Federal Court  Cour fédérale

Date: 20220330

Docket: T-474-20

Citation: 2022 FC 436

Ottawa, Ontario, March 30, 2022

PRESENT: The Hon Mr. Justice Henry S. Brown

BETWEEN:

MARY LINDA WHITFORD AND ALICIA MOOSOMIN

Applicants

and

CLINTON WUTTUNEE, LUX BENSON, JASON CHAKITA, MANDY CUTHAND, DANA FALCON, HENRY GARDIPY, GARY NICTOINE, SAMUEL WUTTUNEE, SHAWN WUTTUNEE, BURKE RATTE, and RED PHEASANT FIRST NATION

Respondents

JUDGMENT AND REASONS

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I. Nature of the matter

[1] This is an application pursuant to section 31 of the *First Nations Elections Act*, SC 2014, c 5 [*FNEA*] contesting the validity of the March 20, 2020 Red Pheasant First Nation [Red Pheasant] elections for Chief and Councillors [Election]. Red Pheasant is an Indian Band within the meaning of the *Indian Act*, RSC 1985, c I-5 [*Indian Act*].

[2] The Respondent Burke Ratte [Mr Ratte] was this First Nation's Electoral Officer and is named only to facilitate discovery and source documents.

[3] The Respondent Red Pheasant is named for the limited purpose of a potential cost award against it in relation to these proceedings.

[4] The other Respondents are the successful Chief and Councillors in the Election, who I will henceforth refer to as the Respondents, given the limited roles of Mr Ratte and Red Pheasant.

[5] The Applicants Mary Linda Whitford and Alicia Moosomin are electors and members of Red Pheasant.

[6] The Applicants allege the Respondents and others acting on their behalf engaged in various forms of serious electoral fraud in the Election. The Applicants seek 1) an Order setting aside the elections of the Chief and all 8 Councillors of Red Pheasant, pursuant to sections 31

and 35 of the *FNEA* and 2) costs on a solicitor and client basis jointly and severally against the Respondents and Red Pheasant.

[7] The Respondents oppose the contestation and ask that it be dismissed with costs on a solicitor client basis. I agreed to entertain cost submissions after a decision on the merits because at that time Red Pheasant will require separate legal representation on the issue of costs.

[8] Mr Ratte asked that the application be dismissed and proposed an all-inclusive cost award of $20,000.00 if he is successful.

[9] Red Pheasant did not make cost submissions. The Court was told at the hearing that Red Pheasant is now separately represented for the purpose of making cost submissions after the release of this decision on the merits.

A. *Summary of conclusions, definitions, and note re references to the records*

(1) Summary of mail-in ballot procedures and conclusions

[10] The Applicants seek to set aside the elections of the Chief and all 8 Councillors of the Red Pheasant First Nation under *FNEA* and or *FNER* as construed and applied in jurisprudence. *FNEA* permits [“may”] this Court to set aside such elections where two conditions are met: 1) a provision of *FNEA* is contravened (per section 31), and 2) the contravention is likely to have affected the result of the election (per subsection 35(1)). The “magic number” test is used in the

second part, and asks if the number of rejected votes is equal to or greater than the successful candidate's margin of victory (*Opitz v Wrzesnewskyj*, 2012 SCC 55 [*Opitz*] at para 73).

[11] To protect the integrity of *FNEA* elections this Court (and the Superior Courts) may also annul *FNEA* election results where the integrity of the election was corrupted by serious electoral fraud (*Papequash v Brass*, 2018 FC 325 [*Papequash FC*] at para 36). In this respect, jurisprudence establishes that attempts by electoral candidates or their agents to purchase the votes of constituents are an insidious practice that corrodes and undermines the integrity of any electoral process (*Papequash FC* at 38). Put another way, in *Gadwa v Kehewin First Nation*, 2016 FC 597 [*Gadwa*] at para 88, a candidate who engages in vote buying is attempting to corrupt the election process.

[12] Therefore, regardless of the number of votes a candidate purchased, or attempted to purchase, and regardless of whether the candidate wins the election by a greater margin than the number of votes that were purchased (i.e. less than the magic number), this may not save the candidate; in the Court’s discretion, his or her election may and in some cases must be vitiated. This is the case because fraud, corruption and illegal election practices are serious (*Opitz* at para 43, *Gadwa* at para 88).

[13] The central and principle issue in this case is whether and to what extent any of the Respondents were involved in vote buying. If they were, they were involved in serious electoral fraud for which reason their election may be annulled regardless of the number of votes obtained.

Vote buying and selling are also contraventions of subsections 16(f) and 17(b) respectively of *FNEA*.

[14] The vote buying in this case almost entirely related to Mail-in Ballots. The vote buying took place in relation to two steps involved in obtaining and sending back a Mail-in Ballot. The first step in the Mail-in Ballot process is for an elector to send to the Elections Officer a Request for Mail-in Ballot per section 15 of *FNER* in prescribed form (5-D), together with a copy of the elector's ID and his or her address. Notably, a Request for Mail-in Ballot may be sent to the Electoral Officer electronically, that is by photo text message (a text message accompanied by an electronic photograph of the Request for Mail-in Ballot form), in addition to being sent by mail or by hand.

[15] If the request is accepted the second step entails the Electoral Officer mailing the elector, at the address given, a package containing a Mail-in Ballot and a Voter Declaration form. Upon receipt, of the package, the elector marks the Mail-in Ballot, puts it into a sealed envelope, and mails or delivers it to the Electoral Officer in a package which must also contain a Voter Declaration form duly signed by the elector and witnessed per subsection 17(1) of *FNER*. Notably, while an elector may ask for the assistance of another person to mark their ballot, in that case the Voter Declaration form must not only be signed by a witness who attests the elector is the person whose name is set out in the form, but which also attests that the ballot was marked in the manner directed by the elector (subsection 5(6) of *FNER*).

[16] While the Applicants established a number of contraventions of *FNEA*, in my view none of the contraventions are likely to have affected the result of the Election in that none triggered the magic number per *Opitz*. That is, in no case was the difference between the successful candidate's vote equal to or greater than the successful candidate's margin of victory.

[17] However, I am satisfied on a balance of probabilities that several of the Respondent candidates engaged in serious electoral fraud namely vote buying and related activities, such that the integrity of their elections were corrupted. In the result, in the exercise of the Court's discretion, the elections of the Respondents Chief Clinton Wuttunee and Councillor Gary Nicotine will be annulled regardless of the number of votes they obtained. I also find on a balance of probabilities that Councillors Lux Benson, Jason Chakita, Mandy Cuthand, Henry Gardipy, Samuel Wuttunee, and Shawn Wuttunee engaged in serious electoral fraud, but on a lesser scale, such that their elections might be, but in my discretion are not annulled. In addition I find on a balance of probabilities that supporters Leroy Nicotine Jr. and Shelley Wuttunee engaged in multiple instances of serious electoral fraud, in respect of which the *FNEA* gives this Court no remedy to impose.

(2) A note on references

[18] The material filed in this contestation totalled 7,565 pages including authorities. Where I refer to the specific record, I use the shorthand AR to mean Applicants' Record, and RR for Respondents' Record. Because the records are filed in PDF format, the page numbers on the hard copy do not match the PDF page number used in the PDF search bar at the bottom of the screen.

Therefore I have provided both, the first is the reference to the hard copy page number, and the second refers to the PDF search bar.

(3) Needs of band members for financial support and Band Member Assistance [BMA]

[19] A defence frequently raised by the Respondents is that band members of this First Nation require assistance throughout the year, and their needs did not stop during the Election. The Chief and Councillors therefore should not be faulted for giving money to First Nation members during the Election, provided it seems such assistance is provided as a coincidence and did not entail the purchase of votes. In this connection there is evidence First Nations received only $255 a month from Red Pheasant, and many needed far more. It was said the calls came in to the Chief and Councillors every day and in some cases all day long.

[20] I do not doubt the needs of these First Nation members arise throughout the year. However Red Pheasant has a procedure in place by which members in need may be paid Band Member Assistance [BMA] with the authority of the Chief and a Councillor, which requests are dealt with on a less formal basis without Council meetings. That said, in fact and as Chief Wuttunee and Chief Financial Officer Austin Ahenakew both testified, there are special forms to be completed before BMA would be paid.

[21] Thus I conclude this First Nation has records of legitimate BMA payments. It is also apparent the required forms should be kept for audit purposes. I see no reason why such records would not be kept for BMA payments made during an election period.

[22] I endorse what my colleague Justice McVeigh observed in *Good v Canada (Attorney General),* 2018 FC 1199 [*Good*] which involved this same First Nation:

> [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.

II. Facts

A. *Statutory Regime*

[23] This contestation is brought under the FNEA, which came into force in April of 2015 along with the associated First Nations Elections Regulations, SOR/2015-86 [*FNER*], section 31 of which requires the matter proceed by application. As summarized by Justice McVeigh *Good, supra*, "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*."

[24] In order to fall under the *FNEA*, a First Nation such as Red Pheasant must opt in. To opt into the provisions, a Band Council Resolution in favour of elections governed by the FNEA must be passed by the First Nation and submitted to the Minister, who adds the First Nations to the FNEA Schedule if relevant criteria are met (see section 3). As per Justice McVeigh in Good at para 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."

