Federal Court  Cour fédérale

Date: 20110617

Docket: T-16-11

Citation: 2011 FC 720

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Ottawa, Ontario, June 17, 2011

PRESENT: The Honourable Mr. Justice Lemieux

BETWEEN:

DENIS LANDRY
GAÉTAN LANDRY
CHRISTIAN TROTTIER
LUCIEN MILLETTE
DAVE LEFEBVRE

Applicants

and

YVON SAVARD
LOUISE BERNARD
DIANE M'SADOQUES
and
RAYMOND BERNARD
NAYAN BERNARD
KEVEN BERNARD
JACQUES BERNARD
RÉJEAN BONNEVILLE
JULES BERNARD
CATHELINE BERNARD
NELSON LEFEBVRE

Respondents

REASONS FOR JUDGMENT AND JUDGMENT

I. Introduction

[1] On November 14, 2010, the applicant Denis Landry was elected Chief and the other applicants were elected councillors of the Bande des Abénakis de Wôlinak (the First Nation). This election was appealed by the defeated candidates, including the former Chief, Raymond Bernard, and some of the other incumbent councillors (the applicants). In accordance with the custom election code of the First Nation, this appeal was decided on its merits by the three-member appeal board constituted by the incumbent Council that had called the election after an appeal board had set aside the election held on June 13, 2010 (the first election). In this case, the appeal board was constituted of Yvon Savard, the president, and Louise Bernard and Diane M'Sadoques, the members (the Tribunal).

[2] On December 21, 2010, the majority of the Tribunal, Mr. Savard dissenting, decided to set aside the election of November 14, 2010, and order that a new election be held as soon as practicable. The Tribunal also ruled that the incumbent Council had to remain in place until the results of the new vote were known. By means of this application for judicial review, the applicants are asking this Court to overturn the appeal board's decision.

II. The facts

[3] The First Nation has a very small population; some one hundred persons live on the reserve, and approximately four hundred live off the reserve.

[4] The elections for the Council of the First Nation are not governed by the regime set out in the *Indian Act*; instead, they are held in accordance with the election code, or *Code électoral*

(the Code), approved by referendum by the members of the First Nation and then by the Minister of Indian Affairs (the Minister) on May 29, 2009.

[5] Sections 8.2 and 8.7 of the Code are of determinative importance to the outcome of this application. Section 8.2 provides that a candidate in the election or an elector who voted may file an appeal with the appeal board if this person has reasonable grounds to believe that

(a) there was corrupt or fraudulent practice in connection with an election to an office;

(b) there was a violation of this Code that might have affected the result of an election to an office;

(c) a person nominated to be a candidate in an election was ineligible for this office.

[6] Section 8.7 of the Code provides as follows:

> [TRANSLATION]
>
> If the appeal board has reason to believe that
>
> a. there was corrupt or fraudulent practice in connection with an election,
>
> b. there was a violation of this Code that might have affected the result of an election; or
>
> c. a person nominated to be a candidate in an election was ineligible to be a candidate,
>
> the appeal board may set aside the election in whole or in part and order a new election or vote in respect of one or more positions.
>
> If the appeal board does not have reason to believe that the appellants' allegations have merit, the board gives written notice to the appellants, the candidates, the electoral officer and the new Council of the Abénakis de Wôlinak First Nation of its decision to dismiss the appeal.
>
> All decisions of the appeal board are final and without appeal.

[7] The election officer, Robert St-Ours (the President), had reported on the election of November 14, 2010, as follows:

[TRANSLATION]

1. The voters list consisted of 492 electors, among whom 333 were sent mail-in ballot voting packages off-reserve; 42 mail-in ballot voting packages were given to electors on the reserve, for a total of 375 mail-in ballot packages.

2. The Officer received 209 mail-in ballot voting packages before the November 14, 2010, deadline; 5 ballots were received after this date and therefore disallowed; 13 non-compliant voter notices were disallowed; and 4 mail-in ballots received alone in their return envelopes were disallowed.

3. Distribution of votes:

   - The participation rate was 39 percent for the 192 votes cast by mail, and 14 percent for the 71 votes cast at the polls.
   - The total number of votes was 263, for a participation rate of 53 percent.

4. Election results:

   (1) Office of Chief
   Denis Landry – 145 votes – elected
   Raymond Bernard – 70 votes
   Jacques Bernard – 41 votes

   (2) Office of non-Aboriginal councillor
   Gaétan Landry – 165 votes – elected
   Réjean Bonneville – 64 votes

   (3) Office of Aboriginal councillor
   Lucien Millette – 148 votes – elected
   Dave Lefebvre – 133 votes – elected
   Christian Trottier – 128 votes – elected
   Catheline Bernard – 110 votes
   Nelson Lefebvre – 53 votes
   Jules Bernard – 51 votes
   Keven Bernard – 35 votes

Nayan Bernard – 35 votes

[8] Mr. Savard is a former public servant in the Department of Indian Affairs; he was retired and lived in Florida throughout his tenure of office as president of the appeal board established for the election of November 14, 2010. He had also advised the First Nation when it decided to adopt a custom election code, newly enacted and approved by the Minister in 2009, in accordance with which the first election was held. Mr. Savard was the president of the first appeal board that set aside the first election; Diane M'Sadoques was member of that same appeal board. Diane M'Sadoques has worked for 19 years for the Grand Conseil de la Nation Waban-Aki; she acted as secretary of the appeal board at issue here. Louise Bernard is the third member; she is Raymond Bernard's sister.

III. Conduct of the appeal

The appeals

[9] On or about November 21, 2010, the appeal board received an appeal dated November 16, 2010, filed by all of the defeated candidates, requesting that the appeal board [TRANSLATION] "investigate the procedures and irregularities we have noticed:

1. Many voter declaration forms were witnessed by the same persons, such as Denis Landry and Lucien Millette, and we even suspect that they put pressure on the electors, some of whom were vulnerable and had little education.
2. The Council's receptionist received completed mail-in ballot envelopes, which we found odd, and we were unable to check whether those envelopes were well and truly given to the electoral officer.

3. The voters list was given to the candidates who requested it, whereas the electors had not authorized the electoral officer to disclose their address and telephone number.
4. When the counting was completed, we noticed that the candidates' representatives gave the candidate Lucien Millette the lists of electors who did and did not vote; the electoral officer should have kept that information secret.
5. The expectation of secrecy was not honoured for all of these reasons; we request that the election be set aside immediately and that you order another election immediately. This situation is very urgent since, before the election, some of the Landrys circulated information that if they were elected, they would use the band council's funds to defend their case, as they were permanently removed from the Register of Indian Affairs Canada about a month ago."

[10] On November 19, 2010, Kevin Bernard, elector and candidate for the office of councillor, filed an appeal on the following grounds:

[TRANSLATION]

1. Last September, my spouse was subjected to intimidation by the former director general of the Wôlinak band council, Bernard Ross, with the aim of having me join Denis Landry's team on the pretence that the incumbent Chief would do nothing for the youth of the community. Furthermore, Bernard Ross told Karine Rouleau [his spouse] that when she returned from maternity leave, she would not necessarily be able to return to her job with a band council led by the former Chief, Raymond Bernard.
2. Under the membership code of 1987, ONLY those members registered in the Indian Register have voting rights in elections. Considering that 108 members of the Landry family lost their status in 1995 for birth certificate forgery and that this decision by the

Registrar of the Department of Indian Affairs was reconfirmed in 2010, this means that those members, their spouses and their children should not have had voting rights. It must also be emphasized that the 1987 code is still in force. For these reasons, we request that the appeal board immediately set aside the election of November 14, 2010.

[11] In addition to those two appeals, the appeal board received three affidavits and a letter, as follows:

(i) The affidavit of Nelson Lefebvre, status member, which states:

[TRANSLATION]

1. I asked the band council's receptionist, Lucie Landry, to give me two mail-in ballot voting packages. She told me that she would to send an email to the electoral officer, Robert St-Ours, and wait for his reply.
2. The packages were not delivered to me personally, but sent through internal mail at the band council by the receptionist.
3. I never saw the authorization email from the electoral officer and do not know whether the mail-in ballot voting packages could have been given out by the receptionist, Lucy Landry, on her own initiative.

(ii) Réjean Bonneville's affidavit is similar to Nelson Lefebvre's. His first paragraph is identical, except that he states having asked Lucie Landry to give him five mail-in ballot voting packages. He adds, [TRANSLATION] "She then gave them to me". His second paragraph is different. He asserts that [TRANSLATION] "when I went to take them back, duly completed and sealed, she placed them on her desk".

(iii) In her affidavit sworn November 24, 2010, Marielle Béliveau affirms that she did [TRANSLATION] "not give the electoral officer, Mr. Robert St-Ours, permission to

disclose my name, address and telephone number to the candidates in the election campaign leading to the election of November 14, 2010".

(iv) The letter received by the appeal board was written by Manon Bernard. Her complaint was that Lucie Landry had given her personal information [TRANSLATION] "to everyone who ran in the November 14, 2010, election".

