Federal Court Cour fédérale

**Date: 20161115**

**Docket: T-2205-14**

**Citation: 2016 FC 1272**

**Ottawa, Ontario, November 15, 2016**

**PRESENT: The Honourable Mr. Justice Russell**

**BETWEEN:**

**MICHELLE GOOD**

**Applicant**

**and**

**THE ATTORNEY GENERAL OF CANADA, CHIEF STEWART JR BAPTISTE AND COUNCILLORS LUX BENSON, SABRINA BAPTISTE, RYAN BUGLER, MANDY CULHAND, LARRY WULLUNEE, HENRY GARDIPY, GARY NICOTINE AND CLINT WUTTUNEE OF THE RED PHEASANT FIRST NATION**

**Respondents**

# JUDGMENT AND REASONS

## I. INTRODUCTION

[1] This is an application under ss 18 and 18.1 of the *Federal Courts Act*, RSC 1985, c F-7, for judicial review of the decision of the Director General of the Policy Development and

Coordination Branch, representing the Minister of Aboriginal Affairs and Northern Development Canada, dated September 23, 2014 [Decision], which denied the Applicant's appeal of the March 20, 2014 election of the Red Pheasant First Nation.

## II. BACKGROUND

[2] The Applicant is a member of the Red Pheasant First Nation. On May 2, 2014, she filed an appeal of the March 20, 2014 election [2014 election] which relied on two grounds:

1. Misconduct on the part of the Electoral Officer, Wes Lambert [Electoral Officer], in: failing to mail the ballots of off-reserve members in a timely manner; being absent at the polling station on the day of the election; changing the date of the election without formal notice; not asking voters to provide identification at polling stations; allowing clearly intoxicated candidates to vote; and, because candidates were seen standing at the entrance of the polling stations, forcing voters to come in contact with them.
2. Corruption in the form of vote-buying by candidate for councillor Charles Meechance and Chief Stewart Baptiste.

[3] The appeal was supported by statutory declarations by the Applicant, by former Band Councillor Sandra Arias and by Band members Leona Carol Wuttunee, Denise Virginia Soonias and Robin Dean Wuttunee.

[4] On May 28, 2014 and June 18, 2014, the appeal was circulated to all the candidates and the Electoral Officer, inviting them to respond to the allegations in the appeal. Chief Baptiste and the Electoral Officer provided responses to the appeal.

[5] On September 16, 2014, Nathalie Nepton, Director of Governance Policy and Implementation at Aboriginal Affairs and Northern Development [Delegate] recommended that

the Applicant's appeal be dismissed. This recommendation was approved by Eric Marion, Acting Director of the Policy Development and Coordination Branch.

[6] The Applicant was notified of the Decision to dismiss the appeal on September 25, 2014, via email. She filed her application for judicial review of the Decision on October 27, 2014, and an amended notice of application on November 17, 2014.

## III. DECISION UNDER REVIEW

[7] In her recommendation, the Delegate set out every allegation raised by the Applicant in her appeal. For each allegation, the Delegate listed the relevant provisions of the *Indian Band Election Regulations*, CRC, c 952 [Regulations], of the *Indian Act*, RSC 1985, c I-5 [Act], as well as the relevant sections of the *Electoral Officer's Handbook*. The Delegate also considered the responses to the appeal.

[8] In regards to the first allegation that the Electoral Officer had failed to provide mail-in ballots to electors in a timely manner thereby preventing them from completing and returning their ballots in time to be counted, the Delegate concluded that it should be dismissed on the grounds that the "evidence was insufficient for the purposes of finding a violation of the Act or the Regulations that would have affected the outcome of the election."

[9] The second allegation that 39 band members who were on a list of 92 members provided to the Electoral Officer by former Councillor Sandra Arias did not receive their ballots, was also dismissed on the grounds that there was insufficient evidence to support the allegation that the

Electoral Officer neglected to send the mail-in ballots and "the Regulations and guidelines uphold that the Electoral Officer did, in fact, perform his duties with due diligence by not accepting lists of multiple names and addresses from sources other than the Band."

[10] The third allegation was that the Electoral Officer was not present at the polling station and left his wife in charge. This allegation was dismissed by the Delegate on the grounds that the Regulations allow the Electoral Officer to delegate some of his responsibilities to a deputy and the evidence showed that the deputy did perform the required duties and responsibilities.

[11] The fourth allegation was that the original date of the election posted at the nomination meeting was changed without formal notice. This allegation was dismissed because the Polling Notice, which constitutes formal notice of an election, showed the correct election date.

[12] The fifth allegation was that the Electoral Officer and/or his deputy did not ask voters for identification before permitting them to vote. This allegation was dismissed as the Electoral Officer and deputy ensured that voters' names were on the list prior to issuing them ballots. Voters were asked their names, birthdates and registration numbers and "there is no legal requirement for an elector to provide identification to the Electoral Officer to vote."

[13] The sixth allegation, that candidates were standing in the entrance of the polling station and electors were forced to walk past them, was dismissed as it was not established that voter secrecy was compromised or that voters were intercepted.

[14] The allegation that intoxicated voters were not prevented from voting was also dismissed. The Regulations are silent on the subject and nothing showed that the deputy did not exercise good judgment in letting intoxicated voters vote. She “performed her duty in maintaining peace and order at the polling station.”

[15] Lastly, the allegations that Chief Baptiste and Mr. Meechance engaged in vote-buying were also dismissed. The Delegate found that, in both cases, the evidence failed to meet the burden of proof. The Delegate then recommended that the appeal be dismissed. This recommendation was accepted by Eric Marion, Acting Director General of the Policy Development and Coordination Branch, replacing Perry Billingsley, and the Applicant was informed of the dismissal on or around September 25, 2014**.**

## IV. ISSUES

[16] The Applicant raises the following issues for consideration by the Court:

1. What is the appropriate standard of review?
2. Did the Delegate err at law resulting in a denial of procedural fairness by holding the Applicant to a higher evidentiary standard of proof than exists in ss 79 (a) and (b) of the Act and ss 12 to 14 of the Regulations?
3. Did the Delegate demonstrate a reasonable apprehension of bias in her consideration of irrelevant factors in denying the appeal?
4. Did the Delegate deny the Applicant procedural fairness by failing to assign an investigator once an appearance of corruption was established?
5. Did the Delegate demonstrate a reasonable apprehension of bias in communicating an opinion of the outcome of the appeal to the Electoral Officer prior to a decision being rendered in the appeal?

6. Did the Delegate, by knowingly holding the Applicant to a burden of proof higher than established at law, engage in frivolous and vexatious conduct that would attract the Court's sanctions?
7. Did the Delegate intentionally act to deceive the Court when she gave evidence under oath that she knew to be false, and should this attract sanctions of the Court?

[17] The Respondent, the Attorney General of Canada [AG] raises the following issue:

1. Considering that a subsequent election took place on March 18, 2016, is the application moot?

[18] The AG also argues that the Applicant's arguments are not actually arguments about procedural fairness but are about the reasonableness of the Decision and should be phrased as such.

## V. STANDARD OF REVIEW

[19] The Supreme Court of Canada in *Dunsmuir v New Brunswick*, 2008 SCC 9 [*Dunsmuir*] held that a standard of review analysis need not be conducted in every instance. Instead, where the standard of review applicable to a particular question before the court is settled in a satisfactory manner by past jurisprudence, the reviewing court may adopt that standard of review. Only where this search proves fruitless, or where the relevant precedents appear to be inconsistent with new developments in the common law principles of judicial review, must the reviewing court undertake a consideration of the four factors comprising the standard of review analysis: *Agraira v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 at para 48.

