Federal Court  Cour fédérale

Date: 20140528

Docket: T-1819-12

Citation: 2014 FC 508

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Ottawa, Ontario, May 28, 2014

PRESENT: The Honourable Mr. Justice de Montigny

BETWEEN:

GUY MEDZALABANLETH

Applicant

and

ABÉNAKI OF WÔLINAK COUNCIL

Respondent.

JUDGMENT AND REASONS

[1] By means of this application for judicial review, the applicant, Guy Medzalabanleth, is challenging the decision by the election appeal board (Appeal Board) of the Abenaki of Wôlinak Band Council (the Respondent) rendered September 1, 2012, which affirmed the conclusion of its Chair's Investigation Report that there had not been any violation of the *Election Code*. As a result, the Appeal Board declared that the results of the election held in Wôlinak on June 10, 2012 were valid.

[2] For the reasons listed below, I feel that the applicant's application for judicial review must be dismissed. The applicant did not show the existence of a reasonable apprehension of bias, and the interpretation of the *Election Code* made by the Electoral Officer and the Appeal Board was reasonable.

I. Facts

[3] The Abénakis of Wôlinak is a band within the meaning of the *Indian Act*, RSC 1985, c. I-5. The applicant is a member of this band. It is undisputed that the band has controlled its membership within the meaning of section 10 of the *Indian Act* since June 23, 1987, as indicated in the *Membership Code* of the Abénakis of Wôlinak and the correspondence of the Department of Indian Affairs produced in support of Denis Landry's affidavit.

[4] On April 26, 2012, an election notice was issued for the positions of Chief and non-status councillor. The election, which was scheduled for June10, 2012, was governed by the Abénakis of Wôlinak's *Election Code* that had been approved by the Department of Indian Affairs on May 29, 2009.

[5] The election notice also noted that the Band Council had, by resolution, appointed Claude Philippe as the Electoral Officer of this election, as well as Yvon Savard, Daniel Landry and Stéphan Landry as members of the Appeal Board. Lastly, the notice reminded voters that [TRANSLATION] "it is their responsibility to verify the information on the voter's list and ensure that the registration coordinator makes all necessary corrections."

[6] During the nomination meeting of May 11, 2012, four candidates presented themselves for the position of Chief (including Denis Landry and Raymond Bernard, for whom the applicant acted as agent), and two candidates presented themselves for the position of non-status councillor (Gaétan Landry and Réjean Bonneville).

[7] Also on that day, the applicant submitted an application for a revision of the electoral list. In this application, he noted that many members of the Medzalabanleth family, who should have been on the list, were not. The application also noted that many individuals whose names were on the list (including Denis Landry and Gaétan Landry) should not be because they had been removed from the Registry of Indian and Northern Affairs Canada.

[8] The Electoral Officer responded to the applicant by email on May 12, informing him that his comments would be taken into consideration in his final election report.

[9] On May 30, 2012, the applicant submitted another application through his counsel for a review of the electoral list pursuant to section 5.3 of the *Election Code*, essentially restating the reasons raised in the first application for revision. The Electoral Officer replied on May 31, 2012, that he did not have the required jurisdiction to conduct the review the applicant was seeking, noting that unless additional information was received, the decision would become final on June 1, 2012.

[10] In a letter dated June 5, 2012, counsel for the applicant responded to the Electoral Officer, noting that the preparation of the electoral list is not a purely clerical procedure that

consists of transcribing the Band List but also involves the duty to ensure that those who are eligible to vote can do so.

[11] It was in this context that the election was held as planned on June 10, 2012. Denis Landry was re-elected as Chief with 149 votes (versus 100 for Raymond Bernard and 39 for Paul Lefebvre), while Gaétan Landry was elected as non-status councillor by 170 votes (versus 111 for Réjean Bonneville).

[12] On July 4, 2012, the applicant served his appeal against the election on the Appeal Board in accordance with section 8.2 of the *Election Code*. The applicant restated that the Electoral Officer erred by refusing to make a ruling on his request for a revision of the electoral list. Given the applicant's concerns about the impartiality of the Appeal Board (Stéphan Landry being Denis Landry's brother), the Board found it appropriate, [TRANSLATION] "to ensure transparency", to confer consideration of this appeal to the Chair of the Board, Yvon Savard.