Replies to the appeals

[12] According to section 8.4 of the Code, the elected parties had the right to reply in writing to the grounds raised in both complaints. The following replies were filed with the appeal board under solemn affirmation:

1. Denis Landry's reply, dated December 9, 2010, is as follows:

a. [TRANSLATION] "Regarding the intimidation allegedly directed at Keven Barnard's spouse by a former band council employee, Bernard Ross:"

i. [TRANSLATION] "Neither Keven Bernard nor his spouse stated what the intimidation involved; Keven Bernard's spouse, the person concerned, is even more vague than Keven Bernard on this point";

ii. [TRANSLATION] "Even supposing that there was intimidation, neither I nor the other candidates had anything to do with that incident".

b. [TRANSLATION] "Regarding my right to vote and the voting rights of the other non-status members of the Bande des Abénakis de Wôlinak:"

i. [TRANSLATION] "I and the other non-status members to whom Keven Bernard is referring are on the band list of the Abénakis de Wôlinak, as we are entitled to be under section 8.2(a) of the *Code de citoyenneté*

[membership code] as Abénakis descended from an Abénaki living on the Abénakis de Wôlinak reserve";

ii. [TRANSLATION] "I and the other non-status members referred to by Keven Bernard are therefore 'électeurs' [electors] under section 1.3 of the *Code électoral*, and were registered on the voters list for the November 14, 2010, election";

iii. [TRANSLATION] "Moreover, it would be absurd for section 2.1 of the *Code électoral* to provide that the position of Chief can be held by a non-status elector and to have specifically created a position for a non-status councillor if non-status electors did not have voting rights!"

c. Regarding the grounds argued in support of the appeal filed by Raymond Bernard, Réjean Bonneville, Keven Bernard, Nayan Bernard, Jacques Bernard, Jules Bernard, Catheline Bernard and Nelson Lefebvre, Denis Landry replies as follows:

i. [TRANSLATION] "As for the first ground, which concerns the voter declaration forms I signed, I should not even have to reply because the appellants themselves admit that <u>these are 'suspicions'</u> on their part, not facts and, <u>furthermore, they do not name the electors</u> I allegedly put 'pressure' on and also <u>fail to specify what kind of 'pressure' that would be</u>";

ii. [TRANSLATION] "However, in the interests of transparency, I affirm that I did not put any 'pressure' on the electors whose voter declaration forms I witnessed";

iii. [TRANSLATION] “Regarding the second ground, which concerns the mail-in ballot envelopes received by the Council’s receptionist and the appellants’ ‘suspicions’ as to whether those envelopes were given to the electoral officer, here again there should be no need to reply to mere suspicions. As well, the issue does not concern me or the other election candidates in the slightest. However, for transparency’s sake, I have appended hereto the solemn affirmation of the Council’s receptionist—Exhibit P-2 of my solemn affirmation—who affirms having given the electoral officer all of the mail-in ballot envelopes she received”;

iv. [TRANSLATION] “As for the third and fourth grounds, which concern the secrecy of the voters list, I note that this criticism, if it is one, is directed not at the elected candidates but rather at the electoral officer and that, as well, supposing that the alleged disclosures were an error, this is not among the grounds for setting aside an election as set out at section 8.2 of the Code”.

v. He states that, in the past, election appeals made on the same grounds (non-status members’ lack of voting rights) were dismissed, and has filed, in support, a letter dated September 1, 1998, from the department’s director general of registration;

vi. He denies Keven Bernard’s allegation that the Landry family’s loss of voting rights was reconfirmed by the department in 2010.

d. Mr. Landry asks that the appeal board reject the appeals because they [TRANSLATION] “fail utterly to establish any of the three grounds for setting aside the election provided for at section 8.2 of the *Code electoral*” and, in particular,

> [TRANSLATION] "how, for each of the grounds alleged, the election results were affected", adding, [TRANSLATION] "these appeals are made on the basis of vague suppositions, suspicions and hearsay, which does not fulfill the requirements of section 8.2 of the *Code électoral*." He also requested that the appeals be dismissed on the ground that they were not made in the form required by the Code. [Emphasis added]

[13] Gaétan Landry's reply addresses the contention regarding the voting rights of the members of the Landry family. His reply is similar to that of Denis Landry in this regard. He adds that the two appeals do not raise any of the grounds admitted by section 8.2 and, more specifically, [TRANSLATION] "they do not explain in what way the alleged incidents influenced the election results".

[14] Lucien Millete's reply is the same as Denis Landry's as regards the voter declaration forms and the disclosure of the voters list. According to him, these are merely a matter of [TRANSLATION] "suspicions" and allegations of [TRANSLATION] "pressure" that are unproven, undefined and fail to identify the electors concerned who are [TRANSLATION] "vulnerable and have little education". He denies having [TRANSLATION] "put any pressure on the electors for whom he acted as witness". He also notes that the appellants mention [TRANSLATION] "that the voters list was given [TRANSLATION] 'to the candidates who requested it'". He acknowledges that, after the votes were counted, his representatives gave him the voters list showing who did or did not vote, adding that [TRANSLATION] "since the other candidates' representatives also gave them that same list, well, I see nothing in the *Code électoral* forbidding that, and, if there is a criticism to be made against anyone about secrecy, the criticism is not directed towards the

candidates, but towards the electoral officer". He emphasizes that the appellants [TRANSLATION] "do not explain in what way the candidates' receipt of voters lists after the counting of votes might have influenced the election results".

[15] Dave Lefebvre and Christian Trottier, both elected councillors in the November 14, 2010, elections, made similar replies; they raise two points: for one, neither of the two appeals satisfies the requirements of form and substance set out at section 8.2 of the Code and, for another, none of the allegations concerns them.

[16] Louise Landry was the receptionist of the Council of the First Nation during the election period. In her solemn affirmation, she affirms that she received a certain number of mail-in ballot envelopes for the Electoral Officer from electors (residing on the reserve) having used the mail-in voting method. She states that all of these envelopes were sealed and that she diligently placed them in the drawer set aside for this purpose in the Electoral Officer's office located on the Council premises.

V. Tribunal record

[17] Section 8.5 of the Code provides as follows :

> [TRANSLATION]
> 8.5 Appeal Record
>
> All particulars and documents filed in accordance with the provisions of this section will constitute and form the appeal record. Once the appeal procedure is complete, the appeal record is archived with the Council of the Première nation des Abénakis de Wôlinak.

[18] In this case, the contents of the Tribunal record are of particular importance, given that its president lived in Florida throughout the sitting of the Tribunal. This record contains the exchanges of documents and emails between Mr. Savard and Diane M'Sadoques and the members' comments between themselves.

[19] This record shows that Mr. Savard prepared the draft communications from the board to individuals. As an example, I refer to the acknowledgement of receipt of the appeals (Record pages 12, 14 and 15), notifying the appellants of the deadline to send in their reply, on December 14, 2010.

[20] The record also contains Mr. Savard's exchanges with third parties. At page 22 of the Tribunal record, there is a copy of the email he sent to the electoral officer on December 1, 2011, asking him for his comments on the appeals, with a copy of this email sent to Ms. M'Sadoques, and Mr. St-Ours' reply, which Mr. Savard received and forwarded to Ms. M'Sadoques (see Record pages 24 and 63).

[21] I reproduce below the comments of the electoral officer:

> [TRANSLATION]
> First, the person whom I had hired to assist me in the process resigned the day before the presentation assembly. I therefore had to deal with that state of affairs at very short notice.
>
> I never gave a voters list to anyone at all. The question was raised at the beginning by a candidate. I replied that I would check the election code. Some persons pointed out to me that the incumbent chief had access to the voters list and that documents were sent to electors. I added that what was sauce for the goose should be sauce for the gander, but I never asked for this to be done.

> I oversaw the distribution of all of the mail-in packages. I did indeed leave sealed packages at the reception desk to accommodate electors, since I was only present for one half day each week. As for the envelopes returned by Réjean Bonneville, he could have mailed them; there was postage affixed to the envelopes. He alleges that he cannot know whether the return envelopes were given to the electoral officer. There is a way to check: by asking the electoral officer. I can affirm that I have in hand the voter notices of Réjean Bonneville and his family, confirming that I did indeed receive those envelopes.
>
> On the matter of secrecy, it is my duty to ensure that the vote is secret. All of the witnessing representatives can know who voted, but cannot know for whom those electors voted. I would have preferred that the lists remain in the room.
>
> After the counting, around twenty minutes after midnight, I asked everyone to wait and went to the washroom. When I came out, the police officer informed me that there were people outside. I went out. They asked me for the results. I replied that I would give them out in the next ten minutes or so. Right then, the candidates' representatives exited. I asked them to go back inside so that I could make the announcement myself. The two persons assisting me gathered up the documents during that time.
>
> I do not think that the fact that one of the representatives exited with a list of the electors who voted breaches the duty of secrecy of the ballots under the election code.
>
> It is the electoral officer's duty to ensure that the electors' choices as to how they cast their vote remains fully secret, and that duty was well and truly fulfilled. (Record page 63) [Emphasis added]

[22] On December 14, 2010, Mr. Savard sent the two other members of the Tribunal the results of his research, analysis, comments and conclusions regarding both appeals. To save time and possibly make a decision before the holidays, and in the expectation of a consensus among the board members, Mr. Savard had prepared everything in the form of a response to the appellants. He emphasized to his colleagues [TRANSLATION] "that our role as an appeal board is to determine whether any of the grounds raised could have contravened section 8.2 of the Code", adding, [TRANSLATION] "[h]owever, for my part, you will note upon reading my analysis and my

conclusions that I found no ground which could contravene section 8.2 and, consequently, I am of the opinion that both appeals should be dismissed. I would hope that you share my opinion." (Record page 65 to 76). [Emphasis added]

[23] That same day, Diane M'Sadoques sent Mr. Savard the comments received by the board from Denis Landry (Record pages 77 to 86), Lucie Landry (Record page 87), Lucien Millette (Record pages 88 and 89), Gaétan Landry (Record pages 90 and 91), Christian Trottier (Record page 92) and Dave Lefebvre (Record page 93).