[20] The second issue, related to the appropriate standard of proof, is a question of law. As such, it is reviewable on the standard of correctness: *Paz Ospina v Canada (Citizenship and Immigration)*, 2011 FC 681 at paras 20 and 31.

[21] The third, fourth, and fifth issues relate to procedural unfairness and an apprehension of bias on the part of Ministry staff involved in the decision-making process and are reviewable on a standard of correctness: *Rally v Telus Communications Inc,* 2013 FC 858 at para 7; *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 43 [*Khosa*]; *Muskego v Norway House Cree Nation Appeal Committee*, 2011 FC 732 at para 26.

[22] The question of whether the evidence supports a finding of corrupt election practices is reviewable on a reasonableness standard: *Dedam v Canada (Attorney General)*, 2012 FC 1073 at para 59 [*Dedam*]; *Hudson v Canada (Indian Affairs and Northern Development)*, 2007 FC 203 at para 74 [*Hudson*]. Moreover, "deference will usually result where a tribunal is interpreting its own statute or statutes closely connected to its function, with which it will have particular familiarity": *Dunsmuir*, above, at para 54.

[23] When reviewing a decision on the standard of reasonableness, the analysis will be concerned with "the existence of justification, transparency and intelligibility within the decision-making process [and also with] whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law." See *Dunsmuir*, above, at para 47, and *Khosa*, above, at para 59. Put another way, the Court should intervene only if the

Decision was unreasonable in the sense that it falls outside the "range of possible, acceptable outcomes which are defensible in respect of the facts and law."

## VI. ARGUMENTS

### A. *Applicant*

[24] The Applicant argues that the applicable standard of review is correctness for questions of procedural fairness and for the legal interpretation of corrupt election practices. Therefore, little deference should be afforded to the Decision.

[25] The Applicant says that the Delegate erred in law in her application of the Regulations and the Act. Under s 14 of the Regulations, the Applicant only had to demonstrate that there was an appearance of corruption or of a violation that might have affected the election's result in order to trigger the Minister's duty to report to the Governor in Council. Therefore, the Delegate erred in law when she recommended that the appeal be dismissed on the grounds that "the burden of proof had not been met that there were violations of the Act and/or Regulations that might have affected the result of the election."

[26] It was also an error on the part of the Delegate to reject the Applicant's appeal that she had received her ballot late on the grounds that this had not affected the outcome of the election. The Applicant only needed to show that it *might* have affected the outcome. Requiring that the irregularities would have affected the outcome of the election is an "imported standard." Also,

the Applicant only needed to show an *appearance* of corruption, which the two statutory declarations accompanying the appeal demonstrated.

[27] As demonstrated in her cross-examination, the Delegate weighed the evidence according to the civil standard of balance of probabilities. This constitutes an admission that the appeal was not processed in accordance with s 14 of the Regulations. This means that the Applicant was denied procedural fairness because she was held to a higher evidentiary standard than is contemplated by the statutory scheme.

[28] Additionally, the Delegate showed actual bias in making her Decision. According to the Applicant, the factors she relied on to discredit the evidence adduced by the Applicant in support of her appeal do not stand up to scrutiny. In addition, the Delegate's consideration of irrelevant factors, her failure to properly assess and weigh the evidence, and her favouring of the Respondents over the Applicant without evidentiary justification created a reasonable apprehension of bias.

[29] Furthermore, the failure to assign an investigator also constitutes denial of procedural fairness. As the evidence submitted was not persuasive one way or another, and as a reasonable expectation that an investigator would be assigned was created by the appeal of the earlier 2012 election, failure to appoint an investigator was a denial of procedural fairness.

[30] In addition, the tone and content of email conversations between Anita Hawdur, Elections Analyst, and the Electoral Officer, created a reasonable apprehension of bias.

[31] Moreover, the Delegate could not ignore that the appropriate standard of proof was identified by the Court in *Dedam*, above. In that decision, the Court found that the standard of proof was lower than the civil standard. Hence, the Delegate applied the higher standard in order "to create a more difficult test for the appellant," thereby breaching her duty of fairness to the appellant. In addition, the Delegate intentionally deceived the Court when, in her cross-examination, she stated that the applicable standard of proof was a balance of probabilities.

B. *Respondent - Attorney General*

[32] The AG is the only Respondent who made submissions and appeared at the hearing.

[33] The AG's first argument is that this application is moot and therefore should not be heard. The subsequent election held on March 18, 2016, means that the dispute between the parties has disappeared.

[34] Moreover and alternatively, the Decision was reasonable. The AG says that the standard of review for a decision on whether the evidence supports a finding of corrupt election practices is reasonableness.

[35] The issues raised by the Applicant, although framed as issues of bias and errors of law, actually relate to whether the Decision was reasonable. The Delegate carefully analyzed the evidence and her findings are reasonable.

[36] Furthermore, there was no error of law. Section 79 of the Act requires that corruption be found on a balance of probabilities to set aside an election.

[37] In addition, a decision of the Elections Unit should be reviewed on a standard of reasonableness as the Unit is familiar with, and has expertise in, the governing statutory and regulatory provisions. The Elections Unit reviewed all of the allegations and concluded that the applicable burden of proof was not met. References to widespread vote-buying when considering the allegations against Mr. Meechance do not make the Decision to dismiss the appeal unreasonable.

[38] Additionally, there was no denial of procedural fairness and no legitimate expectation that an investigation would be ordered. In the context of election appeals, band members are owed a duty of fairness. Procedural fairness matters are to be reviewed on a standard of correctness. In this case, the Applicant received procedural protections during the appeal process. She had the opportunity to present her case and the Decision was made in a fair, impartial and open process, with ample reasons provided. There could be no legitimate expectation that an investigation would be ordered. There is no practice or policy of ordering such investigations and s 13 of the Regulations clearly indicates that such a decision is discretionary. The decision not to order an investigation should be reviewed on a reasonableness standard. The Delegate's determination that a conclusion could be reached without an investigation was reasonable.

[39] Lastly, an important portion of the application consists of personal attacks against the Delegate which are unfounded and inappropriate.

## VII. ANALYSIS

### A. *Introduction*

[40] The Applicant has raised various issues for review, but at the heart of this dispute there lies a fundamental disagreement about the applicability of s 79 of the Act to the Applicant's appeal of the 2014 election.

[41] The Applicant says that, in assessing her appeal of the 2014 election, the Delegate bypassed ss 13 and 14 of the Regulations and erroneously applied s 79 of the Act to the evidence submitted by the Applicant and to the responding evidence of the Electoral Officer, and Chief Baptiste.

[42] As the Decision makes clear, and as the Delegate confirmed in cross-examination, there is no doubt that the Delegate did apply s 79 of the Act when considering whether the appeal should be dismissed or go forward. However, the AG takes the position that this was not an error of law because s 79 of the Act, and the civil standard of proof (balance of probabilities) applicable to that provision were correctly and reasonably applied by the Delegate in the exercise of her duties in dealing with the Applicant's appeal.