B. *Background facts*

[25] Every recent election of the Red Pheasant First Nation has been appealed. The most recent previous appeal also involved the current chief, Chief Clinton Wuttunee [Chief Wuttunee], and was considered by this Court in *Good, supra*. There Ms. Good applied for judicial review of the March 18, 2016 band election in which Chief Wuttunee was elected Chief. Justice McVeigh declined to set aside the 2016 election, finding "[t]he 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." Costs and disbursements in a lump sum of $100,000.00 were awarded to the respondents (Chief Wuttunee and Councillors Lux Benson, Mandy Cuthand, Dana Falcon, Henry Gardipy, and Shawn Wuttunee). Ms. Good is not a party to the present application.

[26] The case at bar concerns the election of Chief Wuttunee and eight Councillors on March 20, 2020. The Applicants allege each of the Respondents together with and or their agents or persons acting on their behalf contravened the *FNEA*, the *FNER* and/or other applicable laws and engaged in electoral corruption, which contraventions include, but are not limited to, vote buying, forging Requests for Mail-In Ballots, paying electors to request their Mail-in Ballots, forging Mail-in Ballot Voter Declaration Forms and forging identity documents.

[27] The agents or persons acting on behalf of the Respondents are not named as Respondents. However they are named in this proceeding and were served with it. They appeared through the same counsel as the named Respondents. They are alleged to include but are not limited to Shelley Wuttunee (wife of Councillor Shawn Wuttunee), Leroy Nicotine Jr., Cody Benson (Band Manager for Red Pheasant and son of Councillor Lux Benson), Austin Ahenakew (Chief Financial Officer for Red Pheasant) and Deloris Peyachew (Indian Registry Administrator for Red Pheasant).

[28] As summarized by Justice Aylen as Case Management Judge (the Amended Notice of Application itself is 20 pages long; the Amended Notice of Motion was approved by Order of Prothonotary Molgat April 6, 2021) by Order dated August 30, 2021 [Tab 30 of the Applicant's Record], the Applicants plead:

> A. The Participants unlawfully possessed a large number of mail-in ballots (which were not their respective mail-in ballots) which they forged and thereafter filed with Mr. Ratte;
>
> B. Mr. Ratte was deceived by the Participants and others when he received forged documents and unknowingly accepted a large number of requests for mail-in ballots on behalf of other electors directly from the Participants by text message;
>
> C. Several persons attended polling stations and were permitted by Mr. Ratte to deposit several mail-in ballots, notwithstanding the limitation that an elector may only vote once;
>
> D. Mr. Ratte was deceived by the Participants and others when he received forged documents and unknowingly mailed and delivered a large number of mail-in ballots to persons other than the electors in question; and
>
> E. Mr. Ratte has failed to deliver certified election results.

(1) March 20, 2020 Election Results

[29] I accept the affidavit evidence of Electoral Officer Burke Ratte [Mr Ratte], dated August 27, 2020, that 1,869 eligible electors were registered to vote in the Election.

[30] According to the "Statement of Votes" attached as Exhibit "D" to the same affidavit [RR 0317, PDF 0322], a total of 1084 ballots were cast for Chief with 6 rejected at the ballot box. Chief Wuttunee received 648 votes. The runners-up were Todd Baptiste who received 424 votes, and Lester "George" Nicotine who received 6 votes.

[31] 1084 ballots were cast for Councillors with 1 rejected. Votes obtained for Councillors were:

- Councillor Henry Gardipy: 637 votes
- Councillor Shawn Wuttunee: 634 votes
- Councillor Lux Benson: 619 votes
- Councillor Jason Chakita: 615 votes
- Councillor Dana Falcon: 607 votes
- Councillor Gary Nicotine: 599 votes
- Councillor Samuel Wuttunee: 597 votes
- Councillor Mandy Cuthand: 585 votes

[32] The runners up were:

- Angus (Peyachew) Donna: 252 votes
- Stewart Sr. Baptiste: 238 votes
- Keith (Tyson) Wuttunee: 234 votes
- Kellie Wuttunee: 167 votes
- Chuckie Harriet Nicotine: 159 votes
- Dickie Lee Baptiste-Bull: 149 votes
- Alvin Leroy Nicotine: 145 votes
- Charlotte Benson: 142 votes
- Charles Meechance: 139 votes

- Sabrina Theresa Peyachew (Baptiste): 139 votes
- Alvin Baptiste: 126 votes
- Michael (Mike) Wuttunee: 126 votes
- Glen (Peanut) Bugler: 102 votes
- Gerald Meechance: 96 votes
- Edgar Baptiste: 77 votes
- Carolyn Rose Kiskotagan: 75 votes
- Elvin Fredrick Nicotine: 74 votes
- Langford Douglas Wuttunee: 72 votes
- Margaret (Bepee) Nicotine (Benson): 69 votes
- Ida Wuttunee: 68 votes
- Jacob Moosomin/Moosuk: 68 votes
- Dennis Russel Nicotine: 64 votes
- Lynale Benson: 60 votes
- Deanna Bugler Arcand: 55 votes
- Rudy W. Wuttunee: 52 votes
- Andrea Nicotine: 27 votes
- Ellen Cuthand: 17 votes
- Trevor (Topdog) Cuthand: 11 votes

[33] As deposed by Mr Ratte at paras 9-12 [RR 0177-0180, PDF 0182-0185], a total of 748 Request for Mail-in Ballots were received and accepted. 684 Mail-in Ballot packages were received by the Electoral Officer of which 32 were rejected.

[34] Mr Ratte's Reply to Undertakings dated May 18, 2021 ["May 18, 2021 RTU"] reveal the following individuals submitted Requests for Mail-in Ballots to Mr Ratte by photo text message:

1. Chief Wuttunee submitted 521 [AR Tab 253]
2. Councillor Gary Nicotine submitted 164 [AR Tab 254]
3. Councillor Shawn Wuttunee submitted 24 [AR Tab 255]
4. Councillor Dana Falcon submitted 18 [AR 256]
5. Councillor Henry Gardipy submitted 25 [AR Tab 257]
6. Councillor Mandy Cuthand submitted 49 [AR Tab 258]
7. Councillor Samuel Wuttunee submitted 31 [AR Tab 259]
8. Band Manager Cody Benson submitted 22 [AR Tab 260]

[35] Parenthetically, the Respondents objected to Mr Ratte's May 18, 2021 RTU forming part of the evidence, however as discussed below, I find no merit in that objection.

(2) Procedural background and Justice Aylen's Order dated August 30, 2021

[36] As with the election of 2018 considered by Justice McVeigh in *Good*, this case had extensive case management because the parties were unable or unwilling to work out many issues. The proceedings were marred by antagonism and refusals to co-operate.

[37] The matter was originally case managed by Prothonotary Molgat. As it moved closer to a hearing, it became case managed by Justice Aylen. Justice Aylen heard a number of motions – including motions brought by both sides to strike all affidavits filed by the other – resulting in Justice Aylen's August 30, 2021 Order.

[38] Justice Aylen criticized the conduct of this litigation:

> [2] With the exception of the Respondent, Mr Ratte, and his counsel, the conduct of the parties and their counsel throughout this proceeding has left much to be desired. Over the last 16 months, the parties and their counsel were repeatedly warned by the previous Case Management Judge and then by me (following my appointment in June 2021) that their behaviour to date has shown a shocking disregard for the principle of proportionality, as well as an unacceptable unwillingness or inability to communicate or otherwise cooperate in advancing the proceeding in an efficient manner.

[39] Justice Aylen's Order dated August 30, 2021, dealt with six motions. Materially for these purposes Justice Aylen Ordered as follows; my comments follow where required.

[40] Regarding the FIRST MOTION, Justice Aylen Ordered:

> 1. The Applicants' motion for an order that Mr. Stooshinoff and the firm of Stooshinoff Bitzer be removed as counsel of record and disqualified from acting for any of the parties is dismissed, without prejudice to the Applicants' right to seek similar relief in relation to the cost phase of the application.
>
> [Court Comment: This is one of the reasons costs will be determined after this Decision is released. The Applicants have appealed this part of the Order to the Federal Court of Appeal.]
>
> 2. The Applicants shall pay to the Respondents, Clinton Wuttunee, Lux Benson, Jason Chakita, Mandy Cuthand, Dana Falcon, Henry Gardipy, Gary Nicotine, Samuel Wuttunee, Shawn Wuttunee and the Red Pheasant First Nation, their costs of the motion to remove Mr. Stooshinoff as counsel of record, with the quantum of costs to be fixed by the hearings judge.
>
> [Emphasis added]
>
> [Court Comment: These costs will be determined after this Decision is released. The Applicants have appealed this part of the Order to the Federal Court of Appeal; a decision is reserved.]

[41] Regarding the SECOND MOTION, Justice Aylen Ordered:

> 8. The affidavit of John Benson sworn August 27, 2020 is hereby struck.
>
> [Court Comment: The Affidavit was struck because of improper conduct by Respondents' counsel Mr. Stooshinoff during Mr Benson's cross examination including as found Justice Aylen: "John Benson repeatedly turns his back to the Court Reporter (while on video) despite repeated requests to turn around so that his face could be seen", and "Mr. Stooshinoff not only encouraged this behaviour, but engaged in repeated private conversations with the witness during his cross-examination, even after such conversations were repeatedly objected to by counsel for the Applicants." Therefore, Justice Aylen was satisfied that "this misconduct has had the effect of frustrating the cross-examination of John Benson and demonstrates a complete disregard for this proceeding."]

