right to be) registered on the Abénaki Band list at the time that the Code came into force. It also granted the status of ordinary member (1) to any Indigenous person listed in the Indian Register who was not a member of another band (or who renounced

his or her membership in another band) and who was approved by a special general assembly of the Band (article 8(2)(*c*) of the Membership Code), and (2) to any Abénaki who descended from an Abénaki who had a domicile on the Abénaki reserve, provided that he or she was not a member of another band (or that he or she renounced his or her membership in that band subject to his or her being approved as an ordinary member of the Band) (article 8(2)(*b*) of the Code).

[9] In addition, any non-Indigenous individual who was not a member of another band (or who renounced his or her membership in another band subject to his or her being approved as an associate member) and who married an ordinary member, as well as any non-Indigenous child legally adopted by an ordinary member (up to the age of majority) and any child of an associate member, could become an [TRANSLATION] "associate member" pursuant to article 9 of the Membership Code.

[10] Honorary members are the third category of members provided for by the Code. As its name indicates, this status is granted pursuant to a decision by the Council, during pleasure, as a reward for exceptional services rendered to the Band or its members (article 10).

[11] The rights of members are set out in Title III of the Code. In particular, it provides that all members [TRANSLATION] "are required to contribute to the Band's social, cultural, and economic development" (article 11) and have the right to enter and circulate freely on the reserve (article 12). Finally, article 13 states that all Band members enjoy all the rights conferred upon them by the Membership Code, subject to the requirements and limitations therein. Under these provisions, all members have a right to stand for election to a Band office (article 15) or to the

office of chief (article 16). They have the right to vote at general and special Band member assemblies (article 18) and are entitled to the legal possession of a lot on the reserve (article 19) and, consequently, to receive grants to make improvements to or to construct a building on such a lot (article 20). Only ordinary members have these rights. Article 26, which is at the heart of this case, also specifies that [TRANSLATION] "an associate member may not attend general or special assemblies relating to elections for the offices of Band councillor or Band chief and may not participate in the electoral process".

[12] Title V of the Code lists the provisions concerning the Band Register. Article 37 provides that the Register in which the list of members appears must contain six chapters that list, respectively, the entries for the following categories: (1) ordinary Abénaki members (articles 8-1, 8-2(*a*), 8-2(*b*) and 8-2(*g*) of the Membership Code); (2) other ordinary members (articles 8-2(*c*) and 8-2(*d*) of the Membership Code); (3) associate members as non-Indigenous children legally adopted by an ordinary member (articles 9(*c*) and 9(*d*) of the Membership Code); (4) associate members as spouses of ordinary members (articles 9(*a*) and 9(b) of theMembership Code); (5) honorary members (article 10 of the Membership Code); and (6) the official list of all members in alphabetical order, which clearly indicates to which categories they belong.

[13] It is not easy to accurately determine the total number of Band members and the number of Band members in each category given the number of challenges, resolutions, and decisions over the past 10 years. It appears that the Band had 624 members as of November 1, 2016, 546 of whom were voters and approximately 335 of whom were so-called "status" Indians under

the Act (A.B. A-271-20, at 86). The appellants in docket A-271-20 further alleged in their memorandum that the Band had 66 associate members as of July 6, 2020 (appellant's memorandum of fact and law at para. 9).

[14] The Abénakis also adopted an Electoral Code in June 2008, which was approved by ministerial decree on May 29, 2009 (A.B. A-271-20, at 578). The Electoral Code's preamble states that the Code was adopted to [TRANSLATION] "better reflect, through a formal document, the practices, customs, and traditions relating to the democratic process that the community uses to elect its leaders". The Code defines a voter as a person who is listed or entitled to be listed on the Band list (article 1.3). Similarly, article 5.1 states that for the purposes of preparing the voters list, the Registrar must submit, as soon as he or she is appointed, an up-to-date list of members to the Electoral Officer. These provisions echo the definition provided in section 77 of the Act, where a voter is simply defined as a member of the band.

[15] Articles 2.1 and 2.6 specify that the Council is made up of a chief, three councillors who [TRANSLATION] "have Indigenous status" (that is to say a person entitled to be registered as an Indian under the Act), and a councillor who does not have this status, who are elected for a four-year term but on different dates in order to promote greater stability. It is understood that councillors Lucien Milette, René Milette and Christian Trottier, who are respondents in this case, were elected in the June 2014 elections, while Chief Michel Bernard, a respondent as well, was elected in June 2016. Their respective terms of office therefore expired in June 2018 and June 2020.

III. Procedural history

[16] As mentioned previously, it would be tedious and of little use for the purposes of this appeal to review all the legal challenges that have arisen in this case since its inception. In the following paragraphs, I will therefore simply provide a brief summary of the previous decisions as well as of the series of events that gave rise to the three cases that are currently before us and that provide us with a better understanding of their scope.

A. *Application for judicial review in docket T-990-18*

[17] The Council repeatedly attempted to exclude the members of the extended Landry family from the Band. These family members are all descendants of Clothilde Metzalabanlette, an Abénaki woman who resided on the Wôlinak reserve, and Antonio Landry, whom the Superior Court of Québec recognized as an Indian member of the Band in a judgment dated February 7, 2017 (*Landry v. Canada (Attorney General)*, 2017 QCCS 433, [2019] 3 C.N.L.R. 125).

[18] In November 2016, the Council took a number of steps to expel the members of the Landry family. A resolution was adopted ruling that all members without Indigenous status (which was the case for several members of the Landry family according to the final decision of the Minister's Registrar, which was subsequently quashed by the Superior Court in the judgment cited in the previous paragraph) were excluded from any referendum or electoral vote. An amendment to the Membership Code that excluded members of the Band who were not

registered as Indians within the meaning of the Act was subsequently adopted in March 2017. As a result of the numerous procedural flaws in the adoption of this amendment, the Council consented to judgment in the application for judicial review filed by the Landrys.

[19] On December 5, 2017, the Council adopted a new resolution amending the 1987 Membership Code and convened a special general assembly to ratify the amendments to the Membership Code. Only ordinary members listed in the Indian Register were called to this meeting. The appellants filed a new application for judicial review on May 25, 2018. In particular, the application sought to declare void the amendments to the Membership Code that excluded non-status members (i.e., 289 persons), as well as the removal of 94 status members of the Landry family.

[20] Given that the terms of office of the three councillors with Indigenous status, Lucien Milette, René Milette and Christian Trottier (respondents in this appeal), were about to expire and elections were scheduled to be held on June 10, 2018, the appellants filed an injunction application at the same time as their application for judicial review. They thus sought to preserve their right to participate in these elections by suspending them until a final judgment was rendered on their application for judicial review.

[21] On June 8, 2018, Justice Pentney of the Federal Court granted this interim injunction application on the grounds that it was necessary to maintain the status quo until the judgment on the merits was rendered and the question of the legitimacy of the amendments made by the Council to the Membership Code was decided (*Landry v. Abénaki Council of Wôlinak*, 2018 FC

601, 2019 CarswellNat 8649 (WL Can)). Drawing inspiration from article 8.8 of the Electoral Code, which applies when election results are challenged, Justice Pentney also found (with the agreement of the parties) that councillors whose terms had expired would continue to exercise their functions and could make urgent decisions, and that the outgoing Council would continue to handle current management and administration responsibilities until the decision on the merits of the application for judicial review was rendered and elections could be held.