B. *The Act and Regulations*

[43] The legislative framework governing the 2014 election is set out in ss 74 to 80 of the Act and ss 12 to 14 of the Regulations. For convenience, I will set out these provisions here. Sections 74 to 80 of the Act read as follows:

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| **74** (1) Whenever he deems it advisable for the good government of a band, the Minister may declare by order that after a day to be named therein the council of the band, consisting of a chief and councillors, shall be selected by elections to be held in accordance with this Act. | **74** (1) Lorsqu'il le juge utile à la bonne administration d'une bande, le ministre peut déclarer par arrêté qu'à compter d'un jour qu'il désigne le conseil d'une bande, comprenant un chef et des conseillers, sera constitué au moyen d'élections tenues selon la présente loi. |
| (2) Unless otherwise ordered by the Minister, the council of a band in respect of which an order has been made under subsection (1) shall consist of one chief, and one councillor for every one hundred members of the band, but the number of councillors shall not be less than two nor more than twelve and no band shall have more than one chief. | (2) Sauf si le ministre en ordonne autrement, le conseil d'une bande ayant fait l'objet d'un arrêté prévu par le paragraphe (1) se compose d'un chef, ainsi que d'un conseiller par cent membres de la bande, mais le nombre des conseillers ne peut être inférieur à deux ni supérieur à douze. Une bande ne peut avoir plus d'un chef. |
| (3) The Governor in Council may, for the purposes of giving effect to subsection (1), make orders or regulations to provide | (3) Pour l'application du paragraphe (1), le gouverneur en conseil peut prendre des décrets ou règlements prévoyant : |
| (a) that the chief of a band shall be elected by | a) que le chef d'une bande doit être élu : |
| (i) a majority of the votes of the electors of the band, or | (i) soit à la majorité des votes des électeurs de la bande, |
| (ii) a majority of the votes of | (ii) soit à la majorité des votes |

the elected councillors of the band from among themselves,

des conseillers élus de la bande désignant un d'entre eux,

but the chief so elected shall remain a councillor; and

le chef ainsi élu devant cependant demeurer conseiller ;

(b) that the councillors of a band shall be elected by

b) que les conseillers d'une bande doivent être élus :

(i) a majority of the votes of the electors of the band, or

(i) soit à la majorité des votes des électeurs de la bande,

(ii) a majority of the votes of the electors of the band in the electoral section in which the candidate resides and that he proposes to represent on the council of the band.

(ii) soit à la majorité des votes des électeurs de la bande demeurant dans la section électorale que le candidat habite et qu'il projette de représenter au conseil de la bande.

(4) A reserve shall for voting purposes consist of one electoral section, except that where the majority of the electors of a band who were present and voted at a referendum or a special meeting held and called for the purpose in accordance with the regulations have decided that the reserve should for voting purposes be divided into electoral sections and the Minister so recommends, the Governor in Council may make orders or regulations to provide for the division of the reserve for voting purposes into not more than six electoral sections containing as nearly as may be an equal number of Indians eligible to vote and to provide for the manner in which electoral sections so established are to be distinguished or identified.

(4) Aux fins de votation, une réserve se compose d'une section électorale ; toutefois, lorsque la majorité des électeurs d'une bande qui étaient présents et ont voté lors d'un référendum ou à une assemblée spéciale tenue et convoquée à cette fin en conformité avec les règlements, a décidé que la réserve devrait, aux fins de votation, être divisée en sections électorales et que le ministre le recommande, le gouverneur en conseil peut prendre des décrets ou règlements stipulant qu'aux fins de votation la réserve doit être divisée en six sections électorales au plus, contenant autant que possible un nombre égal d'Indiens habilités à voter et décrétant comment les sections électorales ainsi établies doivent se distinguer

ou s'identifier.

**75** (1) No person other than an elector who resides in an electoral section may be nominated for the office of councillor to represent that section on the council of the band.

**75** (1) Seul un électeur résidant dans une section électorale peut être présenté au poste de conseiller pour représenter cette section au conseil de la bande.

(2) No person may be a candidate for election as chief or councillor of a band unless his nomination is moved and seconded by persons who are themselves eligible to be nominated.

(2) Nul ne peut être candidat à une élection au poste de chef ou de conseiller d'une bande, à moins que sa candidature ne soit proposée et appuyée par des personnes habiles elles-mêmes à être présentées.

**76** (1) The Governor in Council may make orders and regulations with respect to band elections and, without restricting the generality of the foregoing, may make regulations with respect to

(a) meetings to nominate candidates;

(b) the appointment and duties of electoral officers;

(c) the manner in which voting is to be carried out;

(d) election appeals; and

(e) the definition of residence for the purpose of determining the eligibility of voters.

**76** (1) Le gouverneur en conseil peut prendre des décrets et règlements sur les élections au sein des bandes et, notamment, des règlements concernant :

a) les assemblées pour la présentation de candidats ;

b) la nomination et les fonctions des préposés aux élections ;

c) la manière dont la votation doit avoir lieu ;

d) les appels en matière électorale ;

e) la définition de résidence aux fins de déterminer si une personne est habile à voter.

(2) The regulations made under paragraph (1) (c) shall provide for secrecy of voting.

(2) Les règlements pris sous le régime de l'alinéa (1)c) contiennent des dispositions assurant le secret du vote.

**77** (1) A member of a band who has attained the age of eighteen years and is ordinarily resident on the reserve is qualified to vote for a person nominated to be chief of the band and, where the reserve for voting purposes consists of one section, to vote for persons nominated as councillors.

**77** (1) Un membre d'une bande, qui a au moins dix-huit ans et réside ordinairement sur la réserve, a qualité pour voter en faveur d'une personne présentée comme candidat au poste de chef de la bande et, lorsque la réserve, aux fins d'élection, ne comprend qu'une section électorale, pour voter en faveur de personnes présentées aux postes de conseillers.

(2) A member of a band who is of the full age of eighteen years and is ordinarily resident in a section that has been established for voting purposes is qualified to vote for a person nominated to be councillor to represent that section.

(2) Un membre d'une bande, qui a dix-huit ans et réside ordinairement dans une section électorale établie aux fins d'élection, a qualité pour voter en faveur d'une personne présentée au poste de conseiller pour représenter cette section.

**78** (1) Subject to this section, the chief and councillors of a band hold office for two years.

**78** (1) Sous réserve des autres dispositions du présent article, les chef et conseillers d'une bande occupent leur poste pendant deux années.

(2) The office of chief or councillor of a band becomes vacant when

(a) the person who holds that office

(i) is convicted of an indictable offence,

(ii) dies or resigns his office, or

(iii) is or becomes ineligible to hold office by virtue of this Act; or

(b) the Minister declares that in

(2) Le poste de chef ou de conseiller d'une bande devient vacant dans les cas suivants :

a) le titulaire, selon le cas :

(i) est déclaré coupable d'un acte criminel,

(ii) meurt ou démissionne,

(iii) est ou devient inhabile à détenir le poste aux termes de la présente loi ;

b) le ministre déclare qu'à son

his opinion the person who holds that office

avis le titulaire, selon le cas :

(i) is unfit to continue in office by reason of his having been convicted of an offence,

(i) est inapte à demeurer en fonctions parce qu'il a été déclaré coupable d'une infraction,

(ii) has been absent from three consecutive meetings of the council without being authorized to do so, or

(ii) a, sans autorisation, manqué les réunions du conseil trois fois consécutives,

(iii) was guilty, in connection with an election, of corrupt practice, accepting a bribe, dishonesty or malfeasance.

(iii) à l'occasion d'une élection, s'est rendu coupable de manoeuvres frauduleuses, de malhonnêteté ou de méfaits, ou a accepté des pots-de-vin.

(3) The Minister may declare a person who ceases to hold office by virtue of subparagraph (2) (b) (iii) to be ineligible to be a candidate for chief or councillor of a band for a period not exceeding six years.

(3) Le ministre peut déclarer un individu, qui cesse d'occuper ses fonctions en raison du sous-alinéa (2)b)(iii), inhabile à être candidat au poste de chef ou de conseiller d'une bande durant une période maximale de six ans.

(4) Where the office of chief or councillor of a band becomes vacant more than three months before the date when another election would ordinarily be held, a special election may be held in accordance with this Act to fill the vacancy.