> 9. The balance of the Applicants' motion to strike the affidavits relied upon by the Respondents is dismissed.
>
> 10. The Applicants' request for an order compelling the Respondents [including Mr Ratte, ed.] to answer all questions refused from the cross-examinations of the Respondents' affiants is dismissed, without prejudice to the right of the Applicants to ask the hearings judge to draw an adverse inference from the affiants' refusals to answer the questions.
>
> [Emphasis added]
>
> [Court Comment: I have drawn many adverse inferences where appropriate from refusals to answer relevant questions on cross-examination.]
>
> 11. The Applicants' request for an order compelling the Respondents to answer all undertakings given at the cross-examinations of the Respondents' affiants is dismissed.
>
> 12. The Applicants' request for an order compelling the Respondents' affiants to attend for further cross-examination is dismissed.
>
> [Court Comment: The Applicants have appealed parts 9, 10, 11 and 12 of this Order to the Federal Court of Appeal. A decision of the Federal Court of Appeal is reserved.]

[42] Regarding the THIRD MOTION, Justice Aylen Ordered:

> 14. The Applicants are granted leave, pursuant to Rule 312, to file the affidavit of Tomas Pritchard sworn February 8, 2021.
>
> 15. The Respondents shall serve, and file proof of service of, any additional affidavit(s) to respond to the affidavit of Mr. Pritchard by no later than September 13, 2021.
>
> 16. The parties shall be afforded an opportunity to conduct cross-examinations in relation to the affidavit of Mr. Pritchard and any other affidavit(s) served by the Respondents in response thereto. The parties shall complete any such cross-examinations by no later than October 4, 2021. In relation to such cross-examinations:
>
> > (a) The party tendering the affiant shall accept service of any Direction to Attend and attendance money.

> (b) Any dispute regarding a request for production in a Direction to Attend shall be raised with the Court forthwith and shall be addressed by the Court in advance of the cross-examination at issue, by way of informal motion to be heard at a case management conference.
>
> (c) The parties shall cooperate in the scheduling of the cross-examinations. Should the Court find that any party has failed to do so, the Court will impose cost sanctions against such party and their counsel, if appropriate.
>
> (d) The parties shall confirm the cross-examination schedule with the Court by no later than September 24, 2021. If the parties are unable to agree on a schedule for the cross-examinations, they shall so advise the Court by no later than September 24, 2021 and at that time provide the Court with their respective proposed schedules and the Court will unilaterally impose a schedule based on the proposed schedules of the parties.

17. There shall be no award of costs in relation to the Rule 312 motion.

[Court Comment: The Applicants appealed para 17 of this Order to the Federal Court of Appeal. The Respondents seek a variance so that CDs of certain telephone conversations by Robin Wuttunee from prison are not allowed in evidence. I deal with this issue in these Reasons. The Respondents also asked for a stay of this hearing but no stay was granted. A decision of the Federal Court of Appeal is reserved.]

[43] Regarding the FOURTH MOTION, Justice Aylen Ordered:

> 3. The Respondents' motion for relief pursuant to Rule 94(2) in relation to the Direction to Attend dated June 9, 2020 and served on Clinton Wuttunee is dismissed as moot. Costs of the motion shall be payable in the cause.

[44] Regarding the FIFTH MOTION, Justice Aylen dealt with requests by the Respondents to be relieved of their obligation to produce certain documents. Justice Aylen agreed to reduce the number of documents, however she ordered the Respondents affected to produce a narrower range of documents:

> 4. The Respondents' motion for an order pursuant to Rule 94(2) that the Respondents' affiants, Clinton R. Wuttunee, Dana Falcon, Gary Nicotine, Henry Gardipy, Jason Chakita, John Benson, Lux Benson, Mandy Cuthand, Samuel Wuttunee, Shawn Wuttunee, Austin Akenakew, Cody Benson and Shelly Wuttunee, be relieved from the production of documents sought by the Applicants in their Directions to Attend dated September 4, 2020 and all subsequent Directions to Attend served by the Applicants is granted, with the exception of the following requests for production:
>
> > (a) In relation to the Directions to Attend served on Clinton Wuttunee:
> >
> > > (i) All emails, letters, text messages, Facebook messages, or other correspondence between January 1 and March 20, 2020 in his possession, power or control that include Burke Ratte.
> > >
> > > (ii) All emails, letters, text messages, Facebook messages, or other correspondence between January 1 and March 20, 2020 in his possession, power or control that include Robin Wuttunee or anyone on his behalf, or that relate or refer to Robin Wuttunee.
> > >
> > > (iii) All communications that he had with the family of Arnold Bruce Wuttunee referred to at paragraph 16 of his affidavit.
> > >
> > > (iv) All documents referring or relating to him looking into the matter for Robin Dean Wuttunee and being advised that he was not eligible to vote, as referred to at paragraph 26 of his affidavit.
> > >
> > > (v) All emails, letters, text messages, Facebook messages, or other correspondence between January 1 and March 20, 2020 in his possession, power or control that include, or that relate or refer to, Patricia Bird.

(b) In relation to the Directions to Attend served on Austin Ahenakew:

(i) The “directive” referred to at paragraph 15 of his affidavit and documents referring or relating to same.

(c) In relation to the Directions to Attend served on Henry Gardipy:

(i) With reference to paragraph 5 of his affidavit, all documents referring or related to the request made by Michael Earnest Stevens that Mr. Gardipy assist him with his D-5 request for a mail-in ballot.

(d) In relation to the Directions to Attend served on Cody Benson:

(i) All documents referring or relating to the decision to grant a Band Member Assistance payment of $400 to Heather Meechance referred to at paragraph 13 of his affidavit, and all documentation referring or relating to the payment of same to Heather Meechance.

(e) In relation to the Directions to Attend served on Gary Nicotine:

(i) All emails, letters, text messages, Facebook messages or other correspondence requesting financial assistance that he received from Heather Meechance regarding her request for “help to buy groceries” and his response referred to at paragraph 16 of his affidavit.

(ii) All documents requesting or relating to the decision to grant a Band Member Assistance payment of $400 to Heather Meechance referred to at paragraph 16 of his affidavit, and all documentation referring or relating to the payment of same to Heather Meechance.

(f) In relation to the Directions to Attend served on Jason Chakita:

(i) All emails, letters, text messages, Facebook messages or other correspondence between January

> 1 and March 20, 2020 between him and Robin Dean Wuttunee or anyone on his behalf.
>
> 5. The documents ordered to be produced in paragraph 4 shall be provided to the Applicants by no later than September 13, 2021.
>
> 6. The Applicants shall pay to the Respondents their costs of the Rule 94(2) motion referenced in paragraph 4 in the amount of $10,000.00, inclusive of fees, disbursements and taxes.
>
> [Court Comment: The Applicants appealed parts 4 and 6 of this Order to the Federal Court of Appeal; its decision is reserved.]

[45] Regarding the SIXTH MOTION, Justice Aylen Ordered:

> 7. The Respondents' motion to strike the affidavits relied upon by the Applicants is dismissed.
>
> 13. The costs of the two motions to strike the affidavits shall be determined by the hearings judge.
>
> [Emphasis added]
>
> [Court Comment: I will determine costs regarding both motions after the release of this Decision.]

[46] The Applicants appealed the Order of Justice Aylen to the Federal Court of Appeal on September 8, 2021. The Respondents moved to vary. The appeal book is filed. Both the Applicants and Respondents have filed their Memoranda. The appeal was set down for a hearing on March 15, 2022. Judgment is reserved.

[47] I will decide the issues before me as they stand and given the various Orders of Justice Aylen.

[48] Both parties made submissions in response to the particulars set out in the August 30, 2021 Order of Justice Aylen, exchanged multiple letters but continued to disagree. In the result Justice Aylen made further Orders dated September 28 and October 8, 2021:

> 1. The cross-examination of Mr. Pritchard by the Respondents (other than Mr. Ratte) shall proceed on September 30, 2021 at 9:00 a.m. (Saskatchewan time) by Zoom video-conference. Counsel for the Applicants shall make themselves or someone from their office available to attend.
>
> 2. The cross-examination of Mr. Ratte by the Applicants shall proceed on October 4, 2021.
>
> 3. The cross-examinations of Leroy Nicotine Jr., Clinton Wutunee and Marie Adam by the Applicants shall proceed all on October 2, 2021. In the event that the parties are unable to agree on an in-person venue for the cross-examinations, they shall proceed by Zoom

[49] In her preamble to the September 28, 2021 Order, Justice Aylen reserved the following to the hearings judge, i.e., to this Court:

> **CONSIDERING** that the Court will not entertain the Applicants' request for the issuance of an order requiring Mr. Pritchard to attend for cross-examination. A Direction to Attend has been served for Mr. Pritchard's cross-examination and he is required to attend, failing which the Respondents may make submissions before the hearings judge as to whether his evidence should be struck;
>
> **CONSIDERING** that the admissibility of the answers to undertakings of Mr. Ratte will be a matter for the parties to address before the hearings judge;
>
> **CONSIDERING** that, based on the submissions of the Applicants, the Court will not compel the production of an unredacted version of the document produced by Austin Ahenakew in furtherance of paragraph 4(b)(i) of the Order. The Applicants may make whatever submissions they deem appropriate before the hearings judge regarding any alleged improper redactions;

> **CONSIDERING** that the issue of whether the affidavits served by the Respondents in response to the affidavit of Mr. Pritchard constitute proper responding evidence as contemplated by the Order is a matter to be addressed before the hearings judge;
>
> [Emphasis added]
>
> [Court Comment**:** Where applicable these Reasons deal with these matters. The first matter is not relevant because Mr Pritchard attended. I deal with the second issue namely Mr Ratte's May 18, 2021 RTU in these Reasons.]