[24] On December 15, 2010, Ms. M'Sadoques sent Mr. Savard her comments and analysis regarding the holding of the election, the appeal filed and the comments of the electoral officer and those of the applicants (Record pages 95 to 98). Essentially, Ms. M'Sadoques' comments are identical to those found in support of her decision. I note that in the comments they sent to Mr. Savard, Ms. M'Sadoques and Ms. Bernard did not conclude, at that time, that the election should be set aside.

[25] The Tribunal record shows that it was not until the morning of December 21, 2010, that Mr. Savard realized that the arguments of his two colleagues were aimed at setting aside the election. Through the day on December 21, 2010, he revised the documentation to reflect a split decision.

[26] He sent the following email on December 21, 2010 (Tribunal record page 142):

> [TRANSLATION]
> I am extremely surprised to learn that police officers are already at your place to go deliver the letters; first, to comply with the spirit

> of the policy, the letters in question must be sent by registered mail; second, this is not at all as agreed this morning by telephone during our telephone conference. I was to send you, as soon as possible in the early afternoon, a draft letter containing both sets of arguments as to how the two appeals received by the board are to be dealt with. We were then to discuss whether you agreed. I do not know what is inciting you to act so hastily right now; I was thinking even the opposite: that we should take our time, because although I found that the facts were clear enough to dismiss both appeals, my suggestion, which you refused, to appoint an independent investigator would have allowed you to avoid making a decision that I find to be unreasonable.
>
> Nonetheless, I will send you my draft letter in the next half hour, but I will point out to you that it should not stop there, since, once we agree on the draft letter, another one will have to be prepared to send to the elected candidates and the officer to inform them of the decision in the manner set out in the *Code électoral*.
>
> Last, if you make any changes, I hope that you will have the common decency and courtesy to send me the final version of the draft. [Emphasis added]

VI. Tribunal's decision

[27] On December 21, 2010, at or about 4 p.m., the appeal board delivered a split decision. This decision stated that it was accompanied, in an appendix, by the arguments of the majority and Yvon Savard's dissenting arguments. Part of Mr. Savard's arguments was left out inadvertently; it was given to the parties two days later.

[28] In its decision, the majority of the appeal board stated that, after having analyzed the contents of the appeal documents, it acknowledged that irregularities had come about during the election and that some of the grounds raised by the appellants had merit. [TRANSLATION] "The main grounds were that the voters list containing members' addresses and telephone contact information was given to the candidates who requested it (contravening section 5.1) and that the list of electors who had and had not voted was given to one of the candidates (contravening

sections 5.18 and 7.1). The majority of the members of the appeal board reached the decision that under paragraph 8.7(b) of the Code, they had the duty to set aside the election and order that a new election be held in as soon as practicable".

Arguments of the majority

[29] The arguments of the majority give the reasons for which it decided that the election had to be set aside.

1. [TRANSLATION]
   The *Code électoral* states that the Electoral Officer provides, upon request by any elector residing on the reserve, the documents described (mail-in ballot voting package), which documents must be sent by mail or given to each elector. The majority notes: . . . In his comments, the electoral officer admits to having left packages at the reception desk. Lucie was not authorized to distribute them (affidavit of Réjean Bonneville, point 1, and of Nelson Lefebvre, point 1).

2. The voters list was corrected/revised. The majority stated the following:

   [TRANSLATION]
   Three members were registered on October 12. The same three members were removed on October 20. However, one of them was able to vote in the election. (Reason given by the Electoral Officer: the CBW [Wôlinak band council] had been paying for this person's education for years . . . reason not valid because a non-Aboriginal person residing on a reserve can apply for welfare without being a Band member, and the Council cannot refuse. After discussing this with the [Electoral] Officer, he admitted that the person was not registered on the voters list.

3. Regarding the instructions pertaining to the electoral officer, the majority wrote as follows:

   [TRANSLATION]
   The electoral officer must, before the poll is open, cause to be delivered to the deputy electoral officer the voters list, the ballot papers, materials for marking the ballot papers, and a sufficient quantity of directions-for-voting. This instruction is surely in place in the event that there is more than one polling station, but that is not specified. If there had been no deputy electoral officer appointed, this instruction would not have been followed.

4. Regarding the list of persons who voted, the majority emphasized the following:

   [TRANSLATION]
   The electoral officer must keep in his possession the ballot papers, voters lists and any other . . . In his comments, the officer admits that a list of the electors who had voted left the premises and that he does not believe that the secrecy of the vote was compromised . . . This is not a provincial election where there are 5,000 votes . . . out of 263 votes, it is very easy to figure out who voted for whom.

5. Regarding the list given to the candidate, the majority stated the following:

   [TRANSLATION]
   Regarding the members' list (list of names only), that may be given to the candidates, but not the list including addresses and telephone numbers. The fact that the list with contact information was distributed by the receptionist leads me to suspect that pressure tactics might have been used in connection with the election results.

6. The majority wondered whom the electoral officer had appointed to assist him as deputy electoral officer.

7. Regarding the appeal of Raymond Bernard and others, the majority wrote as follows :

   [TRANSLATION]
   Point (1) Suspicions of pressure. The fact that the list including contact information was distributed by the receptionist leads me to suspect that pressure tactics might have been used by different sides in connection with the election results.

   Point (2) Voters list given to the candidates. The only list that may be given to the candidates is the list of names only (without contact information).

   Point (4) The list showing the electors who did and did not vote was given to Lucien Millette. Out of 263 votes, it is very easy to figure out who voted for whom. The secrecy of voting was not maintained.

8. Regarding Denis Landry's affirmation, the majority made the following comments:

[TRANSLATION]
Point 4.11 – Regarding Mr. Landry's reply that [TRANSLATION] "[e]ven supposing that there was intimidation, neither I nor the other candidates have anything to do with that incident", the majority's opinion is that [TRANSLATION] "Mr. Ross is an associate of Lucien Millette, that he resigned rather than be dismissed from his position as director general of the Council, and that he anticipates becoming a consultant to the Council with the new Council". Mr. Ross admits that he did indeed speak with Karine Rouleau and apologizes if his words were interpreted as intimidation. The majority reached the following conclusion:
[TRANSLATION] "If he is apologizing for the interpretation, knowing Mr. Ross, I believe that he truly did intimidate her."

(Point 5(a)(d)) Suspicions of pressure. The fact that the list with contact information was distributed by the receptionist leads me to suspect that pressure tactics may have been used in connection with the election results.

9. Regarding Lucien Millette's affirmation, (1) concerning the intimidation of Karine Rouleau, the majority even applied the same reasoning that it used previously in its discussion of point 4.11 of Denis Landry's affirmation by way of reply; (2) it appears that this is the case regarding the question of pressure arising from the fact that the voters list containing residential addresses and telephone numbers was available to all candidates; (3) both members of the majority rely on section 7.1 of the Code to denounce the fact that after the election, Mr. Millette allegedly had the voters list showing the electors who had and had not voted; (4) regarding point 12, the majority wrote that

[TRANSLATION]
. . . the board gives no weight to the fact that some elected candidates had nothing to do with the grounds alleged in the appeals. Does that mean that he admits that some other candidates were involved in the grounds alleged? The electoral officer failed to correctly follow procedure.

Arguments of Yvon Savard

[30] I am reproducing Yvon Savard's comments on each point raised by the majority and the resulting conclusion. His comments are addressed to the majority.

Point No. 1 – Voter declaration forms witnessed by the same persons

He refers to paragraph 5.9.1(d) of the Code and replies as follows:

> [TRANSLATION]
> As you can see for yourself, nowhere in this provision or any other part of the *Code électoral* is there a restriction limiting the number of declaration forms that can be witnessed by the same person.

Regarding the point raised by the majority that [TRANSLATION] "there might have been pressure", Mr. Savard wrote the following:

> [TRANSLATION]
> . . . I can express no opinion on this subject because your hypothesis is <u>founded only on suspicions</u>; you will understand than in an election campaign, it is easy to confuse pressure and solicitation, and I am unable to rule on allegations founded only <u>on suspicions that have, moreover, been denied under oath by the interested parties in the documentation they submitted to us</u>;

Point No. 2 – <u>Mail-in ballot envelopes received at the reception desk</u>

> [TRANSLATION]
> The electoral officer affirmed to us that in the cases where this occurred, the office receptionist had instructions to <u>place these envelopes in a specific drawer of his desk</u>; and, in the cases where this did occur, it could have been avoided if the envelopes, which were postage paid, had been mailed directly by the persons concerned and thus sent to the post office box rented for this purpose in St-Grégoire.
>
> Regarding your uncertainty as to whether those envelopes were indeed given to the electoral officer, I can confirm to you that, <u>after checking with the electoral officer</u>, all of the electors concerned were indeed registered on the electoral officer's list as having exercised their right to vote in the election on November 14. As well, we have a solemn affirmation by Lucie Landry confirming that she did in fact place those envelopes in the drawer that the electoral officer had indicated to her.

Point No. 3 – <u>Voters list given to certain candidates</u>

> [TRANSLATION]
> According to the information obtained, the electoral officer knew that staff members of the existing Administration had given those lists, not only to Lucien Millette, but to other candidates as well; furthermore, the reason that the electoral officer did not object was that after having checked, he was told that this practice was accepted, having already been used regularly in the past.
>
> Although this practice is not contrary to the *Code électoral*, it is a point of concern for the appeal board in that certain persons complained that it provided a means of disclosure of personal information such as their address and telephone number.