[13] Mr. Savard filed his report to the Appeal Board on August 31, 2012 ("Investigation Report"). Addressing each point the applicant raised in his Statutory Declaration in support of his appeal, Mr. Savard found that there was no violation of the *Election Code* during the June 10, 2012, election and that the election results were to be upheld. The Appeal Board confirmed the findings unanimously on September 12, 2012.

[14] On 15 October 2012, the applicant submitted an application for judicial review of the Appeal Board's decision.

II. The impugned decision

[15] Since the Appeal Board adopted all the findings of the Investigation Report, which was very well documented (the Report consists of 30 pages), the focus will be on the highlights of the Report.

[16] To respond to the applicant's many allegations, the investigator conducted thorough research, reviewing various documents considered in Electoral Officer's Report, by obtaining additional documents, by contacting the former Band Registrar and his replacement, the Electoral Officer and two representatives of candidates present at the review of the ballot boxes to obtain further information. The investigator also reviewed various decisions rendered in other similar cases.

[17] The applicant first questioned the eligibility of Denis Landry and Gaétan Landry, on the ground that they were both "non-status". The investigator dismissed this charge, stating that Denis Landry was registered in the Indian Registry on May 2, 2012, and that in any event, section 2.1 of the *Election Code* provides that the Chief's position may be held by a status or non-status elector. As for Gaétan Landry, being non-status did not disqualify him but rather constituted an essential condition to his eligibility as non-Aboriginal councillor in accordance with section 2.1 of the *Election Code*.

[18] The applicant also alleged that the Electoral Officer had refused to consider his requests to correct the electoral list. On this, the investigator first noted that the Officer followed up on

the requests, indicating they would be taken into consideration in his election report, and correctly declined his jurisdiction with regard to the requests on amendments to the Registry. With regard to the applicant's claim that the votes were rejected irregularly, the investigator noted that 33 mail-in ballots were rejected because they did not follow the formalities set out at section 5.9 of the *Election Code* and this was done with the unanimous support of all the candidates' representatives including the applicant.

[19] The investigator then considered at length the applicant's allegation that many individuals who did not have the right to vote nonetheless exercised this right during the June 10, 2012, elections. On this, the investigator wrote:

> [TRANSLATION]
>
> Further to the analysis of the existing documentation on previous elections in Wôlinak, I noted that over the past 15 years, there have been many election challenges in Wôlinak, most of which were with regard to the same issue, namely whether the non-status members had the right to vote and present themselves as candidates at Band elections. This issue has always been decided in the same very clear manner, by independent committees, tribunals or even by the Department of Indian Affairs. Specifically, the answer in these cases has always been, in essence, that since 1987, the band has had control of its members, and had full latitude to accept non-status individuals as members and to allow them to vote and be candidates at elections.
>
> Applicant's record, p. 29.

[20] The investigator added that this approach has been confirmed and reinforced since the 2008 adoption of a custom election code, section 2.1 of which states that one of the four councillor positions must be filled by a non-Aboriginal elector and the position of Chief may be held by either a status or non-status elector. For this provision to have meaning, he wrote,

[TRANSLATION] "there must be non-status members on the Band List and the electoral list" (applicant's record, p. 30). Lastly, he relies on a decision by Justice Lemieux regarding this same Band (*Landry v Bernard*, 2011 FC 720) to state that an election shall be set aside under sections 8.2 and 8.7 of the *Election Code* only in the event that two conditions are met: [TRANSLATION] "...there must be not only one or more reasonable grounds to believe there was a violation, but also and despite the existence of the ground, it must be shown that this ground affected the election result." (applicant's record, p. 31)

[21] The investigator then addressed the procedural allegations the applicant presented. In light of the information he had and the verifications he conducted with the Electoral Officer, he stated that he felt the provisions of the *Election Code* that govern the nomination meeting, the electoral list, monitoring mail-in ballot boxes, the return envelopes for mail-in ballots, mail-in ballot voting packages, position of the voting compartments, voting record and the non-use of electronic devices were all respected. Additionally, the withdrawal of a candidate to the Chief position was communicated to all voters at the time of the vote, even though the ballots could not be reprinted in time. According to the investigator, the Electoral Officer showed judgment by acting this way. The applicant's allegations regarding the fact a voter was allegedly able to vote without identifying himself were considered unfounded. Lastly, the investigator noted that it was reasonable for the Electoral Officer to amend the voter declaration because the Code has no provision for this and the new declaration did not violate the vote secrecy or the acceptation of votes.