[50] On October 8, 2021, Justice Aylen further Ordered:

> 1. The Respondents' motion is granted and Mr. Nicotine Jr. is relieved from the request for production nos. 5 and 6 as sought by the Applicants in their Direction to Attend dated September 24, 2021.
>
> 2. The Applicants shall forthwith pay to the Respondents (other than Mr. Ratte) their costs of this motion fixed in the amount of $1,500.00.

[51] The Applicants appealed the Order dated October 8, 2021 to the Federal Court of Appeal on October 18, 2021. An appeal book has not been filed and the appeal is not yet set down for a hearing.

[52] For completeness, I note three other matters.

[53] First, two business days before the start of the hearing before me on January 11 and 12, 2022, the Applicants moved to file an affidavit commissioned in October 2021. I dismissed this motion because the three-month delay was not explained, with the following endorsement:

> The Applicant conducted cross-examination of Mr. Nicotine Jr. on October 12, 2021, and on January 5, 2022 moved for leave to file

> an affidavit dated October 13, 2021. Today is January 6, 2022. An unexplained delay of almost three months is not readily excused. It puts the Respondent in a difficult position although the Respondent had notice of the subject affidavit for some time. However the Court has not, the matter is set to be argued in two business days, i.e., tomorrow Friday, and Monday next week. The hearing is scheduled to start Tuesday January 11, 2022. The Court has the evidence of Mr. Nicotine Jr. and his cross-examination which of course may be addressed by counsel at the hearing. The Motion is dismissed with costs in the cause.

[54] Second, a day or so after the hearing, counsel for the Respondents, *ex parte* (without serving Applicants' counsel), electronically filed a document uncomplimentary to Applicants' counsel (without any explanation; it was already in its Record) along with its Memorandum in Word (which I had requested). I ordered the document removed from the Court file (although it remains in the Record) because there was no explanation for the *ex parte* filing except its uncomplimentary nature. Respondents' counsel subsequently delivered a written apology.

[55] Thirdly, before the hearing I issued a Direction with specific e-formatting requirements for any compendia the parties wished to file. A compendium from each party is in my view a practical necessity, although not one in the Rules, in a large record file like this. Regrettably, Registry staff failed to send the Direction to the Applicants or Respondents, only to Mr Ratte. My direction was resent during the hearing. The Applicants managed to file a hyperlinked Compendium. At the end of their submissions, the Applicants asked if the Court would appreciate a thematically arranged compendium in both electronic and hard copy and I agreed; these were subsequently delivered. The Respondents did not file a compendium at the hearing. At the end of the hearing they requested leave to file a compendium, to which I agreed, again because of the size of the record (approximately 7,565 pages with authorities).

[56] However, the Respondents' material did not comply with my Direction: it contained both new argument and new material. In addition, while the Direction permitted a two page summary of argument, the Respondents filed four pages single spaced, i.e., contrary to both Rule 65 and the Direction, effectively three times longer than permitted. This resulted in a justified objection by the Applicants. I issued a further Direction permitting refiling - but only if accompanied by a certification of compliance by Respondents' counsel, which was subsequently delivered. The Respondents submitted that I had allowed the Applicants a noncompliant submission. I declined to engage in further post-hearing back and forth.

III. Issues

[57] The Applicants submit the issues are:

1. How should this Honourable Court determine the facts?
2. Was the *FNEA* or the *FNER* contravened?
3. Should the Election be set aside?
4. What costs if any should be awarded to the successful party?

[58] The Respondents submit the issues are:

1. Was the *FNEA* or the *FNER* contravened?
2. Should the Election be set aside?

[59] In my respectful view the issues are twofold:

1. Have the Applicants discharged their burden to prove the *FNEA* and or *FNER* were contravened and if so, is it likely to have affected the result of the Election?

2. Was the Election corrupted by serious elector fraud such that the integrity of the electoral process is in question and an annulment justified regardless of the proven number of invalid votes, as in the case when there is serious reason to believe that the results would have been different but for the fraud, or when an electoral candidate or agent is directly involved in the fraud: *Papequash v Brass*, 2018 FC 325 [Barnes J] at paras 34-36, *McEwing v Canada (Attorney General)*, 2013 FC 525 [Mosley J] at paras 81-82, *Gadwa v Kehewin First Nation*, 2016 FC 597 [Strickland J] at para 88.

[60] That said, while the Applicants have established that *FNEA* was contravened, in no instances was the contravention likely to have affected the result of the Election. Therefore the answer to question 1 is "No". Only the second question remains to be determined and is the focus of these Reasons.

IV. The Law

A. *Relevant provisions of the First Nations Elections Act, SC 2014, c 5* [*FNEA*]

[61] Sections 30, 31 and 35 of the *FNEA* provides for the contestation of an election:

Means of contestation	**Mode de 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.	**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 of election	**Contestation**
31 An elector of a participating First Nation may, by application to a competent court, contest the election of the chief or a	**31** Tout électeur d'une première nation participante peut, par requête, contester devant le tribunal compétent l'élection du chef ou d'un

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.	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.
…	…
Court may set aside election	**Décision du tribunal**
35 (1) After hearing the application, the court *may*, if the ground referred to in section 31 is established, set aside the contested election.	**35 (1)** Au terme de l'audition, le tribunal *peut*, si le motif visé à l'article 31 est établi, invalider l'élection contestée.
[Emphasis added]	[Je souligne]

[62] Sections 16 and 17 of the *FNEA* set out "prohibitions", that is, activities which constitute "contravention" of *FNEA*, although I note there are other provisions in *FNEA* that might be contravened:

Prohibition — any person	**Interdictions générales**
16 A person must not, in connection with an election,	**16** Nul ne peut, relativement à une élection:
(a) vote or attempt to vote knowing that they are not entitled to vote;	**a)** voter ou tenter de voter sachant qu'il est inhabile à voter;
(b) attempt to influence another person to vote knowing that the other person is not entitled to do so;	**b)** inciter une autre personne à voter sachant que celle-ci est inhabile à voter;
(c) knowingly use a forged ballot;	**c)** faire sciemment usage d'un faux bulletin de vote;
(d) put a ballot into a ballot box knowing that they are	**d)** déposer dans une urne un bulletin de vote sachant

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.

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.

B. *Relevant provisions of the First Nations Elections Regulations, SOR/2015-86 [FNER]*

[63] Sections 15 to 17 of the *FNER* allow electors to vote by Mail-in Ballot:

Mail-in ballot	**Demande de bulletin de vote postal**
15 An elector who wants to receive a mail-in ballot must make a written request to the electoral officer that includes a copy of their proof of identity.	**15** L'électeur qui désire obtenir un bulletin de vote postal présente au président d'élection une demande écrite accompagnée de la copie d'une preuve d'identité.
Mail-in ballot package	**Trousse de vote postale**
16 (1) No later than 30 days before the day on which the election is to be held, the electoral officer must mail to every elector who has made a written request a mail-in ballot package consisting of	**16 (1)** Au plus tard le trentième jour avant l'élection, le président d'élection envoie par la poste à l'électeur qui en a fait la demande écrite une trousse comprenant les éléments suivants:
(a) a ballot, initialed on the back by the electoral officer or deputy electoral officer;	**a)** un bulletin de vote portant au verso les initiales du président d'élection ou du président d'élection adjoint;
(b) an outer return envelope that is pre-addressed to the electoral officer and, if the elector's address is in Canada, is postage-paid;	**b)** une enveloppe-réponse adressée au président d'élection et, si l'adresse de l'électeur se trouve au Canada, affranchie;
(c) an inner envelope marked "Ballot" for insertion of the completed ballot;	**c)** une enveloppe intérieure portant la mention « bulletin de vote » dans laquelle doit être inséré le bulletin de vote rempli;

(d) a voter declaration form;

d) un formulaire de déclaration d'identité;

(e) instructions regarding voting by mail-in ballot;

e) les instructions relatives au vote par bulletin de vote postal;

(f) the notice set out in section 14;

f) l'avis visé à l'article 14;

(g) a statement that the elector may vote in person at a polling station on the day of the election, or at an advance polling station if applicable, in lieu of voting by mail-in ballot, if

g) une mention indiquant que l'électeur peut, au lieu de voter par bulletin de vote postal, voter en personne à un bureau de vote le jour de l'élection ou à un bureau de vote par anticipation, le cas échéant, dans les cas suivants:

(i) they return the unused mail-in ballot to the electoral officer or deputy electoral officer, or

(i) il retourne son bulletin de vote postal inutilisé au président d'élection ou au président d'élection adjoint,

(ii) they provide the electoral officer or deputy electoral officer with a sworn affidavit stating that they have lost their mail-in ballot; and

(ii) il fournit au président d'élection ou au président d'élection adjoint une déclaration sous serment indiquant qu'il a perdu son bulletin de vote postal;

(h) a list of the names of any candidates who were elected by acclamation.

h) le cas échéant, une liste mentionnant le nom des candidats élus par acclamation.