The board will therefore make a recommendation to the Band Council regarding this practice, but it is not a ground that can justify setting aside the election under section 8.2 of the *Code électoral*.

Point No. 4 – Voters list given to the candidate Lucien Millette

[TRANSLATION]
You state here that when the counting was completed, we noted that the representatives had given the list of electors who had and had not voted to the candidate Lucien Millette. The president should have kept that information secret.

According to Lucien Millette's solemn affirmation, other candidates also received a voters list.

Here is the full text of the electoral officer's comments on the subject:

> [TRANSLATION]
> On the matter of secrecy, it is my duty to ensure that the vote is secret. All of the witnessing representatives can know who voted, but cannot know for whom those electors voted. I would have preferred that the lists remain in the room.
>
> After the counting, around twenty minutes after midnight, I asked everyone to wait and I went to the washroom. When I came out, the police officer informed me that there were people outside. I went out. They asked me for the results. I replied that I would give them out in the next ten minutes or so. Right then, the candidates' representatives exited. I asked them to go back inside so that I could make the announcement myself. The two persons assisting me gathered up the documents during that time.
>
> I do not think that the fact that one of the representatives exited with a list of the electors who voted breaches the duty of secrecy of the ballots under the election code.
>
> It is the electoral officer's duty to ensure that the electors' choices as to how they cast their vote remains fully secret, and that duty was well and truly fulfilled.

I agree with the electoral officer and I am of the opinion that the secrecy of the vote was not breached and that the secrecy of the ballots as required by section 6.5 of the *Code électoral* was fully maintained.

I acknowledge, however, that there were some irregularities in terms of procedure as regards the information that must be sent and disclosed by the electoral officer; specific recommendations will be made to the Band Council about those irregularities, but they are not a ground that can justify setting aside the election under section 8.2 of the *Code électoral*. [Emphasis added]

Point No. 5 – Maintenance of secrecy and status of the Landry family

For the grounds he previously expressed to the majority, Mr. Savard is [TRANSLATION] "of the opinion that on the whole, the secrecy of the vote was maintained".

Regarding the status of the Landry family, he brings up a particular point:

> [TRANSLATION]
> As regards the information you heard that the Band's funds could be used to defend the Landry family, I cannot rule on a hypothesis of this kind which, in any event, is not a ground for appeal under the *Code électoral*.

Last, as regards the Landry family's loss of status, Mr. Savard states having done some checking on this matter. He believes, contrary to what was stated by the majority, that no final decision had been made by the department in this matter. He adds the following:

> [TRANSLATION]
> In any case, the argument that the Landry family did not have voting rights was already rejected in 1998 in two different proceedings: one being an appeal dismissed by Ralph Brent of the Department of Indian Affairs, dated September 1, 1998, and the other a judgment of the Federal Court of Canada delivered on June 18, 1998, by Justice Richard in the case of Fortin and the Wôlinak band council.
>
> I also wish to point out that in Wôlinak, voting rights are granted to Band members under your membership code, not just to persons who have Indian status.
>
> Therefore, the Landry family had every right to be registered on the voters list and to exercise their right to vote in the election of November 14. [Emphasis added]

The two points missing from Mr. Savard's arguments in response to the appeal by Keven Bernard

[31] The Tribunal record shows that the two points missing from Mr. Savard's arguments when the appeal board issued its decision on December 21, 2010, are from a draft decision that Mr. Savard had prepared one week earlier for all three members of the appeal board to agree upon, which they did not do. The two points responded to Keven Bernard's appeal, which raised two considerations. The following is Mr. Savard's position. He addresses his comments to Keven Bernard.

Point No. 1 – Allegation of intimidation

> [TRANSLATION]
> From the outset, it is important to emphasize that the person who was supposedly intimidated did not personally provide any details in support of her claim.
>
> Nevertheless, I contacted the person about whom this allegation was made, and the version I obtained differs slightly from your statement. To be specific, Bernard Ross admits that he did indeed speak with Ms. Rouleau and informed her of the philosophy of the Chief at the time, Raymond Bernard, a philosophy that consisted of monitoring the young persons working for the community a little more closely, since, because of their lack of experience, he believed that it was necessary to keep an eye on them. Mr. Ross further states that his words could even be corroborated by a witness who was present during this conversation.
>
> If statements of this nature by Bernard Ross were interpreted as intimidation, he apologizes and maintains that he never intended to intimidate anyone at all. [Emphasis added]

Point No. 2 – Membership code and the Landry family's loss of status

> [TRANSLATION]
> You state that, under the membership code of 1987, only those members who are registered in the Indian Register have the right to vote in elections. The definition of this register at Article (I) states that it is the register kept by the Minister of Indian Affairs and Northern Development Canada containing the name of each person entitled to be registered as an Indian under the Act. Ever since you adopted your Membership Code in 1987, the definition set out in Article K of that Code is what has always applied to elections in Wôlinak: this means the Band List containing the names of all Band members, Indian or otherwise. This is also corroborated by your *Code électoral*, adopted in 2008, at section 2.1, which provides that one of the four councillor positions may be held by any elector regardless of whether he or she has Indian status or not. [Emphasis added]

Mr. Savard addresses a second consideration: the Landry family's loss of status. In short, he maintains the same position as he had already expressed at point No. 5 above.

By way of conclusion regarding Keven Bernard's appeal, Mr. Savard refers to section 8.2 of the Code and writes the following:

[TRANSLATION]
After having carefully analyzed and checked the grounds you raised, I informed the board of my findings that

(a) there was no corrupt or fraudulent practice in connection with an election to the offices to be filled;
(b) there was no violation of the election code that might have affected the result of an election to any of the offices to be filled;
(c) none of the persons nominated to be a candidate in this election was ineligible to be a candidate.

In conclusion, I therefore recommended to the board that we could not grant your request on the basis of the grounds raised and, consequently, rule that the results of the election of November 14 are upheld.

Furthermore, we wish to assure you that after having checked, we found that although there were a few minor, unintentional irregularities by the Electoral Officer during the process, he objectively fulfilled his functions as mandated by the Band Council.

Sincerely,

VI. Arguments of the parties

(a) The Applicants

[32] The applicants submit that the decision of the majority of the appeal board must be set aside for the following reasons:

1. There is a reasonable apprehension of bias as a result of the composition of the two members of the majority;
2. The respondents' complaints are inadmissible because they fail to comply with the requirements of form set out in the Code;
3. The conclusion of the majority that there were violations to the Code affecting the election results is in error;
4. On their face, the facts set out in Keven Bernard's complaint do not correspond to intimidation;

5. The appeal board contains absolutely no evidence of fraudulent manoeuvres likely to affect the election results;
6. The members of the Landry family had the right to vote for the simple fact that each of their names was on the voters list;
7. The authorization to vote given by the electoral officer to a member not registered on the voters list was not a ground raised in either of the two complaints the respondents filed with the appeal board.

(b) The Respondents

[33] In their reply record, the respondents submit that the decision by the majority of the appeal board must be upheld, essentially for the following reasons:

1. The applicants did not come before the board with clean hands because they [TRANSLATION] "collectively breached the rules of procedural fairness and therefore cannot ask this Court to intervene to set aside the board's decision". In support of that statement, the respondents make the following contentions:
   (i) Denis Landry and Lucien Millette illegally obtained the voters list with addresses and telephone numbers;
   (ii) Mr. Savard, through Lucie Landry, was communicating with Paul Dionne, counsel for the applicants, without informing the other members of the appeal board about it;
   (iii) According to section 8.6 of the Code, if the appeal board deems that the alleged facts are insufficient to determine the validity of the election that is the subject of the complaint, the appeal board may conduct an investigation to that effect or have one conducted.

Mr. Savard conducted an investigation to that effect without being appointed by the appeal board and without having submitted a detailed report for consideration by the other board members;

(iv) The applicants cannot belatedly, on judicial review, object to Louise Bernard's presence on the board, since they did not raise that objection previously. What is more, there is no evidence of bias on the part of Diane M'Sadoques;

(v) The evidence in the record was sufficient to support the board's conclusion that there were a number of violations to the provisions of the Code;

(vi) Denis Landry and Gaétan Landry are no longer registered in the Register of the Department, which made its final decision on January 28, 2011. Consequently, the applicants, Denis Landry and Gaétan Landry, are no longer members of the Bande des Abénakis de Wôlinak and no longer electors within the meaning of section 1.3 of the Code.

VII. Analysis

A. Standard of review

[34] Following the Supreme Court of Canada's ruling in *Dunsmuir v New Brunswick*, 2008 SCC 9 [*Dunsmuir*], which revised the law on the subject, the Federal Court of Appeal set out the following principles in its decision in *Salt River First Nation #195 v Martselos*, 2008 FCA 221:

(i) A Band Council's decision to remove the Chief from office which raises a question of jurisdiction and procedural fairness must be reviewed on a standard of correctness (paragraph 26);

(ii) The Council's interpretation of the election code attracts a standard of correctness (paragraphs 28 to 32); and

(iii) The examination of the facts and action taken pursuant to it call for a review on a standard of reasonableness (paragraph 28).

B. The election code

[35] We know that the First Nation adopted its own Code governing elections of the Council in accordance with custom; it was approved by ministerial order on May 29, 2009. Its preamble reads as follows:

> [TRANSLATION]
> The Council of the Première nation des Abénakis de Wôlinak hereby adopts its own election code to better reflect, in a formal document, the practices, habits and customs related to the democratic approach used by the community to elect its leaders who are mandated to meet the objectives arising from its mission, and which is intended to defend and protect the rights and interests of the Nation and strive on the cultural, economic and social levels to promote individual and collective wellness for all of its members.