[22] On December 4, 2018, Associate Chief Justice Jocelyne Gagné allowed the application for judicial review in part and declared that the amendments to the 1987 Membership Code were not validly adopted: see *Landry v. Council of the Abénakis of Wôlinak*, 2018 FC 1211, 2018 CarswellNat 8476 (WL Can). In fact, the applicants had been excluded from the process that preceded the adoption of the amendments (they were not called to the special general assembly convened to ratify the amendments to the Membership Code and were unable to participate in the referendum vote on this issue) despite the fact that they were entered on the Band membership list and on the Indian Register kept by the Registrar of Indian Affairs.

[23] Justice Gagné also found that the notices of removal sent to the status members of the Landry family by the Registrar were invalid and contrary to the 1987 Membership Code and subsections 10(8) and 10(10) of the Act. In this regard, Justice Gagné pointed out that the power to add or remove a name from the Band list is delegated to the registrar, a position to which no one had been elected in accordance with the procedure of the Membership Code since May 30, 1994. In addition, Justice Gagné noted that a Band members list had never been rigorously maintained. As a result, the registration date, Indian status or lack of Indian status

entered in the Minister's Register as well as the names of the ancestors of the members had not been properly compiled.

[24] On March 25, 2019, the Council adopted Resolution RCB 2018-2019-0539. The resolution indicated that the Council had taken note of the judgment rendered by Justice Gagné and expressed a willingness to reach a negotiated solution to the dispute between the Council and representatives of the Landry family. The Council nevertheless appealed the judgment and ultimately withdrew its appeal on March 12, 2020.

B. *Consequences of the judgment rendered on December 4, 2018*

[25] On April 10, 2019, the Council adopted Resolution RCB 2019-2020-001, by which it called the community to a special general assembly on April 27, 2019, in order to elect a registrar in accordance with the provisions of article 40 of the Membership Code. During this special general assembly, Lynda Landry was elected Band Registrar.

[26] The Council also adopted another resolution on April 10, 2019 (RCB 2019-2020-002) providing for an election to be held on July 7, 2019, for the positions of four councillors, in accordance with the Electoral Code. Another resolution was adopted on May 1, 2019 (RCB 2019-2020-007) confirming that elections would be held on July 7, 2019, and appointing Guylaine Boisvert as Electoral Officer, in accordance with article 1.5 of the Electoral Code. That same day, the Electoral Officer sent the Registrar a written request asking her for an updated

Band members list before May 9, 2019, in order to prepare the electoral list in accordance with article 5.1 of the Electoral Code.

[27] As Justice Gagné noted in the reasons for judgment that are the subject of this appeal, several incidents affected the relationship between the Council, the Electoral Officer and the Registrar in the weeks that followed. It is not for me to decide whether these individuals acted in good or bad faith in fulfilling their respective responsibilities. It is sufficient to point out, as Justice Gagné did at paragraph 28 of her reasons, that the stumbling block seems to have been the issue of whether the Register and the Band members list must make it possible to clearly identify associate members (who make up almost half of the Band's membership) so that they can be excluded from the electoral process.

[28] Given that it was impossible to meet the deadlines provided for in the Electoral Code, article 5.2 of which provides that the voters list must be posted at least 35 days before the vote is held (therefore, on May 2 if the elections were held on July 7), the Council initially postponed the date of the elections to August 11, 2019 (RCB 2019-2020-006, adopted on May 27, 2019).

[29] It was only on June 10, 2019, that the Registrar finally sent the Electoral Officer an updated Band members list. This list was structured in the same manner as the previous ones in that it did not distinguish between the different categories of members.

[30] There followed a series of interactions between the Council and the Registrar that reflected a deep disagreement regarding the Registrar's role. After the Registrar had expressed

the opinion that the Council and its representatives did not have standing to require these corrective measures, the Council sent the Registrar a formal notice calling upon her to fulfill her duties and obligations in accordance with articles 45 and 49 of the Membership Code and to make the necessary corrections. In particular, she was ordered to send a list taking into account the various chapters of the Register from which the entries were taken. A list of 211 entries was appended to this formal notice, dated June 25, 2019. These entries were likely to contain errors and required verification. At a meeting held on July 3, 2019, the Registrar informed Council that she did not intend to address the issues raised and make the appropriate corrections, if necessary, until after the elections had been held.

[31] Citing the Registrar's lack of cooperation and availability as well as the need to ensure that the list of members was accurate, complete, and reliable before proceeding with the elections, the Council adopted a new resolution on July 7, 2019 (RCB 2019-2020-010) suspending the elections pending judgment on the merits of its dispute with the Registrar. The Council was of the view that the reference to the various chapters of the Register from which the registrations originated was essential for preparing a valid electoral list, which should exclude associate members who do not have the right to vote according to article 26 of the Membership Code.

C. *Applications for judicial review in dockets T-1139-19 and T-1227-19*

[32] On July 12, 2019, the appellants filed an application for judicial review in docket T-1139-19, essentially asking the Federal Court to quash Resolution

RCB 2019-2020-010, recognize the associate members' right to vote and order that the elections be held without delay. They also alleged that the resolution was not duly adopted by the Council and that the Council had no legal interest in challenging the list of members prepared by the Registrar.

[33] This application for judicial review was followed by a motion for an interlocutory injunction filed on August 2, 2019, seeking an order to hold elections without further delay. This motion was not heard by the Federal Court given the importance of dealing with all the issues relating to this case in the same proceeding on the merits. In addition, Indigenous Services Canada appointed a receiver-manager on August 9, 2019, whose role was to manage the funding agreement between the Council and the Department on behalf of the Council, as well as to deliver programs and services pursuant to the same terms and conditions as those stipulated in the funding agreement.

[34] In tandem with these actions by the appellants, the Council filed an application for judicial review in docket T-1227-19 on July 26, 2019. The purpose of this application was to request that a *mandamus* order be issued compelling the Registrar to make the necessary corrections to the Register and to the Band members list so that the elections could be held on the basis of an accurate, complete, and reliable voters list as soon as possible.

[35] During the hearing of the applications for judicial review in dockets T-1139-19 and T-1227-19, on June 18, 2020, Justice Gagné asked the Registrar, the respondent in docket T-1227-19, to file with the Court a Band members list that identified associate members

and to also provide this list to the Electoral Officer. The Registrar complied with this request and, on July 6, 2020, sent the members list identifying 66 associate members.

[36] At the same hearing, the respondents consented to the application for an order to hold elections without delay and to the appellants' verbal request that Justice Gagné continue to hear the case in order to ensure the integrity of the election process and compliance with the Electoral Code.

[37] On July 20, 2020, the appellants sent Justice Gagné a letter in which they requested that a management conference be held in order to submit an application to reopen the hearing and to give them the opportunity to amend their pleadings in docket T-1139-19 to introduce findings in *quo warranto*. That letter went unanswered.

[38] On October 1, 2020, Justice Gagné ruled on dockets T-1139-19 and T-1227-19. She dismissed the appellants' application for judicial review in docket T-1139-19 and allowed the Council's application in part in docket T-1227-19 by ordering the Registrar to provide an updated Band members list, making sure to identify or exclude associate members. That decision is the subject of the first appeal before this Court.