Six or more days before election

Délai de reception

(2) If an elector makes a written request for a mail-in ballot six or more days before the day on which the election is to be held, the electoral

(2) Si l'électeur soumet une demande écrite de bulletin de vote postal six jours ou plus avant la date de l'élection, le président d'élection lui envoie

officer must mail, or deliver at an agreed time and place, a mail-in ballot package to the elector as soon as feasible after receipt of the request.

la trousse par la poste ou la lui remet à l'heure et au lieu convenus, et ce, dans les plus brefs délais après la réception de la demande.

Voters list

(3) The electoral officer must indicate on the voters list, next to the name of each elector to whom a mail-in ballot package was mailed or delivered, that a package has been provided to that elector and keep a record of the date on which, and the address to which, each package was mailed or delivered.

Registre

(3) Le président d'élection note, en regard du nom de l'électeur sur la liste des électeurs, qu'une trousse lui a été envoyée par la poste ou remise et tient un registre de l'adresse et de la date de l'envoi ou de la remise.

…

…

Mail-in ballot

17 (1) An elector may vote by mail-in ballot by

(a) marking the ballot with a cross, check mark or other mark that clearly indicates the elector's choice, but does not identify the elector, next to the name of the candidates for whom they intend to vote;

(b) folding the ballot in a manner that conceals the candidates' names and any marks on the ballot without hiding the initials on the back;

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

Vote par la poste

17 (1) L'électeur qui vote par bulletin de vote postal:

a) marque son bulletin, en regard du nom des candidats pour qui il souhaite voter, en apposant une croix, un crochet ou toute autre marque qui indique clairement son choix mais ne permet pas de;

b) plie le bulletin de manière à cacher le nom des candidats ainsi que toute marque sans toutefois cacher les initiales qui figurent au verso;

c) insère le bulletin dans l'enveloppe intérieure et cachette l'enveloppe;

(d) completing and signing the voter declaration form;	**d)** remplit et signe le formulaire de déclaration d'identité;
(e) placing the inner envelope and the completed voter declaration form in the outer envelope; and	**e)** insère l'enveloppe intérieure et le formulaire de déclaration d'identité rempli dans l'enveloppe-réponse;
(f) delivering or mailing the mail-in ballot package to the electoral officer or deputy electoral officer before the time at which the polls close.	**f)** avant la fermeture du scrutin, remet la trousse ou l'envoie par la poste au président d'élection ou au président d'élection adjoint.
Assistance of another person	**Assistance**
(2) If an elector is unable to vote in the manner set out in subsection (1), the elector may enlist the assistance of another person.	**(2)** L'électeur qui est incapable de voter de la manière prévue au paragraphe (1) peut demander l'assistance d'une personne.
Voided mail-in ballot	**Nullité du bulletin de vote**
(3) A mail-in ballot is void if the mail-in ballot package is not received by the electoral officer or deputy electoral officer before the time at which the polls close.	**(3)** Le bulletin de vote postal est nul si le président d'élection ou le président d'élection adjoint n'a pas reçu la trousse avant la fermeture du scrutin.

[64] Importantly, subsection 5(6) of the *FNER* states that an elector who enlists the assistance of another with a Mail-in Ballot pursuant to subsection 17(2) of the *FNER*¸ must have a witness sign their Voter Declaration Form. Note that all Mail-in Ballots require a Voter Declaration form; the one provided by subsection 5(6) requires this extra safeguard:

Witness	**Témoin**
(5) A voter declaration form must contain the name,	(5) Le formulaire de déclaration d'identité contient

address, telephone number and signature of a witness who is at least 18 years of age and who attests to the fact that the person completing and signing the voter declaration form is the person whose name is set out in the form.	le nom, l'adresse, le numéro de téléphone et la signature d'un témoin âgé d'au moins dix-huit ans attestant que la personne qui a rempli et signé le formulaire de déclaration d'identité est celle dont le nom figure sur le formulaire.
Witness	**Témoin d'une personne incapable**
(6) The voter declaration form of the elector who enlisted the assistance of another person under subsection 17(2) must be signed by a witness that attests to the fact that the elector is the person whose name is set out in the form and that the ballot was marked in the manner directed by the elector.	5(6) Dans la cas d'une personne qui demande l'assistance d'une personne pour voter en vertu du paragraphe 17(2), la déclaration d'identité de l'électeur est signée par un témoin qui atteste que le bulletin de vote a été marqué selon les instructions de l'électeur et que cet électeur est celui dont le nom figure sur le formulaire.
[Emphasis added]	[Je souligne]

C. *Jurisprudence*

[65] In their respective Memoranda, the parties generally agree on the governing law and referred to a number of cases including the leading case *Papequash v Brass*, 2018 FC 325 [*Papequash FC*], per Justice Barnes. I say the leading case because the Federal Court of Appeal dismissed an appeal from *Papequash FC* appeal stating it "correctly applied the jurisprudence". Therefore I set out the following from *Papequash FC*:

> **XIV. The Law**
>
> [32] The Applicants challenge the Key First Nation Band election held on October 1, 2016 under sections 31 and 35(1) of the *First*

Nations Elections Act, above. Those provisions authorize the Court to set aside a band election provided that there is satisfactory proof of the contravention of the Act or the regulations that is likely to have affected the election result. Included among the prohibitions listed in section 16 of the Act is the following:

16 A person must not, in connection with an election,	16 Nul ne peut, relativement à une élection:
(a) vote or attempt to vote knowing that they are not entitled to vote;	a) voter ou tenter de voter sachant qu'il est inhabile à voter;
(b) attempt to influence another person to vote knowing that the other person is not entitled to do so;	b) inciter une autre personne à voter sachant que celle-ci est inhabile à voter;
(c) knowingly use a forged ballot;	c) faire sciemment usage d'un faux bulletin de vote;
(d) put a ballot into a ballot box knowing that they are not authorized to do so under the regulations;	d) déposer dans une urne un bulletin de vote sachant qu'il n'y est pas autorisé par règlement;
(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	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) <u>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.</u>	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.
[Emphasis added]	[Je souligne]

[33] The Applicants carry the burden of proof of establishing, on a balance of probabilities, that a contravention of the Act has occurred that is likely to have affected the election results: see *McNabb v Cyr*, 2017 SKCA 27 at para 36, [2017] SJ No 132. Where sufficient evidence of corruption is adduced, the evidentiary burden may shift to the Respondents.

[34] Not every contravention of the Act or regulations will justify the annulment of a band election. A distinction is not infrequently made between cases involving technical procedural irregularities and those involving fraud or corruption. In the former situation, a careful mathematical approach (eg reverse magic number test) may be called for to establish the likelihood of a different outcome. However, where an election has been corrupted by fraud such that the integrity of the electoral process is in question, an annulment may be justified regardless of the proven number of invalid votes. One reason for adopting a stricter approach in cases of electoral corruption is that the true extent of the misconduct may be impossible to ascertain or the conduct may be mischaracterized. This is particularly the case where allegations of vote buying are raised and where both parties to the transaction are culpable and often prone to secrecy: see *Gadwa v Kehewin First Nation*, 2016 FC 597, [2016] FCJ No 569 (QL).

[35] In *Opitz v Wrzesnewskyj*, 2012 SCC 55, 351 DLR (4th) 579, the Court considered language in the *Canada Elections Act*, SC 2000, c 9 that closely mirrors that found in section 31 of the *First Nations Elections Act*, above. In describing the basis for the exercise of judicial discretion in cases involving procedural irregularities or fraud, the Court had this to say:

> [22] Under those provisions, if the grounds in para. *(a)* of s. 524(1) are established (the elected candidate was ineligible), then a court must declare the election null and void. In such circumstances it is as if no election was held. By contrast, if the grounds in para. *(b)* are established (there were irregularities, fraud or corrupt or illegal practices that affected the result of the election), a court *may* annul the election. Under these circumstances, a court must decide whether the election held was compromised in such a way as to justify its annulment.
>
> [23] In deciding whether to annul an election, an important consideration is whether the number of impugned votes is sufficient to cast doubt on the

> true winner of the election or whether the irregularities are such as to call into question the integrity of the electoral process. Since voting is conducted by secret ballot in Canada, this assessment cannot involve an investigation into voters' actual choices. If a court is satisfied that, because of the rejection of certain votes, the winner is in doubt, it would be unreasonable for the court not to annul the election.

