

Federal Court



Cour fédérale

Date: 20181128

Docket: T-596-16

Citation: 2018 FC 1199

Ottawa, Ontario, November 28, 2018

PRESENT: The Honourable Madam Justice McVeigh

BETWEEN:

MICHELLE GOOD

Applicant

and

**CHIEF ELECT CLINTON WUTTUNEE AND
COUNCILLORS ELECT LUX BENSON,
MANDY CUTHAND, DANA FALCON,
HENRY “BOSS” GARDIPY AND GARY
SAUVE NICOTINE**

Respondents

JUDGMENT AND REASONS

I. Introduction

[1] This is an appeal arising from the March 18, 2016 Red Pheasant First Nation election.

[2] The Applicant, Michelle Good [Good], is a Red Pheasant First Nation band member who resides in British Columbia. She applied to this Court under section 30 of the *First Nations Elections Act*, SC 2014, c5 [*FNEA*] for judicial review of the election.

[3] It was confirmed at the start of the hearing that Good is a practising lawyer in British Columbia, but is representing herself in this matter as a member of the Red Pheasant First Nation.

[4] Good brought an application for an interlocutory injunction and it was dismissed on August 19, 2016, by Justice Gagné, with costs payable by Good to the Respondents.

[5] The tenor of the allegations can be gleaned from the closing paragraph of Good's submissions in her Memorandum of Fact and Law. She submits at paragraph 189:

The Red Pheasant Respondents have done everything in their power to subvert this appeal by nefarious means. It is a reasonable conclusion that these acts of bribery and intimidation are the desperate or arrogant acts of persons determined to conceal their corruption of the 2016 Red Pheasant Election.

[6] Good's Notice of Application [Notice] does not set out any relief sought, but does apply for nine different declarations and an order that a new election be called. The Notice further demands that election observers be engaged and assigned at the expense of the Minister to ensure the election is lawfully commissioned, and also to have observers at all advance polls to prevent mail-in ballots being cast fraudulently.

[7] Good's Memorandum of Fact and Law seeks the following relief:

190. A declaration that the Minister delegated her duty to consult to the Band Council with respect to opting—out of s.74(1) of the Indian Act in favour of opting in to the FNEA;

191. A declaration that the Red Pheasant Band Council also had a duty to consult its members seeking their consensus with respect to opting-out of s.74(1) of the Indian Act in favour of opting in to the FNEA pursuant to s.2(3) of the Indian Act;

192. A declaration that the Red Pheasant Band Council breached their duty to consult with respect to opting-out of of [sic] s.74(1) of the Indian Act in favour of opting in to the FNEA;

193. A declaration that the November BCR is based on a misrepresentation that the Band Council consulted its membership with respect to opting out of s.74(1) and is thus void and without legal authority;

194. A declaration that the March 2016 Red Pheasant Election, arising as it does from the void November BCR is a nullity and a new election be ordered;

195. A declaration that the Red Pheasant Band Council breached its fiduciary duty to its members by misrepresenting to the Minister that its members had been consulted; and

196. A declaration that the Minister breached her fiduciary duty by failing to uphold her duty arising from the Honour of the Crown to ensure that consultation had occurred upon delegating that duty to the Band Council.

197. A finding that respondents Clinton Wuttunee, Mandy Cuthand, Henry "Boss" Gardipy, Garry Sauve Nicotine, Shawn Wuttunee, Dana Falcon and Lux Benson engaged in corrupt practices contrary to section 14(b) and (c); 16 (a) (c) (d) and (e) of the FNEA and as such are disqualified as candidates pursuant to the FNEA and subject to penalties listed therein."

[8] At the hearing, the Court confirmed that even if the Application for Judicial Review was successful, a number of Good's requests for relief were unobtainable. It was further confirmed that if Good was successful, I could exercise my discretion to set aside the impugned election.

[9] I am dismissing the application for the reasons that follow.

II. Background

[10] Good has filed appeals in all of the last three previous elections. This is the first appeal under the *FNEA*.

[11] In a previous appeal arising out of the March 20, 2014 election, Good applied 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 (known as INAC). Good argued that INAC erred when they denied an appeal after Good made serious allegations of misconduct of the Electoral Officer and corruption in the form of vote buying for Councillor Charles Meechance and Chief Stewart Baptiste. The Director General, without conducting an investigation, had denied the appeal. That decision was judicially reviewed by Justice Russell in *Good v Canada (Attorney General)*, 2016 FC 1272, which was released on November 15, 2016.

[12] Justice Russell examined the allegation that both the delegate and the electoral officer demonstrated a reasonable apprehension of bias, and that the delegate acted in a manner that was procedurally unfair. Good further submitted that the delegate attempted to deceive the Court by giving false evidence. Justice Russell held:

[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 that 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.

[13] Justice Russell did not return the matter for reconsideration, given the results of the 2016 election.

[14] Moving on to discuss the appeal before me now, the appeal of this election is governed under the statutory regime of the *FNEA*. The *FNEA* legislates a process for First Nations and Indigenous communities to elect their Band Council members. The process under the *FNEA* operates in parallel and in addition to other processes set out in section 74(1) of the *Indian Act*, RSC, 1985, c I-5 [*"Indian Act"*].

[15] The *FNEA* is a relatively new statute that came into force in April of 2015, along with the associated *First Nations Elections Regulations*, SOR/2015-86 [*"FNEA Regulations"*]. In order to opt into the provisions, a proper Band Council Resolution [*"BCR"*] in favour of being governed by the *FNEA* must be submitted to the Minister. The Minister then adds the First Nations to the *FNEA* Schedule.

[16] On November 5, 2015, the Red Pheasant First Nation Band Council signed a BCR in favour of opting into the *FNEA*. On January 4, 2016, after receiving the BCR, the Minister added the Red Pheasant First Nation to the *FNEA* Schedule. An election followed on March 18, 2016.

[17] On April 12, 2016, after the election results became known, Good filed an application under section 30 of the *FNEA* in the Federal Court to review the election. She went on to allege in her Memorandum of Fact and Law that the election and the election process contravened numerous sections of the *FNEA*, including sections 14(b), (c), (d), and (e), 16(a), (b), (c), (e), and (f), 17 (b), 18, and 19(a), and alleged that the Electoral Officer failed to comply with section 24(1).

[18] Good also requested judicial review of numerous other decisions, including the decision of the Minister to add the Red Pheasant First Nation to the *FNEA* Schedule (which she alleged was a breach of fiduciary duty), and the decision of the Red Pheasant First Nation Band Council to join the *FNEA* Schedule in the first place.

[19] Note that the Applicant requests differing remedies in her Memorandum of Fact and Law (see paragraph 7 above), in contrast to the Notice of Application. In the Memorandum of Fact and Law, she asks for a declaration that a number of the Respondents breached sections 14(b), 14(c), and 16(a), (b), (c), (d), and (e), whereas in the Notice of Application she also requests a declaration that sections 14(d) and (e), 17(b), 18, and 19(a) were contravened during the election, but leaves out section 16(a).

[20] The parties underwent what can only be described as extensive case management, and many months of back and forth between the parties ensued without much progress. By and large, the parties were unsuccessful in working out many issues in case management proceedings, and at the judicial review hearing, there were still a number of outstanding issues.

III. Preliminary Motions and Issues

[21] At the commencement of the hearing, the parties made submissions regarding two motions. A Rule 312 motion was brought by the Applicant and a Rule 302 motion was brought by the Respondents.

[22] The Applicant's motion for leave to file additional affidavits pursuant to Rule 312 of the *Federal Courts Rules*, SOR/98-106 ["FCR"] was granted. The Respondent Attorney General's ["AG"] and the Respondent Red Pheasant First Nation's motions pursuant to Rule 302 of the FCR were granted. Accordingly, the hearing was limited to the appeal of the election results. An oral decision on both of these motions was provided at the hearing, as summarized below, and an order granted to that effect dated April 3, 2018.

A. *Rule 302*

[23] In the Rule 302 motion, the Respondents argued that there were multiple issues raised against multiple bodies with 10 distinct requests for relief in Good's application. On January 3, 2017, the Respondent Red Pheasant First Nation filed a Notice of Motion raising Rule 302. On January 27, 2017, the AG filed a Notice of Motion in agreement with the Respondent Red Pheasant First Nation's submission on Rule 302. Both the Red Pheasant First Nation and the AG made submissions on the Rule 302 motion at the hearing.

[24] The Respondents submit that this Court must limit the judicial review to a single decision against a single administrative body.

[25] Good argued that the AG's decision to put the band on the *FNEA* Schedule after receiving the BCR was inherently a part of the election, and that the Rule 302 motion should therefore be dismissed. In Good's submission, the AG allowing the Red Pheasant First Nation to proceed under the *FNEA* breached a duty to consult.

[26] The AG submitted conversely that as the decision of the Minister regarding the *FNEA* Schedule is entirely separate from the other matters at issue in the application, the application should be discontinued against them.

[27] The AG submitted that on November 15, 2015, the Saskatchewan regional office of INAC received a BCR from Red Pheasant First Nation requesting that the Minister add the Red Pheasant First Nation to the *FNEA* Schedule. Specific to this motion, Good challenged the decision of the Red Pheasant Band Council to opt to conduct the election under the provisions of the *FNEA*.

[28] I agreed with the Respondents that judicial review must proceed on a single decision. Rule 302 of the *FCR* stipulates that applications for judicial review should be limited to one decision. Thus, where the review of multiple decisions is sought, an application for each decision must be sought (*Servier Canada Inc v Canada (Health)*, 2007 FC 196; *Truehope Nutritional Support Ltd v Canada (Attorney General)*, 2004 FC 658).

[29] The Court will make an exception to Rule 302 when an applicant challenges a continuing course of conduct arising from the decision of the same body (*Mahmood v Canada*, [1998] FCJ No 1345 at para 10; *Lessard-Gauvin v Canada (Attorney General)*, 2016 FC 227).

[30] In this matter, I find that Good is challenging multiple decisions that do not arise from the decisions of the same body. I do not accept Good's submission that there is only one official decision for review.

[31] This is of a completely different factual matter than the circumstance in *Shotclose v Stoney First Nation*, 2011 FC 750 [*Shotclose*], which Good relies on in her submissions. In *Shotclose*, the applicants were challenging not one specific decision by the Chief and Council, but were rather challenging all of decisions and actions taken by the Chief and Council leading up to the failure to properly conduct the 2010 election. This is clearly factually distinct from the multiple decisions put forward by Good for review, where Good initially sought review of the decision of the former Chief, the decision of the Minister to place the Red Pheasant First Nation on the *FNEA* Schedule, the actions of the Electoral Officer (later discontinued by Good), the actions of the current Chief, and the contravened nature of the election itself.

[32] In addition, the Applicant filed her application on April 13, 2016, well after the 30-day statutory timeline (*Federal Courts Act*, s. 18.1(2)) given to file an application for judicial review in respect of the other decisions. I note, however, that this is not determinative in this decision as the application is not in respect of a tribunal's decision or order (*Friends of the Oldman River Society v Canada (Min of Transport)*, [1992] 1 SCR 3).

[33] I find that the single decision that will be reviewed arises from the March 18, 2016 election, which is the decision identified in the Notice of Application made pursuant to the *FNEA* and the relevant *FNEA Regulations*. Good's Notice of Application was filed pursuant to section 30 of the *FNEA*, and section 30 only pertains to the validity of *FNEA* elections.

[34] I awarded costs to the AG in an April 3, 2018 Order that indicated that a lump sum award would be determined within the application for judicial review. The AG subsequently withdrew their request for costs for this motion and none are awarded to the AG for this motion.

B. *Rule 312*

[35] Good brought a motion to file the additional affidavits and the cross-examination transcripts of: Sandra Arias, dated February 9, 2017; Michelle Good #6, dated January 17, 2017; Elsie Wuttunee #2, dated January 16, 2017; Eldon Wuttunee, dated January 16, 2017; Chief Clinton Wuttunee, dated January 22, 2018; and Dana Falcon, dated January 22, 2018.

[36] The Respondents opposed these being filed. The Respondents submitted that the additional affidavits are, on an individual analysis, barred by the rules of hearsay and other evidentiary issues, and are not saved by any principled exceptions. In addition, relying on the test in *Strykiwsky v Stony Mountain*, 2000 CanLII 16155 (FC), the Respondents submitted that the late filing of the affidavit evidence significantly prejudiced the Respondents, as it would place additional cost and effort on the Respondents after cross-examinations had already been completed on an already impecunious Red Pheasant First Nation. The Respondents submit that no reasonable or valid explanation for the delay in filing the affidavits exists.

[37] In respect of the Rule 312 motion, I granted the Applicant leave to file the additional affidavits and the cross-examination transcripts of: Sandra Arias, dated February 9, 2017; Michelle Good #6, dated January 17, 2017; Elsie Wuttunee #2, dated January 16, 2017; Eldon Wuttunee, dated January 16, 2017; Clinton Wuttunee, dated January 22, 2018; Dana Falcon, dated January 22, 2018.

[38] In admitting these affidavits, there is no prejudice to the Respondents as the Court can still assign what weight, if any, is to be given the filed affidavits and cross-examinations.

[39] I allow these affidavits and cross-examinations evidence into the record to ensure that all the evidence that could possibly be before the Court is so the matter can finally proceed.

C. *Discontinuance against Parties*

[40] Good discontinued the application against the Attorney General after the Rule 302 motion was successful.

[41] Counsel for the remaining Respondents requested that the matter be discontinued against the following: Howard McMaster (deceased), Sabrina Baptiste, Larry Wuttunee, former Chief Stewart Baptiste Jr., Shawn Wuttunee, Ryan Buglar and the Red Pheasant First Nation. Good agreed to discontinue against Howard McMaster, Ryan Bugler, Sabrina Baptiste, and the Red Pheasant First Nation.

[42] The matter was discontinued against those parties and they will therefore be removed from the style of cause.

[43] I will not entertain any of the arguments or make any finding regarding evidence against Howard McMaster (deceased) given that he has been discontinued against.

[44] After the hearing, Good wrote to the Court explaining that she changed her mind about discontinuing against the Red Pheasant First Nation. I subsequently issued written directions to the parties reminding them that the submissions are closed. Reasonable diligence before or during the hearing could have resolved this issue, and to continue to allow counsel to change her mind after the fact would result in this issue proceeding by installment. Although there are exceptions, counsel changing her mind is not one of them (*Varco Canada Ltd v Pason Systems Corp*, 2011 FC 467 at para 15).

IV. Issue

[45] The issue is:

- A. Has the Applicant discharged its burden to satisfactorily prove that the *FNEA* has been contravened and if so, did it likely affect the election result?

V. The law

[46] The relevant provisions of the *FNEA* are as follows:

Ballots**Prohibition**

14 A person must not, in connection with an election,

- (a) provide a false name in order to obtain a ballot;
- (b) possess a ballot that was not provided to them in accordance with the regulations;
- (c) purchase a mail-in ballot that was issued to another person;
- (d) sell or give away a mail-in ballot; or
- (e) print or reproduce a ballot with the intention that the print or reproduction be used as a genuine ballot, unless that person is authorized to do so under the regulations.