D. *Application for judicial review in docket T-922-20*

[39] On August 13, 2020, the appellants filed a notice of application for judicial review. They alleged that the councillors' and the Chief's terms of office expired on June 10, 2018, and

June 14, 2020, respectively, that the elections were postponed indefinitely by a media release on July 7, 2020, and that the respondents nevertheless used Band assets to carry out projects that had not been validly authorized, i.e., a casino, a greenhouse for growing cannabis, a boxing arena, and the construction of a new garage for which a three-hectare wooded area in the centre of the reserve had to be logged. By way of their application, the appellants asked the Federal Court, in particular, to find that the defendants were improperly occupying their office, to order that elections be held as quickly as possible, and that the administration of the Band be entrusted to a judicial receiver who would only be authorized to perform strictly administrative operations until a new, validly constituted council took office. They also asked that any contract or agreement entered into with third parties since June 10, 2018, be declared null and void and that all work undertaken for the purposes of carrying out the aforementioned projects be ordered to stop.

[40] The next day, August 14, 2020, the appellants also filed a motion record for an interlocutory injunction.

[41] In their response record to the motion for injunction, the respondents argued that the findings and orders sought had already been substantially resolved by the decision rendered by Justice Pentney on June 8, 2018, in docket T-990-18, or subject to the findings on the application for judicial review that was then under deliberation by Associate Chief Justice Gagné in dockets T-1139-19 and T-1227-19. They further argued that the appellants' claims were based on false premises and amounted to pure speculation, in the absence of evidence.

[42] It is also important to mention that the *First Nations Election Cancellation and Postponement Regulations (Prevention of Diseases),* SOR/2020-84 (the Regulations), adopted on April 8, 2020, provided in subsection 5(2) (repealed on April 7, 2021) that if an election that was to be held within the 30 days before the day on which these Regulations came into force did not take place in order to prevent, mitigate or control the spread of diseases on the reserve, a new election had to be held within six months. In the meantime, the chief and councillors who were in office were deemed to remain in office until the new election.

IV. Lower court decisions

A. *Gagné judgment*

[43] In its October 1, 2020, decision, the Court combined the many issues raised in dockets T-1139-19 and T-1227-19 into a single issue. In fact, when identifying the issues, the Court stated the following: "The only . . . issue at the heart of these applications for judicial review is whether associate members are entitled to vote in elections to fill Band Council positions" (*Gagné* at para. 30; emphasis added). According to the Court, the following two sub-issues were to be considered in analyzing the case: (i) Is article 26 of the Membership Code discriminatory? and (ii) Is the associate members' right to participate in the Band's electoral process an established custom that takes precedence over the Membership Code?

[44] Before studying these sub-issues, the Court provided a preliminary discussion on the so-called "peripheral" or even "academic" issues raised by docket T-1139-19, i.e., the validity of Resolution RCB 2019-2020-010 and the interest in challenging the membership list.

[45] With respect to the first issue, the Court considered that Resolution RCB 2019-2020-010 was duly adopted by a majority of the councillors present at a duly convened Council meeting. The fact that the resolution was drafted before the meeting was held and that its content was not debated or discussed in no way affects its validity (*Gagné* at paras. 33–34). In any event, the Court noted that this question had become moot because the elections scheduled for August 11, 2019, did not take place and no decision of the Court was likely to remedy this fact and its consequences (*Gagné* at para. 37).

[46] Regarding the second preliminary issue, the Court found that the Council had a legal interest in challenging the Band membership list and the manner in which the Register was maintained (*Gagné* at para. 42). In so doing, the Court rejected the appellants' contention that, pursuant to article 63 of the Membership Code, only a member or a person claiming to be a member had standing to contest an entry on the Band membership list. In the opinion of the Court, the corrections and amendments to the membership list requested by the Council occurred because the Registrar refused to fulfill the obligations imposed by the Membership Code (*Gagné* at para. 40). In such circumstances, the Court considered it entirely logical that the Council—and not individual members—should take the necessary steps to remedy the situation (*Gagné* at para. 41).

[47] Having ruled on these preliminary issues, the Court turned to the constitutional validity of article 26 of the Membership Code with respect to section 15 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982*

(U.K.), 1982, c. 11 (the Charter). *Corbière v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203, 173 D.L.R. (4th) 1 (*Corbière*) is the starting point of the Court's analysis.

[48] The Court first drew a "fundamental distinction" between the circumstances of this case and the situation that prevailed in *Corbière*, where all the Band members—residing on or off reserve—had Indigenous status. In this case, the Court noted that the electoral rights granted to non-Indigenous Band members were compared to those of its Indigenous members. Although being a non-Indigenous person was "certainly a ground enumerated in section 15 or a ground analogous to it" (*Gagné* at para. 46), the Court held that the appellants were not deprived of any benefits to which they would otherwise be entitled, had it not been for the impugned provision of the Membership Code. The core of the Court's reasoning in this regard is provided in the following paragraph of its reasons:

> [47] Basically, the Band was not required to grant any status or entitlement to associate members since they are not persons who are registered as Indians or entitled to be registered as such under the Act. The fact that they are not entitled to vote in Band Council elections therefore does not deprive them of any benefits to which they would otherwise be entitled. In adopting its Membership Code, it was open to the Band to allow certain non-Indigenous people to participate in the cultural life of the Band while keeping the Band's destiny in the hands of ordinary members of Abénaki descent. It is perfectly legitimate for an Indigenous band to take the necessary steps to preserve its identity and culture, and to protect itself against a takeover of its destiny and its assimilation by a majority of non-Indigenous members (*Jaime Grismer v Squamish First Nation*, 2006 FC 1088 at paras 61–62).

[49] Having thus ruled that articles 18 and 26 of the Membership Code did not discriminate against associate members, the Court then turned to the appellants' argument that was based on custom. Relying on the affidavits of a dozen associate members who claimed to have voted in

the elections for many years, the appellants argued that this custom should override article 26 of the Membership Code. The Court rejected this argument.

[50] While acknowledging that some associate members had indeed voted in Council elections in the past, the Court noted that this was because no registrar had been elected in accordance with the procedure set out in the Membership Code until 2019, the Band members list was not kept up to date and it was not possible to identify associate members (*Gagné* at para. 53). Furthermore, the evidence did not make it possible to know how many associate members were in the Band, whether all of these members regularly voted in elections, and whether this practice was known and accepted by all ordinary members. It was therefore impossible to argue that a custom had, so to speak, overridden article 26 of the Membership Code:

> [56] To the extent that it is established that it was never possible for the Electoral Officer to identify associate members and thereby exclude them from the electoral process, and to the extent that it is impossible to know whether this was a practice generally known and accepted by Band members (many if not the majority of whom remain off reserve), one cannot logically speak of a custom that superseded the clear language of the Membership Code that was clearly adhered to by all members.

[51] The Court added that the failure to comply with the Membership Code with respect to the election of a registrar and the maintenance of a register and membership list does not make for a custom either. It further stated that the subsequent adoption of an Electoral Code did not have the effect of amending the Membership Code. Finally, the Court pointed out that the Membership Code could only be amended by a Council resolution passed by a majority of Band members.

[52] Consistent with its finding that associate members were not entitled to vote in Council elections, the Court ordered the Registrar to provide the Electoral Officer with a list of Band members entitled to vote that excluded or at the very least identified associate members (*Gagné* at para. 61).