[36] In light of the above statement, the idea that serious electoral fraud can vitiate an election result cannot be seriously doubted. What must not be overlooked, however, is the Court's admonition that a reviewing court retains a discretion to decline to annul an election even in situations involving fraud or other forms of corruption. This was a point more recently noted in *McEwing v Canada (Attorney General)*, 2013 FC 525, [2013] 4 FCR 63, where Justice Richard Mosley stated:

> [81] What may constitute a corrosive effect on the integrity of the electoral process will depend on the facts of each case. I do not read the comments of the majority in paragraph 43 of *Opitz* as providing authority for the proposition that the Court may overturn election results in every case in which electoral fraud, corruption or illegal practices have been demonstrated. In that paragraph, the Supreme Court cited *Cusimano v Toronto (City)*, 2011 ONSC 7271, [2011] OJ No 5986 (QL) at para 62: "An election will only be set aside where the irregularity either violates a fundamental democratic principle or calls into question whether the tabulated vote actually reflects the will of the electorate."
>
> [82] At paragraph 48 of *Opitz*, the majority cautioned that annulling an election would disenfranchise not only those persons whose votes were disqualified (in the context of an irregularities case) but every elector who voted in the riding. That suggests, in my view, that the Court should only exercise its discretion to annul when there is serious reason to believe that the results would have been different but for the fraud or when an electoral candidate or agent is directly involved in the fraud.

[37] Justice Mosley's remark that electoral corruption conducted by a candidate or agent ought generally to be treated more strictly

is also reflected in the following passage from Justice Cecily Y. Strickland's decision in *Gadwa v Kehewin First Nation,* above:

> [88] It must first be stated that a candidate who engages in vote buying is attempting to corrupt the election process. Therefore, regardless of the number of votes that the candidate purchased, or attempted to purchase, and regardless of whether the candidate wins the election by a greater margin than the number of votes that were purchased, this cannot save the candidate and his or her election must still be vitiated. Fraud, corruption and illegal election practices are serious (*Opitz* at para 43).
>
> [38] What can be taken from the relevant authorities is that attempts by electoral candidates or their agents to purchase the votes of constituents are an insidious practice that corrodes and undermines the integrity of any electoral process.
>
> [Emphasis added]

[66] As noted the jurisprudence cited by Barnes J in *Papequash FC* was upheld by the Federal Court of Appeal in *Rodney Brass v Papequash,* 2019 FCA 245 [*Papequash FCA*]. Justice Boivin JA, (Webb and Near JJA, concurring) held:

> [13] It bears emphasis that the Judge thoroughly reviewed the filed affidavits, which, for the most part remained unchallenged. The Judge also considered the relevant sections in the *FNEA* and correctly applied the jurisprudence in the context of this case (*Gadwa v. Kehewin First Nation*, 2016 FC 597, [2016] F.C.J. No. 569 (QL), aff'd 2017 FCA 203; *Opitz v. Wrzesnewskyj*, 2012 SCC 55, [2012] 3 S.C.R. 76). On the basis of the record before him, it was open to the Judge to make a finding of "widespread and openly conducted vote buying activity" and to conclude that "the integrity of the Key First Nation Band election conducted on October 1, 2016 was sufficiently corrupted by the misconduct of Rodney Brass, Glen O'Soup, Sidney Keshane, and Angela Desjarlais" to order that the election be set aside (Judge's reasons at paras 39 and 40).
>
> [Emphasis added]

[67] Notably, electoral corruption by a candidate or agent ought generally to be treated more strictly and the resulting election may be annulled: see *Papequash FC* at paras 34 to 38, *McEwing v Canada (Attorney General)*, 2013 FC 525 [Mosley J] at paras 81, quoted in *Papequash FC* at para 36, and *Gadwa v Kehewin First Nation*, 2016 FC 597 [*Gadwa*] at para 88 quoted in *Papequash FC* at para 37. Justice Barnes put it this way in *Papequash FC* at para 34: "However, where an election has been corrupted by fraud such that the integrity of the electoral process is in question, an annulment may be justified regardless of the proven number of invalid votes." Justice Barnes cited to *Gadwa* as did the Federal Court of Appeal in upholding *Papequash FC*.

[68] In Gadwa, Justice Strickland held:

> [88] It must first be stated that a candidate who engages in vote buying is attempting to corrupt the election process. Therefore, regardless of the number of votes that the candidate purchased, or attempted to purchase, and regardless of whether the candidate wins the election by a greater margin than the number of votes that were purchased, this cannot save the candidate and his or her election must still be vitiated. Fraud, corruption and illegal election practices are serious (*Opitz* at para 43).
>
> [Emphasis added]

[69] *Gadwa* was also upheld by the Federal Court of Appeal: see *Joly v Gadwa*, 2017 FCA 203 [*Gadwa FCA*] where Justice Rennie JA (Webb and Boivin JJA, concurring) held:

> [3] I would dismiss the appeal for the reasons given by the Federal Court judge. No error has been identified either in the judge's assessment of the standard of review of the Elections Officer's decision, nor in the application of that standard to the evidence before her.

[70] *Good v Canada (Attorney General),* 2018 FC 1199 [*Good*], per Justice McVeigh is to the same effect and see paras 54 and 55:

> [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.
>
> [Emphasis added]

[71] In *Papequash FC* Justice Barnes concluded the authority to annul for corruption and fraud continues in an *FNEA* contestation because the language of the *Canada Elections Act*, SC 2000, c 9 [*CEA*] "closely mirrors" language found in section 31 of the *FNEA*. Justice Barnes cites to *Opitz v Wrzesnewskyj*, 2012 SCC 55 [*Opitz*], where Justices Rothstein and Moldaver JJ. (for the majority) considered the statutory language of the *CEA*:

> [19] Part 20 of the *Act* deals with contested elections. Section 524(1) provides:
>
> > **524.** (1) Any elector who was eligible to vote in an electoral district, and any candidate in an electoral district, may, by application to a competent court, contest the election in that electoral district on the grounds that
> >
> > (*a*) under section 65 the elected candidate was not eligible to be a candidate; or
> >
> > (*b*) there were irregularities, fraud or corrupt or illegal practices that affected the result of the election.
>
> [20] The remedy the court may provide is in s. 531(2):
>
> > **531.** . . .
> >
> > (2) After hearing the application, the court may dismiss it if the grounds referred to in paragraph 524(1)(*a*) or (*b*), as the case may be, are not established and, where they are established, shall declare the election null and void or may annul the election, respectively.
>
> The use of the word "respectively" means that where the grounds in s. 524(1)(*a*) are established, a court *must* declare the election null and void; where the grounds in s. 524(1)(*b*) are established, a

court *may* annul the election. Conversely, a court may not annul an election unless the grounds in s. 524(1)(*b*) are established.

[21] The French version of the *Act* confirms this interpretation:

> 531. . . .
>
> (2) Au terme de l'audition, [le tribunal] peut rejeter la requête; si les motifs sont établis et selon qu'il s'agit d'une requête fondée sur les alinéas 524(1)*a*) ou *b*), il doit constater la nullité de l'élection du candidat ou il peut prononcer son annulation.

[22] Under those provisions, if the grounds in para. (*a*) of s. 524(1) are established (the elected candidate was ineligible), then a court must declare the election null and void. In such circumstances it is as if no election was held. By contrast, if the grounds in para. (*b*) are established (there were irregularities, fraud or corrupt or illegal practices that affected the result of the election), a court *may* annul the election. Under these circumstances, a court must decide whether the election held was compromised in such a way as to justify its annulment.

[23] In deciding whether to annul an election, an important consideration is whether the number of impugned votes is sufficient to cast doubt on the true winner of the election or whether the irregularities are such as to call into question the integrity of the electoral process. Since voting is conducted by secret ballot in Canada, this assessment cannot involve an investigation into voters' actual choices. If a court is satisfied that, because of the rejection of certain votes, the winner is in doubt, it would be unreasonable for the court not to annul the election.

[Emphasis in original]

[72] To compare, section 31 of the *FNEA* provides:

Contestation of election	**Contestation**
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	**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 of a provision of this Act or the regulations is likely to have affected the result.	contravention à l'une des dispositions de la présente loi ou des règlements a vraisemblablement influé sur le résultat de l'élection.
[Emphasis added]	[Je souligne]

[73] Justice McVeigh in *Good* recognized that the majority in *Opitz* only dealt with "irregularities". However, the Supreme Court noted at para 43 of *Opitz*:

> [43] The common thread between the words "irregularities, fraud or corrupt or illegal practices" is the seriousness of the conduct and its impact on the integrity of the electoral process. Fraud, corruption and illegal practices are serious. Where they occur, the electoral process will be corroded. In associating the word "irregularity" with those words, Parliament must have contemplated mistakes and administrative errors that are serious and capable of undermining the integrity of the electoral process. (See *Cusimano v. Toronto (City)*, 2011 ONSC 7271, 287 O.A.C. 355, at para. 62.)
>
> [Emphasis added]

[74] From this, Justice Strickland in *Gadwa* held at para 88:

> [88] It must first be stated that a candidate who engages in vote buying is attempting to corrupt the election process. Therefore, regardless of the number of votes that the candidate purchased, or attempted to purchase, and regardless of whether the candidate wins the election by a greater margin than the number of votes that were purchased, this cannot save the candidate and his or her election must still be vitiated. Fraud, corruption and illegal election practices are serious (*Opitz* at para 43).
>
> [Emphasis added]

(1) In Summary

[75] Section 31 of the *FNEA* requires an applicant to establish on a balance of probabilities (1) a contravention of a provision of *FNEA* or the regulations occurred, and (2) that the contravention "is likely to have affected the result" of the election. If that is the case, the Court *may* set aside the election under section 35.