Prohibition — any person

16 A person must not, in connection with an election,

- (a) vote or attempt to vote knowing that they are not entitled to vote;
- (b) attempt to influence another person to vote knowing that the other person is not entitled to do so;

Bulletins de vote**Interdictions**

14 Nul ne peut, relativement à une élection :

- a) demander un bulletin de vote sous un faux nom;
- b) avoir en sa possession un bulletin de vote qui ne lui a pas été fourni en conformité avec les règlements;
- c) acheter le bulletin de vote postal d'une autre personne;
- d) vendre ou donner un bulletin de vote postal;
- e) sauf s'il y est autorisé par règlement, imprimer ou reproduire un bulletin de vote dans l'intention que l'impression ou la reproduction soit utilisée comme bulletin authentique.

Interdictions générales

16 Nul ne peut, relativement à une élection :

- a) voter ou tenter de voter sachant qu'il est inhabile à voter;
- b) inciter une autre personne à voter sachant que celle-ci est

(c) knowingly use a forged ballot;

(d) put a ballot into a ballot box knowing that they are not authorized to do so under the regulations;

(e) by intimidation or duress, attempt to influence another person to vote or refrain from voting or to vote or refrain from voting for a particular candidate; or

(f) offer money, goods, employment or other valuable consideration in an attempt to influence an elector to vote or refrain from voting or to vote or refrain from voting for a particular candidate.

inhabile à voter;

c) faire sciemment usage d'un faux bulletin de vote;

d) déposer dans une urne un bulletin de vote sachant qu'il n'y est pas autorisé par règlement;

e) par intimidation ou par la contrainte, inciter une autre personne à voter ou à s'abstenir de voter, ou encore à voter ou à s'abstenir de voter pour un candidat donné;

f) offrir de l'argent, des biens, un emploi ou toute autre contrepartie valable en vue d'inciter un électeur à voter ou à s'abstenir de voter, ou encore à voter ou à s'abstenir de voter pour un candidat donné.

Prohibition — elector

17 An elector must not, in connection with an election,

(a) intentionally vote more than once in respect of any given position of chief or councillor; or

(b) accept or agree to accept money, goods, employment or other valuable consideration to vote or refrain from voting or to vote or refrain from voting for a particular candidate.

Interdictions visant l'électeur

17 Nul électeur ne peut, relativement à une élection :

a) voter intentionnellement plus d'une fois à l'égard de chacun des postes de chef ou de conseiller;

b) accepter ou convenir d'accepter de l'argent, des biens, un emploi ou toute autre contrepartie valable pour voter ou s'abstenir de voter, ou encore pour voter ou s'abstenir de voter pour un candidat donné.

Secrecy of voting

18 Voting at an election is to be conducted by

Vote secret

18 Le vote à une élection se

secret ballot.

Prohibition — elector

19 An elector must not, in connection with an election,

(a) show their ballot, when marked, to reveal the name of the candidate for whom the elector has voted, other than in accordance with the regulations; or

(b) in the polling station, openly declare for whom the elector intends to vote or has voted.

Contested Elections

Means of contestation

30 The validity of the election of the chief or a councillor of a participating First Nation may be contested only in accordance with sections 31 to 35.

Contestation of election

31 An elector of a participating First Nation may, by application to a competent court, contest the election of the chief or a councillor of that First Nation on the ground that a contravention of a provision of this Act or the regulations is likely to have affected the result.

Court may set aside election

35 (1) After hearing the application, the court may, if the ground referred to in section 31 is

tient par scrutin secret.

Interdictions visant l'électeur

19 Nul électeur ne peut, relativement à une élection :

a) montrer son bulletin de vote, une fois marqué, pour révéler le nom du candidat pour lequel il a voté, sauf en conformité avec les règlements;

b) dans un bureau de scrutin, déclarer ouvertement en faveur de qui il a l'intention de voter ou pour qui il a voté.

Contestation de l'élection

Mode de contestation

30 La validité de l'élection du chef ou d'un conseiller d'une première nation participante ne peut être contestée que sous le régime des articles 31 à 35.

Contestation

31 Tout électeur d'une première nation participante peut, par requête, contester devant le tribunal compétent l'élection du chef ou d'un conseiller de cette première nation pour le motif qu'une contravention à l'une des dispositions de la présente loi ou des règlements a vraisemblablement influé sur le résultat de l'élection.

Décision du tribunal

35 (1) Au terme de l'audition, le tribunal peut, si le motif visé à l'article 31 est établi,

established, set aside the contested election.

invalider l'élection contestée.

Duties of court clerk

Transmission de la décision

(2) If the court sets aside an election, the clerk of the court must send a copy of the decision to the Minister.

(2) Lorsque le tribunal invalide une élection, le greffier expédie un exemplaire de la décision au ministre.

[47] The purpose of the *FNEA* is to provide alternative electoral processes for indigenous communities in Canada. A relatively recently proclaimed piece of legislation, the *FNEA* has received little judicial consideration to this point.

[48] The judicial principles and interpretative approach to the *FNEA*, and the provisions governing prohibited conduct during an election, have however been considered in *Papequash v Brass*, 2018 FC 325 [*Papequash*] and *Cyr v McNab*, 2016 SKQB 357 [*Cyr*], appeal allowed in part in *McNabb v Cyr*, 2017 SKCA 27 [*McNabb*], and *Paquachan v Louison*, 2017 SKQB 239 [*Paquachan*].

[49] The cases cited clarify the statutory test to set aside an election under section 31 and section 35(1) of the *FNEA*. The test requires the Applicant to establish that a provision was contravened and that the contravention likely affected the election result. Contraventions unlikely to have affected the result of the election will not trigger overturning the election. The requisite standard of proof for establishing this test is the balance of probabilities (*Papequash* at para 33; *McNabb* at para 36).

[50] Both Justice Barnes in this Court (*Papequash*) and the Saskatchewan Court of Appeal in *McNabb* have also adopted the Supreme Court of Canada's approach with the *Canada Elections Act* used in *Wrzesnewskyj v Canada (AG)*, 2012 SCC 55 (sub nom *Opitz v Wrzesnewskyj* [*Opitz*]) in interpreting the *FNEA*.

[51] The Saskatchewan Court of Appeal in *McNabb*, in citing *Opitz*, noted:

[26] It is clear from the minority reasons of the Supreme Court in *Opitz* that the presumption of regularity is reflected in the onus and evidentiary burden imposed on an applicant to demonstrate that a contravention that **likely affected the result of an election** has occurred. Using the language of CEA, McLachlin C.J.C., who wrote for the minority, explained:

[169] Election results benefit from a "presumption of regularity": *Dewdney Election Case*, 1925 CanLII 314 (BC CA), [1925] 3 D.L.R. 770 (B.C.C.A.), at p. 771. This reflects the fact that the applicant bears the burden of establishing, on a balance of probabilities, that there were "irregularities ... that affected the result of the election": see *Beamish*, at para. 39. ...

[emphasis added]

[52] In adopting the ruling in *Opitz* in their interpretation of the *FNEA*, the courts have confirmed that when alleging a breach of the *FNEA*, an applicant must establish a *prima facie* case, after which the burden switches to the respondent to refute it (*Paquachan*):

[23] *The Burden of Proof*: To assist in the implementation of the burden of proof to determine whether a contravention of the *FNEA* likely affected the result of the election, the framework offered by Justice Rothstein at para 61 in *Opitz* respecting the *Canada Elections Act* is instructive. First, the applicant must prove a *prima facie* case of irregularity (or in this instance, "contravention"), leaving to the respondent the opportunity to refute the alleged contravention or that the contravention likely did not affect the election result.

[53] In *Opitz*, the majority only dealt with “irregularities”. The type of contravention, then, is important and relevant.

[54] Not every contravention will justify triggering the overturning the election. As was held at paragraph 34 in *Papequash*, in cases involving technical procedural questions, a careful mathematical approach, like the “reverse magic number” test, may be utilized to establish the likelihood of a different outcome. In a case involving assertions of fraud, on the other hand, an annulment “may be justified regardless of the proven number of invalid votes”. Justice Barnes held at paragraph 34 of *Papequash* that the latter situation is “particularly the case where allegations of vote buying are raised...”

[55] Given the consideration by Justice Barnes and the Saskatchewan Court of Appeal, it also cannot be overlooked that this Court retains discretion on overturning elections, even in situations involving fraud or other forms of corruptions. In *Opitz*, for example, the majority stated that annulling an election would disenfranchise not only those whose votes were disqualified, but also for every elector who cast a vote. Therefore, assuming that the two-part test is met to establish a contravention of *FNEA*, the Court must carefully utilize its discretion before annulling an election.

[56] In this case, it was confirmed at the hearing with both remaining parties that this was not a situation that would need to have a “reverse magic number” test.

VI. Analysis

A. *Evidence*

[57] Pursuant to section 30 of the *FNEA*, the appeal proceeds as a judicial review. Evidence in a judicial review proceeding is dealt with by the Court through examination of the affidavits before it.

[58] Unfortunately, the record before me is complicated by numerous affidavits which included redacted affidavits, supplementary affidavits, and late filed affidavits.

[59] In the materials filed there were in total approximately 52 affidavits with 27 cross-examinations listed. At the start of the hearing, this evidentiary record was canvassed as the Prothonotary had not allowed a number of affidavits, and certain pieces of evidence had been withdrawn. Included in the 52 affidavits were two affidavits by affiants who were redacting their previous affidavits. There are multiple cross-examinations of several affiants on various affidavits. For example, there were six affidavits of Michelle Good in the file, and not all of them were properly before the Court or numbered correctly. This made the matter more complex and unnecessarily difficult to reconcile.

[60] Many of the affidavits contain hearsay evidence, argument, and irrelevant or inflammatory comments. This is unacceptable to the Court. This is inappropriate, and this is not a good use of judicial resources. Not only is such a record unfair to the Judge, but it is also unfair to the Respondents as the Respondents cannot know exactly what the relevant allegation is, or

the specific evidence that supports the allegation. The Court has to unnecessarily deal with a mishmash of evidence that is comprised of volumes of affidavits, supplementary affidavits, cross-examinations and recanted affidavits.

[61] Attached as Appendix “A” is a list of the affidavits and their status as best as can be determined, notwithstanding the issues noted above.

[62] As noted above, many of the affidavits contain hearsay or double hearsay without meeting any principled exceptions to the hearsay rule. In addition, there were redacted affidavits, and affidavits attaching affidavits, that were unsworn and attached as exhibits to other affidavits. No weight will be given to hearsay evidence or to unsworn affidavits as per Rule 81 of the FCR.

[63] I also note that no independent evidence or corroborative evidence was given to support the Applicant’s allegation that many of the affidavits were crafted to be self-serving for a nefarious purpose.

[64] I was asked to make an inference as to the truth of the matter if an affidavit was not cross-examined on. In this exceptional matter, due to the number of affidavits, and a lack of direction on what specific allegations the evidence referred to, I will not make that inference. I will respect that the main witnesses on both sides were cross-examined, and it was only a few of the more outlier affiants that were not.

[65] Further support to do so is found in *Cyr* at paragraph 74, where Justice Schwann noted that drawing a negative inference from an absent witness would shift the statutorily imposed burden of proof onto the respondent. I find that as per the statute and the relevant case law, as was the holding in paragraph 50 of *Cyr*, the applicant must bear the legal burden of proof. I will examine the evidence of the affiants not cross-examined with the same lens as the cross-examined affiants.

B. *Allegations*

[66] Good did not set out in her Memorandum of Fact and Law the specific incidents and the corresponding evidence that would establish a *prima facie* case that met the test of “likely to have affected” the result of the election. Instead, Good made a running list of facts regarding the “corrupt practices” that took place at Red Pheasant, a “he said, she said”, and general accusations of actions that would breach the relevant sections of the *FNEA*. I will wade through the morass of affidavits and cross-examinations relevant to each allegation to make a finding. This too is unacceptable and made the matter lengthy and complex.

[67] As per the *FNEA* and the relevant jurisprudence, the issue that I must decide is whether, on a balance of probability the prohibited act occurred. If I find that the prohibited act occurred, I must determine whether the contravention affected the outcome of the election. Good no longer raises any allegations against Howard McMaster, so as noted above I will not deal with any allegations regarding Howard McMaster. Nor will I deal with any evidence against any of the parties that have been discontinued against or the evidence that related to decisions other than the 2016 decision.

[68] In the interest of justice, I have broadly diagrammed, from the written and oral submissions, what the specific allegations before the Court are. It is on the basis of the specific allegations that I must make my finding.

C. *Particular Evidence*

[69] Before I lay out the specific and relevant allegations in front of me, I will deal with the evidence of Jeffery Tisnic (Meechance) and Nisha Wuttunee. As well, I will look at the circumstances related to Chief and Councillors giving cash to members of the band before I deal with the specific allegations as this is pervasive theme throughout the evidence.

(1) Jeffery Tisnic (Meechance)

[70] Jeffery, born on February 5, 1997, also goes by the names “Jeffery Meechance”, “Jeffery Tisnic Meechance” or “Jeffery Tisnic” [Jeffery]. Jeffery filed an affidavit in support of the appeal. He was cross-examined on his affidavit on February 10, 2018.

[71] At the time of the cross-examination, he was living in or around Edmonton managing Tim Hortons’ restaurants, and had been so occupied for approximately three years. Jeffery had moved to Edmonton to take the job at Tim Hortons sometime after the election. Before Edmonton, Jeffery had lived in or around Saskatoon where he had obtained his Grade 12 education.

[72] Jeffery voted in the election with a mail-in ballot that he alleges he was paid for by Gary Nicotine [Gary]. He further stated on cross-examination that Gary never provided support, whether in the form of foodstuff or financial support to himself or his family but Chief Clinton Wuttunee [Chief Clinton] has. Though Jeffery stated that Chief Clinton provided financial support only for the purpose of purchasing ballots, and did not provide any other kind of financial support to him. Jeffery asserted that Mandy Cuthand [Mandy] gave him \$40 via e-transfer to purchase his vote, and Henry Gardipy [Henry] gave him between \$60 to \$100 to purchase his vote.

[73] On page 297 of the recorded transcript, Jeffery stated on the record :

A.—well, I came outside with my ballot, and then I didn't let him take it, and he gave me about, like, 60 to \$100. I'm not too sure, like, how much it was because it was two years ago, but — yeah. I didn't let him take it. He was trying to take it, but I didn't let him take it.

Q. Okay.

A. Yeah. 'Cause I know I could get more money for it, like, if I get more 'X's, yeah.

Q. Okay. So, you were in the business of trying to sell your ballot?

A. Yes.

[74] Later Jeffery during cross-examination said that he absolutely was not in the business of selling his ballot, and when he was reminded he was under oath, said, “No, I was needing financial help because I was going through a —hard times”. Jeffery asserted at this point during the cross-examination that he needed financial support because he was not working.

[75] Jeffery admitted on cross-examination that he tried to sell his vote by contacting all of the current Chief and Council, but he said he did not attempt to sell his vote to anyone that he was supporting, such as the former Chief Baptiste:

Q. Ms. Good- He asked the question, did you text all of the current Chief and Council.

A. I guess so, yes.

Q. That wasn't so hard to answer, was it?

...