B. *Pentney judgment*

[53] After stating the three tests set out by the case law (in particular in *R. v. Canadian Broadcasting Corp.*, 2018 SCC 5, 417 D.L.R. (4th) 587 at para. 12) in order to obtain an interlocutory injunction, i.e., the existence of a serious issue to be tried, irreparable harm, and the balance of convenience, Justice Pentney first reiterated the arguments submitted by the appellants in support of their motion. Stating that he was of the view that it was not necessary for him to rule on the existence of a serious issue, Justice Pentney dismissed the appellants' motion on the basis of the absence of proof of real, definite and unavoidable harm.

[54] Turning briefly to each of the grounds submitted by the appellants, Justice Pentney determined that:

(a) the pine forest had already been logged, so it was impossible to avoid the consequences;

(b) it was not appropriate to rule on the impact of the Regulations in the context of this case given the other applications for judicial review between the same parties;

(c) Indigenous Services Canada had already appointed a receiver-manager;

(d) there was no evidence demonstrating that it would be difficult to cancel the loan or line of credit obtained by the current Council; and

(e) companies affected by the termination of leases in a shopping centre, for the purpose of operating the proposed casino, could assert their contractual rights if they wished to.

[55] Given that the appellants had failed to establish that they would suffer real harm, rather than hypothetical and speculative harm, that could not be remedied later, Justice Pentney dismissed the motion for an interlocutory injunction.

V. Issues

[56] The appellants raised several arguments in each of the two appeals. I am of the opinion that the issues upon which the Court must rule in determining the two appeals are as follows:

(1) Did the Court err in finding that neither the Electoral Code nor the existence of any custom takes precedence over article 26 of the Membership Code?

(2) Does article 26 of the Membership Code violate section 15 of the Charter and, if so, does it constitute a reasonable limit within the meaning of section 1 of the Charter?

(3) Did the Federal Court err in dismissing the motion for an interlocutory injunction, in particular by failing to rule on the existence of a serious issue and in finding that the appellants had not proved that there had been irreparable harm?

VI. Analysis

A. *Standard of review*

[57] Since the Supreme Court ruling in *Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36, [2013] S.C.R. 559 at paragraph 45, it has been settled law that the role of this Court in hearing an appeal from a decision disposing of an application for judicial review is simply to decide whether the court below identified the appropriate standard of review and applied it correctly: see also *Canada (Revenue Agency) v. Telfer*, 2009 FCA 23, [2009] 4 C.T.C. 123 at para. 18. In other words, this Court must step into the shoes of the trial judge and focus not on the decision that he or she rendered, but rather on the impugned administrative decision.

[58] Given that Justice Gagné did not rule on the standard of review applicable to the two applications for judicial review before her, I must conduct this exercise without the benefit of her insight. In doing so, I will focus on the wording of the notices of application as well as on the issues on appeal before us.

[59] In docket T-1139-19, the appellants argued that Resolution RCB 2019-2020-010, by which the Council suspended the elections until a decision was rendered in the dispute between it and the Registrar, was invalid because it was not adopted in accordance with the provisions of subsection 2(3) of the Act. The appellants also asked that an election be ordered as soon as possible. With respect to these issues, there appears to me to be no doubt that the Court must

show great deference. As a result, our intervention will be warranted only insofar that it can be established that the Council's decisions were unreasonable.

[60] The two dockets (T-1139-19 and T-1227-19) also raised (the first tacitly, the second more directly) the question of whether the Registrar should provide a list identifying the members according to the category to which they belong (ordinary, associate, or honorary). The stated objective of such a request was to restrict the right to vote to ordinary members. To answer this question, the Federal Court had to rule on the three arguments that were raised by the appellants and that are at the heart of this appeal, i.e., whether article 26 of the Membership Code complies with custom, the Electoral Code and section 15 of the Charter. The first argument depends largely on the evidence in the record and on the assessment to be made of the evidence. The applicable standard of review in such matters can only be reasonableness. The same is true of the second argument, insofar as the appellants claimed that certain provisions of the Electoral Code crystallized and elevated the earlier practice to the rank of custom and thereby ruled out the application of article 26 of the Membership Code. With respect to the constitutional validity of article 26 of the Membership Code, it must be assessed on the basis of correctness: *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, 441 D.L.R. (4th) 1 at paras. 25, 55.

[61] With respect to the second appeal, there is no disagreement between the parties regarding the requirements for an interlocutory injunction order. Rather, the debate involves the application of legal principles to the facts of the case, as well as the findings of fact made by the Federal Court. It is settled law that issues of this nature are subject to the standard of palpable and

overriding error: see in particular *Hospira Healthcare Corporation v. Kennedy Institute of Rheumatology*, 2016 FCA 215, 402 D.L.R. (4th) 497 at paragraphs 79, 83, 84; *Tearlab Corporation v. I-Med Pharma Inc.*, 2017 FCA 8, 2017 CarswellNat 39 (WL Can) at paragraph 6. Accordingly, this Court must exercise restraint and deference in considering the findings of the motions judge and bear in mind that the interlocutory injunction is an extraordinary remedy that is within the judge's discretion. It is not for us to substitute our discretion for that of the motions judge: *Canada (Attorney General) v. Simon*, 2012 FCA 312, [2013] 1 C.N.L.R. 58 at paras. 2, 21–22 (*Simon*).

B. *Preliminary issues in Gagné*

[62] The appellants maintain that Justice Gagné erred in finding that Resolution RCB 2019-2020-010 was duly adopted by the Council—first, because no provision of the Electoral Code or the Act authorizes the Council to suspend elections indefinitely, and second, because the simple administration power that the Council had exercised since June 2018 allowed it to hold elections only as soon as the final judgment had been rendered in docket T-990-19, in December 2018.

[63] I concur with Justice Gagné's opinion that these questions are very peripheral and do not have a determinative impact on the real matter at issue. Furthermore, the validity of the suspension of the elections that were to be held on August 11, 2019, can now only be moot, as Justice Gagné pointed out.

[64] I also note that the arguments raised by the appellants before us regarding the validity of Resolution RCB 2019-2020-010 were not argued before Justice Gagné, as the appellants themselves admitted in paragraph 3 of their notice of appeal (A.B. A-271-20, at 7). It is common ground that an appellate court will be very reluctant to rule on an issue that was not raised at trial, for the simple reason that "there is always the very real danger that the appellate record will not contain all of the relevant facts, or the trial judge's view on some critical factual issue, or that an explanation that might have been offered in testimony by a party or one or more of its witnesses was never elicited": *Performance Industries Ltd. v. Sylvan Lake Golf & Tennis Club Ltd.*, 2002 SCC 19, [2002] 1 S.C.R. 678 at para. 32, cited with approval by this Court in *Eli Lilly Canada Inc. v. Teva Canada Limited*, 2018 FCA 53, 2018 CarswellNat 1114 (WL Can) at para. 44. In this case, the appellants did not discharge their heavy burden of establishing that the interests of justice dictate that this rule be ignored and that all the relevant facts had been submitted at trial.

[65] The appellants also claimed that the Council had no legal interest in contesting the Band list prepared by the Registrar, a contention that Justice Gagné rejected on the grounds that the Council should logically be able to take the necessary steps to ensure that the Registrar respects the terms and conditions of her mandate and complies with the Membership Code. This finding was not challenged in this appeal, and it is therefore unnecessary for me to address it further.

(1) Did the Court err in finding that neither the Electoral Code nor the existence of any custom takes precedence over article 26 of the Membership Code?