[36] It is useful to reproduce some of the provisions of the Code. I previously mentioned that section 8.2 allows an election candidate to appeal the election. Section 8.7, however, identifies the circumstances in which the appeal board can allow an appeal. Those two provisions were reproduced previously in this judgment.

[37] To better appreciate the arguments of the parties, I have reproduced certain provisions of the Code in the Appendix.

[38] Although the First Nation adopted an election code, there is no doubt that this Code was modelled on certain provisions of the *Indian Act* and its regulations on electoral matters, the *Indian Band Election Regulations*, CRC, c 952 (the Regulations).

[39] As regards the legislative scheme for setting aside an election, the *Indian Act* makes the following provision at paragraph 79:

79. The Governor in Council may set aside the election of a chief or councillor of a band on the report of the Minister that he is satisfied that	79. Le gouverneur en conseil peut rejeter l'élection du chef ou d'un des conseillers d'une bande sur le rapport du ministre où ce dernier se dit convaincu, selon le cas :
(*a*) there was corrupt practice in connection with the election;	*a*) qu'il y a eu des manœuvres frauduleuses à l'égard de cette élection;
(*b*) there was a contravention of this Act that might have affected the result of the election; or	*b*) qu'il s'est produit une infraction à la présente loi pouvant influer sur le résultat de l'élection;
(*c*) a person nominated to be a candidate in the election was ineligible to be a candidate.	*c*) qu'une personne présentée comme candidat à l'élection ne possédait pas les qualités requises.

[40] An election challenge or appeal is provided for at section 12 of the Regulations, which reads as follows:

12. (1) Within 45 days after an election, a candidate or elector who believes that	**12.** (1) Si, dans les quarante-cinq jours suivant une élection, un candidat ou un électeur a des motifs raisonnables de croire :
(*a*) there was corrupt practice in connection with the election,	*a*) qu'il y a eu manœuvre corruptrice en rapport avec une élection,
(*b*) there was a violation of the Act or these Regulations that might have affected the result of the election, or	*b*) qu'il y a eu violation de la Loi ou du présent règlement qui puisse porter atteinte au résultat d'une élection, ou
(*c*) a person nominated to be a candidate in the election was ineligible to be a candidate,	*c*) qu'une personne présentée comme candidat à une élection était inéligible,
may lodge an appeal by forwarding by registered mail to the Assistant Deputy Minister particulars thereof duly verified by affidavit.	il peut interjeter appel en faisant parvenir au sous-ministre adjoint, par courrier recommandé, les détails de ces motifs au moyen d'un affidavit en bonne et due forme.

[41] Section 14 of the Regulation sets out the circumstances in which the Minister of Indian Affairs and Northern Development Canada must report to the Governor in Council. It reads as follows:

14. Where it appears that	**14.** Lorsqu'il y a lieu de croire
(*a*) there was corrupt practice in connection with an election,	*a*) qu'il y a eu manœuvre corruptrice à l'égard d'une élection,
(*b*) there was a violation of the Act or these Regulations that might have affected the	*b*) qu'il y a eu violation de la Loi ou du présent règlement qui puisse porter

result of an election, or	atteinte au résultat d'une élection, ou
(*c*) a person nominated to be a candidate in an election was ineligible to be a candidate,	*c*) qu'une personne présentée comme candidat à une élection était inadmissible à la candidature,
the Minister shall report to the Governor in Council accordingly.	le Ministre doit alors faire rapport au gouverneur en conseil.

C. Some principles

1. Legislative interpretation

[42] Justice Iacobucci of the Supreme Court of Canada in *Rizzo & Rizzo Shoes Ltd (Re)*, [1998] 1 SCR 27, at paragraphs 21, 22 and 23, wrote the following:

> [21] Although much has been written about the interpretation of legislation (see, e.g., Ruth Sullivan, *Statutory Interpretation* (1997); Ruth Sullivan, *Driedger on the Construction of Statutes* (3rd ed. 1994) (hereinafter "*Construction of Statutes*"); Pierre-André Côté, *The Interpretation of Legislation in Canada* (2nd ed. 1991)), Elmer Driedger in *Construction of Statutes* (2nd ed. 1983) best encapsulates the approach upon which I prefer to rely. He recognizes that statutory interpretation cannot be founded on the wording of the legislation alone. At p. 87 he states
>
> > Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.
>
> . . .
>
> [22] I also rely upon s. 10 of the *Interpretation Act*, R.S.O. 1980, c. 219, which provides that every Act "shall be deemed to be remedial" and directs that every Act shall "receive such fair, large and liberal construction and interpretation as will best ensure the

> attainment of the object of the Act according to its true intent, meaning and spirit".
>
> [23] Although the Court of Appeal looked to the plain meaning of the specific provisions in question in the present case, with respect, I believe that the court did not pay sufficient attention to the scheme of the *ESA*, its object or the intention of the legislature; nor was the context of the words in issue appropriately recognized. I now turn to a discussion of these issues. [Emphasis added]

[43] In my opinion, this approach is also valid for the interpretation of the Code.

2. Applicable case law

[44] The essential task before the appeal board was to properly interpret the provisions of the Code on which it relied, and then to properly apply the Code to the facts of the case.

[45] In its decision, the majority of the board relied on paragraph 8.7(*b*) of the Code to justify setting aside the election of November 14, 2010. The text of this paragraph, I repeat, reads as follows: [TRANSLATION] "Where there is reason to believe that there was a violation of the Code that might have affected the result of the election . . .".

[46] The case law of this Court holds that this provision requires a two-step decision: (1) a first step, which is concluding that the Code was violated and (1) a second step, such as concluding that the violation(s) might have affected the election results. In *Lower Similkameen v Allison*, [1997] 1 FC 475, Deputy Judge Heald, of this Court, formerly Justice of the Federal Court of Appeal and Attorney General of Saskatchewan, found at paragraph 86 of his reasons that, on the evidence before him (this being an action, not judicial review), the election had been

conducted in violation of the Regulations. The following is written at paragraph 87 of his reasons:

> In my view, a failure to strictly comply with the Regulations does not necessarily render the election results null and void. As stated *supra*, there is no dispute that the election was to be run according to the Regulations. The Regulations not only set out the method by which to run the election, but set out a mechanism for dealing with breaches thereof. The grounds for appeal to the Appeal Board of the election are set out in the Regulations at Part VIII, Article 1. Although the present application is not an appeal of the election, these grounds provide a useful guide for determining whether a particular violation, according to the purpose of the Regulations, should render the election results null and void or whether it merely results in a technical breach which does not undermine the spirit of the Regulations. [Emphasis added]

At paragraph 90 of his reasons, he expressed his opinion that a violation of the Regulations is not, by its mere fact, a ground for appeal. He stated the following:

> I have already found that the election was conducted in violation of four of the Regulations. However, the violation of a regulation is only a ground for an appeal if such a violation might have affected the results of the election. Accordingly, I shall examine each violation and determine whether it meets this criterion. [Emphasis added]

[47] After having examined each violation of the Regulations, Justice Heald was satisfied that none of the violations might have had any effect on the election (see paragraphs 91 to 110 of his reasons).

[48] Justice Heald's decision is relevant as regards two other points in dispute before this Court. At paragraph 89, he expressed his view that establishing that there were corrupt practices in connection with an election requires evidence of the corrupt practice (see also, to the same effect, the recent judgment by Justice O'Reilly, of this Court, in *Dumais v Fort McMurray*

No 468 First Nation, 2010 FC 342, at paragraph 12 and the decision by Justice MacTavish, also of this Court, in *Hudson v Canada (Indian Affairs and Northern Development)*, 2007 FC 203, (*Hudson*) at paragraphs 85, 86 and 87.

[49] I refer to the following judgments:

a. The decision of this Court in *Samson Indian Band v Cutknife*, 2003 FCT 721, in which Justice Martineau allowed an application for judicial review against an appeal board that had ordered a new election. The judge was of the opinion that the appeal board had incorrectly interpreted the election code of the First Nation in concluding that there had been violation of the code and that there was no proportionality between the violation and the consequences of such a violation, that is, the setting aside of the election.

b. The decision of this Court in *Leaf v Canada (Governor General in Council)*, [1988] 1 FC 575, made by Associate Chief Justice Jerome, is another example of the requirement set out in the Act and the Regulations to consider whether a violation has occurred and the impact of this violation on the results of an election. In that case, the Court upheld an Order-in-Council by the Governor General in Council setting aside an election on the ground that a violation of the electoral system had occurred when Mr. Francis's nomination for the position of band councillor was unlawfully withdrawn and that, as a result, this was a violation that might have affected the result of the election, given that other persons were elected as councillors in the unlawful absence of Mr. Francis' candidacy.

c. The decision by my colleague Justice Hughes in *Temagami First Nation v Turner*, 2009 FC 548, is also relevant. In that case, it was a matter of determining whether certain persons were eligible to vote. Two candidates to the position of chief received the same number of votes—51. Applying the principle that a violation might influence the results of the election, Justice Hughes, at paragraph 30, expressed his opinion that one non-compliant ballot could have that consequence.

d. The decision of Justice Moreau of the Alberta Court of Queen's Bench in *Anderson v Laderoute*, 2001 ABQB 961, is another example of a provincial statute which authorized a judge to deem an election valid if a violation, error or irregularity had no material impact on the election results. In that case, 14 votes separated the parties. Justice Moreau was of the opinion that, in order for the alleged contravention to have affected the election results, the applicant had to successfully show that not fewer than 14 ballots were inadmissible.