Q. What about Stewart Baptiste, did you ask him?

A. No.

Q. Did you ask Sandra Arias?

A. I don't know who that is.

[76] On Facebook, Jeffery purportedly attempted to shine a light on corruption in the Red Pheasant First Nation. At the end of his post, Jeffery, as per Exhibit "C" of his affidavit, finished his message with the hashtags of #IdleNoMore, #NoMoreCorruption, #Decolonize, and #SetThemUp. The hashtag **#SetThemUp** seems to indicate the potential will to bring ill-repute to the relevant parties. This is indeed troubling.

[77] Even as a first time voter, Jeffery decided that he would try and sell his vote for money and appeared non-repentant about it. During the cross-examination, Jeffery was asked about how he came up with the strategy of deciding to sell his vote by contacting candidates. He answered as such:

A.—it's a way to make money. We did not think it was wrong. We had to survive. We need to put food in our bellies, we need to put gas in our vehicles. People did not know it was wrong.

[78] Jeffery was also questioned about how Henry had helped Raelynn (Jeffery's sister) and Jeffery move from one house to another. While Jeffery admitted to this, he also stated that he had no idea any of these people had been helping his family over the years.

[79] Jeffery further stated on cross-examination that he was taken advantage of because he is a first time voter.

[80] Indeed, I do not find him to be a credible witness. His credibility was further diminished by a number of flippant, inconsistent, and implausible statements. For example, Jeffery had texted "LOL" in response to an apparent threat against him. Maintaining that he considered this a threat on cross-examination, Jeffery stated that he wrote "LOL" as he was "being hysterical".

[81] Jeffery was also cross-examined as to when he texted to request Chief Clinton for money for his father's funeral expenses. While Good objected to this line of questioning, as the text messages were not exhibits to Jeffery's affidavit. I note the texts were marked as exhibits to his cross examination. Jeffery asserted that the texts referenced on the cross-examination were never sent. I have no evidence they were not sent and in fact, the Respondents produced them so it can be inferred they were sent. This inconsistency with documentary evidence further impugns Jeffery's credibility as a witness.

[82] The significant contradictions in Jeffery's evidence given in cross-examination come into further stark contrast when compared against Henry's evidence given in cross-examination and Chief Clinton's evidence.

[83] The evidence given by these individuals cannot be so easily explained as being self-serving for the Respondents; rather the contradictory evidence given by both individuals is corroborated by exhibited documentation. For example, Jeffery had texted Chief Clinton on April 10, 2018, that "...you actually help the people. First time in Chief history. I am grateful for all the help you do for me and my family and relations". When cross-examined on this, Jeffery was evasive and stated that he had never written such a message. Such an answer, while under oath, further impugns Jeffery's credibility.

[84] Jeffery even took the opportunity to make misrepresentations on non-material facts. For example, Jeffery stated that Henry is his relative, but when asked about this at cross-examination, he could not provide any explanation as to how they were related.

[85] Gary provided evidence that he is a friend of Jeffery's mother and has helped the family out over the span of decades. As stated by Gary when cross-examined on this issue, the help provided has been through financial means, as well as other forms of assistance, and that Gary considered those forms of assistance to be part of his job as a councillor. Gary affirmed that he did not give Jeffery a list of candidates to vote for.

[86] In one instance, Jeffery asked for financial support from Gary via text message. In the exhibited text exchange, Jeffery was very persistent that he should be given \$60, so much so that Gary went to his house. Gary stated on the record that when he went to the house, Gary told Jeffery that he wasn't there to buy a vote, but would help him if he needed help, as Jeffery was crying to him on the cell, and out of respect for Jeffery's mother. Gary did not remember if he

gave Jeffery the money, but remembers that Jeffery's sister Raelynn was also in the vehicle. It is of note that Raelynn never filed an affidavit.

[87] Henry's evidence in cross-examination is equally unequivocal that Henry was there to help Jeffery and his family:

Q. You met with him.

A. Yeah.

Q Did you give him \$100.00?

A. I gave him \$100 for groceries and whatever he wanted for him and his boyfriend there at the time. He said they were short some money for—for groceries. I helped Jeffery out on a daily basis with his family, tobacco, drove his mom for groceries, drove Jeffery everywhere to move to his places, wherever he stayed, so I was just—I thought it was just another—another day, you now, helping—helping a—helping a young man, 18 years old...

[88] During cross-examination, Henry further confirmed his motivations for providing assistance in the context of Jeffery's father's funeral expenses:

Q. What about this business about—was it his father's funeral?

A. Yeah.

Q. Tell us about that.

A. Well, he wanted help to go for his father's funeral. He died, so we gave him a BMA from the band.

Q. BMA, what's that?

A. Band member assistance. I think it was a cheque for \$400 to help get him there and back. You know, we helped him at his time of death.

[89] Jeffery's denial that he or his family ever received any support is contradicted then by the evidence of Henry, Chief Clinton, and Gary. The evidence provided in contradiction to Jeffery's narrative is corroborated by texts.

[90] Jeffery's claim that he was intimidated so much that he had to move to Edmonton was contradicted by his own testimony at cross-examination, where he acknowledged that he moved to Edmonton for a job. He certainly does not seem easily intimidated from his behaviour shown in texts and on Facebook and his cross-examination.

[91] There was discussion that he was not presented for cross-examination. Nothing turns on that at this stage, as he was eventually cross-examined, but I will mention it only to show the credible issues with Jeffery are evident in his general lack of respect for the Court process. The Respondents submits that contrary to Good's assertion, they never refused to examine him, and that it defies logic that the Chief Clinton would pay for a room for him to attend for his cross-examination and then not cross-examine him.

[92] As noted above, I find then that Jeffery's evidence is unreliable. Jeffery's attitude in the cross-examination, flexible relationship with the truth, and his propensity to erupt and lash out gives me no confidence in his evidence. For example, in cross-examination, Jeffery attempted to explain the contradiction between him swearing that he was intimidated enough to move, but that he responded with "LOL" to the impugned threatening messages. As evidenced from the

excerpts of the transcript, Good has to step in to try and calm him down while he is being cross-examined:

Q. Mr. Stooshinoff: Laugh out loud, hysterical. That's your word, isn't it, Jeffery? It's hysterical?

A. No.

Q. Yeah. All right. Paragraph 13.

A. Read it.

Q. You read it.

A. You read it. Get—get—

Ms Good: Calm down.

A. —Lux to read it. See if he can read, just kidding.

Ms Good: Just relax. It's okay. Just relax, okay Just read—

A. On—

Ms Good: —the paragraph

A. I'll actually—

Ms Good: You don't have to read it out loud.

A. I'll actually read, the only educated one in this fucking room, the one who fucking dropped out of college.

[93] Later during the cross-examination, Jeffery made a reprehensible remark in alluding to the spouse for counsel for the Respondents, who had only recently passed away. Good had to intervene again in that instance, but the behaviour is disgraceful, and provides further indication of Jeffery's reliability as an affiant with little conscience:

Q. Did you ask Chief: (as read) Would you be able to help me out with \$40, Chief?

A. Let me see it, then.

Q. Bottom, bottom.

A. It seems like a fraud because they're all frauds.

Ms. Good: I don't see any phone numbers or anything; right?

A. Me neither.

Q. Mr. Stooshinoff: Did you say that, Jeffery?

A. Let me just look this over.

Q. Hang on to that eagle feather. It may help protect you from your perjury.

A. That's not perjury. This is inaccurate. Phone number—it says email, no phone number, Shirpinoff (sic) I feel so sorry if you had a wife, oh my God. (spoken in foreign language).

Ms. Good: I'm sorry for that, Nicholas.

A. Do you have a wife, I'm sorry?

Ms. Good: Don't say that. Don't talk about that.

A. Okay.

Ms. Good: Come here.

A. It's not my concern. I'm here about this affidavit not about him.

Ms. Good: That's right.

[94] In the cross-examination of Mandy Cuthand, Mandy stated that he gave Jeffery \$40 for fuel. It was after this discussion of the \$40 when Jeffery started talking about ballots and "x's", at which point Mandy stopped talking to Jeffery. The text message stated, "Its Jeffery meechnance adeles other son. I am wondering if you could help me out with \$40. I am trying to get funds, I was asked to go to Kamsack to do a ceremony. I am voting for you too. You have my x. okay?"

[95] Mandy's evidence is that he e-transferred Jeffery the \$40 on February 17, 2016, and then on that same day Jeffery asked him for \$50 in exchange for his mother's, sister's, and his own ballot. Mandy stated that he did not respond to the second request. I choose to believe Mandy's explanation of why he provided Jeffery with \$40 on February 17, 2016, and that it was for fuel and not to buy his vote.

[96] The text messages have many requests from Jeffery for money for school books and gas. Though the exhibit of the text messages does not have phone numbers, it is useful to provide an additional evidentiary component that serves to corroborate what the Chief and Councillors have said and to determine that Jeffery is not credible.

[97] Chief Clinton provided hearsay evidence that Jeffery had schizophrenia and had been in mental health facilities throughout his life, as he had been told this by Jeffery's mother and sister. There was no medical evidence to support this allegation, and it is not necessary for me to make a finding regarding his ability to swear an affidavit, as I find him not to be a credible witness and I will not accept any of his evidence, as I find his evidence was tailored and will give it no weight.

(2) Nisha Wuttunee

[98] Nisha Stewart Wuttunee [Nisha] who provided evidence for the applicant filed 4 affidavits one of which recanted the others. He was then cross-examined on October 30, 2017.

[99] In response to recanting his affidavits, I was provided Good's Affidavit #6 which addresses the circumstances surrounding Nisha's provision of the affidavits. The affidavit of Eldon Wuttunee [Eldon], who considers himself to be Nisha's uncle "in the Cree way", provides evidence that Good says corroborates and contrasts against Nisha's account in Affidavit #4 as does his wife "Aunty" Elsie Wuttunee [Elsie]'s affidavit.

[100] A summary of the allegations made by Nisha in his first 3 affidavits is that Chief Clinton supplied Nisha with cash, and gave him alcohol to have him swear a new affidavit and recant his previous affidavits.

[101] Nisha's narrative in Affidavit #4 alleges that following the band election in 2016, he was contacted by Elsie regarding the election appeal. Elsie expressed her concern that the Chief and Council were planning to take away traditional lands from traditional land owners. Nisha swore in his recanting affidavit that he was misled by Elsie and Good about Chief Clinton's proposed traditional land policy. Rather, after having talked to Chief Clinton on or around September 6, 2016, he felt that the Chief and Council were taking Red Pheasant First Nation in the "right direction". He disputes Good's assertion that he recanted his previous affidavits because he was "bought" by the Chief and Council, and he presented text messages as corroborating evidence.

[102] Nisha lives with his grandmother at her house on reserve as do his uncle and father. In his Affidavit #1, his evidence is that his grandmother has dementia and his uncle has a severe intellectual disorder. Nisha stated they were never alone that day, yet the Electoral Officer stated that he came to the house and they voted. That was confirmed by the band membership officer.

[103] In Affidavit #2, Nisha stated that 3 weeks before the election, Chief Clinton gave him a \$100 e-transfer through a third party, as he does not have online banking. Nisha said in his affidavit that Chief Clinton said “remember to vote for me”. He was given another \$50 a few days before the election, with another reminder to vote for Chief Clinton, and then a further \$50 via e-transfer that was delivered in cash by Chief Clinton’s brother. Nisha stated further that a rumor was circulating that Chief Clinton would pay \$100 if you took a photo of your ballot showing that you voted for him. Nisha said that he took a photo of his ballot, but never collected any money from Chief Clinton because he had voted for his friend running for Chief, Todd Baptiste. He attached the photo of his ballot as an exhibit to the affidavit and noted that there was no security at the polling station to prevent photos. He further stated that vote buying has always been part of the Red Pheasant First Nation elections.

[104] In Affidavit #3, Nisha states that Chief Clinton called him on May 17, 2006 (this must be a typographical error, and the intended date was likely May 17, 2016). Chief Clinton allegedly said that he had 21 affidavits against him, and later texted that he was concerned that the affidavit was not actually signed by Nisha. Nisha’s evidence was that Chief Clinton came and gave him a 60oz bottle of alcohol and \$50, and then asked him to go to Regina with him to swear a new affidavit. His evidence is that he took the alcohol and money, but did not swear a new affidavit, although Chief Clinton did text him during the evening to see if he was drinking. On May 18, 2016, on direction from Good, he went to the RCMP and filed a complaint that Chief Clinton was “trying to pressure him to withdraw my evidence in this Appeal Application”. He further stated that he had no doubt that Chief Clinton would continue to try to pressure him.

[105] My review of the text messages leads me to a different interpretation. In the exhibited text messages, Chief Clinton does ask, “Well did u make this affidavit?” and Nisha’s response is “I’ll jump in with you...No”. Clinton then asks “Will u sign one to state you never did this affidavit? I’m on my way”. Nisha later says the signature “kind of looks like it”.

[106] The actual text messages do not support the statements made in the affidavit. There is no mention of any offer as to whether Nisha can change his affidavit. Nisha texted “LOL Captain Morgan spiced. Text when you get here”, to which Chief Clinton texted back, “IDK cuz...Sounding sketchy” (“IDK” being short for “I don’t know”).

[107] In Affidavit #4, Nisha recanted his prior sworn statements to “set the record straight” and to provide an explanation as to why he is recanting his sworn statement.

[108] As noted above, Nisha stated that he was contacted by Elsie and was told that the Chief and Council were planning on taking away traditional lands from traditional land owners and he believed her as she is very politically connected. This made him angry as his family owns some of the traditional lands and he would do anything to protect his family’s lands.

[109] Elsie gave him Good’s phone number and when he called her. Good allegedly steered the conversation towards vote buying, and although he had not sold his vote or seen vote buying in this election, he was very upset about the Chief going to take away the traditional land. He stated that he did lie about his grandmother and uncle not voting and he did not contact the Electoral

Officer Howard McMaster as he claimed he had. He further says Elsie gave him alcohol and food after he swore his first affidavit.

[110] Regarding what he said in his second affidavit, Nisha stated in Affidavit #4 that he did vote for the Todd Baptiste, but was not paid by anyone for his vote despite what he said in his earlier affidavit. Further Nisha's evidence is that he did not receive anything from the current Chief and Council to recant his previous affidavits.

[111] In Affidavit #4 he said that Good and Elsie told him to go to the RCMP and lay a complaint, and he did so as he was desperate to save their traditional lands. Nisha swore that he was not pressured by Chief Clinton, but was pressured by Good to swear the affidavits and to round up people to swear affidavits to remove the Chief and Council. He attached text messages to show that Good was continuing to pressure him. On cross-examination, it became clear on the evidence that Nisha had addiction issues at the time he was swearing affidavits:

Q. And now you're saying it isn't—

A. No. I'm only saying this shit because I needed the money for drugs. That's what the whole point is for.

Q. I understand that.

...

Q. We're at paragraph 8 already, and you have agreed that everything up to that point is true.

A. Yeah, but it—it was all lies to get my—my crack money. That's all it was for.

[112] He later stated that he received money, as was the common practise for the Chief and Council to give numerous items to their constituents, including money for a trip or food or gas money or pampers. He had asked the Chief Clinton for money to go to Regina to see his girlfriend. He then said he was paid for work that he did, and to not show up for examination for discovery after Chief Clinton drove him there and paid for a hotel room. Later it came out that he was given the money to pay a fine so that he could go back to work to get his license back.