[66] The appellants argued that Justice Gagné erred, not in identifying the applicable principles regarding the requirements for establishing the existence of a custom or even in applying those principles, but in her assessment of the facts. In fact, the parties did not question the constituent elements of a custom, i.e., consistent practices that are generally acceptable to members of the band and upon which there is a broad consensus: see *Francis c. Conseil mohawk de Kanesatake*, [2003] 4 CF 1133, [2003] 3 C.N.L.R. 86 at 23 (1e inst.); Ghislain Otis, « Élection, gouvernance traditionnelle et droits fondamentaux chez les peuples autochtones du Canada » (2004) 49 R.D. McGill 393, at 402–403.

[67] What the appellants did question was Justice Gagné's finding that the evidence did not support the existence of a customary norm that allowed associate members to participate in electing the Council. As part of their argument, the appellants attempted to demonstrate how Justice Gagné had manifestly erred in her assessment of the facts submitted to her. In my opinion, Justice Gagné's reasoning was not vitiated by the flaws cited by the appellants.

[68] First, the appellants disagreed with the finding that, on the basis of the evidence, it was not possible to determine whether all associate members regularly voted in elections. According to the appellants, this part of Justice Gagné's reasoning was contrary to all 18 affidavits submitted as evidence, including the affidavits of six ordinary members, according to which the associate members have always voted since 1987.

[69] In my opinion, this claim is based on a misreading of the evidence and is an exaggeration. As Justice Gagné pointed out, the 12 affiants with associate member status "state[d] that they had

voted in elections for many years" (*Gagné* at para. 53). They did not state that they had always voted or voted regularly. Many discrepancies with respect to the dates on which these witnesses were registered on the electoral lists were also noted. As revealed by the appellants' response to the additional clarifications requested by the Court after the hearing, two of their affiants had been registered on the electoral lists since 1996, three of them since 2002, and four others since 2004, while the last three affiants were simply not registered. Under these circumstances, Justice Gagné was right in finding (at paragraph 54 of her reasons) that the evidence did not allow her to know "exactly how many associate members there are in the Band, whether all associate members regularly voted in elections and, more importantly, whether this practice was known and accepted by all ordinary members, or even a majority of them."

[70] In addition, the appellants greatly emphasized the testimony of Director General Dave Bernard, who stated that he served as registrar from 2006 to 2011, and according to whom associate members began to vote [TRANSLATION] "to increase the number of electors" and pursuant to Chief Raymond Bernard's [TRANSLATION] "political strategy". According to the appellants, such comments constitute an admission by the respondents, for whom Dave Bernard was acting as a witness, that the Council had deliberately authorized the votes of the associates by political calculation. However, the respondents submitted that Dave Bernard was not acting as registrar but as registration officer from 2006 to 2011. Furthermore, and more significantly, a careful reading of Dave Bernard's comments does not allow such an inference to be made. As the respondents rightly pointed out, his examination was characterized by a lack of certainty regarding the peremptory assertions attributed to him, as shown in the following excerpts:

[TRANSLATION]
Q. 161 Have associate members voted in elections since 1987?

A. 153 Look, sir, I was . . . In 1987, I was four years old. I couldn't tell you.

Q. 162 During the . . .

A. 154 I started working in 2006.

Q. 163 O.K. Have associate members voted in elections since 2006?

A. 155 Yes, some voted, yes.

. . .

Q. 172 Since 1987, have non-status individuals ever been deprived of their right to vote?

A. 164 Before 2006, I don't know. Since 2006, I know that at general assemblies, only status individuals are given the right to vote.

Q. 173 I'm talking about elections.

A. 165 At elections? I've known . . . 18, 14, 10 . . . so, I've had three, then no, I don't think they were prevented from . . .

Q. 174 O.K. Since 1987, have associates ever been deprived of their right to vote?

A. 166 I don't remember.

. . .

[Examination of Dave Bernard on February 6, 2020, at 44–46; A.B. A-271-20, Tab 13, at 1359.]

[71] In any event, the fact that elected representatives of the Band claimed to have known for decades that associate members voted in elections cannot be proof of a custom that has [TRANSLATION] "always" existed or proof that a majority of the community knew about this so-called custom and followed it. The words of Mr. Justice Martineau in *Francis* clearly

demonstrate that tacit assent from a small segment of the community is not sufficient to establish the existence of a "broad consensus":

> [35] Thus, one will have to determine how an electoral code has been applied in practice in a given situation, for instance *vis-à-vis* the question of who is entitled to vote and who will administer the conduct of the elections or by-elections. It is quite common that behaviours arising through attitudes, habits, abstentions, shared understandings and tacit acquiescence develop alongside a codified rule and may colour, specify, complement and sometimes even limit the text of a particular rule. Such behaviours may become the new custom of the band which will have an existence of its own and whose content will sometimes not be identical to that of the codified rule pertaining to a particular issue. In such cases, and bearing in mind the evolutionary nature of custom, one will have to ascertain whether there is a broad consensus in the community at a given time as to the content of a particular rule or the way in which it will be implemented.
>
> [36] For a rule to become custom, the practice pertaining to a particular issue or situation contemplated by that rule must be firmly established, generalized and followed consistently and conscientiously by a majority of the community, thus evidencing a "broad consensus" as to its applicability. This would exclude sporadic behaviours which may tentatively arise to remedy certain exceptional difficulties of implementation at a particular moment in time as well as other practices which are clearly understood within the community as being followed on a trial basis. If present, such a "broad consensus" will evidence the will of the community at a given time not to consider the adopted electoral code as having an exhaustive and exclusive character. Its effect will be to exclude from the equation an insignificant number of band members who persistently objected to the adoption of a particular rule governing band elections as a customary one.
>
> [Emphasis added.]

[72] In support of their argument, the appellants also claimed, contrary to what Justice Gagné found, that it was quite possible to identify the associate members in order to exclude them from the electoral process, if that had really been the Band's intention. As evidence, they pointed to the fact that on July 6, 2020, the Registrar produced a Band members list—and more specifically, a list that identified the associate members. With respect, the appellants' argument

confuses the distinct roles of electoral officers and registrars and reflects a misreading of Justice Gagné's findings.

[73] Justice Gagné never claimed that the registrars had been unable to identify associate members since 1987; rather, she claimed that electoral officers had been unable to identify them: " . . . it was never possible for the Electoral Officer to identify associate members and thereby exclude them from the electoral process . . . " (*Gagné* at para. 56). Before the Registrar was appointed in 2019, the Band did not elect registrars in accordance with the procedure set out in the Membership Code (*Gagné* at para. 53), a conclusion that Justice Gagné had already reached in her previous judgment of 2018 (*Gagné* at para. 22). As a result, the registrar's obligation to update the membership list pursuant to article 45 of the Membership Code was not met. It follows that without a list identifying associate members, electoral officers could not draw up electoral lists that excluded associate members. In this case, an electoral list excluding associate members could only be prepared if they were identified beforehand in the membership list, a task that had never been rigorously performed prior to the election of the Registrar in 2019.

[74] For all the foregoing reasons, I am of the opinion that the Federal Court did not err in finding that the evidence did not support the existence of a customary norm allowing associate members to participate in the election of the Council.

[75] What should we now make of the argument that the exclusion of associate members from the electoral process violates the Electoral Code? Here again, I see no flaw in the reasoning that Justice Gagné developed in her reasons.