(4) Lorsque le poste de chef ou de conseiller devient vacant plus de trois mois avant la date de la tenue ordinaire de nouvelles élections, une élection spéciale peut avoir lieu en conformité avec la présente loi afin de remplir cette vacance.

**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

a) qu'il y a eu des manœuvres frauduleuses à l'égard de cette

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| election; | 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. |
| **80** The Governor in Council may make regulations with respect to band meetings and council meetings and, without restricting the generality of the foregoing, may make regulations with respect to | **80** Le gouverneur en conseil peut prendre des règlements sur les assemblées de la bande et du conseil et, notamment, des règlements concernant : |
| (a) presiding officers at such meetings; | a) les présidents de ces assemblées ; |
| (b) notice of such meetings; | b) les avis de ces assemblées ; |
| (c) the duties of any representative of the Minister at such meetings; and | c) les fonctions de tout représentant du ministre à ces assemblées ; |
| (d) the number of persons required at such meetings to constitute a quorum. | d) le nombre de personnes requis à ces assemblées pour constituer un quorum. |

[44] Sections 12 to 14 of the Regulations read as follows:

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| **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 | b) qu'il y a eu violation de la |

Act or these Regulations that might have affected the result of the election, or

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.

(2) Where an appeal is lodged under subsection (1), the Assistant Deputy Minister shall forward, by registered mail, a copy of the appeal and all supporting documents to the electoral officer and to each candidate in the electoral section in respect of which the appeal was lodged.

(2) Lorsqu'un appel est interjeté au titre du paragraphe (1), le sous-ministre adjoint fait parvenir, par courrier recommandé, une copie du document introductif d'appel et des pièces à l'appui au président d'élection et à chacun des candidats de la section électorale visée par l'appel.

(3) Any candidate may, within 14 days of the receipt of the copy of the appeal, forward to the Assistant Deputy Minister by registered mail a written answer to the particulars set out in the appeal together with any supporting documents relating thereto duly verified by affidavit.

(3) Tout candidat peut, dans un délai de 14 jours après réception de la copie de l'appel, envoyer au sous-ministre adjoint, par courrier recommandé, une réponse par écrit aux détails spécifiés dans l'appel, et toutes les pièces s'y rapportant dûment certifiées sous serment.

(4) All particulars and documents filed in accordance with the provisions of this section shall constitute and form the record.

(4) Tous les détails et toutes les pièces déposés conformément au présent article constitueront et formeront le dossier.

**13** (1) The Minister may, if the material that has been filed is not adequate for deciding the

**13** (1) Le Ministre peut, si les faits allégués ne lui paraissent pas suffisants pour décider de

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| validity of the election complained of, conduct such further investigation into the matter as he deems necessary, in such manner as he deems expedient. | la validité de l'élection faisant l'objet de la plainte, conduire une enquête aussi approfondie qu'il le juge nécessaire et de la manière qu'il juge convenable. |
| (2) Such investigation may be held by the Minister or by any person designated by the Minister for the purpose. | (2) Cette enquête peut être tenue par le Ministre ou par toute personne qu'il désigne à cette fin. |
| (3) Where the Minister designates a person to hold such an investigation, that person shall submit a detailed report of the investigation to the Minister for his consideration. | (3) Lorsque le Ministre désigne une personne pour tenir une telle enquête, cette personne doit présenter un rapport détaillé de l'enquête à l'examen du Ministre. |
| **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 result of an 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 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. *Case Law*

[45] The Court has previously dealt with the issue of which provisions are applicable when appeals are made under the Act and Regulations. In *Keeper v Canada,* 2011 FC 307 [*Keeper*],

Justice Campbell found that "the legislative provisions place an evidence gathering and reporting responsibility on the Minister, and a final decision-making responsibility on the Governor in Council" (at para 4). He then goes on to point out that:

> [5] It is agreed that the Delegate was required to decide according to the evidentiary standard of proof specified in s. 14 of the *Regulations* which requires only proof of the appearance of wrongdoing under both s. 14 (a) and s. 14 (b). In my opinion, there is no question that the decision is rendered according to the elevated evidentiary standard specified in s. 79 of the *Act* which requires proof of wrongdoing. I reject the argument made by Counsel for the Minister that the words used in the passage are only "unfortunate" and that they should be taken to be an application of s. 14. There is no credible support for this argument. The words speak for themselves; the mistake in law is not defensible.

[46] It is notable that the AG in *Keeper* agreed that s 14 of the Regulations was the governing provision. In the present case, the AG says that *Keeper* has been superseded by the decisions of Justice O'Reilly in *Woodhouse v Canada (Aboriginal Affairs and Northern Development Canada)*, 2013 FC 1055 [*Woodhouse*], and Justice O'Keefe in *Dedam*, above.

[47] In written argument, the AG asserts as follows:

> 41. No error in law was made with respect to how the *Indian Band Election Regulations* and *Indian Act* were applied in this case. The Respondent submits that the Applicant miscomprehends the differences that exist between section 14 of the *Indian Band Election Regulations* and section 79 of the *Indian Act*, and the burden of proof required under each of those sections. The Applicant suggests that all that is required under both provisions is that a mere appearance of corruption be found. This is incorrect.
>
> 42. While section 14 of the *Indian Band Election Regulations* indicates that an appearance of corruption will be enough to require a report to be submitted to the Governor in Council, section 79 of the *Indian Act* requires that corruption be found using the civil standard of a balance of probabilities in order for an

> election to be set aside. Thus, section 79 does not require an evidentiary standard lower than the civil standard of a balance of probabilities. In fact, it would not be reasonable for an election to be set aside based on the mere appearance of corruption.
>
> 43. The Federal Court's decision in *Woodhouse v. Canada (Attorney General)*, which followed and clarified the court ['] s earlier decisions that the Applicant relies upon, *Keeper v. Canada (Minister of Indian Affairs & Northern Development)* and *Dedam*, sets out the burden of proof required under sections 78 and 79 of the *Indian Act*. In *Woodhouse*, the Court makes it clear that only if the Minister is satisfied on a balance of probabilities that a corrupt practice has occurred can an election be set aside.
>
> 44. When referring to section 78 of the *Indian Act*, which is similar to section 79, the Court notes, "it certainly requires more than the mere appearance of impropriety, which is sufficient only to trigger a report to the Governor in General under s 14 of the Regulations." The Court went on to note, "[t] he Minister's declaration of guilt must, therefore, be based on his being satisfied on the balance of probabilities that an election official has committed a corrupt practice. Only then can a person be removed from office."
>
> 45. Further, with respect to *Dedam*, the Court in *Woodhouse* clarified, "the Minister's decision under s 78 (2) (b) (ii) of the Act removing certain persons from elected office was reasonable, as it was based on sufficient cogent evidence of corrupt practice on the part of those individuals." In other words, in *Dedam*, the civil standard of proof had been met, and not merely the lower evidentiary threshold found in section 14 of the *Indian Band Election Regulations*.
>
> [footnotes omitted]

[48] In my view, this reasoning entirely misses the point of the issue in dispute in this application. There is no disagreement that ss 78 and 79 require the civil burden of proof. In fact, s 78 does not even arise on the facts of this case. The issue is that the Delegate, in dealing with the appeal and making her recommendations, felt free to deal with the whole matter under s 79 of the Act and omitted to apply the applicable standard to the evidence-gathering aspect of her

report. As Justice Campbell pointed out, s 79 deals with the powers of the Governor in Council to set aside "the election of a chief or councillor of a band on the report of the Minister." The Delegate and others working within the Elections Unit of Indigenous and Northern Affairs Canada [INAC] are not the Governor in Council, and no report was made to the Governor in Council in this case, so that s 79 of the Act never came into play. The Delegate decided to dispense with any investigation under s 13 of the Regulations and to dismiss the appeal without providing a report to the Governor in Council.