[113] The cross-examination is telling as it is contradictory and confusing. Nisha admitted in cross-examination to being a heavy drinker, and being an addicted drug user of crack cocaine. Nisha said he would put forth evidence to feed his drug habit.

[114] In Chief Clinton's affidavit, he discusses Nisha, and sets out exactly when and why he provided money to Nisha. Chief Clinton also confirmed that Nisha had known addiction issues with alcohol and cocaine. In his cross-examination, Chief Clinton confirmed that he gave Nisha money at Nisha's request.

[115] Note that Eldon is Good's first cousin and Elsie is his wife. Elsie in Affidavit #3, confirmed that Nisha is vulnerable and suffers from substance abuse, is unemployed, and lives in extreme poverty. Eldon further confirmed in his affidavit that Nisha has substance abuse issues and always needs money for basics such as food. Eldon has on multiple occasions given Nisha money to help him.

[116] In Good's cross-examination, her evidence was that Nisha told her that he was paid \$2000 to swear the recanting Affidavit #4 and that she accused Nisha of accepting a bribe.

[117] The evidence makes it clear, unfortunately, that Nisha will say and do anything to obtain money to feed his addictions. I will not give any weight to any of the evidence of Nisha, as he is unreliable and has addiction issues that he has admitted to.

[118] Using Nisha to further the narrative of either party, given his obvious vulnerable situation and the complex issues that face communities due to systemic mistreatment of Indigenous peoples, is reprehensible. Based on the above, I will give his evidence no weight.

(3) Money to Assist Band Members in Need

[119] Permeating throughout the evidence is the practice of Chief and Council providing band members with money. Good says that is this practice cannot be characterized as "helping people", but rather that it is election corruption, that this kind of evidence is clandestine in nature, and that the conduct is corrupt.

[120] A main allegation, then, that has been presented in a number of affidavits revolves around cash being given to band members by the Chief and Council at the time of the election and with respect to the appeal. This is evidenced Good alleges by recorded e-transfers, as well as the requests and responses of the individuals as evidenced by print outs of text messages and Facebook chats.

[121] In this context, the texts and Facebook chats have little weight, as they are open to various interpretations and inferences. The meaning behind the messages is tarnished by opinion or hearsay and is unreliable in many cases.

[122] I have evidence before me from both supporters of the appeal and the Respondents regarding the practise of the Red Pheasant First Nation's Chief and Council providing cash to band members in need throughout the year.

[123] This has been the tradition for many years, and evidence was led by both parties to the effect that the Red Pheasant First Nation is not a wealthy First Nation, and that many of its members are in need of assistance for food, gas, and other necessities.

[124] What is further evidenced in all the material is that people text or solicit the Chief and Council for cash; if the Chief or Council deem the request as a legitimate one, the Chief or Councillor will typically give them the money from their own pockets or accounts, and on occasion from a band account.

[125] This practice does not stop during election campaigning. Thus, the providing of money by a Councillor to a band member can be coloured or interpreted as buying a vote or may in fact be buying a vote, even though this practise is done regularly outside of the election period.

[126] The evidence of Sandra Arias [Sandra] is relevant to this. Sandra is an appeal supporter and a former Councillor. Sandra was asked in her cross-examination about whether she was ever

approached by people for money to help them out. Sandra agreed that she had a similar experience and had helped out members of the community, but that did not mean that there was vote purchasing occurring:

Q. Let me try it this way: It is the way of life on Red Pheasant First Nation for members of the First Nation to continually ask councillors for financial support, correct?

A. Yes.

Q. And that would happen 24 hours a day and 365 days a year, correct?

A. Yes.

Q. And it wouldn't matter if it was election time or not correct?

A. Yes.

Q. Were you asked for money during election time when you ran in an election?

A. Yes

Q. Did you give people money?

A. No

Q. Never?

A. No

Q. Not for—

...

Q. ... While you were running as a candidate for councillor did you ever give people money for food or gas or diapers or cigarettes?

...

A. No

Q. No one asked you for money?

A. Yes, a lot of people asked me for money, and my response was always that it is a very dangerous line when you're asking a

candidate for money in terms of—and mentioning the election. I would always say if you need help with fuel, I can put fuel in your vehicle.

Q. And did you?

A. One occasion I did help a lady out, yes.

Q. Sure. But you'll agree with me just because you're helping out members of your community—

A. But it wasn't—yes...

Q. —doesn't mean you're buying their ballot?

A. I agree with you.

[127] Another supporter of the appeal, Archie Nicotine [Archie], in cross-examination said:

Q. Do you agree with me that councillors on Red Pheasant are asked on a regular basis for money from members of the band?

A. Yes

Q. Have you asked Chief Wuttunee or any of the elected councillors for money?

A. For help, yep.

[128] Archie, provided evidence that he asked Chief Clinton for \$150 to take a DWI Course so he could get his Driver's Licence back. Chief Clinton gave him the money and Archie gave evidence that the check came from the Men's Wellness account and though Archie said he really wanted the money for his Driver's Licence it was an abuse as it was not related to his health. This is not relevant to the election but is relevant as evidence that people ask the Chief and Councillors for money all the time when they have needs and no money.

[129] In Chief Clinton's Affidavit #1 at paragraph 8, he stated:

Jeffery texted me several times for financial assistance, just like many band members do in Red Pheasant. Students, single mothers and grandmothers all have financial hardships and they struggle day to day at times, and it's a common occurrence for Chief and Council to get requests from band members for financial assistance daily.

[130] Chief Clinton also made it clear that this provision of assistance did not extend simply to Jeffery, and stated in the affidavit at paragraph 11:

... I have dealt with these two individuals many of times in the past, as they were always requesting financial assistance from my program.

[131] Chief Clinton stated in response to the affidavit of Marie Baptiste [Marie] that:

12. On January 19, 2016, Marie texted me asking for financial assistance, stating that she really needed the help. I informed her that Chief Stewart Baptiste had depleted the Brighter Futures budget in August 2015.

13. Marie stated that all she needed was \$60 to get to and from work

14. On February 9, 2016, she texted me again asking for money to help her get her wife back from Cold Lake as she got sick, couldn't work and was hospitalized.

15. On February 10, 2016, she texted me again asking for gas money to get to Edmonton for a job interview. I informed her that I was going to announce my candidacy for Chief. She phoned me and I asked her if her mother had spoken to her about my intention to run for Chief. She said yes and that she would support me. I told her I would honour her request and e-transferred her some gas money to get to Edmonton for her interview.

[132] In Chief Clinton's cross-examination at page 906 of the transcript, he indicated:

Q. All right, And so when you say Jeffery was saying you should help me out with gas money, how do you interpret that?

A. Well, it's just we help people out every day daily 365 days of the year, you know. Like, last night I was getting text messages from band members at 3:00 in the morning asking for an E-transfer you know, it's daily. It's not an uncommon occurrence to help people out from our own pockets with gas money or whatever the emergency is. There is all kinds of emergencies.

Q. Okay. So the reference to giving gas money, is that in the context of buying a ballot?

A. No

Q. Well, what is it in the context of?

A. Well, even though there's an election going on, it's still the same thing every day, people are asking for assistance. And the band is not a rich band, we don't have, you know, excess dollars to just—you know, it's got to be budgeted, so we're on budgets, and , you know a lot of times we're just giving people money from our pockets to help them with their daily—daily struggles and requests.

[133] The Respondent Dana Falcon [Dana]'s affidavit evidence is also relevant to this issue.

Dana swore the following:

2. In reply to Marie Wuttunee's Affidavit dated May 20, 2016, on March 14, 2016, Marie contacted me with a personal request to assist her financially for fuel to get to work. I was able to assist her and sent it to her at her request an e-transfer in the amount of \$20.00.

3. At no time before or after the financial transfer was there any discussion with her regarding vote buying. The money was given to Marie to assist her as she had requested.

[134] The affidavit evidence put forward by Dana supplements and corroborates the explanation put forward by the Respondents that the Chief and Council assisted people with their day-to-day expenses as a matter of practice both within and outside of the election period.

[135] Henry Gardipy's sworn evidence further corroborates this narrative. Henry stated the following at paragraph 6 of his affidavit, "I restate that as an incumbent Band Councillor, I assist numerous people of the Red Pheasant First Nation. I have helped Marie in the past and will continue to assist her in the future."

[136] Mandy Cuthand's affidavit is also relevant. The relevant affidavit evidence is reproduced below:

3. In response to the Affidavit of Marie Baptiste dated May 20, 2016, we were running for election, and campaigning for Council. We help people with problems, such as no gas, no food, bills, etc. I would help when needed, but I can't say what I helped Marie with. I think it was gas. I never told her to vote for me. It was her own choice when she got to the polling station.

[137] In the cross-examination of Lux Benson [Benson], Benson provides further perspective on the issue of Chief and Council providing financial assistance to the community, garnished from 18 years of experience as a Councillor:

Q. Now, just why are people asking for money, for what purposes?

A. I'll clarify that in the best way I can. I lived there all my life. I've been a leader for my community for going on 18 years now, and I've sat on different portfolios, one of them which was the social development portfolio; I looked after welfare. And I'm aware—the thing is, is we are short-funded by the government where band members only get 255 a month, and some of them have kids, like three, four kids, to provide for.

Q. Out of that \$255 a month?

A. Out of \$255 a month they have to buy their pampers, their food, their little bit of clothing they can buy. That's all they get in that one month, so that's why they go to chief and council and that's why we give—we give out money, just the goodness of our heart as—as our position as a leader. Like, a long time ago, you go back to our people, like, my—my late dad and my grandpa's time, they were hunters, they provided for the people, and that's how they became a leader, they would help provide for the people. So it's extended on now to us, to our generation. Now nobody is hunting, but there is—financial—wise we try and help out whatever we can. That's how we help our people because they've struggling.

[138] I find that there is credible evidence to establish that there was a practice where the Chief and Council would and did provide money (cash or e-transfers) and other forms of assistance to band members in this impoverished band from their own pockets in addition to providing assistance from the band accounts.

[139] The issue then before me is to determine in each situation that is presented in the affidavits as to whether the contributions by the individuals should be considered to be philanthropic, or whether these contributions were for the purposes of campaigning or vote purchasing. The Respondents has provided a methodical refutation to the allegations.

D. *Issue Analysis*

Has the Applicant discharged its burden to satisfactorily prove that the FNEA has been contravened? And if so did it affect the election?

(a) *Allegation #1-Filling out Blank Ballots for Support and joining Wuttunee's slate of candidates (corrupt practice)*

[140] In her Amended Affidavit, Sandra states that Dana approached her two weeks before March 11, 2016 and told her that “Wuttunee’s team was going to win and that they had runners all over buying ballots.” No first name is provided, but I assume “Wuttunee” refers to Chief Clinton, and not one of the other candidates with the same last name (such as Keith Wuttunee), who is also mentioned in the Amended Affidavit.

[141] In Sandra’s Amended Affidavit, she further stated that the slates of candidates are called “teams” and often have names such as “Team United”. Dana allegedly approached Sandra to join their team, to which Sandra was non-committal.

[142] Sandra’s evidence (paragraphs 15-18) was that:

Wuttunee told me that he needed working councillors and that Falcon was going to be his right-hand man. He told me that he had 80 blank ballots that had not yet been filled out and that they were meeting that night to fill them out. Wuttunee and Falcon told me that these ballots would be filled out as votes for me if I agreed to join their team. All I had to do for these ballots was to convince my supporters to vote for Wuttunee’s team. Again, I was non-comital in my response.

...

Over the final week before the election, the offer was first reduced to 50 ballots and then to 30 ballots in return for convincing my supporters to vote for Wuttunee's team.

I did not accept the offer. I was not successful in my bid for council and lost by a gap of 30 votes.

[143] Good's submissions regarding this allegation are that Chief Clinton and Dana were unlawfully in control of enough blank ballots to control the outcome of the election. At the hearing, Good submitted that such a practice was corrupt, affected the integrity of the election, and breached the prohibitions set out in the *FNEA*. Good alleges that this practice is essentially vote buying by Chief Clinton, as Chief Clinton used a surrogate to do it for him.

[144] Good created and filed a summary of the walked in 8C ballots. I allowed Good to file this summary against the objection of the Respondents. During oral argument, it was discovered that the summary Good filed did not correspond with the actual ballots in the record. Good then chose to withdraw the summary.

[145] I note that this allegation overlaps with the next allegation regarding walk-in ballots.

[146] Sandra's affidavit evidence is that Chief Clinton and Dana told her that 80 blank ballots would be filled out as votes for her if she agreed to join their team, and convince supporters to vote for Chief Clinton team:

Q. All right. And do you have any evidence that Dana Falcon was talking about the physical ballots as opposed to delivering the votes to support you?

A. They won by quite a large margin.

Q. That's your evidence?

A. It—

Q. I'm just asking

A. I would have had the evidence had I gone to meet with them that evening, later on that evening.

Q. But should have, could have, would have, might have, you don't have any evidence?

A. Yes.

Q. Correct?

A. You are correct.

[147] In the re-examination, Sandra further said that Dana had stated to her that he could bring 80 blank ballots that she could help fill out to bolster her campaign.

[148] In contrast, the Respondents' position is that the Wuttunee team wanted Sandra and her brother to join their slate of candidates, and if she did join their slate, they could swing votes her way as they did with all the candidates that were on their team. In other words, they argue that the Wuttunee team did not provide blank ballots, but rather provided the opportunity to gain 80 potential votes.

[149] In the cross-examination of Dana, he stated that he did talk to Sandra about working together with Chief Clinton and himself both before the election campaign and throughout the election period.

[150] In Dana's affidavit, he denied there ever being a discussion with Sandra and himself about the delivery of the 80 blank legal ballots to be filled out to her as she deposes. He does confirm that he and Sandra ran on the same slate last election and were elected, so he hoped to work together again.

[151] He does say that Elder Gerald Wuttunee who is Sandra's uncle wanted Dana to approach Sandra so that the two families could work together. On redirect :

A. well. We talked about, like, a blocked vote type of thing, like, aligning families because Gerald had his part of the family, and he—he wanted, like, myself and Sandra and Chief Baptiste all—or sorry, Chief Wuttunee to all work together just to have, like, a stronger alignment, I guess, with his family and—

Q. And Sandra was part of that family?

A. Yes that's his niece.

Q. And were there any so-called 80 blank ballots?

A. No. there was no talk about ballots or any ballots that I've seen.

[152] Sandra's Amended Affidavit stated that she was intimidated by the Chief and others, including Gary.

[153] Good alleges that Sandra was intimidated by the now deceased Michael Cote, who was the step-son of Councillor Gary. It was argued that Gary may harbour unhappiness because of his step son being incarcerated for an incident involving Sandra that happened in 2003.