[76] The appellants' argument, if I understand it correctly, is that articles 1.3, 1.4 and 5.1 of the Electoral Code adopted in 2008 crystallized the pre-existing practice of considering all Band members as voters, thereby implicitly setting aside article 26 of the Membership Code. These provisions read as follows:

> [TRANSLATION]
> 1.3 Voter
>
> A person who
>
> (a) is listed, or is entitled to be listed, on the Première Nation des Abénakis de Wôlinak Band List;
>
> (b) is eighteen (18) years of age on voting day; and
>
> (c) has not lost the right to vote in the elections of the First Nation.
>
> 1.4 Voters List
>
> The list of electors of the Première Nation des Abénakis de Wôlinak First Nation maintained by the Band Registrar.
>
> 5.1 Voters List
>
> For the purposes of preparing the voters list, the person responsible for the membership of the Première Nation must submit to the Electoral Officer, as soon as he or she is appointed, an up-to-date list of members, along with each member's date of birth, Band or member's number, and address.
>
> [A.B. A-271-20, at 579, 588.]

[77] For their argument to have any chance of succeeding, the appellants would first have had to demonstrate the existence of a custom that associate members were entitled to vote in an election. However, as shown in the preceding paragraphs, such a custom could not be

established, and articles 1.3, 1.4 and 5.1 of the Electoral Code cannot therefore crystallize a custom that does not exist.

[78] Moreover, I find it difficult to understand how the Electoral Code could be interpreted as an expression of a clear desire to override an important provision of the Membership Code. As Justice Gagné rightly pointed out in paragraphs 51 and 52 of her reasons, the Membership Code was adopted by the Band in 1987 following the amendment of the Act in 1985, and it was adopted by the majority of voters. These voters clearly limited the rights and privileges of the new class of members made up of non-Indigenous individuals, in particular with regard to the right to vote. Furthermore, the two codes are perfectly compatible, insofar as the Registrar fulfills her obligation pursuant to article 37 of the Code to keep a register that clearly identifies the three categories of members. The list of voters to be kept by the Registrar and sent to the Electoral Officer must therefore comply with this requirement. As Justice Gagné rightly indicated, "[the Electoral Code] is [not] incompatible with [the Membership Code] if the list provided by the Registrar contains only the names of ordinary members of the Band, as provided for in the Membership Code" (*Gagné* at para. 58).

[79] Finally, it is important to note that article 76 of the Membership Code provides that [TRANSLATION] "no amendments can be made to this Code without a resolution of the Band Council endorsed by a majority vote of all Band members who have the right to vote at a special general assembly called for this purpose". Similarly, article 79 of the Membership Code states that its provisions override any contrary provisions; the Electoral Code does not contain an equivalent provision. To consider the adoption of the Electoral Code as an implicit abrogation of

article 26 of the Membership Code would therefore amount to circumventing the amendment procedure set out in article 76 and rendering it meaningless.

[80] In short, the appellants have not persuaded me that the Federal Court's decision was erroneous, regardless of the applicable standard of review.

(2) Does article 26 of the Membership Code violate section 15 of the Charter and, if so, does it constitute a reasonable limit within the meaning of section 1 of the Charter?

[81] The appellants argue that the distinction that the Membership Code makes between ordinary and associate members is based on race and ethnic or national origin and therefore violates subsection 15(1) of the Charter. By depriving associate members of the right to vote, articles 18 and 26 of the Membership Code are purportedly discriminatory insofar as these provisions are based on an immutable personal characteristic rather than on merit to prevent them from fully participating in the administration of the Band. In doing so, these provisions undermine the dignity of non-Indigenous individuals who join the Band by marriage or adoption by sending the message that they are less deserving than ordinary members. Finally, they criticized Justice Gagné for having implicitly recognized the legitimacy of these provisions pursuant to section 1 of the Charter without performing the analysis required in *R. v. Oakes*, [1986] 1 S.C.R. 103, 26 D.L.R. (4th) 200 to arrive at this conclusion and in the absence of any evidence in this regard.

[82] Having duly considered the arguments of both parties on this issue, I am of the opinion that Justice Gagné did not err in finding that articles 18 and 26 of the Membership Code are valid and do not violate the Charter. However, I come to this conclusion for somewhat different reasons than hers.

[83] In my opinion, the distinction that articles 18 and 26 of the Membership Code make between ordinary and associate members does not even involve section 15 of the Charter. In fact, the Act itself is based on the premise that it applies only to individuals registered or entitled to be registered as Indians (see the definition of the word “Indian” in subsection 2(1) of the Act; see also sections 4 to 13, which deal with the Indian Register kept by the Department of Indigenous Services and with band lists). Status Indians have certain rights and benefits that cannot be claimed by non-status Indians, Métis, Inuit, or other Canadians.

[84] It would not occur to anyone to challenge the constitutionality of the Act, as well as the rights and privileges that flow from it, on the grounds that the Act is discriminatory. The distinction that this statute makes between Indians and non-Indians is inherent in the very power of Parliament to make laws in relation to Indians, as provided for in subsection 91(24) of the *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, Appendix II, No. 5 (C.A., 1867). It is true *a priori* that classification based on race and ethnicity is suspect and will generally infringe on the right to equality enshrined in section 15 of the Charter. However, the Supreme Court has repeatedly stated that one part of the Constitution cannot repeal another. In the same way that the denominational guarantees granted to Protestants and Catholics, as well as the linguistic guarantees granted to English- and French-speakers, cannot be challenged from the

standpoint of section 15 even though these guarantees are not very compatible, in the abstract, with the concept of equality, the special treatment reserved for Indigenous people cannot be the subject of a legal challenge for the same reason. Mr. Justice Estey's concurring reasons in *Reference re Bill 30, An Act to Amend the Education Act (Ont.)*, [1987] 1 S.C.R. 1148, 40 D.L.R. (4th) 18 at paras. 79–80 provide the clearest formulation of this principle:

> Once section 93 is examined as a grant of power to the province, similar to the heads of power found in s. 92, it is apparent that the purpose of this grant of power is to provide the province with the jurisdiction to legislate in a *prima facie* selective and distinguishing manner with respect to education whether or not some segments of the community might consider the result to be discriminatory. In this sense, s. 93 is a provincial counterpart of s. 91(24) (Indians, and lands reserved for Indians) which authorizes the Parliament of Canada to legislate for the benefit of the Indian population in a preferential, discriminatory, or distinctive fashion *vis-à-vis* others.
>
> The role of the *Charter* is not envisaged in our jurisprudence as providing for the automatic repeal of any provisions of the Constitution of Canada which includes all of the documents enumerated in s. 52 of the *Constitution Act, 1982*. Action taken under the *Constitution Act, 1867* is of course subject to *Charter* review. That is a far different thing from saying that a specific power to legislate as existing prior to April 1982 has been entirely removed by the simple advent of the *Charter*. It is one thing to supervise and on a proper occasion curtail the exercise of a power to legislate; it is quite another thing to say that an entire power to legislate has been removed from the Constitution by the introduction of this judicial power of supervision.
>
> [See also, in the same decision, the comments to the same effect of the majority at paragraphs 62−63. See also *Canada (House of Commons) v. Vaid*, 2005 SCC 30, 252 D.L.R. (4th) 529 at paras. 30−55; *Gosselin v. Quebec (Attorney General)*, [2005] 1 S.C.R. 238, 250 D.L.R. (4th) 483 at paras. 12−14; *Adler v. Ontario*, [1996] 3 S.C.R. 609, 140 D.L.R. (4th) 385 at paras. 33−35.]