[50] The Quebec case law is similar to that of this Court with regard to the need to consider both steps—the violation and the impact on the results of an election—before making a ruling to set aside the election. I refer to the decision by Judge Lavergne of the Court of Québec in *Danyluk v Wemindji Band (Wemindji Eeyou)*, [2004] 1 CNLR 87, which quoted with approval the decision of the Court of Appeal of Québec in *Dompierre (Re)*, (Qc CA) [1994] JQ No 29, in which Justice Proulx wrote the following:

> [TRANSLATION]
> . . . <u>In electoral matters, it has long been established that an election can only be deemed invalid if the very purpose of the Act, that is, electors' exercise of their democratic rights, has been compromised by failure to observe the formalities</u>. As early as

> 1873, it was decided that, as a rule, any failure that did not prejudice free and full voting cannot invalidate an election

[51] Justice Lavergne also quotes the words of Justice Delisle in *Raymond c Dupont*, JE 91-261 at paragraphs 4 and 7:

> [TRANSLATION]
> It should be noted, from the outset, that it must be with great circumspection that, in a democratic system, the judicial branch intervenes in the people's free choice of its representatives at any level of government.
>
> It is not simply any breach of the formalities prescribed by the Act which gives rise to the setting aside of an election, but only those irregularities that might have had a determinative impact on the person's election that is sought to be set aside.

[52] Last, the decision of the Court of Appeal of Manitoba *Dumont v Manitoba Metis Federation Inc,* 2004 MBCA 149, in a different context, is another example from the line of authority holding that an election will not be set aside if the irregularities did not affect the election result.

[53] Two remarks are in order regarding the nature of judicial review. In *Ontario Assn. of Architects v Assn. of Architectural Technologists of Ontario*, 2002 FCA 218, [2003] 1 FC 331, at paragraphs 29 and 30, Justice Evans expressed the opinion that, unlike in an appeal to this Court under section 56 of the *Trade-marks Act*, where an applicant is entitled to adduce evidence that was not before the Registrar, applications for judicial review "are normally conducted on the basis of the material before the administrative decision-maker", in this case, the appeal board, except in two circumstances. New affidavit evidence is admissible on questions of procedural fairness and jurisdiction (See also the reasons of Justice MacGuigan in *Canada (Human Rights*

Commission) v Pathak, [1995] 2 FC 455 at page 463; and *Gagliano v Canada (Commission of Inquiry into the Sponsorship Program and Advertising Activities)*, 2006 FC 720 at paragraph 50).

[54] Judicial review is subject to a second restriction: in judicial review proceedings, a tribunal cannot improve its original reasons by affidavit. This position was framed clearly by Justice Pelletier in *Sellathurai v Canada (Public Safety and Emergency Preparedness)*, 2008 FCA 255, [2009] 2 FCR 576 at paragraphs 46, 47 and 48 of his judgment.

> The judges of the Federal Court have previously stated that a tribunal or a decision maker cannot improve upon the reasons given to the applicant by means of the affidavit filed in the judicial review proceedings. In *Simmonds v. M.N.R.* 2006 FC 130 (CanLII), (2006), 289 F.T.R. 15, Dawson J. wrote, at paragraph 22 of her reasons:
>
> > I observe the transparency in decision-making is not promoted by allowing decision-makers to supplement their reasons after the fact in affidavits.
>
> See to the same effect *Kalra v. Canada (Minister of Citizenship and Immigration)* (2003), 29 Imm. L.R. (3d) 208 (F.C.), at paragraph 15; *Yue v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 717 (CanLII), 2006 FC 717, at paragraph 3; *Abdullah v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 1185 (CanLII), 2006 FC 1185, at paragraph 13. Any other approach to this issue allows tribunals to remedy a defect in their decision by filing further and better reasons in the form of an affidavit. In those circumstances, an applicant for judicial review is being asked to hit a moving target.
>
> Quite apart from its admissibility on the issue of the reasons for the decision, the Minister's delegate's affidavit raises issues of credibility because the factual issues identified in the affidavit were never raised with Mr. Sellathurai, nor was he ever asked for any explanation of any of the facts which were identified as giving rise to reasonable grounds for suspicion. One would have thought that if the Minister's delegate was examining the facts identified as the grounds for suspicion, he would have made inquiries about them.

D. Standard and burden of proof

[55] Section 8.2 of the Code allows for the election of a Chief or councillor to the Council of the First Nation to be appealed on condition that the elector or candidate has "reasonable grounds to believe" that there was a violation of the Code that might have affected the result of an election to an office or that there were corrupt or fraudulent practices. The words "reasonable grounds to believe" must be interpreted as establishing a standard of proof of less than a balance of probabilities, and the burden of establishing the reasonable grounds to believe rests on the party asserting them. (See the Federal Court of Appeal's decision in *Ramirez v Canada (Minister of Employment and Immigration)*, [1992] 2 FC 306 at pages 311 to 314.

[56] Section 8.7 applies to the appeal board and states the conditions in which the appeal board may reject an election. The standard of proof is higher. The appeal board must be satisfied that there is reason to believe that there was a violation of the Code or that there was corrupt or fraudulent practice in connection with the election. The standard of proof is proof on a balance of probabilities. The burden of proof is on the appellant.

[57] The notion of standard of proof is clear: it is the evidentiary threshold for making a decision. This evidence is found in the Tribunal record (see the Federal Court of Appeal's decision in *Sellathurai*, above, at paragraph 51).

> This leads to the question which was argued at length before us. What standard of proof must the applicant meet in order to satisfy the Minister that the seized funds are not proceeds of crime? In my view, this question is resolved by the issue of standard of review. The Minister's decision under section 29 is reviewable on a standard of reasonableness. It follows that if the Minister's conclusion as to the legitimacy of the source of the funds is reasonable, having regard to the evidence in the record before him, then his decision is not reviewable. Similarly, if the Minister's

> conclusion is unreasonable, then the decision is reviewable and the Court should intervene. It is neither necessary nor useful to attempt to define in advance the nature and kind of proof which the applicant must put before the Minister. [Emphasis added]

E. Discussion and conclusion

1. Preliminary remarks

[58] In support of their submissions, the parties filed several affidavits on which the opposing party conducted cross-examinations. The applicants filed the affidavits of Denis Landry, Christian Trottier, Lucien Millette, Robert St-Ours and Yvon Savard, and the respondents filed the affidavits of Diane M'Sadoques, Karine Rouleau and Raymond Bernard and two affidavits by Dominique Bélanger.

[59] On May 12, 2011, upon motion by the respondents, I had struck certain paragraphs from the affidavit of Yvon Savard for the reason that the Supreme Court of Canada ruled in *Caimaw v Paccar of Canada Ltd*, [1989] 2 SCR 983, that an administrative tribunal, on judicial review before a Superior Court, has a limited right to make submissions and cannot defend the merits of its decision (see pages 1014 and 1015 of the reasons of Justice LaForest).

[60] After a close reading of the affidavits listed at paragraph 58 and the cross-examinations, I am of the opinion that, with the exception of the question of procedural fairness and the appropriate remedy, I cannot give them any weight for the following reasons:

(1) The affidavits are predicated on a false premise, that is, that a judicial review is equivalent to an appeal *de novo*;

(2) They contain new facts that were not before the Tribunal when it made its decision;

(3) A tribunal cannot defend the merits of its decision before the reviewing court; and

(4) A tribunal cannot improve its reasons for decision after the fact.

[61] As stated above, an administrative tribunal may intervene before the Court to defend its jurisdiction, impartiality or observance of procedural fairness. For that reason, in my order dated May 12, 2011, I authorized Mr. Savard, during his cross-examination, to refer to the struck paragraphs in order to establish the spirit in which he made his decision.

2. Errors of the majority

[62] I am of the opinion that, first, the majority misinterpreted the election code of the First Nation in concluding that the points raised in the respondents' two complaints were violations of the Code, and second, the majority also erred in law as follows: (1) by failing to consider the second condition for the application of paragraph 8.7(b) of the Code—[TRANSLATION] "violation that might have affected the result of an election"—(2) or, by reaching a reasonable conclusion on this aspect of the Code, (3) by concluding that the evidence filed by the respondents was sufficient to set aside the election.

[63] I reiterate that the respondents' two complaints raised the following points:

(1) Voter declaration forms were witnessed by the same persons.

(2) The voters list with contact information was given to the candidates who asked for this list.

(3) A tally sheet was given to Lucien Millette after the counting of votes.

(4) The Council's receptionist received completed mail-in ballot envelopes, [TRANSLATION] "which was odd", and the complainants did not know whether those mail-in ballots had been given to the electoral officer.

(5) Last September, Keven Bernard's spouse was subjected to intimidation in order to have him join Denis Landry's team.

(6) The Landry family did not have the right to vote in the election.

[64] I have analyzed the decision of the majority on those six grounds as set out below.