[154] However, in her cross-examination, Sandra stated clearly that she is not intimidated by the current Chief. When crossed-examined she admitted that she was not intimidated by the

current Chief, Council or other Respondents, and that her affidavit referred to something that happened in or around 2012:

Q. You're talking about an incident that happened sometime in around 2010 or 2012?

A. 2012.

Q. But nothing related to this current chief and council, the parties named in relation to this litigation? Nobody tried to intimidate you, Sandra, with regard to not speaking out about this election that's the subject of this lawsuit, the 2016 election?

A. I don't think that I was—that's what I was referring to in my Affidavit.

Q Well, that's what I thought you were referring to. So your answer to my question is, no, nobody tried to intimidate me and stop me from speaking out about this 2016 election?

A. No.

[155] Based on the evidence before me, it is clear that Sandra is not intimidated, so any allegation regarding the intimidation of Sandra affecting the election is unfounded.

[156] In cross-examination, it was confirmed that Sandra had no personal issues with Dana. In fact, Sandra had been on Council in 2012 with Dana, and they had successfully run together on the same slate in 2012. In cross-examination, Sandra stated, "He is very mild mannered, yeah."

[157] She further confirmed in cross-examination that:

Q. So he was urging you to join with him on a slate?

A. Yes

Q. and you refused?

A. I had considered it, but ultimately I did refuse, yes.

Q. Did you join another slate?

A. I was already currently running with another group of people.

Q. Well, that makes sense, then. So which group of people or slate or team was that?

A. I was running with Chief Candidate Todd Baptiste and his group of supporters.

...

Q. And did your brother also run with—

A. My brother did run, yes.

Q. Nathan?

...

A. Oh, yes. Yes, my brother, Nathan Arias, did run as well.

Q. And neither of you were successful; is that correct?

A. That is correct.

[158] Chief Clinton's evidence in his affidavit dated January 20, 2018, says:

4. ...I deny that there was any discussion between Sandra Arias and myself to provide illegal ballots to her as the Applicant claims. I deny offering to hand over to her blank ballots at any time. We did have a general discussion in which it was proposed that we work together to join support that each of us had amongst band members.

5. I did ask Sandra Arias to work with us in the election campaign, however, I deny making any sort of offer to her to engage in any illegal or corrupt activity.

[159] She was re-examined on this, but Good's questions were leading questions and at some points, Good was directly supplying answers. For example, Good asked:

Q. And you gave evidence—or you were asked if Dana Falcon had stated to you that he could bring you the vote, that he could bring you support in the form of their supporters voting for you. In your Affidavit you swear that he had said that there were 80 blank ballots that were going to be filled out that night and that they would be given to bolster your campaign, that they would be given to you; is that correct?

A. Yes. I should—

Q. But they were not—your evidence is that the ballots were being filled out that night, correct?

A. Yes, that they were inviting me to fill them out with them, so they would ensure that my name would be on them and that—

Q. Correct.

[160] When Dana was cross-examined by Good on December 29, 2016, there were no questions regarding the alleged meeting or the blank ballots.

[161] I counted the 8C ballots in evidence and found only 7 ballots where Dana had solemnly declared that he had a ballot package of a named person and that he actually delivered. Even if the number count is minutely off, it is far from the alleged 80 ballots that Dana supposedly had and was filling out and delivering.

[162] In cross-examination it was explored why she was not paid after disrupting Council session. Her lack of forthrightness in other matters, as well as the corroborating evidence of Chief Clinton and Dana, leads me to believe that there were not blank ballots that were going to be filled out.

[163] Rather, I find that she is a strong successful woman that had been elected as a supporter of one group, and when she chose not to be part of that block, she lost. The allegations have reasonable explanations given by the Respondents that were also at the “meeting” and I will prefer their evidence.

[164] I find that Sandra and her brother were asked to join the Wuttunee slate of candidates, and not that they would have 80 blank ballots to fill out with her selected. In the last election (2012-2014 interim) that Sandra had won, she had been part of the Wuttunee slate of candidates.

[165] Having slates or teams of candidates in political elections is not uncommon. Sandra herself confirms as much:

Q. Okay. Now—

A. And it’s done in every type of election, municipal, provincial, federal.

Q. Because you will appreciate that in election talk people will frequently say I can deliver 100 votes for you, right? You have heard that kind of talk?

A. Oh, yes.

Q. That’s not the same thing as handing over to you official unsigned ballots?

A. No, it is not.

[166] I do not find it a violation of the *FNEA* or any common-law principles to be asked to join a slate of candidates. I find on the evidence before me that Dana, on behalf of a slate of candidates, did try to have Sandra join their slate. This political maneuvering would appear to be what occurs in many elections, and is a recognized part of the political process.

[167] This allegation has not been proven on a balance of probabilities.

(b) *Allegation #2- Walk-in ballots*

[168] Good alleges that the fraud that occurred was facilitated by the overbroad use of Form 5D (*Form to Request a Mail-in Ballot*) and Form 8C (*Declaration of Person Delivering a Mail-in Ballot Package*) which allowed illegally obtained ballot forms to be placed in the ballot box, therefore controlling the outcome of the election.

[169] Good stated that if a member lived off-reserve, the member can fill out a request to receive a ballot, and then the Electoral Officer would then mail it to them.

[170] Good argued that Chief Clinton and Dana would use a Form 5D to get a ballot, and then send it to someone other than that person so they could pick the blank ballot and then the Wuttunee team would then fill out the blank ballot and then walk the ballot in.

(i) *Jennifer Peyachew & Sam Wuttunee*

[171] Jennifer Peyachew [Jennifer] filed an affidavit that indicates that on or about March 5, 2016, she was picked up by Sam Wuttunee [Sam], a candidate for Council from work. Sam then took her to another candidate, Charles Meechance [Charles]'s house. She stated in her affidavit that Charles had blank 5D Forms in his house. She says she signed one to request mail-in ballots. She said she put a Lloydminister address that was not hers on the 5D Form.

[172] Jennifer's affidavit states that her ballot package arrived in Lloydminster and Stayce Peyachew [Stayce] took a picture of the ballot package and posted it on Facebook on March 10, 2016.

[173] Jennifer filed a photo of Stayce's Facebook entry with a photo of an envelope that says "Ballots". Keeshawn Armstrong [Keeshawn] is tagged and asked on her wall why Keeshawn was using her address because Stayce just received a ballot with Keeshawn's name on it. When Keeshawn expressed bemusement with the situation, Stayce indicated "I'll just discard it haha" and later the chain of comments on the wall from others went to the effect that Stayce should burn the ballot and that it not worth the paper it was written on.

[174] Jennifer stated in her affidavit that roughly a week after first meeting with Sam and Charles, in or around March 11, 2016, Sam met her at the Tropical Inn and they went outside to meet Todd Baptiste, who she says picked up her ballot from Lloydminster. She says Todd Baptiste gave her \$130 and Sam gave her a gram of marijuana. Her evidence is that Sam said that the gram of marijuana came from another candidate, Russell Podgurny. He further promised her Pampers which she never received. She said they would not tell her which candidates they marked her ballot for.

[175] I note the evidence of Form 8C that shows that Sam did indeed walk-in Jennifer's ballot package on March 18, 2016.

[176] I find that the Facebook evidence alluded to is about Keeshawn's ballot, and has nothing to do with Jennifer's ballot. It is only speculation that because Keeshawn's ballot that was posted about on Facebook that was sent to Stayce is related at all to Jennifer. I have no evidence from Stayce that she received Jennifer's ballot. I have no evidence that Todd Baptiste picked up a blank ballot of Jennifer's or if he is Chief candidate Baptiste who is not part of this application.

[177] I am being asked by the Applicant to engage in speculation without the relevant evidence. The evidence on the Facebook page is given no weight. This is irrelevant and not supportive of her affidavit evidence.

[178] Jennifer was not cross-examined on her evidence and it does not relate to any of the respondents.

[179] Jennifer's evidence is that she received money and drugs from candidates and that the 8C Form shows that Samuel Wuttunee walked in a ballot. I find that Samuel is the Sam that Jennifer refers to. On the basis of this evidence corroborated by material documentation, I find on a balance of probabilities that Sam did indeed breach section 16 of the *FNEA*.

[180] The next step I must take is to determine whether the contravention likely affected the election results.

[181] In my view, it is of note that neither Sam, nor any of the other individuals involved were part of the slate of candidates with Chief Clinton that I am aware of. Furthermore, Sam is not a

respondent in this appeal, and there is no affidavit from Sam or any of the other named individuals. It is also relevant that Sam was unsuccessful in his election bid on this occasion and had never been elected before.

[182] Therefore, I do not find that the contravention affected the election result as the perpetrator of this prohibited conduct was not an incumbent and was not elected. In addition, there is no magic number count back at issue in this case. For these reasons, the election results were not affected.

(ii) Marguerite Benson & Crystal Baptiste

[183] Good submits that Marguerite Benson [Marguerite]'s evidence provides further evidence of fraud utilizing walk-in ballots. Marguerite says on March 18, 2016, she was sitting in a vehicle outside a hall that was being used as a polling station with her husband, Dwayne Benson [Dwayne], who was a candidate in the election. She says that she saw Nola Wuttunee [Nola] drive up, park, and then walk to Benson's car. Marguerite further stated in her affidavit that Nola reached in the window of the car and removed a stack of white legal size envelopes which Marguerite "deduced were ballot envelopes", after which Nola walked to the polling station.

[184] Marguerite says she confronted Nola at 7:30 (PM I presume) and asked her what she was doing. Marguerite stated, "I said to her that I thought she was for change. I told her I saw what she did taking the ballot envelopes from Benson. She was speaking to Benson on the phone at the time but went silent when I said this and looked at me with a shocked look on her face as though I had exposed her."

[185] Marguerite says Nola did not respond and was silent when confronted by Marguerite. Marguerite was not cross-examined and so Good submitted that I can infer the truth of the contents of Marguerite's affidavits from that lack of cross-examination by the Respondents.

[186] On the evidence of Marguerite's regarding who Nola was speaking on the phone to or what her expressions meant, I will give no weight to as it is opinion evidence and unreliable evidence.

[187] Marguerite's husband, Dwayne, also a candidate who was in the vehicle with Marguerite, filed an affidavit but did not give evidence regarding this allegation to corroborate his wife's.

[188] Good argued that support for this allegation was furthered by the evidence of Crystal Baptiste who acted as a scrutineer during the March 18, 2016 election. Her affidavit describes conduct during the election that she believes was contrary to the election rules. For example, she states people under the influence of drugs or alcohol were allowed to vote, and that she saw Cody Benson (son of Lux Benson), Rene Wuttunee (brother of Dana), Mandy, and Nola each walk in stacks of envelopes containing at least 40 ballots in total. She also saw her father, Michael Baptiste, hand in two ballots for Councillor, when he should only have been given one. She noticed that these two ballots were put aside, and that Howard McMaster would not let her father have another ballot to vote.

[189] I will not deal with Crystal's evidence related to the Electoral Officer and the conduct of the election.

[190] I will give weight to Marguerite's evidence that she saw Nola obtain ballots from Benson's vehicle. I also give weight to Crystal's evidence that Nola walked in some ballots.

[191] The signed 8C *Declarations of Person Delivering a Mail-in Ballot Package* are evidence that Nola, who lives in Calgary, delivered 13 mail-in ballot packages. In total, there were 209 8C Forms files in the evidence before me, and a number of different people swearing to the Electoral Officer or Deputy Electoral Officer. These numbers may be off by one or two but that does not affect the reasoning.

[192] I found none signed by Cody Benson, but several with the last name as "Benson" but with a different first name, and none by Mandy. In a review of the 8C Forms, it is clear that a number of people delivered ballots from specific geographical regions where they also lived. For example, Arlysse Wuttunee delivered several from Edmonton, and Henry, who lives in Saskatoon, delivered 10. Rene Wuttunee of Saskatoon also delivered 21 walk-in ballots. It is not too surprising given this pattern that Nola of Calgary would deliver a number of walk-in ballots from Calgary.

[193] In the affidavit of Dana, Dana does not make mention of walk-in ballots, nor was he cross-examined on walk-in ballots regarding his brother Rene Wuttunee. Dana did complete seven 8C Forms.

[194] Mandy, in response to Crystal Baptiste's evidence, swears he was out campaigning on election day, and never left his truck or saw Crystal or even knew she was a scrutineer. He

stated, “I never went in the building and did not walk in the back with a stack of ballots”. While Mandy was cross-examined on his affidavit, Mandy was not specifically cross-examined on the question of walk-in ballots.

[195] Walking in ballots in and of itself is not a breach of a prohibition especially given that the evidence is most of the band members live off reserve. Crystal’s estimate of how many ballots that four people walked in is not as reliable as the actual 8C Forms I have in front of me as evidence. On the evidence, it is clear for example that Nola completed and walked in 13 8C Forms. Mandy’s evidence is he did not walk any in and there are no 8C Forms in his name. Rene Wuttunee completed 21, 8C Forms and I have none from the 4th person Crystal named. I will take the actual count of walked in ballots, in conjunction with the evidence of Mandy and Dana, over Crystal’s account that estimates.

[196] I find that the evidence discussed above regarding the allegation of corruption of walk-in ballots does not meet the evidentiary standard.

(iii) Elsie Wuttunee

[197] Elsie, in her role as a scrutineer stated that she witnessed Howard McMaster not let Morgan Harrison Payne vote [Morgan], as Howard McMaster said that Morgan had already voted. Morgan said someone must have stolen his ballot as he had not voted. Elsie gave further opinion evidence on Howard McMaster’s intentions which will not be considered.

[198] Elsie at the advanced poll on March 10, 2016, states that she saw and noted a number of candidates delivering large numbers of ballots to the polling station. She states at paragraph 4 of her affidavit that Ryan Bugler delivered ten ballots, Dana delivered seven ballots, Sam delivered seven ballots, Henry delivered ten ballots, and others that she named in her affidavit at paragraph 5 delivered large numbers of ballots to the polling station. She swore that in her role as a scrutineer, she kept notes on which ballots were walked in by whom.

[199] In terms of the documentary evidence, the 8C Forms give us proof of who walked in what ballot, contrary to the vague evidence lead that Elsie witnessed the delivery of "... large numbers of ballots to the polling station" (para 3).

[200] The named individuals in paragraph 4 of her affidavit 8C Forms confirm that Ryan Bugler delivered ten ballots, Dana delivered seven ballots, Sam delivered 28 ballots and Henry delivered 10 ballots. As noted above walking in ballots is provided for in the election and the number of 8C Forms correspond with her evidence except for the number walked in by Sam Wuttunee. Walking in ballots and completing the 8C Form in itself is not evidence of fraud.

[201] Many individuals walked-in many ballots, especially when they lived off reserve. Given that Good admits in in her oral argument that the Red Pheasant First Nation has 2500 members, but only 600 live on reserve, the walked-in ballots totaling 209 are a small percentage of the total eligible voters.

[202] I do not find that this evidence meets the evidentiary standard of a breach of a prohibition.

(c) *Allegation #3: Inducement to Recant Affidavit*

[203] Good stated in her Memorandum of Fact and Law:

147. The Applicant submits that the evidence regarding corrupt practices must be considered in light of the corrupt manner in which the Red Pheasants conducted themselves during the course of this litigation. .

148. Intimidation, denial of services, outright cash bribes and other inducements offered to witnesses to recant their evidence or to evade Cross-examination demonstrates an absolute lack of compunction with respect to stooping to any illegality or impropriety to achieve their aims.