[49] As far as I can gather from the cross-examination of the Delegate, this approach to dealing with election appeals under the Act is settled practice within the Elections Unit of INAC. Given the volume of appeals across the country, I can see why INAC would try to streamline the appeals process into something that is manageable. However, in resorting to a straight application of s 79 of the Act, or conflating s 79 of the Act with s 14 of the Regulations, the Elections Unit has significantly changed the very nature of the appeals process and has, in effect, bypassed ss 13 and 14 of the Regulations. Internal policy decisions cannot be used to amend the law in this way.

[50] At the hearing of this application before me in Saskatoon on September 14, 2016, the AG attempted to justify and legitimize the Elections Unit's treatment of appeals in various ways. Counsel argued that:

(a) The Court's position in *Keeper*, above, has been corrected by the decisions in *Woodhouse* and *Dedam*, both above, which decisions make it clear that s 79 is the governing provision for the Elections Unit to apply when dealing with election appeals under the Act;

(b) The bypassing of s 14 of the Regulations or the conflation of s 14 with s 79 of the Act really made no difference in this case at the end of the day because the dismissal of the appeal, as in others, was reasonable given the facts established by the evidence.

[51] These arguments are, in my view, meretricious and unconvincing. To begin with, there is nothing in *Woodhouse* or *Dedam*, or any other case of which I am aware, that modifies or supplants *Keeper*. If Justice O'Reilly and Justice O'Keefe had felt it appropriate to reject *Keeper*, they would have done so in accordance with the rules of judicial comity. And there is no reference in either case to rejecting or even distinguishing *Keeper*. Counsel for the AG did not point to any specific wording in *Woodhouse* or in *Dedam* that even remotely suggests that *Keeper* does not remain good law.

[52] Secondly, the Elections Unit's decision to simply bypass s 14 of the Regulations and apply s 79 of the Act in the way that was done in this case cannot lead to a reasonable decision because it, in effect, makes it significantly harder for appellants (most of them ordinary people with, perhaps, limited resources) to have their appeals assessed in the way that Parliament has said they must be assessed.

[53] For example, if we take the Delegate's handling of the evidence for alleged vote-buying by Chief Baptiste and Mr. Meechance, all kinds of problems arise from her decision to forego any kind of investigation and to apply the evidentiary standard applicable under s 79 of the Act instead of making an initial assessment of the evidence under s 14 of the Regulations which requires a decision as to whether there is (a) the appearance of a corrupt practice in connection with the election, or (b) a violation of the Act or the Regulations that might have affected the result of an election.

[54] To begin with, the evidence is clear that the Delegate considers that a “corrupt practice,” like a “violation of the Act or these Regulations” also has to be something that would have affected the result of the election. Section 14 does not require that a “corrupt practice” affect the outcome of an election, and nor does s 79(a) of the Act. The Delegate simply imports this requirement into her Decision without any authority or justification. Apparently, the Elections Unit of INAC and, in this application, the AG, are of the view that a corrupt practice does not need to be dealt with unless, on a balance of probabilities, it might have affected the outcome of an election.

[55] Secondly, the Delegate’s refusal to have conflicting evidence investigated and to, instead, apply a balance of probabilities test to the evidence before her, leads her into some entirely unreasonable conclusions, the result of which is to forestall any real assessment of whether a corrupt practice in the form of vote-buying has occurred.

[56] It has to be borne in mind that the appeal process is inherently tipped in favour of those elected, so that great care must be taken by the Elections Unit to ensure that the necessary evidence is available before a decision is made. This is because, when an appeal is made, the appellant has no idea how the person involved in the alleged violation or corrupt practice will respond. If an appeal meets the requirements of s 12 of the Regulations, the Elections Unit sends a copy of the appeal and all supporting documents to the electoral officer and the election candidates. These supporting documents will usually consist of the affidavit of the appellant and, as in this case, statutory declarations that support the allegations. The electoral officer and the

candidates then submit their responses and any supporting documentation. In the present case, the Electoral Officer and Chief Baptiste provided the only responses.

[57] This means that the electoral officer and the candidates have full disclosure of the allegations before they submit, or decline to submit, their responses, and can tailor their responses accordingly. However, the appellant has no opportunity to respond to the materials submitted by the electoral officer and the candidates. This is why the investigative function under s 13 of the Regulations is so important. The nature and scope of any such investigation is entirely at the Minister's discretion if he or she decides that "the material filed is not adequate for deciding the validity of the election complained of…."

[58] It seems to me that, on the present facts, no investigation was required into the Applicant's complaint that the Electoral Officer failed to provide mail-in ballots to electors in a timely manner, thereby preventing them from completing and returning their ballots in time to be counted.

[59] While I don't think the Applicant was provided with her ballot in a timely manner, there was, even under s 14(b) of the Regulations, no evidence to support that this failure "might have affected the result" of the 2014 election.

[60] Ms. Leona Carol Wuttunee, who supports the Applicant with a sworn affidavit about how she failed to receive a ballot did, in fact, vote in person so that her experience could not have impacted the outcome of the election. The Applicant failed to provide the names of other off or

on reserve electors who were allegedly not sent a mail-in ballot package by the Electoral Officer in time to vote.

[61] Although the Delegate refers to s 79(b) of the Act when she addresses the ballot allegations of the Applicant, she also says that "the evidence was insufficient for the purposes of finding a violation of the Indian Act *or the Regulations* that would have affected the outcome of the election. As a result, this allegation is dismissed" (emphasis added). On the facts, I think this was a reasonable finding. I don't think there was sufficient evidence of even an appearance of a violation that under s 14(b) of the Regulations "might have affected the result" of the 2014 election.

[62] What is strange, though, is that, in addition to applying s 79 of the Act to the evidence on this issue, the Delegate also felt the need to refer to the Regulations and to find that the evidence was "insufficient for the purpose of finding a violation of the […] Regulations that would have affected the outcome of the election." If, as the Delegate asserts in her evidence before me and the AG argues in this application, it is s 79 of the Act that governs this situation and not s 14 of the Regulations, there would have been no need for the Delegate to refer to the Regulations. Yet she seems well aware in her report and recommendations that the Regulations do have to be satisfied. On this point, then, she addresses the Regulations as she should, so that I see no error of law or unreasonableness with regard to her decision regarding the Applicant's complaint about electors not receiving ballots. Nor do I think that any investigation was required under s 13. The evidence just did not suggest a ballot problem of sufficient magnitude to affect the

outcome of the election. The problems with the Decision arise from the way that the Delegate addressed the vote-buying issue.

[63] When it comes to the vote-buying allegations, the Delegate:

(a) Completely bypasses s 14 of the Regulations and applies s 79 of the Act to the evidence before her;

(b) Imports an "affected the election" requirement into her deliberations, a requirement that is not in accordance with either s 14(a) of the Regulations or s 79(a) of the Act;

(c) Fails to conduct any kind of investigation under s 13 of the Regulations in a situation where, reasonably speaking, no fair or balanced decision was possible because of conflicting evidence; and

(d) Bases her Decision upon false or irrelevant assumptions.