III. Issues

[22] The applicant raised many questions, which I feel could be rephrased in a useful manner as follows:

A. Do the appointment and behaviour of the Electoral Officer and members of the Appeal Board raise a reasonable apprehension of bias?

B. Did the Appeal Board err in law considering the Electoral Officer correctly exercised his jurisdiction pursuant to the *Election Code*, in particular with regard to the composition of the electoral list and the Band Registry?

C. Do the various procedural violations raised by the applicant constitute violations of the *Election Code*? If so, do these violations justify setting aside the June 10, 2012, election?

IV. Analysis

[23] I feel there is no doubt that the applicable standard of review for the first issue is that of correctness. This is an issue of procedural fairness that does not involve any deference on the part of a reviewing court: *Canadian Union of Public Employees (C.U.P.E.) v. Ontario (Minister of Labour)*, 2003 SCC 29, [2003] 1 SCR 539 at para 100; *Canada (Attorney General) v Sketchley*, 2005 FCA 404 at paras 52 et seq.

[24] As for the third question, it involves the application of a legal standard for situations of fact. Such questions of mixed fact and law must be reviewed using the reasonableness standard: *Salt River First Nation #195 v. Martselos,* 2008 FCA 221 at paras 28 et seq.

[25] What about the second question? In *Landry v Bernard*, Justice Lemieux stated that he felt the interpretation of the *Election Code* by the Band Council must be reviewed using the standard of correctness. Justice Beaudry reached a similar conclusion regarding the decision of an appeal board involving the interpretation of an election code: *Bacon v Appeal Board of the Betsiamites Band Council et al.,* 2009 FC 1060.

[26] In this case, I feel that the standard of reasonableness should apply, using a similar reasoning as that developed by my colleague, Justice Mosley in *Cameron v Ashcroft Indian Band Council*, 2012 FC 579 [*Cameron*]. Of particular interest in this case was a decision in which the Minister of Indian and Northern Affairs Canada dismissed an appeal filed under section 12, of the *Indian Band Election Regulations,* CRC, c 952, regarding the election of a Band Council. Relying on the fact the provisions regarding the elections in the *Indian Act* and the Regulations are the area of expertise of the decision-maker, that the question of law involved was not of central importance to the legal system, and there was reason to believe the minister's delegate had expertise in interpreting electoral laws and applying them in accordance with the Department's policies, Justice Mosley found that the applicable standard of review was reasonableness.

[27] I feel that the same applies in the present case. First, I would note that the issues in question involve the interpretation of the *Election Code* and, incidentally, the *Membership Code* of the Abénakis of Wôlinak Band rather than the *Indian Act*, which reduces the impact of the decision on the legal system. Additionally, it seems clear to me that the issues in question are within the expertise of the Appeal Board. Lastly, as in *Cameron*, the Chair of the Appeal Board, whose investigation report is essentially the impugned decision, was not new to the job. Not only had he actively participated as coordinator for the drafting of the *Election Code* and the *Membership Code*, but it appears he was also the chair of the Appeal Board for the November 14, 2010, elections.

[28] This approach has the advantage of being consistent with the most recent Supreme Court case law on judicial review. In *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 SCR 654, the majority stated (at para 39): "When considering a decision of an administrative tribunal interpreting or applying its home statute, it should be presumed that the appropriate standard of review is reasonableness." Issues of legislation interpretation therefore generally require deference in cases of judicial review.

A. *Do the appointment and behaviour of the Electoral Officer and members of the Appeal Board raise a reasonable apprehension of bias?*

[29] The applicant claimed that two elements resulted in a reasonable apprehension of bias and of the independence of the Electoral Officer. It was first noted that he was appointed and paid by the Band Council, which was being led by the person who was re-elected as Chief at the June 10, 2012, election (Denis Landry). Then, the fact was raised that he requested and obtained

legal advice from Paul Dionne, counsel, when he was also counsel for the Landry family during the appeal proceedings against their deletion by the Registrar of Indian Affairs.