[204] To establish the allegations of vote purchasing and inducements to recant affidavits, Good proffers the evidence of Nisha Wuttunee, Marie Baptiste, Langford Wuttunee, Edward Nicotine, Mallory Wuttunee, Chaystin Armstrong, and her own evidence. The allegations of “vote purchasing” in one way or another permeate these affidavits put forward by Good.

[205] I remark that as I have already found it to be inappropriate to consider the evidence of Nisha Wuttunee, given his inconsistent, unreliable testimony, and his substance abuse issues. I also note that the evidence of Chaystin Armstrong was withdrawn.

[206] I further note that the evidence proffered by Marie Baptiste is dealt with above in paragraphs 131 and 132. I find that the evidence she puts forward in relation to vote buying is rather indicative of the general practice of the Chief and Council supporting individuals outside

of the election period, which therefore cannot result in a finding of a breach of the *FNEA* on a balance of probabilities.

[207] Therefore, I will begin through an analysis of Langford Wuttunee's evidence relating to him being offered a financial inducement.

[208] Specifically, Good submits that Langford Wuttunee was offered and given a pecuniary inducement to recant his affidavit and to swear a false one by Chief Clinton. In Good's submission, Red Pheasant First Nation has no housing policy and is experiencing an extreme housing crisis. As there is no fee simple title on reserve, and as the Band has never developed a land code or housing policy, all houses are technically owned by the Band. Under these factual circumstances, Langford Wuttunee was, "...offered a BCR giving him exclusive usage rights of a house that he had bought". Good argued that this was clearly a *quid pro quo* arrangement; Langford Wuttunee had even been given cash, ostensibly for fuel to go to the Band's lawyer to swear a new affidavit. However, he decided not to recant and instead swore an affidavit regarding the efforts to bribe him.

[209] In support of Langford Wuttunee's evidence, Good advanced evidence from Archie.

[210] Archie in his affidavit and in cross-examination, he confirmed that he is part of the "appeal team". His evidence is that he identified people that would assist Good and the "appeal team" who wanted to overturn the election.

[211] Archie's evidence was that people on the reserve will do anything if they are paid. He gave evidence that Langford Wuttunee was a supporter of the appeal, and would have given evidence in support but did not. Archie thought that the reason he did not give evidence was that he was being bribed by being given a BCR for a private contract regarding possession of a house that he had been seeking.

[212] In addition, Archie gave evidence that he saw Langford Wuttunee receive cash from Lux, and did not say what it was for. Archie gave evidence that Langford Wuttunee told him that Mandy would give him a BCR for the house if he changed his affidavit. This is not the best evidence as Langford Wuttunee, in contrast to Archie's statement that he would not give evidence, filed 2 affidavits.

[213] In cross-examination, Archie agreed that the cash given to Langford Wuttunee could not be to buy a vote because the incident was 8 months after the election. Much of the affidavit was pure speculation and self-serving.

[214] Langford Wuttunee, in his second affidavit, gave evidence that he wanted a BCR to recognize ownership of his house. He gave evidence that he knew that Chief Clinton would not help him obtain the aforementioned BCR, but he had heard that the band council paid Nisha to withdraw his affidavit. He found out the Chief would not help him when he and Graham Wuttunee went to the Gas Bar in North Battleford. They noticed Chief Clinton and approached him. He put the phone on speaker so Chief Clinton could engage with the RCMP officer that he was talking to. When he went into the gas bar to pay he gave his phone to Graham Wuttunee so

Chief Clinton could speak to the RCMP but when he returned Graham Wuttunee told him that Chief Clinton said to a companion “let’s get out of here I don’t want anything to do with this”. This evidence is hearsay as it is what somewhat allegedly said during a phone call and then passed on to Langford Wuttunee and will be disregarded.

[215] Langford Wuttunee indicated that he told Chief Clinton that he would withdraw his affidavit supporting the appeal if Council would issue a BCR concerning his ownership of the house. He alleges that Chief Clinton told him during a phone call that if he wanted to sign a new affidavit he should see the Council’s lawyer and that “they’d got a really good affidavit out of Nisha Wuttunee”.

[216] Langford Wuttunee’s affidavit evidence is that on or around October 22, 2016, he called Chief Clinton to see if the BCR was prepared, and was told that Chief Clinton was driving to Alberta. However, his evidence alleges he was told if Langford Wuttunee went ahead and signed the affidavit, then Council would sign the resolution. Langford Wuttunee alleges he asked for \$250 from Chief Clinton, who said that he would arrange it with Cody Benson. Langford Wuttunee said when he saw Archie, who he knew was a strong supporter of the appeal, he felt guilty about his deal to recant his affidavit, so told him about his arrangement regarding the house and the \$250. He said that Archie was present when the money Chief Clinton promised him was delivered.

[217] His evidence is that Mandy texted him to see if he signed the new affidavit as the BCR would be given to him once he signed. In contrast the text messages that are attached he says he

needs gas money to go to Saskatoon and had asked Chief Clinton for gas money. He explains this by saying he wanted to see the BCR before he would go to Saskatoon and arranged to have Mandy fill his tank with gas to travel to Saskatoon.

[218] In his cross-examination, it was confirmed that he had run for Council and had lost. He was asked about whether he could own the house on reserve given that the houses are owned by the band. He did confirm that he knew that he cannot own the house and that the band owns the houses and that a BCR does not change that. Langford Wuttunee confirmed that he could not own the house he is living in and asking for a BCR for possession of which his ex-father in law lived in. He said he paid money for the house on October 2, 2016, and when asked if it was legal he said that there is no housing policy on reserve so that is what happens if they want a few dollars and the RCMP cannot come in and kick a person out. In the past when he bought the house he would take it apart for lumber. His evidence in cross examination was in this case he bought the house from Stan Osecap [Stan] (\$3,500) for his daughter Alana Wuttunee to live in as of October 2, 2016. But then problems arose as Stan had made another deal with Delphine Nicotine a couple of months before. His position is that only he had the bill of sale but a dispute arose about who had the right to use the house as he had not seen Delphine's paperwork. In cross-examination, he admitted that because of the dispute he threatened to burn the house down and that it did burn down a week later. Langford Wuttunee said he did not burn the house down. Langford Wuttunee said it was because he was upset that he contacted the RCMP but they could not do anything without a BCR to change possession given that Delphine Nicotine had "muscle her way in already". He confirmed that when the RCMP could not do anything that it was a "better way to go about it, I guess, you know, to get a BCR, right?"

[219] Langford Wuttunee agreed that he continued to pursue Chief Clinton and approached him to say that he would withdraw his affidavit if he got a BCR for the house.

[220] I do not find the affidavit evidence of Langford Wuttunee persuasive to the allegation that there was an attempt to induce a recanting affidavit through the arrangement of a BCR. Archie's corroborating testimony, as noted above, has been found to be inconsistent. Further, on the balance of probabilities, I find that the \$250 given to Langford Wuttunee was needed to cover Langford Wuttunee's costs to travel back and forth to Saskatoon. I am supported in this finding by Langford Wuttunee's own admission on cross-examination that the \$250 was paid to him expressly for a legitimate purpose. While Langford Wuttunee may have kept the \$250 and not traveled to Saskatoon, based on the evidence before me, I find that the evidence given at cross-examination is inconsistent with the affidavit evidence, where there is no indication that the \$250 was for an illegitimate purpose.

[221] As no one prepared an affidavit for him, and he did not get a BCR, I find that there is insufficient evidence to find, on a balance of probabilities, that a contravention of the *FNEA* occurred on this allegation.

(d) *Allegation #4-Vote Purchasing Occurred in Breach of the Act*

[222] Having dealt with the allegations of filing ballots to join Chief Clinton's slate, walk-in ballots, and inducements to recant votes, I turn to the substantive allegation (s.16(f)) put forward by the Applicant around vote-buying.

[223] I note at the outset that Good swore affidavit evidence relevant to this allegation as well. Elements of the affidavit evidence put forward by Good are given no weight by this Court. There are numerous instances of self-serving, hearsay, or opinion evidence in these affidavits. For example, Good swears in her affidavit that previous legal counsel withdrew when he became aware of an alleged bribe. Good cannot presume to know the state of counsel's mind, and it is improper of her to allege motives without any further evidence than speculation.

[224] Similarly, Good submits that that exhibits attached to her affidavit include six Facebook posts, which she states are offers for ballots for sale, or decrying the sale of ballots. Good submits that these posts demonstrate that vote buying is normalized in the Red Pheasant First Nation.

[225] The excerpted Facebook posts are not reliable evidence, and will not be given any weight. The evidence is not reliable as the evidence is inherently suspect. As noted above, an individual can post on Facebook that they have sold their vote, and another individual can "corroborate" a potentially false narrative without any underlying substrata of truth to the event. There is no integrity in this evidence. While it has been held that Facebook posts can justifiably result in legal action (in the employment context, for instance), I find this to be highly distinguishable from the matter in front of me, where individuals specifically attempted to "set-up" others on social media platforms to establish the corrupt nature of elections on Red Pheasant First Nation.

[226] Finally, I note that Good's affidavits attempt to bolster her witnesses' affidavits, and are full of inferences and her personal opinion of what people were thinking and doing without evidence to support the inferences. Good was not present at the actual election and was out of the country, and her only knowledge was garnished from following social media. Her affidavits are given no weight as they are tarnished by hearsay, opinion, and argument contrary to the rules of evidence.

(i) Marie Baptiste (AKA) Marie Wuttunee ; Marie Wuttunee Baptiste

[227] Marie Baptiste [Marie]'s evidence is that she received \$500 from Chief Clinton, Henry Gardipy, Mandy Cuthand, Dana Falcon, Shawn Wuttunee and Cody Benson in e-transfers for her vote between February 16, 2016 and March 15, 2016. But that she took the money but did not sell her vote. She said, "It was clear to me that they expected I would vote for them in return for the money they sent me".

[228] I note there was no evidence that any of them actually said they wanted to buy her vote, and that Marie's evidence is that she assumed that the Chief and Council wanted to buy her vote.

[229] Attached to her affidavit is Exhibit "A" which is copies of e-transfers and Exhibit "B" shows what she says are examples of deposit of the e-transfers from all of the candidates except Shawn Wuttunee.

[230] This evidence is problematic as the records of Exhibit "A" don't have amounts of the transfers and Exhibit "B" though it has the amount deposited does not have date it was deposited.

[231] Marie's evidence includes a breakdown that she received three e-transfers from Henry, 8 from Cody Benson, two from Dana one from each of the remaining three candidates.

[232] When I correlate the Exhibits they show:

- a) Two e-transfers from Dana Falcon on 2016-03-15 and 2016-03-14 but only one deposit for \$20.00
- b) One e-transfer on 2016-02-29 from Clinton Wuttunee, and one deposit for \$50.00
- c) One e-transfer on 2016-02-25 from Mandy Cuthand and one deposit for \$60.00
- d) One e-transfer on 2016-03-04 from Shawn Wuttunee, and as she noted no corresponding deposit
- e) Four e-transfers on 2016-02-16, 2016-03-01, 2016-03-15 from Henry Gardipy and deposits on 4 occasions

[233] When I add up the deposits, they come to \$310 not \$500 as alleged by Marie at paragraph 6 of her affidavit.

[234] This evidence is problematic. The evidence does not match and certainly does not indicate why she was paid. She swears at paragraph 5 that she did not sell her vote to any candidate, but took the money. The transfers in Exhibit "A" are spread over a long period of time, but did stop 3 days before the election as she said.

[235] To determine what happened, I first examined Affidavit#1 of Chief Clinton. He says said that Marie is his niece and she and her partner were always asking for financial assistance from his program and "... I found out that they were using the money for partying, liquor and cocaine"

(para 11, page 3). He swears that she asked for \$60 to get to and from work and had texted him February 9, 2016 for money to help get her wife, Tash Baptiste back from Cold Lake as Tash was hospitalized and could not work. On February 10, 2016, she texted him and asked for gas money to get to Edmonton for a job interview. When she called on February 10, 2016, he asked for her support as he was going to announce his candidacy for Chief. She said she would support him "I told her I would honour her request and e-transferred her some gas money to get to Edmonton for her interview. I honestly believed that's what she wanted the money for" (para 15). On February 14, 2016, she said she made it to the second round of interview and needed gas money again and he did not respond. On February 22, 2016, she texted asked for gas money, \$50 to get to Saskatoon and he said he did not have money. She texted again on February 29, 2016, asking for \$50 so she could register her car as she was struggling as she had no job and that her wife and step daughter were all voters so Chief Clinton should help. Chief Clinton told them all he could afford was \$50 and e-transferred that amount for her trip. Chief Clinton's evidence is that he thought Tasha and Marie were supporting him and she texted him about comments and he told her he does not reply on Facebook but he does campaign door to door.

[236] There is no other evidence from Chief Clinton in his Affidavit #2 or in his cross-examination concerning Marie's allegations

[237] Dana's Affidavit #1's evidence is that Marie contacted him with a personal request for financial support for fuel to get to work and in response he transferred her \$20 (para 2, tab 2). His evidence is he never had a conversation with her about vote buying and the money was to assist her only. In his cross-examination, he said he checked his bank records to try and

remember why he paid Marie on March 14, 2016, but he said that it is a daily occurrence to e-transfer money to individuals and he cannot remember specifically why on that date. Dana did find one e-transfer in his records where he paid Marie yet the exhibit said he paid her two e-transfers but he can only remember one e-transfer. Dana was not cross-examined on this evidence.

[238] Benson does not speak about this allegation in his affidavit, but in cross-examination he confirms that he does not e-transfer as a practice and he has never had his son Cody Benson do an e-transfer on his behalf. His evidence has been consistent that he does give band members money for their needs. In his cross-examination it is agreed by Good that possibly there is some duplication in the e-transfers attached (page 1043) when they were examined. But the most interesting evidence that came from his cross-examination is that he has a nephew that also has the same name as his son. Both are called Cody Benson and both are about the same age and friends with Marie. He suggested that Marie maybe was given money by either one of the friends as they hangout and he does not know what for (page 1046), but that was pure speculation.

[239] Henry's evidence is that as a band councillor he assists members of the Red Pheasant First Nation and "I have helped Marie in the past and will continue to assist her in the future" (para 6). Marie is related to him, and is "blood" and in the past his assistance to her was for "smokes", "rides" or gas, in the same vein as most members. He says he has helped Marie move many times but has never helped her out since this appeal because she blocked him from her Facebook (p. 1102).

[240] Finally the last of the individuals named as buying Marie's vote is Mandy. He says he was running for Council and that he helps people that have "...no gas, no food, bills, etc." He could not say what he helped Marie with and he thinks it might have been gas but is clear he never told her to vote for him (para 3).

[241] Marie's evidence is contradicted by the individuals that she says paid for her vote. It is consistent from the Chief and Councillors that she has asked for help and did receive it in the form of assistance. The evidence is not credible that the payments were received to buy her vote. Even the proof she offered is not reliable evidence, as Good admitted that there may be duplication of the e-transfers and they could not provide the dates of the transfers. Further unreliability of the evidence was proofed in the fact there was only \$310 in deposits which is not what she swore she received for her vote. I cannot align the allegation with the evidence she has filed. She has not met the burden of proof to prove that her vote was bought by any of the individuals she alleged did.