[65] Paragraph 4.7.1(b) of the Code requires the electoral officer to send or give to each elector not residing on the reserve, and for whom an address was provided, a mail-in ballot voting package containing the listed documents, one of which is a voter declaration form. As well, section 5.9 of the Code requires that electors voting by mail-in ballot do so in the way prescribed and in a precise sequence. Those electors, after having voted and placed their ballot in the inner envelope and sealed that envelope, must complete the voter declaration form in the presence of a witness who must attest to the elector's identity. Yvon Savard was correct to state in his arguments that the Code does not prohibit candidates from acting as witnesses, and sets no limit on the number of electors for whom a candidate can act as witness. More importantly, the complainants have failed to provide any evidence of an elector's having been subjected to any pressure by a person who witnessed that elector's declaration form. Furthermore, when the decision was made, the appeal board had received no confirmation of the number of attestations provided by either Denis Landry or Lucien Millette. They had denied, under oath, any pressure in that respect.

[66] The majority failed to apply, regarding the complaints, the fundamental principle that the complainants had the burden of proof of establishing, by credible evidence on less than a balance of probabilities, that the ground asserted was likely. No such evidence has been produced.

[67] The second ground raised by the complainants concerns the fact that the candidates who requested it had access to the voters list with contact information. The board had before it the comments of the electoral officer, who stated having never given a voters list to anyone, that a candidate had raised the issue of access at the beginning, that he had replied that he would check the election code, that he had realized that the incumbent Chief (Raymond Bernard) and councillors had access to this list and that he thought that what was sauce for the goose should be sauce for the gander. The board also had a draft decision dated December 14 prepared by Yvon Savard on behalf of the board, dismissing both appeals, in which he stated that the electoral officer did not object to the list being given and [TRANSLATION] "after having checked, he was told that this practice was accepted, having already been used regularly in the past" (Tribunal record page 71).

[68] In its arguments under point 1, Suspicions of pressure, the majority stated that [TRANSLATION] "[t]he fact that the list including contact information was distributed by the receptionist leads me to suspect that pressure tactics may have been used by different sides in connection with the election results." In my opinion, the conclusion of the majority rests on speculation devoid of evidence meeting the minimum threshold to which complainants are held of showing, on less than a balance of probabilities, that there was a possibility of practices or violation of the Code that might have affected the election results. In addition, I see no provision in the Code prohibiting candidates from having access to this list, which was common practice in elections (point 2 of the arguments of the majority).

[69] As regards the second ground—the fact that Mr. Millette received a tally sheet from one of his representatives present at the counting of votes—the board had the electoral officer's

comments stating that all of the representatives witnessing the counting could know who had voted, but could not know for whom those electors had voted. He would have preferred that the list remain in the room. His view was that the fact that one of the representatives exited with a list of the electors who voted did not compromise the duty of secrecy. The majority, in its arguments, brushed aside the electoral officer's opinion that the secrecy of the vote was not compromised on the ground that [TRANSLATION] "[t]his is not a provincial election where there are 5,000 votes . . . out of 263 votes, it is very easy to figure out who voted for whom". The majority did not explain how the secrecy of the vote might have been compromised. More importantly, the majority did not explain how the tally sheet given to Mr. Millette after the ballots were counted could have influenced the election results.

[70] The fourth ground raised by the complainants concerns the fact that the mail-in ballot envelopes were received at the reception desk. In his comments, the electoral officer, Robert St-Ours, stated that he oversaw the distribution of all of the mail-in packages. He stated that he had in hand the voter declaration forms of Réjean Bonneville and his family and had instructed that those envelopes be placed in a drawer in his office. In their arguments, the majority makes no comment on this point. It criticizes the electoral officer's conduct in authorizing Lucie Landry to give some electors residing on the reserve one or several mail-in ballot voting packages. The majority relies on section 4.7.3 of the Code, which requires the electoral officer to provide the elector with the documents. The majority seems to be of the opinion that this section imposes on the officer a personal obligation that cannot be delegated. This interpretation must be ruled out for two reasons:

(1) Read as a whole, the electoral officer's mandate is to conduct the election process, which implies that the officer can rely on others to accomplish certain administrative tasks he or she is mandated to do; and

(2) The Court, in *Hudson*, above, at paragraph 67, acknowledges the Minister's implicit power to delegate. In my opinion, this analogy extends to the electoral officer.

[71] As regards the fifth ground, that of intimidation, Mr. Savard investigated this point by questioning the perpetrator of the intimidation. He shared his findings with the other members of the board, noting that, for one thing, Mr. Ross denied having intimidated Karine Roulean and that, for another, Messrs. Landry and Millette has asserted that there was no evidence linking the applicants and the perpetrator of the intimidation, if any. The majority ignored this evidence.

[72] Last, as regards the point to do with voting rights, my reading of the decision and the arguments of the majority is that it did not accept this ground asserted by the complainants. In any event, Mr. Savard's argument on this point is eloquent and very simple. During the election of November 24, 2010, the Landry family had voting rights; they were registered on the voters list and no one challenged to the electoral officer their right to be registered for this election.

[73] There were later developments in that, as a result of a decision made by the Minister on January 28, 2011, the Landry family lost their registration in the Register as Status Indians, with a right of contestation to the Superior Court of Québec.

[74] It also appears that the Landry family lost their voting rights following a limited general meeting of band members of the First Nation, which apparently amended the membership code—a decision subsequently approved by the Council of the First Nation in February 2011.

[75] These events cannot affect the decision of the board under review in these proceedings.

[76] There is another point to be decided. The respondents submit that the applicants cannot receive any relief from this Court because they do not have clean hands.

[77] In their memorandum of fact and law, the applicants state the following:

> [TRANSLATION]
> During the election process, in the appeal before the Board following the election of November 14, 2010, and in this application for judicial review, the applicants collectively failed to observe the rules of procedural fairness and therefore cannot ask the Court to exercise its discretion on judicial review to set aside the Board's decision; [Emphasis added]

[78] In support of their allegations, the respondents submit the following

1. Denis Landry and Lucien Millette illegally obtained the voters list with contact information from Lucie Landry.
2. Yvon Savard had private conversations with counsel for the Landry family in this case, but failed to share the contents of those conversations with the other board members.
3. Mr. Savard investigated the respondents' complaints without having been appointed by the appeal board and without submitting to it a detailed report, which contravened section 8.6 of the Code.

[79] As stated, when the Court is faced with allegations of a breach of procedural fairness, the Court may receive new evidence. This new evidence was provided by the affidavits of Yvon

Savard, Robert St-Ours, Dominique Bélanger and Diane M'Sadoques, as well as those of Christian Trottier and Lucien Millette on which cross-examinations were conducted.

[80] The respondents had the burden of showing that the clean hands doctrine applied in this case. My assessment of all of the evidence leads me to conclude that it was insufficient to deny the applicants an appropriate remedy. My reasons are as follows.

[81] Messrs. Landry and Millette did not illegally obtain the voters list with contact information. The electoral officer never told Mr. Landry that he could not obtain it. What he did say was that he, as the electoral officer, could not give it to him. What is more, the evidence in the record from Mr. Landry, but especially from Christian Trottier and Dominique Bélanger, shows that it was common practice for candidates to have access to this list in order to campaign or check electors' addresses to go door to door. The electoral officer had become aware of this practice and, for that reason, did not prohibit it.

[82] It is true that Mr. Savard investigated without having been formally appointed by the appeal board to do so. In his affidavit, dated January 5, 2011, he acknowledges that he contacted the interested parties. In particular, he contacted the Band Council of which Raymond Bertrand is the Chief, the members of the Council elected on November 14, 2010, and their representative, Mr. Paul Dionne. He states that his [TRANSLATION] "communications" were only intended to collect information from all parties to verify the accuracy and seriousness of the allegations set out in the election appeals. He also stated that that his communications with the incumbent Council were generally conducted through Ms. M'Sadoques. Regarding his communications with Mr. Dionne, counsel, he wrote the following at paragraphs 6 and 8 of his affidavit:

> [TRANSLATION]
> On rare occasions in the course of the appeal process, I approached Paul Dionne, but only for explanations regarding a decision by the Minister concerning the contestation of Denis Landry's Indian status. For that purpose he sent me a judgment, which I considered, but which had no impact on the position I had already adopted.
>
> Mr. Dionne did not intervene in my decision-making process other than through the information he sent me concerning Mr. Landry's Indian status, which I considered without bias;

[83] The evidence in the record of the Court and in the Tribunal record shows that Mr. Savard revealed the results of all of his research to the board members, particularly by means of his draft decisions. Mr. Savard's words are corroborated by the evidence in the Tribunal record.

[84] I agree that the appeal board and each of its members had a duty of fairness. However, such a duty does not determine which requirements will apply in a given situation. In the Supreme Court of Canada's decision *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, Justice L'Heureux-Dubé, writing for the Court, stated at page 837 that the concept of procedural fairness is eminently variable and its content is to be decided in the specific context of each case.

[85] The respondents are relying on the decision of Justice Rothstein, then a Federal Court judge, in *Sparvier v Cowessess Indian Band*, [1993] 3 FC 142, by referring more specifically to the passage in his reasons in which he points to paragraphs 4 and 5 of the Supreme Court of Canada's decision in *Kane v Board of Governors (University of British Columbia)*, [1980] 1 SCR 1105.

[86] With respect, the context of *Sparvier* is different from the case before this Court in that, in *Sparvier*, the appeal board had proceeded by way of hearing, whereas, in the case at bar, Mr. Savard and Ms. M'Sadoques (the record contains no evidence of Louise Bernard's participation in the process) each carried out their respective verifications and then shared them in the form of draft decisions leading to discussions between them. There is no evidence before me that either Mr. Savard or Ms. M'Sadoques was investigating "on the sly", or that not all of the information gathered was shared. In Mr. Savard's case, there is evidence to the contrary in his activity report, Exhibit YS-1 of his cross-examination.