[64] In her appeal, the Applicant alleged (supported by the affidavit of Robert Dean Wuttunee [Mr. Wuttunee]) that Chief Baptiste participated in the corrupt practice of vote-buying in the 2014 election. The section of the Decision dealing with this issue reads as follows:

> **8. It was alleged by Robin Dean Wuttunee that Chief Stewart Baptists participated in the corrupt practice of vote buying.**
>
> **INDIAN BAND ELECTION REGULATIONS**
>
> Paragraph 12 (1) (b) of the Regulations states that:
>
> *Within 45 days after an election, a candidate or elector who believes that:*
>
> *(a) there was corrupt practice in connection with the election may lodge an appeal by forwarding by registered mail to the Assistant Deputy Minister particulars thereof duly verified by affidavit.*
>
> **FINDINGS**
>
> With her notice of appeal, Ms. Good attached a sworn affidavit from Robin Dean Wuttunee. In his sworn statement he stated that on or about February 20, 2014, he was present at Steward Baptiste Jr's home for the purpose of repairing the Chief's car. He further

stated, *"while I was engaged in this work, Clayton Buglar (hereinafter 'Buglar') drove into the yard and entered the house. A short time later I went into the house to get a drink of water and to advise Baptiste that I might not be able to finish the work on his motor vehicle that evening. As I was walking into the house I overheard Buglar say to Baptiste words to the effect of 'With these it will make it two hundred.' Just as Buglar said this I walked into the kitchen and observed a large stack of what I recognized to be ballots for the upcoming band election."*

## RESPONSES TO THE APPEAL CIRCULATION

Wesley Lambert responded to the allegations of vote buying by stating that he had no knowledge of the allegations against candidate Stewart Baptiste. He further stated, "*Once the voting ballot package is sent out to the elector, there is no control as to whom handles it.*"

In his sworn affidavit, reelected Chief Stewart Baptiste denies that he even hired Mr. Wuttunee to work on his vehicle on February 20, 2014. He stated, "*He was not in my house on that date, invited or not, and could not have seen me 'stuffing' a box with ballots because this is something I have never done.*" He further asserted, "*Mr. Wuttunee and I have not gotten along for a couple of years. Ever since he was released from the penitentiary for armed robbery, sexual assault and numerous vehicle thefts, he has a negative influence on the youth of our community, and I have expressed my desire to see him off our First Nation.*" Chief Baptiste added that it was a matter of public record that Mr. Wuttunee's mother appealed the 2012 election, which was dismissed.

## CONCLUSION

While Mr. Wuttunee declared that he overheard Clayton Buglar say words to the effect of, "*With these it will make it two hundred,*" he did not say that he heard the word "ballots." He further went on to say, "*Just as Buglar said this I walked into the kitchen and observed a large stack of what I recognized to be ballots for the upcoming band election.*" It is not unreasonable to question his statement, "*With these it will make it two hundred*," particularly since Clayton Buglar only received 144 votes from 855 valid ballots cast. If Mr. Buglar had 200 empty ballots, it is reasonable to assume that he would have received a significantly higher number of votes, if not at least 200. Moreover, the Electoral Officer's Report reveals that all ballots were reconciled and accounted for.

> Moreover, Mr. Wuttunee only mentioned that he "*observed a large stack of what I recognized to be ballots for the upcoming band election.*" In not providing additional details concerning this alleged stack of ballots, such as the colour of the ballots or whether or not voter declaration forms and envelopes were included, Mr. Wuttunee failed to provide sufficient evidence to incriminate Chief Baptiste in the corrupt practice of vote buying, and no other elector came forward in support of this allegation. Chief Baptiste refuted the allegations and provided plausible reasons as to why Mr. Wuttunee would fabricate this allegation. Furthermore, Chief Baptiste is currently in his third term of office. Examining the vote spread between the elected Chief and the candidate with the second highest number of votes for the last three elections, numbers are pretty consistent. Thus, it does not appear that there were any large anomalies in this election that would lead to a suspicion of vote buying.
>
> Therefore, based on the evidence gathered, the examination of election documents, as well as the allegation being methodically refuted - in contrast to the uncorroborated allegations - the allegation that Chief Stewart Baptiste engaged in vote buying is dismissed as it fell short of meeting the burden of proof.

[65] It is immediately apparent that the Delegate does not say directly what standard of proof she is applying to the evidence on this issue. However, she did confirm in cross-examination that the information in an appeal was weighed according to the civil standard of proof. See Cross-Examination of Natalie Nepton, Vol I, p 11, lines 17-19, p 38, lines 13-17. It also appears from the Decision itself that the Delegate does not address whether there is an appearance of corrupt practice under Regulation 14(b), but weighs the evidence under s 79(1) of the Act. The AG in this application also asserts that s 79 of the Act is applicable to this situation and that the Delegate was entitled to apply, and did apply, the civil standard of proof. So I take it as established for the purposes of my decision that the Delegate bypassed s 14(b) of the Regulations and assessed this matter as though she was the Governor in Council under s 79 of the Act. It is, once again, strange then that the Delegate should begin by citing s 12(1)(b) of the Regulations,

thus demonstrating that she knows the Regulations are applicable to the task at hand, but then fails to consider ss 13 or 14 of the Regulations. The Delegate does not explain why she feels she is able to render a decision on this issue without some kind of investigation into the conflicting evidence that was before her, and she confirmed in cross-examination that she did not even try to check out the competing assertions of either party and that, in fact, there was nothing to corroborate Chief Baptiste's evidence.

[66] Instead, she engages in a dubious weighing process that, in my view, is not reasonable. Mr. Buglar may not have used the word "ballots" but Mr. Wuttunee observed the ballots and there is no evidence to suggest that Mr. Buglar could have been referring to anything else. The number of votes that Mr. Buglar received is irrelevant because the accusation is that Chief Baptiste was buying votes. Nor is there any reason to doubt that Mr. Wuttunee doesn't know election ballots when he sees them. Just because he doesn't mention their colour or voter declaration forms is no reason to doubt his observations without further investigation. If the Delegate felt it necessary to test the accuracy of Mr. Wuttunee's observations then she should have examined him on the point. In failing to do so, she discounted his evidence for no real reason without giving him an opportunity to satisfy her that he did know what he saw.

[67] There is no basis for the Delegate's conclusion that Chief Baptiste "provided plausible reasons as to why Mr. Wuttunee would fabricate this allegation." The Delegate simply decides that she will accept Chief Baptiste's evidence without - as she conceded in cross-examination - confirming and checking the truth of what either Mr. Wuttunee or Chief Baptiste said. Chief Baptiste is able to "methodically" refute what Mr. Wuttunee says because he has seen

Mr. Wuttunee's evidence and so can provide explanations as to why it should not be believed. Mr. Wuttunee is not allowed to see and comment upon Chief Baptiste's evidence and there is nothing to suggest that, had he done so, he would not have been able to provide an equally methodical refutation. Mr. Wuttunee's evidence may have lacked corroboration, but so did the evidence of Chief Baptiste. The investigative powers in s 13 of the Regulations are provided to resolve this kind of head-on conflict in the evidence. It is not reasonable to simply accept the evidence of one side when there is no real evidentiary basis for doing so.