(ii) Edward Nicotine

[242] I turn then to the allegation that Edward Nicotine [Edward]'s vote was purchased. He swore an affidavit for the Applicant on April 13, 2016, where he stated that he was paid for his vote by Gary, Mandy, and by Cody Benson , after Edward was told by Chief Clinton that he should go see them after he voted for him .

[243] On June 7, 2016, Edward recanted that affidavit, on the basis that he was drunk when he signed, and that in reality no one paid him any money for his vote. He said that he was given a

bottle of Wiser Whiskey by Archie and Dwayne Benson, and after he was drunk, he was paid \$25 to sign an affidavit.

[244] The evidence given by Dwayne (a failed candidate) was that on March 23, 2016, he and his wife (Marguerite) had a visit from Archie, Dennis and Edward Nicotine. His evidence is that they were talking about the election results and the appeal and Edward told him that several people paid him for his ballot and that he wanted to help with the appeal but he was afraid to speak out (tab 8, page 35). He said he has not seen Edward since that meeting and did not know he swore his affidavit. Dwayne said he was not with Edward on April 13, 2016 so did not give him money or alcohol. His wife Marguerite did not address this allegation and was not crossed on it.

[245] Archie Nicotine's evidence is he did not buy Edward any alcohol when he and his brother Dennis Nicotine drove him to North Battleford to sign his affidavit, and that Edward was not intoxicated that morning.

[246] Good submitted that Edward prior to voting was given \$40, \$20 & \$140 from candidates Gary, Mandy and Chief Clinton. She says Nicotine was told by Chief Clinton to collect \$140 from Cody Benson, the son of candidate Benson. He says he was to get a further \$200 after he voted. This affiant recanted his evidence and Good indicated that he is an alcoholic and is vulnerable and "would do anything for a drink" (found at page 1624, para 184). Good says that Archie says he did not get Edward drunk. Good submits that it is "beyond credulity to consider a

commissioner would take the oath of an individual intoxicated to the point of being completely oblivious.”

[247] Good argued that Chief Clinton’s dishonesty is exposed regarding his evidence about Edward on April 13, 2016. She says by Chief Clinton saying that on March 18, 2016 “Edward stopped at my father’s home with his elderly mother and his niece. I invited them to share a meal. We visited and I informed Edward of my plans if I were to be successful in my bid for chief. I did not offer him any money, nor did I tell him to go get any money from any other candidate” (Chief Clinton’s Affidavit, para 2 para 187) (see paragraph 252 below). Good says this story is different than Edward’s when asked he says they had a quick meal and left and that Chief Clinton wasn’t even there much or engaged in the conversation quoted above.

[248] I note that the evidence put forward by the affiant Edward (recanted and cross-examination), Mandy, and Chief Clinton is in direct contradiction with Archie’s, Dwayne and Marguerite’s evidence.

[249] In contrast Edward said that he met his cousins Archie and Dennis Nicotine as well as Dwayne (page 962 tab 48). Edward said that he went in to the liquor store to buy the bottle (mickey) of whiskey with money they gave him and that he drank it all in the backseat of the car before he went to city hall to sign the affidavit. He said he was half snapped when he got up from the night before and then after he drank the mickey. Edward said the \$25 was going to be given to him after he swore the affidavit. Dennis Nicotine came into city hall with him to sign but he was too buzzed and hardly remembers what happened that day (page 972). Edward stated on the

record that his alcoholism meant that he was inebriated when swearing affidavits. He concluded “... I would have said anything for a drink.”

[250] He further explained in his re-examination why he recanted. Edward said it was because he told his mom what he did. His mom asked him why would he do that as she knew it was all a lie because he was with her at the election. She told him that he had better make it right.

[251] On re-cross-examination, Edward confirmed he was with his mom on election night at the reserve and he stopped by Oliver Wuttunee’s (Chief Clinton’s dad) house for a quick meal on the way home as his mother was not feeling well. He did confirm the evidence on the record that he and Archie were at Marguerite and Dwayne’s house though he contradicts it by saying there was no discussion about the election.

[252] When Mandy Cuthand is examined, I see that he denies ever giving or promising Edward money in fact though he was at the hall campaigning for re-election he never talked to Edward that day (page 18, tab 7). In Mandy’s cross-examination (tab 52, page 1119), he is not asked about this allegation in cross. Neither is there anything about Edward in Benson or Gary Sauve’s evidence.

[253] In Chief Clinton’s June 8, 2016 Affidavit #1, he says that Edward and his mother and niece did stop at his father’s house for a meal after the election. He says he did speak to him and did not offer him any money or tell him to get any money from any other candidate (tab 1, page 2). In cross-examination, he confirmed his father’s name is Oliver Wuttunee and that he invited

Edward and his family to come for a meal sometime between 2 and 6 in the afternoon (page 870-871, tab 46). He indicated there were people coming in and out all night as it was election night and it was busy. Everyone was offered a meal that stopped by. He says he spoke to Edward and his family about what his plans were if he was elected Chief (see above paragraph 247).

[254] I give no weight to the evidence of Edward, for similar reasons as my dismissal of the evidence of Nisha as he too was a vulnerable individual. Even if I cannot sort out exactly what happened that day, it is clear that Edward has severe addiction issues.

[255] In his cross-examination by Good, Edward admitted that he had to have his mother write out his second affidavit, as he was shaking too much to write, as a result of being an alcoholic. His evidence given for both parties cannot be found to be credible under the circumstances. Given these facts, I find it inappropriate to further consider the evidence of Edward. His evidence cannot be found to be credible under the circumstances.

(iii) Mallory Wuttunee & Marie Baptiste, Room 317, Ramada Hotel,
Advanced Poll

[256] Mallory Wuttunee and Marie Baptiste allege vote-buying at the Ramada Inn in the hospitality room put on by Chief Clinton.

[257] Good submits that at the advanced poll held at the Ramada Inn in Saskatoon on March 10, 2016, Chief Clinton paid people to vote for him. Good submits that Chief Clinton

accomplished this scheme by having Vinny Wuttunee escort voters to Room 317 of the Ramada Inn, and that Cody Benson, the son of candidate Benson, was paying people for their support.

[258] Mallory Wuttunee gave evidence that she voted for Chief Clinton for Chief. After voting, she was escorted by Vinny to Room 317, where she saw Cody Benson remove a sheaf of bills. She states that Cody Benson gave her \$60; while she states that she knew what she was doing was wrong, she needed gas money, and that people favoured by the band council receive support from the band.

[259] Marie's evidence is that when she was at the advanced poll at the Ramada Inn in Saskatoon she was invited to a hotel room rented by Chief Clinton where candidates Gary, Ryan Bugler, Mandy and Dana were present as well as some of the candidates' relatives. She swore that alcohol was offered and people were drinking in the room. As well, her evidence is that:

10 ...I was approached and told I would be given money if I went downstairs and voted, took a picture of my completed ballot with my cell phone , and brought it back to that room. I told them I had already voted. "(Tab 6 para 10 page 23)

11. They told me I would never get any help form the Band, which I understood to mean that I would be denied Band services, if I did not vote for Clinton Wuttunee and his chosen slate of Councillors."

[260] Marie was not cross-examined on her affidavit, so Good submits it is uncontroverted evidence.

[261] In paragraph 11, quoted above as the basis of the allegation, Marie has inferred a meaning to what was said, but she has no basis for the inference and it will be given no weight. I

also note that her evidence is that she had been invited to the room and after she said she had already voted she was not asked to leave or intimidated. Further I find that the allegation of Marie found above at paragraphs 226 to 240 (above) and these allegations do not match. Why if she voted in the advance poll and told the candidates in the room she had voted would she then have been pursued and paid for her vote by the candidates again.

[262] Looking to the evidence of people that have been accused, I turn first to Chief Clinton who says that he had a hospitality room at the Ramada Inn and he provided food and soda. He further stated that, “I did not make any statements to any band member that if they didn’t support me I wouldn’t assist them in the future in their time of need...”

[263] Chief Clinton does not recall seeing Mallory Wuttunee, in room 317, as he was in and out of the room all day, both to rest, and because he provided food for friends and family. In his cross-examination, he said it was a very long day and band members continued to hang around. There were band members present that he had never met before. Further, as he did not have a scrutineer, he does not know who voted. There is nothing related to the allegation in Affidavit #2 of Chief Clinton.

[264] Mandy in his affidavit in response to the allegation made by Marie was that he was at the Ramada Inn campaigning on March 4, 2016, but did not see Marie that day. He did see her the day he was voting as she was walking out of the polling station and said hello. He says he could not have offered her anything at the Ramada Inn as he never even saw her that day and not until passing her on election day.

[265] Though there is nothing about room 317 in Dana's Affidavit #1 and #2, in cross-examination, Dana was asked by Good about the advance Poll at the Ramada Inn. He said he was there and was campaigning and had been in and out of room 317. He was asked who that was running in the election came to that room and he said Henry and the "ones running sitting and resting. Like, that's all it was, everyone took rests." Which was Chief Clinton's slate of candidates specifically Henry, Lux Benson , Ryan Bugler, Mandy, Dana, Larry Wuttunee, Shawn Nicotine, Gary, as well as others who stopped to visit. He said he was in and out and the only ones he saw for sure was Russell Pogurny and Shawn as everyone was campaigning in and out of the hotel. On re-examination, he said there was no drinking in the room and he did not see Marie. He said that he did not observe alcohol being consumed in the room. He also noted he does not drink, and then stated that no one on council drinks. The latter point seems to be a broad and wide statement his evidence is just that. There is no mention of the hotel room by Gary in his affidavit and he was not questioned on it in his cross-examination.

[266] To no surprise, there is contradictory evidence regarding whether there was drinking of alcohol in room 317, and whether there was a request to vote for the Wuttunee slate, and to then take a picture and come back to the room and receive money for voting for them.

[267] Whether or not there was drinking is irrelevant as nothing in the allegation turns on it. Marie's evidence is in direct conflict with Chief Clinton and Dana's regarding whether Dana even saw her at the advanced polls or whether Chief Clinton said he would not help her if she did not vote for him.

[268] Marie's evidence was as an invited guest after she had voted was told she would be paid and in fact was not paid for her vote as she had already voted. I cannot accept her thoughts as evidence as she only inferred that she would be paid for her vote and not treated well if she did not vote for them. She was not paid for her vote and was not threatened or asked to leave after she said she voted.

[269] Her evidence is contradicted as she says she was in the room and Mandy is clear he did not see her and knows exactly when and where he did see her on other occasions. Nor did Dana remember seeing her that day. From their evidence it is entirely possible they just did not see her but I am going to prefer their evidence that they did not interact with Marie or offer to buy her vote. Given that I found credibility issues (above at paras 226-240) with Marie's evidence with regards to an earlier allegation which is in direct conflict with this allegation I give her evidence no weight in this circumstance. This evidence does not on a balance of probabilities support that there was a breach of a prohibition.

[270] Mallory's evidence is that she was paid for her vote as she needed gas money. When I examine all the circumstances, I note that she does not mention that she was to take a photo of her ballot to prove it. Nor does she say she was told before she would be paid if she voted for those candidates. She does say she needed gas money, and knows people that support the person in power are treated better. I balance that with the evidence that Chief Clinton who does not recall seeing her. No other individual remembers seeing her, and the individuals that are alleged to have bought the vote were not crossed on this incident. It is also undisputed that Mallory went

to the room in need of gas money with no deal for a *quid pro quo* arrangement after she voted went to the room in need of gas money without having made a deal before.

[271] I understand that having a “come and go” hospitality room is not out of the ordinary for candidates in any and all political forums, and I do not find that on these facts that the hospitality room or the events that occurred within comprise an inducement to buy a vote.

[272] I will chose the Respondents evidence over Mallory’s as she had a need for gas money so was given gas for exactly that. In addition in her stated reasons, Mallory says that she voted for Chief Clinton because was that she wanted to be treated better not because she was paid to. I find there was no offer to buy her vote or of her vote being purchased so I find there is not a proven breach of a prohibition.

[273] This allegation has not been proven on a balance of probabilities.

(e) *Allegation #5-Taking slips of paper into the booths*

(i) Slips of Paper

[274] Good provided an affidavit of Crystal Baptiste who said she saw voters enter the polling booth with slips of paper. She was not cross-examined.

[275] There is no prohibition against entering a polling station with a slip of paper in and of itself. I understand that her argument is that people were given the paper with the slate of

candidates that they were to vote for but I have no evidence of any weight before me of that happening. I do not find this allegation is a breach of a prohibition.

(f) *Allegation #6-Intimidation tactics*

[276] Good alleges that witnesses have been intimidated due to the conduct of individuals on the Red Pheasant First Nation who threatened to withhold services from individuals supporting this appeal.

[277] Good submitted that Heather Meechance provided an affidavit of vote buying in the appeal of the 2012 Election, and that the affidavit gives insight into the abuse and denied services and retaliation for that evidence she suffered at the hands of the then Chief and Chief Clinton.

[278] This affidavit is given no weight in this appeal as it is not evidence of what occurred in this election.

[279] Good indicates that Henry threatened Jeffery after he decided to support the election appeal that he moved to Edmonton fearing what harm would come to himself and his family. As noted above, I do not give any weight to the evidence of Jeffery.

[280] There is no evidence to support this allegation and in fact there is evidence by an appeal supporter, Sandra that she is not intimidated by this Chief or Council

[281] Therefore, I find no breach of the *FNEA* established on a balance of probabilities.

(g) *Allegation #7- Miscellaneous Breaches Alleged*

(i) Langford Wuttunee

[282] Langford Wuttunee was an unsuccessful candidate for band council. In his first affidavit, Langford said that at the advanced poll in Saskatoon there was a large “Vote for Clint” sign and Quinn Moosomin was shaking hands in the lobby and handing out business size cards that said “Vote Clint”.

[283] Langford Wuttunee further stated that at the Band Hall on election day there were vehicles parked outside with campaign signs on them close to the entrance. Langford Wuttunee stated in the affidavit that Howard McMaster came out and told him to move his vehicle, or remove the signs in his own vehicle. Langford Wuttunee told Howard McMaster that when the other vehicles that were closer to the entrance removed their signs, he would remove his. He was told that the other vehicles were fine and that Howard McMaster did not make others remove their vehicles.

[284] I will ignore his opinion evidence at paragraph 12 of his affidavit. I will also ignore the evidence regarding Howard McMaster.

[285] The remaining evidence does not support a contravention of the *FNEA*, and in the alternative, it certainly does not affect the results of the election.

(ii) Cecelia Knight

[286] Cecelia Knight's affidavit alleges that because she is elderly, she told Sandra and Elsie that she wanted to vote, and asked if they could find out if she could be brought a ballot to her house. A woman did bring her a ballot in an unsealed envelope. She says she filled in her ballot but did not sign any other paper to go with her ballot and then the woman left with her ballot.

[287] The allegation was not set out by the applicant in the Memorandum of Fact and Law or at the hearing. The Respondents was thus prejudiced by not being able to make a full answer and defence to the allegation. Based on this, I do not find there to be a breach of the *FNEA*.