[30] The applicant also raised the apprehension of bias of the Appeal Board, whose members were also appointed by the Band Council. This apprehension is reinforced, in the applicant's opinion, by two of the Committee members' asking the Chair to act an investigator to ensure transparency.

[31] After having carefully analyzed the file, I cannot agree with these allegations. Even if the allegations of bias were not late since the applicant was not aware of the Electoral Officer's and the Appeal Board's requests for legal advice from Mr. Dionne until July 2013, they must still be dismissed because they are not supported by the evidence.

[32] It must first be restated that the allegations of bias must be analyzed thoroughly, considering the possible impact they could have on the parties in question: *Giroux v Swan River First Nation*, 2006 FC 285. The test to apply is well-known and was formulated in this excerpt, cited countless times, by Justice de Grandpré in *Committee for Justice and Liberty et al. v. National Energy Board et al.*, [1978] 1 SCR 369 at p. 394:

> ... the apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information. In the words of the Court of Appeal, that test is "what would an informed person, viewing the matter realistically and practically—and having thought the matter through—conclude....
>
> See also: *R v S.(R.D.)*, [1997] 3 SCR 484 at para 111; *Wewaykum Indian Band v Canada*, 2003 SCC 45, [2003] 2 SCR 259 at para 76.

[33] Clearly, the application of this test must take the specific circumstances of each case into consideration, and in particular, the fact that the Abénakis of Wôlinak is a small population and on election day had only 511 voters. On this, I adopt the statements made by my colleague Justice O'Keefe in *Lower Nicola Indian Band v Joe*, 2011 FC 1220, in which the apprehension of bias was also raised in the context of an election challenge:

> [45] This test will not necessarily be applied rigorously to the LNIB. The LNIB is a Band of approximately 800 electors. This, inevitably, will create difficulty in convening Council of Elders where familial and business relationships are not present.
>
> [46] In *Sparvier v Cowessess Indian Band #73* (1993), [1994] 1 CNLR 182 (FCTD), the petitioner seeking judicial review of an election appeal tribunal alleged that the tribunal was biased because one of the members maintained a business relationship with the applicant who appeared before it. Mr. Justice Marshall Rothstein addressed this, noting that the test for bias could not be strictly applied to a small Band of 408 participating electors. Mr. Justice Rothstein stated at pages 198 to 199:
>
> > ... it does not appear to me to be realistic to expect members of the Appeal Tribunal, if they are residents of the reservation, to be completely without social, family or business contacts with a candidate in an election. …
> >
> > If a rigorous test for reasonable apprehension of bias were applied, the membership of decision-making bodies such as the Appeal Tribunal, in Bands of small populations, would constantly be challenged on grounds of bias stemming from a connection that a member of the decision-making body had with one or another of the potential candidates. Such a rigorous application of principles relating to the apprehension of bias could potentially lead to situations where the election process would be frustrated under the weight of these assertions. Such procedural frustration could, as stated by counsel for the respondents, be a danger to the process of autonomous elections of band governments.

[34] What about the case at bar? First, I would note that the Electoral Officer was appointed in accordance with sections 1.5 and 2.9 of the *Electoral Code*, which states the following:

> [TRANSLATION]
>
> **1.5** Electoral officer
>
> The person appointed by a resolution of the Council of the Abénakis of Wôlinak First Nation to conduct the election process set out in this Code and ensure that the Code is respected.
>
> **2.9** Forty-five days before the end of the mandate of the outgoing Council Members, the Council shall announce by public notice the vacant positions, the expected election date and shall appoint the persons who will act as officer and the members of the Appeal Board.

[35] The impartiality of the Electoral Officer cannot be questioned simply because he was appointed by a Band Council whose Chief was then re-elected, or because he earns compensation as a consultant. This evidence is clearly insufficient to create a reasonable apprehension of bias. He is not a band member and was appointed based on his specific expertise in interpreting the *Electoral Code* (this was his second mandate as Electoral Officer for the Abénakis of Wôlinak) and his previous experience (he was an employee at the Department of Indian and Northern Affairs Canada and had acted as electoral officer in other communities).