[68] The Applicant also provided evidence from Ms. Denise Virginia Soonias that she and her son sold their ballots to Mr. Meechance. The Delegate deals with this evidence as follows:

> **9. Denise Virginia Soonias alleged that she sold her and her son's ballot to Charles Meechance.**
>
> **<u>FINDINGS</u>**
>
> In support of the appellant's allegation that corrupt practice occurred in the form of vote buying and selling, Denise Virginia Soonias, in her sworn affidavit, states that she contacted Charles Meechance, a candidate for the position of councillor, to ask him to purchase her and her son's ballot for $250 each. She attested that she received money for her ballot in previous elections, and that she wanted do so again. Mr. Meechance agreed to meet her and her son in a parking lot where he provided her and her son with the said amounts. However, her son did not submit an affidavit to support the allegation. Further, no other members came forward to support the allegation that Charles Meechance purchased ballots. It should also be noted that Charles Meechance was not elected in the 2014 election, and has not succeeded in holding a position since the 2001 election. He received 226 votes, ranking ninth in the number of votes cast, 10 votes short of a tie for the last available councillor position. Although both Ms. Soonias and her son live on the reserve, they both voted by mail-in ballot
>
> Ms. Soonais' [sic] sworn affidavit stated that "*Approximately three weeks before the election I contacted Charles Meechance*." She continued, "*Meechance agreed to meet me and my son Dashayne Dwayne Soonias in the parking lot behind the No Frills store in*

*North Battleford. When we met him in the parking lot, he gave me two hundred and fifty dollars for my ballot and I witnessed him give my son Dashayne Dwayne Soonias two hundred and fifty dollars for his ballot. He told us not to tell anyone, took our ballots and we went our separate ways.*"

If Ms. Soonias contacted Mr. Meechance three weeks prior to the date of the election, the alleged meeting would have taken place on or about February 27, 2014. Both Ms. Soonias' and son's voter declarations were examined by the Elections Unit. They both witnessed each other's declarations on March 11, 2014. It therefore brings to question the veracity of Ms. Soonias ['] allegation that Mr. Meechance purchased and took their ballots with him on or about February 27, 2014, when the declarations were signed on March 11, 2014. Moreover, no other elector came forward to support the allegation that Mr. Meechance participated in the corrupt practice of vote buying.

## RESPONSES TO THE APPEAL CIRCULATION

Charles Meechance's appeal package was returned "unclaimed." As such a statement has not been provided by Mr. Meechance.

## CONCLUSION

Ms. Soonias was the only individual who submitted a sworn statement accusing Charles Meechance, unsuccessful candidate for councillor, of buying two ballots. Her son did not provide an affidavit confirming, or denying, that he was given money in exchange for his vote. Also, the dates appearing on the voter declaration forms do not corroborate the allegation that ballots were purchased on February 27, 2014.

As no other individuals came forward to support the appellant's allegation of vote buying, the statement submitted by Ms. Soonias is not indicative of wide-spread vote buying. Two points stand out to support this: Ms. Soonias allegedly contacted Mr. Meechance in order to sell her ballot; she did not claim that he approached her. Moreover, she did not provide any supporting documentation, testimonials, names, or contact information to support her allegation, least of all from her son who allegedly received money for his ballot. As such, the evidence falls short of the burden of proof required to substantiate that there was corrupt practice. Therefore, the allegation is dismissed.

[69] It is noteworthy here that Mr. Meechance did not provide any evidence to refute what Ms. Soonias says, and yet the Delegate, without any checking or investigation, still feels she can reject Ms. Soonias' evidence. At the very least, with no evidence to refute Ms. Soonias' statutory declaration, there has to be an appearance of vote-buying. However, what the Delegate really does here is to make a negative credibility finding without any basis to support it. If she doubted Ms. Soonias' credibility, she could have investigated further. Instead, she once again relied upon spurious grounds to reject unrefuted evidence.

[70] The fact that Ms. Soonias' son did not submit his own affidavit is not a reason to doubt Ms. Soonias' credibility. She provides evidence of what she saw with her own eyes. This is not hearsay. There could have been all kinds of reasons why Ms. Soonias' son did not submit an affidavit, expense being one of them, feeling that his mother had said all that needed to be said, or fear of self-incrimination. The Delegate makes no attempt to find out why he did not provide evidence and merely draws a negative inference that has no basis in law or logic. The Delegate could easily have found out why the son had not provided an affidavit, but she chose not to.

[71] The fact that "no other members came forward to support the allegations that Charles Meechance purchased ballots" is irrelevant and is not evidence that he did not purchase the ballots of Ms. Soonias and her son for which direct, unrefuted evidence exists. Also irrelevant is the fact that Mr. Meechance was not elected. The Delegate makes the mistake of importing into the corruption allegation a requirement that the activity in question might affect the outcome of the election. This is not a requirement under s 14 (a) of the Regulations.

[72] It is also irrelevant that Ms. Soonias contacted Mr. Meechance and he did not contact her. If someone purchases a vote, it doesn't matter who initiated the purchase. It is also unreasonable to expect that Ms. Soonias would be able to provide "any supporting documentation, testimonials, names or contact information to support her allegation, least of all from her son who allegedly received money for his ballot." As already pointed out, the son may have had good reason not to become involved and the Delegate had no reason to suspect that this had anything to do with Ms. Soonias' credibility. Furthermore, it is difficult to understand what other "supporting documentation, testimonials, names or contact information" the Delegate has in mind for a clandestine transaction that took place in secret in a parking lot behind the No Frills store in North Battleford. I somehow doubt that those involved in the purchase of votes do so in a context that yields a paper trail or an opportunity for testimonials and witnesses.

[73] The Delegate's point about the declarations signed on March 11, 2014, may well have some validity, but is not sufficient to support a negative credibility finding when there is no evidence from Mr. Meechance. It is inconsistent for the Delegate to draw a negative inference from the son's failure to provide an affidavit but to draw no negative inference against Mr. Meechance when he provided no statement at all.

D. *Conclusions on Vote-Buying*

[74] It seems to me that the Applicant has established that the Delegate's treatment of the vote-buying allegations was:

(a) Based upon an error of law in failing to consider the evidence in accordance with s 14 of the Regulations;

(b) Was unreasonable in its conclusions given the evidence before her and her failure to check out bald assertions and/or investigate direct conflicts in the evidence;

(c) Was procedurally unfair because the failure to check and investigate provided no opportunity for witnesses to address concerns before negative rulings based upon credibility were used to dismiss the appeal.

[75] Having said all of this, I think it is also necessary for the Court to consider whether there is any practical reason for interfering with this Decision.

[76] I have already said that I do not think there was a reviewable error in the way the ballot issue was dealt with. As the Delegate points out, her findings justify a dismissal of the appeal on this issue, whether it is considered from the perspective of s 79 of the Act or the Regulations. There were no conflicts in the evidence that required any further investigation and the Applicant had failed to demonstrate even an appearance of a violation of the Act or the Regulations that might, under s 14(b) of the Regulations, have affected the result of the 2014 election.

[77] As regards vote-buying, it seems to me that, for the reasons given, the Delegate, in her treatment of the evidence of Ms. Soonias, erred by applying the s 79 standard, by reaching unreasonable conclusions unsupported by the evidence, and by making negative credibility findings in a procedurally unfair way. However, in the end, I don’t think this really matters.

[78] As regards the evidence of Ms. Soonias, the Elections Unit’s approach has some justification because there was little point in the Minister reporting to the Governor in Council. This is because, under s 79 of the Act, the Governor in Council’s discretion only extends to

setting aside "the election of a chief or councillor of a band" if, on a balance of probabilities, there was, under s 79 (a), "corrupt practice in connection with the election."

[79] The only corrupt practice alleged by Ms. Soonias was the purchase of two votes by Mr. Meechance, who was not elected. There is nothing in the evidence to connect Mr. Meechance's vote-buying with any ground that would justify the Governor in Council in setting aside the election of a chief or councillor. Nor was there anything in Ms. Soonias' evidence to suggest widespread vote-buying by the chief and any councillor, so that, in my view, it was reasonable not to pursue this issue further with an investigation under s 13.

[80] The only real issue before me is whether the treatment of Mr. Wuttunee's evidence regarding vote-buying by Chief Baptiste required further action. For reasons given, it seems to me that this evidence certainly established an appearance of corrupt practice in connection with an election in accordance with s 14(a) of the Regulations, so that a report needed to be made to the Governor in Council for the purpose of making a decision in accordance with s 79 of the Act. It also seems to me that the competing evidence on this matter meant that it could not be dealt with without some kind of investigation by the Minister under s 13 of the Regulations. The comparison of the vote spread in previous elections in which Chief Baptiste was a successful candidate does not mean that the alleged purchase of 200 votes did not occur and did not affect Chief Baptiste's success in the 2014 election.