(iii) Ballot Packages not picked up

[288] In Sandra Furrie's affidavit, she stated that she had completed her ballot package and returned it, but it was never picked up by Howard McMaster, and so she was denied her right to vote. This allegation against Howard McMaster was not advanced at the hearing, and so will be disregarded.

[289] Trina Kent had a similar complaint to Sandra Furrie that the Electoral Officer Howard McMaster did not claim her completed ballot. Good did not pursue this at the hearing as Howard McMaster was discontinued against.

[290] Darcie Wuttunee noted that he requested and received his son's ballot and his own, and on May 2, 2016, received the envelopes back marked "unclaimed". This allegation falls in to the

same category as Trina Kent's and Sandra Furrie's, as it was no longer advanced against Howard McMaster.

(iv) Agricultural Equipment

[291] Archie gave evidence concerning the instance of purchase of agricultural equipment by the band and the lack of council meetings in regard to the agricultural equipment, which he alleged demonstrated that corruption is pervasive in the community. I will give no weight to that evidence as it is not relevant to the election and is not otherwise persuasive evidence.

[292] There were several other affidavits that I will not specifically address as the evidence is related to issues not relevant or not before the court.

[293] This application is dismissed.

VII. Conclusion

[294] This election was a complex web of intrigue. Every recent election of the Red Pheasant First Nation has been appealed. The band is clearly divided in its loyalty and this toxic environment can never be in the best interests of the band.

[295] This leads me to make an unrequested observation that the Respondents have put themselves in situations that bring their actions into question by giving money during election campaigns to individuals that request it when they are in times of need. While I recognize that

members of the band will still need support during an election-period, many solutions exist. For example a moratorium on candidates giving out financial help during elections could be supplemented by having a separate fund and an independent person to administer the provision of cash for these emergencies.

[296] I cannot condone the practise of evidence of people posting their wishes to sell their votes. This is sad indeed given the importance of having a vote and a fair and democratic election. This too must stop. Nor can I condone the fishing expedition of attempting to sell votes to gather evidence against an individual running for Chief or Council. Many incidents do not meet the smell test but nor do they meet the standard of proof to find a breach of a prohibition.

[297] I cannot reasonably and rationally conclude on the evidence produced that there was proof on a balance of probabilities of contraventions of the Act or Regulations other than the one found at paragraph 178 against someone that is not a respondent. In that case, I found it would not have affected the results of the election.

[298] The Applicant has not discharged its burden to satisfactorily prove that the *FNEA* has been contravened and even if there was a contravention found in the evidence it is not likely to have affected the results of the 2016 election.

[299] On a balance of probabilities, I do not find that the outcome of the 2018 election results was affected and I will dismiss this appeal.

VIII. Costs

[300] At the hearing, the parties were given until May 1, 2018 to reach an agreement on costs.

[301] The Attorney General waived costs I was to award that was associated with the Rule 302 motion as Good discontinued against them. The Attorney General seeks costs so I will not award any costs, payable to the Attorney General.

[302] The Applicant and remaining Respondents (Chief Elect Clinton Wuttunee and Councillors Elect Lux Benson, Mandy Cuthand, Dana Falcon, Henry “Boss” Gardipy, and Shawn Wuttunee) submitted an agreement in writing to the Court that is attached as Appendix “B”. In summary, the parties agreed that costs and disbursements in a lump sum of \$100,000.00 shall be awarded to the successful party, which is the Respondent.

JUDGMENT in T-596-16

THIS COURT'S JUDGMENT is that:

1. The Attorney General of Canada; Ryan Bugler, Sabrina Baptiste, former Chief Stewart Baptiste Jr, the Red Pheasant First Nation, Shawn Wuttunee, Howard McMaster (deceased), and Larry Wuttunee , will be removed as parties and from the style of cause;
2. This application is dismissed; and
3. Costs will be awarded to the defendants in the lump sum amount of \$100,000.00 inclusive of taxes and disbursements and are payable forthwith.

"Glennys L. McVeigh"

Judge

APPENDIX A

<i>AFFIDAVIT</i>	<i>SWORN</i>	<i>STATUS AS EVIDENCE</i>	<i>CROSS EXAMINED ON AFFIDAVITS</i>
<i>Sandra Arias</i>	2017-02-09	<i>Pursuant to order made on April 3, 2018, leave was granted to file the Affidavit and cross-examination transcript</i>	January 29, 2018
<i>Chastin Armstrong</i>	BLANK	<u>WITHDRAWN</u>	BLANK
<i>Crystal Baptiste</i>	2016-04-25	BLANK	BLANK
<i>Edgar Baptiste</i>	BLANK	<u>WITHDRAWN</u>	BLANK
<i>Marie Baptiste (Wuttunee)</i>	2016-05-20		
<i>Michael Baptiste</i>	2016-05-09		
<i>Dwayne Glen Benson</i>	2016-06-14		
<i>Marguerite Nicotine Benson</i>	2016-04-28		

<i>Marguerite Nicotine Benson #2</i>	2016-06-14	<u>WITHDRAWN</u>	
<i>Sandra Furrie</i>	2016-04-28		
<i>Michelle Good*</i>	2016-05-13		<i>June 11, 2016</i> <i>January 5, 2017</i>
<i>Michelle Good #2</i>	2016-06-08	<u>WITHDRAWN</u>	
<i>Michelle Good #3</i>		<u>PROTHONOTARY DECISION</u>	
<i>Michelle Good #4</i>	2016-06-15	<u>WITHDRAWN</u>	
<i>Michelle Good #5 (now number #6)</i>	2016-11-10	<i>Pursuant to order made on April 3, 2018, leave was granted to file the Affidavit and cross-examination transcript of Good #5, but which is now #6</i>	<i>January 29, 2018</i>
<i>Michelle Good #6</i>	2017-01-17		
<i>Trina Kant</i>	2016-05-04		

<i>Cecilia Knight</i>	2016-04-22		
<i>Heather Meechance</i>		<u>WITHDRAWN</u>	
<i>Archie Nicotine*</i>	2016-05-30		
<i>Archie Nicotine #2</i>	2016-05-24		
<i>Archie Nicotine #3</i>	2016-06-14	Leave to file, but <u>Paras 8 and 9 are ordered struck</u> by order of P. Lafrenière on August 2, 2016	
<i>Archie Nicotine #4</i>	2016-10-25		
<i>Dennis Russel Nicotine</i>	2016-05-25	<u>WITHDRAWN IN HEARING</u>	
<i>Edward Roy Nicotine</i>	2016-04-13		
<i>Jennifer Peyachew</i>	2016-04-22		
<i>Jeffery Meechance Tisnic (attached as exhibit H to</i>	2016-04-18		February 10, 2018

<i>MG#2, and on its own in AR tab 29, page 718).</i>			
<i>Alice Margaret Wuttunee</i>	2016-04-14		
<i>Darcie Wuttunee</i>	2016-05-11		
<i>Eldon Wuttunee</i>	2017-01-16		January 29, 2018
<i>Elsie Marie Wuttunee</i>	2016-04-18		
<i>Elsie Marie Wuttunee #2</i>	2016-05-31		
<i>Elsie Marie Wuttunee #3*</i>	2017-01-17	<i>Pursuant to order made on April 3, 2018, leave was granted to file the Affidavit and cross-examination transcript.</i>	January 29, 2018
<i>Langford Wuttunee</i>	2016-05-03		
<i>Langford Wuttunee #2</i>	2016-10-25		
<i>Mallory</i>	2016-04-25		

<i>Wuttunee</i>			
<i>Nisha Wuttunee</i>	2016-04-25		
<i>Nisha Wuttunee #2</i>	2016-04-27		
<i>Nisha Wuttunee #3</i>	2016-05-18		
<i>Nisha Wuttunee #4</i>	2016-09-14		October 30, 2017
<i>Tammy Wuttunee</i>	2016-05-03		
<i>Linda Whitford</i>	2016-04-14		
<i>Violet Kayseass</i>	2016-06-09		July 11, 2016
<i>(Chief) Clinton Wuttunee #1</i>	2016-06-08		December 28, 2016
<i>Dana Falcon #1</i>	2016-06-09		December 29, 2016
<i>Edward Roy Nicotine</i>	2016-06-07		December 28, 2016
<i>Gary Suave Nicotine</i>	2016-06-08		December 29, 2016

<i>Lux Benson</i>	2016-06-08		<i>December 29, 2016</i>
<i>Henry Boss Gardipy</i>	2016-06-08		<i>December 29, 2016</i>
<i>Mandy Cuthand</i>	2016-06-08		<i>December 29, 2016</i>
<i>Howard McMaster</i>		<u>WITHDRAWN</u>	<i>September 11, 2017</i>
<i>Clinton Wuttunee #2*</i>	2018-01-22	<i>Pursuant to order made on April 3, 2018, leave was granted to file the Affidavit and cross-examination transcript</i>	<i>January 31, 2018</i>
<i>Dana Falcon #2</i>	2018-01-22	<i>Pursuant to order made on April 3, 2018, leave was granted to file the Affidavit and cross-examination transcript</i>	<i>January 31, 2018</i>

- I. *Discrepancy: Archie Nicotine was cross examined on his first affidavit, according to the transcript it is dated May 9, 2016. However, the AR contains a first affidavit dated May 30, 2016, and a second affidavit dated earlier, on May 24, 2016, as well as his subsequent affidavits, but nothing dated May 9, 2016.
- II. *Discrepancy: leave was given to file Elsie Wuttunee #2 dated January 16, 2017. This date is mentioned in the cross examination as one party had an affidavit dated 16 and the other party's was dated 17.
- III. *Discrepancy: Michelle Good's affidavits, and their subsequent withdrawals/striking lends itself to a number of discrepancies with numbering and therefore to reference in terms of filed

material. Affidavit #5, for example, became Affidavit #6, and Affidavit presumably as a result became Affidavit #7. As well, the January 5, 2017 Cross Examination of Michelle Good on her affidavit by Mr. Stooshinoff, covered more than one Affidavit- Affidavit #3 is also a subject of inquiry.

- IV. *Discrepancy: The Applicant notes that the cross examination of Dana Falcon on Affidavit #2 took place on January 30, 2018, whereas the transcript shows that it actually took place on January 31, 2018

APPENDIX B

Court No. T-596-16

FEDERAL COURT OF APPEAL COUR D'APPEL FÉDÉRALE	
FILED	AVR 27 2018 APR 27 2018
MÉLISSA FISHER	
OTTAWA, CN	
DÉPOSÉ	

BETWEEN:

MICHELLE GOOD

APPLICANT

and

THE ATTORNEY GENERAL OF CANADA;

RESPONDENT

and

CHIEF ELECT CLINTON WUTTUNEE and COUNCILLORS ELECT LUX BENSON, SABRINA BAPTISTE, RYAN BUGLER, MANDY CUTHAND, DANA FALCON, HENRY "BOSS" GARDIPY, LARRY WUTTUNEE, SHAWN WUTTUNEE and GARY SAUVE NICOTINE AND THE RED PHEASANT FIRST NATION;

RESPONDENTS

and

FORMER CHIEF STEWART BAPTISTE JR OF THE RED PHEASANT FIRST NATION;

RESPONDENT

and

HOWARD MCMASTER, ELECTORAL OFFICER

RESPONDENT

Agreement as to Costs

WHEREAS as of the date of this Agreement this Application has been heard by the Court, and;

WHEREAS: this Agreement shall only be binding on the Applicant and the Respondents, CHIEF ELECT CLINTON WUTTUNEE and COUNCILLORS ELECT LUX BENSON, MANDY CUTHAND, DANA FALCON, HENRY "BOSS" GARDIPY, and SHAWN WUTTUNEE, and;

WHEREAS the Parties referred to herein have completed their submissions before the Honourable Federal Court of Canada regarding all matters, and;

WHEREAS the Honourable Federal Court of Canada has requested that the parties endeavor to agree upon a fixed or lump sum figure as to costs and disbursements payable to the successful party in the matter.

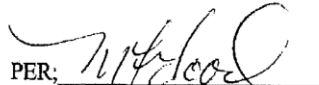
NOW THEREFORE the parties agree to the following terms as to costs:

1. The parties agree that the total sum of costs and disbursements payable to the successful party as between them is \$100,000 (CAN) (one hundred thousand Canadian dollars);
2. The Applicant is a lawyer and the Respondents are represented by lawyers and are aware of their rights and responsibilities in the within action as well as the provisions of the *Federal Courts Rules* and have agreed to forego and waive the requirement that each side prepare and file a Bill of Cost and further, each agrees to waive and forego a right to have those Bill of Costs assessed/taxed by an Assessment Officer or by the Court;
3. The parties jointly submit and agree that the Costs herein shall be the final decision as to Costs in the within matter and jointly request that this Honourable Court award costs to the successful party in accordance with this Agreement.
4. The parties further agree that the costs agreed to herein shall not impair the right of either/or any of the parties to Appeal the final decision of the Court with respect to matters therein.
5. The parties hereto agree that should the Judgment or Decision of the Court be appealed from, the costs agreed to herein shall be and remain the costs in the Application and shall not be subject to appeal and each party hereby waives, foregoes and abandons any right to appeal the amount of costs awarded.

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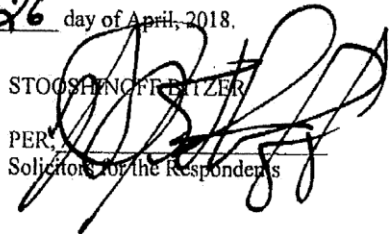
DATED at Kamloops, British Columbia, this 26th day of April, 2018.

MICHELLE GOOD

PER: 
The Applicant

DATED at Saskatoon, Saskatchewan, this 26 day of April, 2018.

STOOSHINOFF BITZER

PER: 
Solicitor for the Respondents

THIS document was delivered by:

STOOSHINOFF BITZER
Barristers & Solicitors
300 416 21 St. East
Saskatoon, SK S7K 0C2
Address for service: as above
Solicitor in charge: Nicholas J. Stooshinoff, Q.C.
Phone: 653-9000 Fax: 653-5284

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-596-16

STYLE OF CAUSE: MICHELLE GOOD v ATTORNEY GENERAL OF CANADA ET AL

PLACE OF HEARING: CALGARY, ALBERTA

DATE OF HEARING: APRIL 3, 2018

JUDGMENT AND REASONS: MCVEIGH J.

DATED: NOVEMBER 28, 2018

APPEARANCES:

Mrs. Michelle Good FOR THE APPLICANT

Mrs. Jody Lintott FOR THE RESPONDENT,
ATTORNEY GENERAL OF CANADA

Mr. Nicholas Stooshinoff FOR THE RESPONDENT,
Mr. Darren Winegarden RED PHEASANT FIRST NATION

SOLICITORS OF RECORD:

Stooshinoff Bitzer FOR THE RESPONDENT,
Saskatoon, Saskatchewan RED PHEASANT FIRST NATION

SEMAGANIS WORME LEGAL FOR THE RESPONDENT,
Saskatoon, Saskatchewan HOWARD MCMASTER

Attorney General of Canada FOR THE RESPONDENT,
Saskatoon, Saskatchewan ATTORNEY GENERAL OF CANADA