[36] Nor do I see anything wrong with the fact the Electoral Officer obtained legal advice from Mr. Dionne. It would undoubtedly have been more cautious for him to consult a lawyer who was not involved in the Band Chief's personal affairs; however, Mr. Dionne was the Band Council's legal counsel and the Electoral Officer can therefore not be faulted for relying on his services during his mandate. With no evidence to the contrary (and the applicant chose not to question Mr. Dionne), the assumption is that Mr. Dionne was respecting the rules that govern the

occupational conflicts of interest and the code of discipline. Moreover, the Electoral Officer was not required to follow this advice and had complete independence.

[37] The apprehension of bias with regard to the Appeal Board members also seems unfounded to me. As with the Electoral Officer, the members of this Committee were appointed in accordance with the *Election Code*, which states the following under article 8.1:

> [TRANSLATION]
>
> **8.1** Appeal Board
>
> When it appoints the Electoral Officer for an election pursuant to article 2.8, the First Nation Council shall also appoint the members of the Appeal Board for this election.
>
> The Appeal Board is composed of three individuals, aged 18 or older, two of which shall be members of the First Nation and one of which shall ideally be a legal practitioner or, if not, shall have recognized experience in the field, and who shall act as chair.
>
> The committee members may adopt internal operational rules subject to the present Code and shall make their decisions based on a majority.
>
> The mandate of the Appeal Board ends once a decision is rendered in case of an appeal or otherwise, 35 days after the election date if there is no appeal.

[38] Again, it would have been preferable to not appoint the brother of one of the candidates for Chief (Stéphane Landry) as an Appeal Board member. However, I feel that considering the procedure followed, the presence of this member did not affect the impartiality of the decision made by the Appeal Board.

[39] It is important to state that Daniel Landry is only a distant relative of the elected Chief, Denis Landry (Denis Landry's interview, pp. 48-50; Applicant's record, pp. 703-705). It is therefore apparently for transparency and to follow up on the apprehension of bias raised by Raymond Bernard that he decided not to participate in the investigation resulting from this complaint and chose to give the mandate to the chair of the Appeal Board.

[40] This procedure is entirely in accordance with the *Election Code*, which states the following at article 8.6:

> [TRANSLATION]
>
> **8.6** Investigation
>
> The Appeal Board may, if it feels the alleged facts are not sufficient to decide on the validity of the election that is the subject of the complaint, conduct or arrange for an investigation that is as thorough as it deems necessary and in the manner it feels is appropriate.
>
> (a) This investigation may be held by the Appeal Board, one of its members or any person the Appeal Board designates for this purpose.
>
> (b) When the Appeal Board designates one of its members or another person to conduct such an investigation, that member or person shall present a detailed investigation report to the Appeal Board for review.

[41] The impartiality of the Chair of the election committee was not questioned by the applicant, and there is nothing in the investigation report that suggests any doubts to this effect. The applicant notes, however, that the Appeal Board's decision to approve this report is fraught with bias because two of the three members were not impartial. However, as mentioned above, there was no proof that Daniel Landry had a significant family relationship with elected Chief

Denis Landry to the extent that it would be sufficient to result in the apprehension that he would not be partial. As a result, only one of the three members of the Appeal Board (Stéphane Landry) was related to the elected Chief, and he did not participate in the investigation; he merely approved the Chair's report. There is no evidence that he attempted to influence the Chair. In the circumstances, I feel that the applicant did not meet his burden of establishing that the Appeal Board's decision leads to an apprehension of bias. Keeping in mind that the principles regarding the apprehension of bias must apply while considering the family relationships that necessarily link many members of a small band, and considering that the process the Appeal Committee followed minimized the risk of undue influence that one of the members may have had because of his relationship with the person whose election was being challenged, it seems to me that no individual who is fully aware of the situation would think that the Appeal Board rendered a decision that, in all likelihood, was not fair.

[42] For all the above-noted reasons, I dismiss the allegations of bias presented by the applicant against the Electoral Officer and the Appeal Board.