[76] The "magic number test" in *Opitz* is the test used to determine when a contravention is likely to have affected the result of the Election and whether the result of the Election should be annulled. The magic number test is described in *Opitz* at paras 71-73:

> **71** To date, the only approach taken by Canadian courts in assessing contested election applications has been the "magic number" test referred to in *O'Brien* (p. 93). On this test, the election must be annulled if the rejected votes are equal to or outnumber the winner's plurality (*Blanchard*, at p. 320).
>
> **72** The "magic number" test is simple. However, it inherently favours the challenger. It assumes that all of the rejected votes were cast for the successful candidate. In reality, this is highly improbable. However, no alternative test has been developed. No evidence has been presented in this case to support any form of statistical test that would be reliable and that would not compromise the secrecy of the ballot.
>
> **73** Accordingly, for the purposes of this application, we would utilize the magic number test. The election should be annulled when the number of rejected votes is equal to or greater than the successful candidate's margin of victory. However, we do not rule out the possibility that another, more realistic method for assessing contested election applications might be adopted by a court in a future case.
>
> [Emphasis added]

[77] Contraventions that are not likely to have affected the result will not generally trigger setting aside the election (*Papequash FC* per Barnes J at para 33; *Good* per McVeigh J, at para 49, and *McNabb v Cyr*, 2017 SKCA 27 per Jackson, Caldwell and Whitmore JJ.A at para 36).

[78] Importantly this Court and the Superior Courts have the discretion to annul an election of a Chief and or Councillor(s) when there is serious electoral fraud, and in particular where an electoral candidate or agent is directly involved in the fraud. See *McEwing* at paras 81 and 82, cited in *Papequash FC* at para 36. See also *Good* at paras 54 and 55, *Opitz* at para 43, *McNabb* at para 45.

[79] This case centres on vote buying in the context of Mail-in Ballots. Most electors voted by mail; the Election was held during the COVD-19 pandemic. Vote buying in this case took place in each of the two steps of the Mail-in Ballot process. In the first step an elector makes a formal Request for Mail-in Ballot and submits ID. If approved by the Electoral Officer, the second step involves sending the elector a blank Mail-in Ballot in a package: the ballot must be marked, put into a sealed envelope and mailed back or delivered inside another envelope to the Electoral Officer with a signed Voter Declaration form.

[80] In my view being directly involved in offering to or purchasing either a Request for Mail-in Ballot or a Mail-in Ballot and or Voter Declaration form are both acts of serious electoral fraud (*Papequash FC* at para 34 and *Gadwa* at para 88). In this connection, Justice Mosley in *McEwing* noted at para 69 with respect to definition of electoral fraud: “any action or instance meeting the dictionary definition of fraud would constitute electoral fraud where it was done in contravention of a provision of the *Canada Elections Act* or where it served to defeat a process provided for in that *Act*.” Moreover, the ordinary meaning of the term “fraud” refers to “An act or instance of deception, an artifice by which the right or interest of another is injured, a dishonest trick or stratagem” (*Oxford English Dictionary* (February 28, 2022) sub verbo “fraud”,

online: <https://www.oed.com/view/Entry/74298?rskey=HGrc2W&result=1#eid>); and an "intentional perversion of truth in order to induce another to part with something of value or to surrender a legal right" (Merriam-Webster.com Dictionary (February 24, 2022) sub verbo "fraud", online: <https://www.merriam-webster.com/dictionary/fraud>).

(2) Change in the Respondents' position in oral argument

[81] The Respondents in their Memorandum largely agreed with the position of the Applicants on the dual remedy under the *FNEA*: either setting aside an election where a contravention is likely to have affected the result, or the annulment of an election. See for example Respondents' Memorandum para 102:

> 102. The leading case authorities on applications brought pursuant to the *FNEA* challenging First Nation elections in Saskatchewan are: the Saskatchewan Court of Appeal decision in *McNabb v Cyr*, 2017 SKCA 27; the Saskatchewan Queen's Bench decision *Paquachan v Louison*, 2017 SKQB 239; and the Federal Court of Canada decisions in *Good v. Wuttunee* 2018 FC 1199 and *Papequash v. Brass*, 2018 FC 325. All of those cases cite with approval *McEwing v. Canada* (Attorney General), 2013 FC 525 and the Supreme Court of Canada decision in *Opitz v. Wrzesnewskyj*, 2012 SCC 55 (CanLII), [2012] 3 SCR 76.

[82] The Respondents' summary of law notably in items 3 to 7 at para 111 of their Memorandum also generally aligns with the Applicants' submissions:

> 1) The Applicant bears the onus, on a balance of probabilities to establish:
>
> a) That there was a "contravention" of the electoral process, *FNEA* or the *Regs*; and
>
> b) That such contravention has **affected the outcome** of the election.

2) If that threshold is met, the Respondents may then:

   a) Refute the alleged contravention; or

   b) If not refuted, show that the contravention **has not affected** the election result numbers.

3) Not every proven but unrefuted "contravention" will trigger the overturning of an election. The so called "reverse magic numbers test" will be the appropriate test to apply to determine the extent to which an election outcome was affected and whether the election should then be overturned. See *Opitz* at para. 23:

   "23. In deciding whether to annul an election, an important consideration is whether the number of impugned votes is sufficient to cast doubt on the true winner of the election or whether the irregularities are such as to call into question the integrity of the electoral process. Since voting is conducted by secret ballot in Canada, this assessment cannot involve an investigation into voters' actual choices. If a court is satisfied that, because of the rejection of certain votes, the winner is in doubt, it would be unreasonable for the court not to annul the election."

4) In cases involving fraud or other forms of corruption an annulment of the election "may be justified regardless that the proven number of invalid votes" in particular in cases where allegations of vote buying are proved. (See *Good* at para 54 and *Gadwa*)

5) The court will in every circumstance retain the discretion to refuse to overturn an election, even in situations involving fraud or other forms of corruption. (See *Good* at para 55)

6) A critical aspect the court must consider in such cases is that annulling an election will disenfranchise, not only those whose votes are disqualified, but also the vote of every elector who cast a legitimate vote. Therefore, the further test set out in *Papequash* at para 39 is applied.

7) The Court must consider the test found in *McEwing* and weight any corrupt activity or other "contraventions" found in the circumstances balanced against whether there was a "corrosive effect" emanating from the corrupt activity, which "violates a fundamental democratic principle or calls into question whether the tabulated vote actually reflects the will of the electorate".

[Emphasis in Original]

[Emphasis added]

[83] However, counsel for the Respondents took a different approach at the beginning of their oral submissions. The day prior, they had filed a one page itemization of authorities.

[84] In oral submissions, the Respondents argued the *FNEA* only authorizes a court to set aside an election if a contravention of the *FNEA* is established that is likely to have affected the result. They took the position this was the only issue for the Court, essentially submitting the Court had no power to annul in the case of serious electoral fraud not affecting the result of the election.

[85] In this, and with respect, they seemed to argue Justice Barnes in *Papequash FC*, Justice Mosely in *McEwing*, Justice Strickland in *Gadwa*, and Justice McVeigh in *Good* fell into error, as did the Federal Court of Appeal in ruling Justice Barnes "considered the relevant sections in the *FNEA* and correctly applied the jurisprudence in the context of this case (*Gadwa v. Kehewin First Nation*, 2016 FC 597, [2016] F.C.J. No. 569 (QL), aff'd 2017 FCA 203; *Opitz v. Wrzesnewskyj*, 2012 SCC 55, [2012] 3 S.C.R. 76)."

[86] The Respondents submit that to impugn conduct of a Chief or Councillor that does not meet the magic number test, i.e., is not likely to have affected the result, a challenger must seek and obtain a conviction of the candidate on criminal charges under sections 16 or 17 or elsewhere in the *FNEA*.

[87] Parenthetically, this might entail a complaint to the police, followed by the police in their discretion conducting an investigation, then police in their discretion laying criminal charges. A prosecutor would then be involved in deciding to prosecute, another discretionary matter. There then might be a criminal trial - or in a case where multiple offenders are involved (as possibly in this case) - many separate trials possibly before different judges at different times. Trials may be conducted either by summary proceeding of by way of indictment (many offences are hybrid per subsection 39(1) of *FNEA*) giving rise to differing appeal routes.

[88] This different argument raised matters generally canvassed at the hearing, in terms of comity between judges of this Court, *stare decisis* in terms of the Federal Court of Appeal (and Supreme Court of Canada in that *Opitz* is involved), and whether Parliament intended a Chief or Councillor(s) to have impunity against their election(s) being set aside under *FNEA* if they contravened the *FNEA* but the contravention(s) is/were not likely to have affected the result. As I understood them, the Respondents answered these concerns by citing to the laying of criminal charges for contravention(s).

[89] The Respondents submitted this interpretation should have been put to both Justice Barnes in *Papequash FC* and to the Federal Court of Appeal, but was not. They said “very junior” counsel carried *Papequash FC* in both courts. They had a transcript of the Federal Court to establish their new argument was not raised before Barnes J. I did not hear them say why Justices Strickland in *Gadwa* and McVeigh in *Good* did not consider or accept this argument.