[85] Of course, the Act or any other provision enacted under the authority of subsection 91(24) of the C.A., 1867 could be challenged if it created a distinction between persons on the basis of a characteristic other than their Indian status. This is precisely what

happened in *Corbière*, where the Supreme Court invalidated the portion of subsection 77(1) of the Act that deprived off-reserve members of Indian bands of the right to vote in band council elections. In that case, it was considered that off-reserve band member status (aboriginality-residence) was a ground analogous to those enumerated in section 15 and constituted discrimination because it perpetuated a historical disadvantage experienced by off-reserve band members. In contrast, in *Lovelace v. Ontario*, [2000] 1 S.C.R. 950, 188 D.L.R. (4th) 193, the Supreme Court considered that excluding certain non-band Aboriginal communities—within the meaning of the Act—from sharing casino proceeds did not violate section 15 of the Charter. The highest court ruled that this program was not based on stereotyping and took into account the actual situation of the individuals that it affected, even though other groups were also disadvantaged.

[86] Following this same logic, I find it difficult to see how it could be claimed that section 77 of the Act and the numerous electoral codes adopted under the authority of the Act are contrary to section 15 of the Charter on the grounds that they restrict the right to vote or to run for chief or councillor to band members only (as defined by the Act itself or the membership codes of these bands). By definition, Parliament can only make laws in relation to this matter to the extent that its intervention can be linked to its jurisdiction with respect to Indians. Its Conversion to Community Election System Policy clearly states that the Minister will only authorize a band to opt out of the electoral process set out in the Act if its electoral code meets a certain number of requirements, in particular that an elector be a band member and be at least 18 years of age.

[87] By restricting the right to vote to ordinary Band members who have reached the age of majority and who are listed in the Indian Register, the Abénaki Electoral Code only complies with one of the criteria developed by the Department when it is called upon to determine whether or not it is appropriate to accept a customary electoral system as a replacement for the electoral system set out in the Act. For this reason, I am of the opinion that this limitation on the right to vote (as well as on the right to run for the position of chief or councillor), regardless of whether it is from the Electoral Code itself or from a cross-reference with the Membership Code, does not infringe the Charter and does not trigger the application of section 15. The fact that, for the sake of inclusiveness, it was decided that certain non-Indigenous peoples would be granted the right to participate in the social, cultural, and economic life of the Band is of no consequence if we adhere to this logic.

[88] Even if it were to be concluded that section 15 must nevertheless be applied (an assumption that seems to me to be erroneous for the preceding reasons), it is clear that the decision to deprive associate members of the right to vote cannot be considered discriminatory. The objective of this constitutional guarantee, as the Supreme Court has repeatedly stated, is to prevent and remedy discrimination against groups that have historically been victims of social, political, and legal disadvantage in Canadian society: see in particular *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143, 56 D.L.R. (4th) 1, at 171; *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497, 170 D.L.R. (4th) 1 at para. 3 (*Law*); *Quebec (Attorney General) v. A.*, 2013 SCC 5, [2013] 1 S.C.R. 61 at para. 332 [*Quebec v. A.*]; *R. v. Swain*, [1991] 1 S.C.R. 933, 4 O.R. (3d) 383, at 994.

[89] Over the years, the Supreme Court has refined its approach to determining whether a statute violates subsection 15(1) of the Charter. In *R. v. Kapp*, 2008 SCC 41, [2008] 2 S.C.R. 483 (*Kapp*) and *Withler v. Canada (Attorney General)*, 2011 SCC 12, [2011] 1 S.C.R. 396 (*Withler*), a two-prong test was developed and constantly applied thereafter: see in particular *Centrale des syndicats du Québec v. Quebec (Attorney General)*, 2018 SCC 18, [2018] 1 S.C.R. 522 at para. 22; *Kahkewistahaw First Nation v. Taypotat*, 2015 SCC 30, [2015] 2 S.C.R. 548 at paras. 19−20 (*Taypotat*); *Quebec v. A.* at paras. 323–324, 327, 332; *Quebec (Attorney General) v. Alliance du personnel professionnel et technique de la santé et des services sociaux*, 2018 SCC 17, [2018] 1 S.C.R. 464 at paras. 25–28; *Fraser v. Canada (Attorney General)*, 2020 SCC 28, 450 D.L.R. (4th) 1 at paras. 27, 30. In its most recent ruling on the subject, the Court summarized this test as follows:

> The Court asks two questions in determining whether a law infringes s. 15(1). First, does the challenged law, on its face or in its impact, draw a distinction based on an enumerated or analogous ground? If a law is facially neutral, it may draw a distinction indirectly where it has an adverse impact upon members of a protected group. Second, if it does draw a distinction, does it impose "burdens or [deny] a benefit in a manner that has the effect of reinforcing, perpetuating or exacerbating . . . disadvantage", including "historical" disadvantage? . . .
>
> [*Ontario (Attorney General) v. G.*, 2020 SCC 38, 451 D.L.R. (4th) 541 at para. 40 (*Ontario v. G.*).]

[90] In the case at bar, there is no doubt that the Electoral Code and the Membership Code create a distinction (between Indigenous and non-Indigenous individuals) based on race. This is not in dispute, and Justice Gagné explicitly acknowledged this in paragraph 46 of her reasons. The real question that arises is whether the difference in treatment contravenes the fundamental standard of equality so as to reinforce, perpetuate or accentuate a disadvantage that has affected

or still affects non-Indigenous individuals. In this regard, the Supreme Court moved away from a formal analysis based on comparison between two similarly situated groups by recognizing that this approach did not assure a result that captures the wrong to which subsection 15(1) is directed and that it came up against many difficulties: *Withler* at paras. 39–40, 56–59.

[91] In *Law* (at paras. 63–75), Justice Iacobucci discussed four contextual factors that are relevant in determining whether legislation has a discriminatory purpose or effect: (1) pre-existing disadvantage; (2) relationship between grounds and the claimant's characteristics or circumstances; (3) ameliorative purpose or effects; and (4) nature of the interest affected. These factors were subsequently reiterated, not in a formalistic manner but as indicators to assess the actual situation of the group and the potential of the impugned law to worsen that situation: see *Withler* at para. 37; *Kapp* at paras. 23–24. The Supreme Court recently took up the issue again and summarized the applicable approach in the following terms:

> [47] Emerging from the foundation laid in *Andrews*, substantive equality concerns itself with historical or current conditions of disadvantage, products of the persistent systemic discrimination that continues to oppress groups (*Fraser*, at para. 42). Substantive equality demands an approach "that looks at the full context, including the situation of the claimant group and . . . the impact of the impugned law" on the claimant and the groups to which they belong, recognizing that intersecting group membership tends to amplify discriminatory effects (*Centrale des syndicats*, at para. 27, quoting *Withler*, at para. 40), or can create unique discriminatory effects not visited upon any group viewed in isolation. It must remain closely connected to "real people's real experiences" (*Egan v. Canada*, [1995] 2 S.C.R. 513, at para. 53, per L'Heureux-Dubé J.): it must not be applied "with one's eyes shut" (McIntyre, at p. 103). . . .
>
> [*Ontario v. G.* at para. 47.]