B. *Did the Appeal Board err in law considering the Electoral Officer correctly exercised his jurisdiction pursuant to the Election Code, in particular with regard to the composition of the electoral list and the Band Registry?*

[43] As mentioned above, the applicant addressed the Electoral Officer twice for him to remove 112 members of the Landry family and 168 other band members from the electoral list on the ground that they had lost their status as Indian registered on the Indian Registry maintained by the Department of Aboriginal Affairs and Northern Development Canada [AANDC]. On May 31, 2012, the Electoral Officer responded to these requests as follows:

> [TRANSLATION]
>
> My responsibility with regard to the electoral list as stipulated at article 5.1 of the Election Code currently in force is to create an electoral list using the band list created by the Band Registrar.
>
> In this context, it is my responsibility to verify whether the individuals on the electoral list have the qualities of elector as described at article 1.3 of the Election Code. It is not my responsibility to verify whether a person has the right to appear on the band list...
>
> As a result, I do not feel I have the jurisdiction to follow-up on your request...
>
> Exhibit R-9 in support of the applicant's affidavit, Applicant's Record, p. 314.

[44] In his investigation report, the Chair of the Appeal Board confirmed the Electoral Officer's position, considering the explanation provided was in accordance with the spirit and the letter of article 5.1 of the *Election Code*.

[45] Before this Court, the applicant resubmitted that the Electoral Officer had the power to revise the electoral list on the ground that certain electors did not have the right to appear on it, and restated that the role of Officer was not limited to automatically relying on the Band Registry.

[46] This issue is at the heart of the present case and must be resolved using a review of the relevant provisions of the *Election Code* and the *Membership Code*. First the following definitions must be considered, as found in the *Election Code*:

> [TRANSLATION]
>
> **1.3 Elector**

> A person who
>
> (a) is on the Band list of the Abénakis of Wôlinak First Nation, or is eligible to be registered
>
> (b) is 18 years old on election day, and
>
> (c) has not lost his or her right to vote in First Nations elections.
>
> **1.4 Electoral list**
>
> The list of electors from the Abénakis of Wôlinak First Nation maintained by the Band registrar.
>
> **1.5 Electoral Officer**
>
> The person appointed by resolution of the Abénakis of Wôlinak First Nation Council to lead the election process provided under the present code and ensure the code is respected.

[47] Also relevant are the provisions from the *Election Code* regarding the electoral list, which states the following:

> [TRANSLATION]
>
> **5.1 Electoral list**
>
> For the purposes of creating the electoral list, the person responsible for the population of the First Nation must, once appointed, remit an up-to-date list of the members and their date of birth and band or member number and address to the Electoral Officer.
>
> **5.3 Review of list**
>
> Any elector may, up to ten days prior to the vote, make a written request to the Electoral Officer for a revision of the electoral list on the ground that his or her name was omitted, that the name of an elector is inaccurately listed, or the name of a person ineligible to vote appears on the list.

> **5.4** Upon receipt of a request under article 5.3, the Electoral Officer shall take the appropriate measures to meet with the requester and, if necessary, the person whose name is allegedly inaccurately listed or who is allegedly ineligible to vote.
>
> **5.5 Correction**
>
> After giving the individuals affected by article 5.4 the opportunity to be heard, the Electoral Officer [considers] the issue and, if necessary, revises the electoral list.
>
> **5.6 Registration entitlement**
>
> In addition to articles 5.3, 5.4 and 5.5, any person who, on election day, has the qualities of an elector is eligible to be included on the electoral list.

[48] In light of these provisions, it seems clear that the role of the Electoral Officer essentially consists of creating an electoral list from the list of members given to him by the Band Registrar. The Band Registrar, elected by the general assembly of the Band, is the person in charge of maintaining and storing the Registry (*Membership Code*, art 40). It is the Registrar who has the power to remove or add members to the Band Registry:

> [TRANSLATION]
>
> **Art. 49** The Registrar shall add or remove, as required, the name of persons who become members or cease to be members from the list of Band members of the Abénakis of Wôlinak, found at Chapter 6 of the Band Registry; the Registrar shall also proceed with any modification of the Registry that is required.

[49] Lastly, articles 63 to 74 of the *Membership Code* govern challenges to the registration or non-registration on the Band Registry. First, it is the Registrar who makes a written and reasoned decision on these challenges (art. 64). An appeal of the decision may be made to the Band

Council (art. 65), who then acts as an appeal court and has the authority to review the decision rendered by the Registrar (art. 66). Article 67 states that the Band Council must hear the member if the member so requests, and article 69 adds that the Council must render its decision based on the evidence collected during the hearing before it.