[81] This matter should have been addressed in accordance with ss 13 and 14 of the Regulations so that a decision could be made by the Governor in Council under s 79 of the Act.

Here, there was both an appearance of vote-buying and directly competing evidence that required further investigation so that a report could be made to the Minister and the Governor in Council.

E. *Other Issues*

[82] The Applicant has raised a number of other issues, some of which (the procedural unfairness allegations, for example) have been dealt with as part of my discussion above. The reasonable apprehension of bias allegations based upon Ms. Anita Hawdur's words of reassurance to the Electoral Officer are not proven. There is no indication, in the full context, that an informed person, with knowledge of all the relevant circumstances and the social realities in this case would apprehend bias, given the evidence on ballots and the checking that was done on this issue. See *Samson Indian Band v Canada*, [1997] FCJ No 1652 at paras 19-27.

[83] Nor do I accept that the Delegate was trying to mislead the Court when she swore under oath that the required standard of proof was the balance of probabilities. As I hope my discussion above had made clear, the interaction between s 79 of the Act and ss 13 and 14 of the Regulations is not absolutely obvious on these facts and, in any event, taking a position that s 79 of the Act should be applied in this case was not an attempt to mislead the Court. Getting the law wrong is not an exercise in deception.

[84] The Applicant wisely withdrew her allegations of actual bias at the hearing on September 14, 2016. There is no evidence before me of actual bias. I think that what the Applicant means by a reasonable apprehension of bias in this case is that the Elections Unit of INAC, in bypassing s 14 of the Regulations, in failing to investigate conflicting evidence under

s 13 of the Regulations (as set out above) and by simply deciding this case under the s 79's civil standard of proof, has created an apprehension of systemic bias in that it tips the appeals process - or it did in this case - unfairly in favour of elected officials and to the disadvantage of appellants in a way that is not authorized by the Act and the Regulations. In this regard, however, it means little more than procedural unfairness and unreasonableness on the facts of this case and does not need to be dealt with as a separate issue.

[85] I also find that the Applicant has failed to establish that she had a legitimate expectation that an investigation would be ordered in this case. As the AG points out, a legitimate expectation requires a clear, unambiguous and unqualified representation, policy or practice that is relied upon. See *Mount Sinai Hospital Center v Quebec (Minister of Health and Social Services)*, 2001 SCC 41 at para 29. No such representation, policy or practice existed in this case and s 13 of the Regulations makes it abundantly clear that the Minister has the discretion to "conduct such further investigation into the matter as he deems necessary, in such manner as he deems expedient." This discretion means there can be no legitimate expectation that an investigation will be ordered in any particular case. But the discretion has to be exercised reasonably, and I have found that this did not occur in the case of the allegations of Chief Baptiste.

F. *Mootness*

[86] The AG argues that this application is moot because a subsequent election took place in 2016 so that there can be no live issue between the parties. The AG also says that there is no

issue raised in the application that is important enough to justify the use of scarce judicial resources.

[87] A case is moot when it fails to meet the “live controversy” test. The principles regarding mootness and the Court’s residual discretion to address a moot issue are well-known and were set out in *Borowski v Canada (Attorney General)*, [1989] 1 SCR 342 at pp 358-363.

[88] In the present case, a live controversy remains over the issue of what statutory provisions and regulations govern election appeals even though a new election has taken place since the 2014 election. The adversarial context still exists and this application was well and fully argued by the parties who have a stake in the outcome. The collateral consequences are important here because of the number of appeals which the Elections Unit has to deal with each year. Judicial resources will be conserved because a decision here will obviate the need to challenge elections on similar grounds in the future. Uncertainly will prevail if this dispute is not resolved and the Court is being asked to provide direction on fundamental issues that are likely to recur across the country. There is a real social cost to leaving the matter undecided. In my view, and based upon these factors, I believe the Court should, notwithstanding the mootness in this case, exercise its discretion to deal with the central issue of controversy between the parties.

[89] Given that the evidence before me establishes that roughly 40 percent (238 of 617) of First Nations hold elections in accordance with the Act, and the Delegate gives evidence of the significant number of appeals dealt with by the Elections Unit, this matter needs prompt clarification.

[90] In the present case, the Applicant asks for a declaration that the Minister breached the principles of procedural fairness in denying the appeal, as well as an order quashing the Decision, together with an order by the Court allowing the original appeal.

[91] The Court cannot substitute its own decision for the Decision under review and there is no point in quashing the Decision and sending it back for reconsideration, given the 2016 election. The Applicant acknowledged this at the hearing and asked that the Court simply issue an appropriate declaration of any reviewable errors it might find. I note that Justice Mactavish did this in *Hudson*, above, where a pending new election meant there was no point in returning the matter for reconsideration:

> [111] Where a finding has been made that reviewable errors were made in arriving at a decision, the normal practice would be to send the matter back for a new decision to be made. However, in this case, there is little to be gained in so doing, as a new election for Chief and Council is scheduled to be held on March 22, 2007, where once again, both Chief Stevenson and Mr. Hudson are candidates for the position of Chief.
>
> [112] As a consequence, while I am satisfied that errors were committed in the determination of Mr. Hudson's election appeal of a magnitude that rendered Ms. Kustra's decision unreasonable, I decline to remit the matter to the respondent Indian Affairs and Northern Development Canada for further determination.

[92] In the present case, I think that all I can say is that reviewable errors were committed by the Elections Unit of INAC in dealing with the appeal in bypassing s 14 of the Regulations and failing to implement an appropriate investigation under s 13 of the Act when dealing with the allegations and evidence of vote-buying by Chief Baptiste.

[93] I wish to make it clear, however, that this does not mean that I think Chief Baptiste engaged in vote-buying for the 2014 election or would have been found to have done so if the Elections Unit had not committed reviewable errors. All it means is that the Elections Unit did not handle this aspect of the Applicant's appeal appropriately and in accordance with the Act and the Regulations.

## G. *Costs*

[94] If the parties cannot agree on costs then they may make submissions to the Court. This should be done, initially at least in writing, and the Court will decide whether oral submissions are also required on this matter.

## JUDGMENT

**THIS COURT'S JUDGMENT is that**

1. The application is allowed in part only.
2. The Decision contains reviewable errors as set out in the reasons with regard to the Applicant's vote-buying allegations against Chief Baptiste. However, the matter will not be returned for reconsideration because a subsequent election has taken place in 2016.
3. The parties may make submission on costs in accordance with the reasons.

"James Russell"

Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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| **DOCKET:** | T-2205-14 |
| **STYLE OF CAUSE:** | MICHELLE GOOD v THE ATTORNEY GENERAL OF CANADA ET AL |
| **PLACE OF HEARING:** | SASKATOON, SASKATCHEWAN |
| **DATE OF HEARING:** | SEPTEMBER 14, 2016 |
| **JUDGMENT AND REASONS:** | RUSSELL J. |
| **DATED:** | NOVEMBER 15, 2016 |

**APPEARANCES:**

| | |
|---|---|
| Michelle Good | ON HER OWN BEHALF |
| David J. Smith | FOR THE RESPONDENT, ATTORNEY GENERAL OF CANADA |

**SOLICITORS OF RECORD:**

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| William F. Pentney<br>Deputy Attorney General of Canada<br>Saskatoon, Saskatchewan | FOR THE RESPONDENT, ATTORNEY GENERAL OF CANADA |