[92] In *Corbière*, the evidence revealed that off-reserve band members were subjected to general stereotyping and experienced particular disadvantages compared to on-reserve members. It is true that in that case, as in the case at bar, the interest affected is important and must be considered. However, I would point out that in *Corbière*, the Supreme Court linked voting to an identification of interests with the band and considered that the denial of that right affected their belonging and connection to the band. In the case before us, this factor is much less important because associate members are non-Indigenous individuals whose ties to the Band are, so to speak, indirect. I also note that associate members can participate in the Band's social, cultural, and economic development in the same way as ordinary members (article 11 of the Membership Code) and take part (with the right to speak) in any general and special assembly of the band (article 27 of the Membership Code).

[93] In the end, I fail to see how the associate Abénaki members' situation could be compared to the situation of off-reserve Batchewana band members, whose application for declaratory relief led to *Corbière*. In the finding it made after performing the contextual analysis required by subsection 15(1), the majority in *Corbière* summarized their thinking as follows:

> In the context of this vulnerable group, and these important interests, this distinction reinforces the stereotype that band members who do not live on reserves are "less Aboriginal", and less valuable members of their bands than those who do. A reasonable person in the position of the claimants, fully apprised of the context, would see the differential treatment contained in s. 77(1) [of the Act] as suggesting that off-reserve band members are less worthy or valuable as band members and members of Canadian society, and giving them less concern, respect and consideration than band members living on reserves. Based upon this finding of discriminatory impact, the third stage of analysis, the identification of discrimination based on a violation of substantive equality and human dignity in the circumstances of this case, has been satisfied.
>
> [*Corbière* at para. 92.]

[94] No such evidence was submitted in this case, and I very much doubt that it could be. However, I will refrain from expressing any final opinion on the matter, on the understanding that it will be for the court that has before it such detailed evidence to rule on this matter should it arise in a subsequent case. In the case at bar, I can note only that the appellants did not submit any evidence tending to demonstrate the violations of dignity or disadvantages that associate members would experience because they were not able to vote. This failure is fatal and sufficient to dispose of the argument based on section 15 of the Charter: *Taypotat* at paras. 24–27. There is therefore no need to rule on whether the impugned provisions of the Electoral Code can be considered a reasonable limit within the meaning of section 1.

(3) Did the Federal Court err in dismissing the motion for an interlocutory injunction, in particular by failing to rule on the existence of a serious issue and in finding that the appellants had not proved that there was irreparable harm?

[95] The appellants raised several arguments against Justice Pentney's decision dismissing their motion for an interlocutory injunction. They argued that the judge erred in failing to rule on the existence of a serious issue or on the appellants' apparent right by finding that proof of irreparable harm had not been made, that it was not appropriate to comment on the impact of the Regulations, and that issues relating to commercial leases were a matter of contract law. I am of the opinion that none of these arguments can be accepted.

[96] I would first like to reiterate that this Court must show great deference when reviewing a discretionary decision such as a decision to grant or refuse a motion for an interlocutory injunction. In the absence of an error of law, the intervention of this Court will be warranted only

if it has been demonstrated that a palpable and overriding error was made: *Simon* at paras. 2, 20–22. In this case, the appellants appear to have raised essentially the same arguments that they raised unsuccessfully at trial. The role of this Court is not to re-examine and reweigh the evidence and to substitute its discretion for that of the trial judge.

[97] After having read the order rendered by Justice Pentney, it is clear that the judge did not err in stating the tests for injunctions. In order to succeed, the appellants had to indeed demonstrate the existence of a serious issue, irreparable harm, and a balance of convenience that was favourable to them. However, as Justice Pentney noted, these three requirements are conjunctive: if one of the three branches is not met, the interlocutory injunction will not be granted: *Janssen Inc. v. AbbVie Corporation*, 2014 FCA 112, 120 C.P.R. (4th) 385 at para. 14; *Air Passengers Rights v. Canada (Transportation Agency)*, 2020 FCA 92, 2020 CarswellNat 1619 (WL Can) at para. 15. The judge was therefore entitled to dispense with an analysis of the serious issue once he found that it had not been demonstrated that irreparable harm had occurred. I also note that the judge did consider, albeit briefly, the existence of a serious issue by implicitly acknowledging that it could be linked to the implications that could arise from the decision to be rendered in docket T-1139-19, which was still under deliberation when he issued his order.

[98] With respect to irreparable harm, the judge first correctly noted that the harm must be proved and cannot be presumed (*Pentney* at para. 6). In their notice of appeal, the appellants reiterated their submissions before the Federal Court that the mere fact that the Council continued to govern and the respondents continued to hold their offices would cause irreparable harm (notice of appeal, reasons 5–6; Appeal Book A-224-20, at 6–7). These allegations are not

sufficient to demonstrate the existence of real, definite, and unavoidable harm, especially since they presuppose the well-foundedness of the allegations underlying the appeal in *quo warranto* to which the motion for an interlocutory injunction was attached.

[99] The judge then performed a thorough review of the evidence adduced by the appellants to show that they would suffer harm if the injunction were not granted. The appellants obviously disagreed with Justice Pentney's assessment of this evidence. However, they have not shown that Justice Pentney's assessment was tainted by a palpable and overriding error. Again, it was not sufficient to demonstrate that irreparable harm could or was likely to occur; rather, it had to be shown that such harm would be suffered: *United States Steel Corporation v. Canada (Attorney General)*, 2010 FCA 200, 406 N.R. 297 at para. 7; *Glooscap Heritage Society v. Canada (National Revenue)*, 2012 FCA 255, 440 N.R. 232 at para. 31; *Arctic Cat Inc. v. Bombardier Recreational Products Inc.*, 2020 FCA 116, 176 C.P.R. (4th) 323 at para. 20. It is not enough to question the social acceptability or economic value of the impugned projects, to argue without any evidence that the projects served only the particular interests of the Chief, or to allege without supporting evidence that the Band members objected to the initiatives taken by the Council, as the appellants did before Justice Pentney.

[100] Finally, considering all the circumstances of the case, Justice Pentney was entitled to render his decision by ultimately relying on his assessment that it was not in the interests of justice to grant the appellants' motion (*Pentney* at para. 4). In doing so, he was consistent with the Supreme Court ruling in *Google Inc. v Equustek Solutions Inc.*, 2017 SCC 34, [2017] 1

S.C.R. 824 at para. 1, that "[u]ltimately, the question is whether granting the injunction would be just and equitable in all the circumstances of the case."

VII. Conclusion

[101] I am therefore of the opinion that both appeals should be dismissed, with costs.

"Yves de Montigny"
J.A.

"I agree.
Richard Boivin J.A."

"I agree.
George R. Locke J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-224-20
STYLE OF CAUSE:	STÉPHANE LANDRY et al. v. THE BAND COUNCIL OF THE ABÉNAKIS OF WÔLINAK et al.
AND DOCKET:	A-271-20
STYLE OF CAUSE:	STÉPHANE LANDRY et al. v. THE BAND COUNCIL OF THE ABÉNAKIS OF WÔLINAK et al.
PLACE OF HEARING:	HEARD BY ONLINE VIDEOCONFERENCE HOSTED BY THE REGISTRY
DATE OF HEARING:	MAY 19, 2021
REASONS FOR JUDGMENT BY:	DE MONTIGNY J.A.
CONCURRED IN BY:	BOIVIN J.A. LOCKE J.A.
DATED:	OCTOBER 6, 2021

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