[50] It seems from these provisions that the Registrar, and on appeal, the Band Council, are responsible for deciding whether a person belongs to the Band, as a regular member, an associate member or honorary member. The provisions cited above indicate that this decision has severe consequences and must be accompanied by formalities that ensure validity. Such a decision cannot be made by an Electoral Officer in the context of an election campaign. An Electoral Officer has neither the expertise nor the time to conduct verifications that are required when adding or removing a person's name from the Band Registry. This is even more the case when, as in the present case, there are 280 people whose membership on the Registry is being challenged.

[51] Considering this context, I feel that the decision of the Electoral Officer and that of the Appeal Board was not only reasonable, but also correct. When article 5.3 of the *Election Code* is interpreted in light of the *Membership Code* and considering the constraints imposed by the election process, the necessary conclusion is that the purpose of this provision is not to empower the Electoral Officer to make a decision himself about whether a person belongs to a band or is eligible to appear on the Band Registry. His role is limited to verifying whether the person whose name appears on the electoral list in fact appears on the Band Registry. In case of doubt, the Electoral Officer can only refer to the Registrar, except in a clear and objectively verifiable case such as if the person who is included on the list is not 18 years old or is deceased.

[52] At any rate, it is not sufficient to prove there was a violation of the *Election Code* for the election to be set aside. To succeed, the applicant must also show that this violation may have had an impact on the result of the election. Paragraph 8.7(*b*) of the *Election Code* states the following:

> [TRANSLATION]
>
> **8.7** When the appeal board has reason to believe:
>
> (a) that there was corrupt or fraudulent practice in connection with an election;
>
> (b) that there was a violation of the present code that might have affected the result of an election; or
>
> (c) that 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.
>
> The appeal board informs the appellants, candidates, Electoral Officer and the outgoing council of its decision in writing. The outgoing council then begins the procedure for a new election or vote immediately.
>
> If the appeal board does not have reason to believe that the appellants' allegations are valid, it informs the appellants, the candidates, the Electoral Officer and the new Council of the Abénakis of Wôlinak First Nation of its decision to dismiss the appeal in writing.
>
> All decisions of the appeal board are final and without appeal.

[53] Called to interpret this provision, Justice Lemieux considered the relevant case law and concluded unequivocally that two steps had to be take in order for an election to be set aside. An applicant must first show there was a violation of the *Election Code*, then establish that this violation might have affected the result of the election: *Landry v Bernard*, *supra*, at para 46; also see *Lower Similkameen Indian Band v Allison*, [1997] 1 FC 475.

[54] In this case, the applicant did not show that the individuals whose registration on the electoral list he was challenging did not meet the band membership criteria. In his applications to the Electoral Officer for a revision, he essentially argued that some people should not have been registered on the electoral list because they did not have the status of Indian. In his application for revision dated May 11, 2012, he wrote the following:

> [TRANSLATION]
>
> Enclosed is a list of persons removed in accordance with a decision by the Ottawa Registrar rendered in 2011. Even if these individuals are the subject of an appeal they should not be registered during this procedure…
>
> Exhibit R-7 in support of the applicant's affidavit, Applicant's Record, p. 288.

[55] In the subsequent application for revision produced by counsel for the applicant on May 30, 2012, they wrote the following:

> [TRANSLATION]
>
> The names of the individuals whose registration is being challenged are found in the enclosed *List*. Under article 1.3 of the *Election Code,* an elector is a person registered on the band list of the Abénakis of Wôlinak first nation. However, the individuals named on the enclosed *List* do not meet the criteria set out in articles 8 to 10 of the *Membership Code* of the Abénakis of Wôlinak and therefore are not eligible to be on the band list.
>
> According to the Band Registrar's list of members as consulted May 22, 2012, by Diane Bernard and Guy and Lucie Medzalabanleth, most of these individuals do not have the status of Indian because they are not registered with the Department of Aboriginal Affairs and Northern Development Canada (hereinafter AANDC). They do not seem to have been the subject of an addition as associate or honorary members.
>
> On the band list as on the *List* provided to you here, the names of these individuals are followed by a ☑. According to the Band Registrar, this checkmark signifies that the individual does not

> have Indian status with AANDC or is awaiting status. Those without a ☑ after their name or who have a ☐ do not seem to have a number with the AANDC registry either. Clarifications on the reasons for the application for revision are sometimes found in the right-hand column.
>
> Exhibit R-8 in support of the applicant's affidavit, Applicant's Record, p. 299.