[87] The respondents state that Ms. M'Sadoques did not learn until afterwards that there had been communication between Mr. Savard and Mr. Dionne. On cross-examination (Applicants' Record page 427), Ms. M'Sadoques stated that she had that knowledge from Ms Dominique Bélanger, who had examined Lucie Landry's computer. Mr. Savard stated on cross-examination that he had informed the other two board members that he had consulted Mr. Dionne solely on the issue of the voting rights (Respondents' Record page 427). I prefer Mr. Savard's testimony; he was entirely independent.

[88] I agree that Mr. Savard's and Ms. M'Sadoques' method of proceeding by way of individual investigation did not comply with the Code, but I do not see how this violation could have affected the election result, especially since Mr. Savard had suggested to the majority that an independent investigator be appointed to investigate, a suggestion that the majority refused on the irrelevant ground that it was important to make a decision swiftly.

[89] The applicants are asking me to overturn the appeal board's decision on the ground that Ms. M'Sadoques' and Louise Bertrand's involvement raised a reasonable apprehension of bias. The respondents submit that it is too late to raise that ground. They refer to the decision of my colleague, Justice Beaudry, in *Bacon v Appeal Board of the Betsiamites Band Council*, 2009 FC 1060 (*Betsiamites*), at paragraph 69. I agree with the respondents. The case law is clear and requires that a party who has a reasonable apprehension of bias by a tribunal member must raise that ground at the earliest practicable opportunity. In this case, the applicants should have raised that issue from the start.

F. Appropriate relief

[90] According to my analysis of the facts and law, the majority decision of the appeal board setting aside the election of November 14, 2010, cannot stand, essentially for three reasons: (1) the appeal board misinterpreted certain provisions of the Code allowing it to find one or more violations of the Code; (2) considering the significant gap in votes separating the candidates, the board neglected to consider or unreasonably applied the second condition set out at paragraph 8.7(b) of the Code before deciding that the applicants' complaints had merit; and (3) the appeal board had insufficient evidence to find that there were reasonable grounds to believe a violation of the Code had occurred which might have affected the election result or that the applicants had engaged in corrupt practices. What is more, the appeal board lacked any evidence sufficient to conclude that it appeared that such was the case.

[91] Since the decision cannot survive these errors, the decision to set aside the election must be overturned. In such cases, the normal practice is to refer the matter back for redetermination.

[92] However, in some cases, the judges of this Court have refrained from referring the matter back for redetermination. (See *Hudson*, above, at paragraphs 111 and 112).

[93] The Federal Court of Appeal, in *Yassine v Canada (Minister of Employment and Immigration)*, [1994] FCJ No 949, acknowledged at paragraphs 9 and 11 that the Court, sitting in judicial review, has the power to not refer the matter back for redetermination if the referral back would be to no purpose, a consideration that I believe applies in this case. In the event that a referral were made to a differently constituted appeal board, the result would be inevitable. The election of November 14, 2010, must be deemed valid for the reasons below.

1. The applicants will not be able to present new evidence to this board; it would be unjust to allow them to do so (See the Federal Court of Appeal's decision in *Francella v Canada (Attorney General)*, 2003 FCA 441 at paragraphs 8 and 9.

2. Even if such new evidence could be presented, the cross-examinations of Chief Bernard and Ms. M'Sadoques show that this new evidence would add but little to the evidence already adduced, especially as regards the effects of the violations on the election results.

3. The evidence submitted by the respondents to the appeal board was vastly insufficient to support their allegations of corrupt practices or violations of the Code.

4. The majority of this appeal board erred in law in its interpretation of the Code. What the respondents alleged to be a violation was, in fact, no such thing.

5. Even supposing that there was a violation of the Code, the respondents have failed to show how those violations might have affected the election results, given the gap in votes between the candidates.

6. To conclude, I am of the opinion that the process followed for the election of November 14, 2010, respected the democratic principle, and that the persons elected democratically should be reinstated immediately.

JUDGMENT

THIS COURT ORDERS that this application for judicial review be allowed and that the Tribunal's decision dated December 21, 2010, setting aside the election of November 14, 2011, be overturned. The applicants will be entitled to their costs in accordance with the highest number of units under Column IV of the Tariff of this Court for each assessable service payable by the respondents.

"François Lemieux"
Judge

Certified true translation
Sarah Burns

APPENDIX

- Sections 1.3, 1.4 and 1.5, with regard to some definitions:

[TRANSLATION]

1.3 Elector

A person who

(a) is on the Band List of the Première nation des Abénakis de Wôlinak or is entitled to have his or her name entered on the Band List;

(b) is of the full age of eighteen (18) years, on the day of the election; and

(c) is not disqualified from voting in elections of the First Nation.

1.4 Voters list

The list of the electors of the Première nation des Abénakis de Wôlinak maintained by the Band registrar.

1.5 Electoral officer

The person appointed by a resolution of the Council of the Première nation des Abénakis de Wôlinak to conduct the election process set out in this Code and ensure that the Code is followed.

- Section 2.10, paragraph 4.7.1(b) and sections 4.7.3, 4.14, 5.1, 5.2, 5.7 and 5.8:

[TRANSLATION]

2.10 The electoral officer must act impartially in the performance his or her duties.

The electoral officer may, in addition to his or her responsibilities under this Code, be consulted by the Council regarding any interpretation of the regulations or election-related advice.

In the event of the temporary and/or permanent disability and/or in the event of the resignation of the electoral officer, the Council of the First Nation will immediately appoint a new electoral officer. Barring exceptional circumstances, such a replacement must not affect the election process underway.

The electoral officer's mandate ends once the electoral officer destroys the ballots in accordance with the provisions of this Code, or has disposed of the ballots in the manner so ordered after the resolution of an appeal.

4.7.1(b) Mail or give the following documents to every elector of the First Nation not residing on the reserve for whom an address has been provided:

i. A notice of poll;

ii. A ballot, initialled on the back by the electoral officer;

iii. An inner envelope marked "ballot", in which the completed ballot must be placed;

iv. An outer envelope, that is, a postage-paid return envelope pre-addressed to the electoral officer;
v. A voter declaration form; and
vi. Mail-in ballot voting instructions.

4.7.3 Upon request by any elector residing on the reserve, the electoral officer provides that elector with the documents described at paragraph (1)(b).

4.14 The electoral officer makes a note beside the names on the voters list that a ballot was provided to each elector to whom a mail-in ballot was mailed, given or otherwise provided. The electoral officer keeps a record of the addresses of the electors who were mailed or given a mail-in ballot and the date on which each mail-in ballot was mailed or given.

5.1 To prepare the voters list, as soon as the electoral officer is appointed, the person responsible for membership in the First Nation must provide the electoral officer with an up-to-date members list with each member's date of birth, band or membership number and address.

5.2 The electoral officer must post, in one or more public places on the reserve, one or more copies of the list of the electors' names, at least thirty-five (35) days before the election is held.

5.7 All mail-in ballots received before the date of the election are kept in a sealed ballot box in the charge of the electoral officer or deputy electoral officer until the counting of the votes, at which time they are incorporated into the regular ballot box and counted with the other votes.

5.8 The electoral officer keeps the list of electors who voted by mail.

- Section 5.9 sets out the manner in which the elector voting by mail may do so:

[TRANSLATION]
1. An elector may vote by mail-in ballot by

(a) marking the ballot by placing a cross (+), an X or a check mark within or by filling in completely the square opposite the name of the candidate or candidates for whom he or she wishes to vote;

(b) folding the ballot in a manner that conceals the names of the candidates and any marks but exposes the electoral officer's initials on the back;

(c) placing the ballot in the inner envelope and sealing that envelope;

(d) completing and signing the voter declaration form in the presence of a witness who is at least 18 years of age and who attests to the elector's identity;

(e) placing the inner envelope and completed voter declaration form in the outer envelope;

(f) giving or, subject to subsection (6) below, mailing the mail-in ballot to the electoral officer before the polls close on the day of the election. Subsection (6) provides that mail-in ballots that are not received by the electoral officer before the polls close on the day of the election are void.

2. Where an elector is unable to vote in the manner set out in subsection (1), the elector may enlist the assistance of another person to mark the ballot and complete and sign the voter declaration form in accordance with that subsection.

3. A witness referred to in paragraph (1)(d) attests to

(a) the fact that the person completing and signing the voter declaration form is the person whose name is set out in the form; or

(b) where the elector enlisted the assistance of another person under subsection (2), the fact that the elector is the person whose name is set out in the form and that the ballot was marked according to the directions of the elector.

- The following sections pertain to secret voting:

[TRANSLATION]
5.18 Secret voting

In all elections, voting is by secret ballot.

5.19 Co-operation

Every person in attendance at a polling place or at the counting of the votes shall maintain and aid in maintaining the secrecy of the voting.

5.20 Voting

No person shall interfere or attempt to interfere with an elector when marking his or her ballot paper or obtain or attempt to obtain at the polling place information as to how an elector is about to vote or has voted.

5.20 Sealing

The electoral officer or the deputy electoral officer must, immediately before the opening of the poll, open the ballot box and call the persons present to witness that it is empty. He or she must then lock and properly seal the box to prevent its being opened without breaking the seal and must place it in view to receive the ballots.

The seal must not be broken and the box must not be unlocked during the time appointed for taking the poll.

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-16-11
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DATE OF HEARING:	April 20, 2011
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DATED:	June 17, 2011

APPEARANCES:

Paul-Yvan Martin	FOR THE APPLICANTS
Éric Oliver	FOR THE RESPONDENTS

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