[56] In his memorandum, the applicant attempted to maintain that he never alleged that non-Status members did not have the right to vote. He contends that he alleged that the people who do not have the right to be on the band list did not have the right to vote. This argument seems circular to me, since the reason the applicant gave to argue that the individuals did not have the right to be on the band list is precisely that these individuals were not registered on the Indian Registry.

[57] However, Indian status is not an essential condition for being a member of the Abénakis of Wôlinak band. Until Parliament adopted the *Act to amend the Indian Act*, SC 1985, c 27, an Indian band could only be made up of "status" members, meaning Indians on the Indian Registry maintained by AANDC. When this Act was adopted, the Indian bands acquired the right to take back control over the membership of their population. In 1987, the Abénakis of Wôlinak band used this opportunity to create a *Membership Code*; under its paragraph 8.2(*a*), [TRANSLATION] "[a]ll Abénakis, descended from an Abénaki living on the Abénakis of Wôlinak reserve, who is not a member of another band" may be an ordinary member of the band. In his affidavit, Denis Landry noted that around 30% of the voters of the Abénakis of Wôlinak band are Status Indians and are registered with the Indian Registry maintained by AANDC.

[58] As a result, even if I did find that the Electoral Officer himself was required to review the band membership of each person targeted by the applicant's applications for revision to then determine whether these individuals could be registered on the electoral list, it would still not likely lead to a modification. With no proof to establish that these individuals were not eligible to be on the Band Registry for any reason other than they were not "status" Indians, he would not have had any option but to dismiss the applicant's applications for revision. In short, the Electoral Officer' alleged violation of the *Election Code* would not have had any effect on the election result.

C. *Do the various procedural violations raised by the applicant constitute violations of the* Election Code*? If so, do these violations justify setting aside the June 10, 2012, election?*

[59] The applicant alleged that the respondent deliberately blocked access to many documents related to the election and to the Band Registry, interfering with his ability to request a revision of the electoral list by the Electoral Officer. The Electoral Officer also allegedly destroyed the election file less than two weeks after the Appeal Board's decision, thereby violating article 7.1 of the *Election Code.*

[60] The issue of access to documents regarding the election and to the Band Registry were not raised before the Appeal Board and was not the subject of a decision, such that it cannot be the subject of this application for judicial review. At any rate, the evidence on file does not show that the Band Council acted in bad faith and the applicant had access to the Band Registry in another case before the Superior Court of Québec. Lastly, the problems accessing the Band

Registry cannot be associated with a violation of the *Election Code* under paragraph 8.7(*b*) likely to have had an effect on the election result.

[61] As for the destruction of the election file and ballots, under article 7.1 of the *Election Code*, the Electoral Officer must keep them when there is an appeal until the appeal is decided. This is what Mr. Philippe did when he destroyed the ballots on September 26, 2012. In the future, he would be well advised to keep these ballots until the after the 30-day deadline to file an application for judicial review under subsection 18.1(2) of the *Federal Courts Act* has passed. There was no wrongdoing under the circumstances, and additionally, there was no evidence on file that the ballots and election material would have shown that the vote was tainted or that its outcome would have been questioned.

[62] The applicant also raised many procedural violations: illegal rejection of mail-in ballots for which the voter's declaration had no address, rejection of a ballot because the Electoral Officer's initials were missing, Electoral Officer allowing an elector to vote without identifying himself, neglecting to send mail-in ballot kits to some voters, late additions to the electoral list and other procedural breaches.

[63] During the examination on the applicant's affidavit on March 27, 2012, counsel for the applicant admitted that these various procedural breaches did not have an effect on the outcome of the vote. In fact, there is no evidence to this effect and the breaches raised by the applicant only affected a very limited number of voters. It seems to me then that there is no need to spend

a long time on this, particularly considering that the Investigation Report approved by the Appeal Board addressed it extensively after conducting an investigation and did so reasonably.

V. Conclusion

[64] For all the above reasons, I feel that the application for judicial review should be dismissed, and the decision of the Appeal Board should be upheld. Costs are awarded to the respondent.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that the application for judicial review be dismissed and the decision of the Appeal Board be upheld. Costs are awarded in favour of the respondent.

"Yves de Montigny"
Judge

Certified true translation
Elizabeth Tan, translator

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1819-12
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