[90] When asked, the Respondents agreed Justice Barnes in *Papequash FC* found the power to annul an election under *FNEA* because section 31 of *FNEA* "closely mirrors" similar provisions (section 524) of the *CEA* at issue in *Opitz.*

[91] In this connection, *Papequash FC* holds:

> [35] In *Opitz v Wrzesnewskyj*, 2012 SCC 55, 351 DLR (4th) 579, the Court considered language in the *Canada Elections Act*, SC 2000, c 9 that closely mirrors that found in section 31 of the *First Nations Elections Act*, above. In describing the basis for the exercise of judicial discretion in cases involving procedural irregularities or fraud, the Court had this to say:
>
> > [22] Under those provisions, if the grounds in para. *(a)* of s. 524(1) are established (the elected candidate was ineligible), then a court must declare the election null and void. In such circumstances it is as if no election was held. By contrast, if the grounds in para. *(b)* are established (there were irregularities, fraud or corrupt or illegal practices that affected the result of the election), a court *may* annul the election. Under these circumstances, a court must decide whether the election held was compromised in such a way as to justify its annulment.
> >
> > [23] In deciding whether to annul an election, an important consideration is whether the number of impugned votes is sufficient to cast doubt on the true winner of the election or whether the irregularities are such as to call into question the integrity of the electoral process. Since voting is conducted by secret ballot in Canada, this assessment cannot involve an investigation into voters' actual choices. If a court is satisfied that, because of the rejection of certain votes, the winner is in doubt, it would be unreasonable for the court not to annul the election.
>
> [36] In light of the above statement, the idea that serious electoral fraud can vitiate an election result cannot be seriously doubted.
>
> [Emphasis added]

[92] With respect, I am not persuaded the Respondents' new argument should be considered. To begin with, major last minute new arguments should not be accepted. The Court and opposing parties are entitled to deal with a contestation based on proper pleadings accurately setting out their positions. The Respondents were served with the underlying Notice of Application on April 17, 2020. They had ample time to develop and plead their case properly. Of course, basic arguments may be fleshed out, but here the Respondents have turned their case around: their oral submissions go against their written submissions.

[93] Moreover, this Court is bound by the doctrine of comity to adhere to the endorsement of the legal proposition that, in addition to setting aside an election where a candidate contravened the *FNEA* that is likely to have affected the result, this Court has the discretion to annul an election if an "election has been corrupted by fraud such that the integrity of the electoral process is in question". As a result, "an annulment may be justified regardless of the proven number of invalid votes" particularly where an electoral candidate or agent is directly involved in the fraud as Justice Barnes put it in *Papaquash FC* at para 34-36, as Justice Mosely found in *McEwing* at para 81-82, as Justice Strickland found in *Gadwa* at para 88, and as followed by Justice McVeigh in *Good*.

[94] Justice Harrington discusses comity in *Sing v Canada (Citizenship and Immigration),* 2011 FC 956 at para 17 and 18 and endorsed Justice Dawson (as she then was):

> [17] Even if I were minded, without the benefit of jurisprudence on point, to have come to a different conclusion, the decisions in *Malik* and *Luongo*, above, are reasonable and judicial comity requires that I follow them.
>
> [18] In *Baron v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2008 FC 341, 324 FTR 133, Madam Justice

> Dawson set out circumstances which would justify a refusal to follow a prior decision of the same court:
>
> > [52] A judge of this Court, as a matter of judicial comity, should follow a prior decision made by another judge of this Court unless satisfied that: (a) subsequent decisions have affected the validity of the prior decision; (b) the prior decision failed to consider some binding precedent or relevant statute; or (c) the prior decision was unconsidered; that is, made without an opportunity to fully consult authority. If any of those circumstances are found to exist, a judge may depart from the prior decision, provided that clear reasons are given for the departure and, in the immigration context, an opportunity to settle the law is afforded to the Federal Court of Appeal by way of a certified question. See: *Re Hansard Spruce Mills Ltd.*, [1954] 4 D.L.R. 590 at page 591 (B.C.C.A.), and *Ziyadah v. Canada (Minister of Citizenship and Immigration)*, [1999] 4 F.C. 152 (T.D.).

[95] I am also bound by *stare decisis*; first level courts must accept and apply the law determined by appellate courts to which their decisions may be appealed. That is exactly the situation here. I therefore follow Justice Barnes in *Papequash FC* because the Federal Court of Appeal in *Papequash FCA* held *Papequash FC* "correctly applied the jurisprudence". To recall, *Papaquash FC* was appealed to the Federal Court of Appeal which not only dismissed the appeal (with high costs), but affirmed the law as set out by Justice Barnes, saying: "[13] It bears emphasis that the Judge thoroughly reviewed the filed affidavits, which, for the most part remained unchallenged. The Judge also considered the relevant sections in the FNEA and correctly applied the jurisprudence in the context of this case (*Gadwa v. Kehewin First Nation*, 2016 FC 597, [2016] F.C.J. No. 569 (QL), aff'd 2017 FCA 203; *Opitz v. Wrzesnewskyj*, 2012 SCC 55, [2012] 3 S.C.R. 76)." [Emphasis added].

[96] Therefore, I will proceed without considering this argument of the Respondents.

(3) Determination of the Respondents' objections to tabs in the Applicant's Record

[97] The Respondents objected to the admissibility of three categories of documents in the Applicants' Record. I propose to deal with two categories now.

[98] The Respondents summarize their position in relation to different categories of documents in their Memorandum at para 131:

> 131. The Respondents submit that of the 260 Tabs submitted by the Applicants in their Record, the following are not appropriately before this Court:
>
> - Tabs 50 – 59, the ERC recordings inappropriately accessed without consent [to be dealt with in the context of Robin Wuttunee's ballot];
>
> - Tabs 86 – 251, the Exhibits inappropriately brought during cross-examination; and
>
> - Tabs 252 – 260, The reply to undertakings of Burke Ratte are not subject to a Motion for inclusion into evidence; furthermore an "examining party has no right to request or demand" an undertaking to produce documents during a cross-examination on an affidavit (See *Preventous Collaborative Health v. Canada* 2020 Canlii 32965 (FC)) and the Respondents object to their inclusion in the Applicant's Record.

(a) Re Tabs 86 – 251: Exhibits put to witnesses being cross-examined without advance notice or ruling on admissibility

[99] The Respondents say these Tabs, each of which is a marked Exhibit, were nonetheless inappropriately put to witnesses during cross-examination. I disagree.

[100] This group of Exhibits has 166 Tabs, totalling 1,191 pages. Included are a very wide variety of different documents. They appear to include many if not all documents exhibited by the Applicants in their cross-examinations of the Respondents' witnesses. These include Directions to Attend, blank election documents including blank ballots, a lengthy affidavit of Mr Ratte filed in another contestation (*Papequash FC*), the 2015 *FNEA* handbook, copies of the *FNEA* regulations and many, many other documents. I will not enumerate them all because the objection is generic and made by the Respondents in respect of each document or set of documents in these Tabs.

[101] The Respondents object to each of these 166 Tabs because they did not have advance notice of them. They submit the documents ought to have been disclosed to the Respondents in advance of the cross-examinations by way of application or motion before being put to their witnesses on cross-examination. The Respondents' Memorandum argues:

> 132. The listed exhibits ought to have been disclosed by number to the Respondents in advance of the cross-examinations by way of application or motion, facilitating argument before this Honourable Court over their inclusion. If the documents were found to be admissible in evidence, then the Court may also have granted time to review the documents with the proposed witnesses prior to cross-examination. The Respondents submit however that such a process is not permitted in the context of an Application for judicial review. At the very least, there should have been a Motion

> made by the Applicants for leave to do what was done. No such Motion or request was ever made.
>
> 133. The Respondents advised the Applicants of the above objection, in reply to their service email, that such materials are not admissible. **(See our email of Thursday, November 4, 2021 10:28 AM in regards to the Service of the Applicants' Record)** Based on all of the foregoing, the Respondents seek an order of the Court that all of those materials be declared inadmissible and struck from the record.
>
> [Emphasis in original]

[102] The Respondents offer no authority to support their argument.

[103] In effect, they ask the Court to rule that witnesses being cross-examined on an application are entitled to advance notice of documents to be put to them, and need answer questions only where such documents are pre-approved by the Court on motion by the cross-examining party.

[104] With respect, the jurisprudence is against the Respondents. As set out in *Thibodeau v Edmonton Regional Airport Authority*, 2021 FC 146 [*Thibodeau Edmonton*] at para 14: "The person may also be cross-examined on documents relevant to the determination of the issue even if those documents are not mentioned in the affidavit filed (*Sierra* at para 9)." *Sierra Club of Canada v Canada (Minister of Commerce)*, [1998] FCJ No 1673 (QL) [*Sierra Club*]; states at para 9:

> 9 The law as to the scope of cross-examination on affidavits is well developed. I touch on some relevant aspects. To begin, it is not confined by the four corners of an affidavit, but includes matters relevant to the determination of the issue in respect of which the affidavit is filed: *Weight Watchers International Inc. v. Weight Watchers of Ontario Ltd. (No. 2)* (1972), 6 C.P.R. (2d) 169 (Fed. T.D.), at 171 and 172, a decision of Mr. Justice Heald as he then was.

[105] See also *Federal Courts Practice 2022*, (Toronto: Thomson Reuters Canada, 2021) which in its commentary on Rule 83 (Cross-examination on affidavits) notes: "*Thibodeau v. Edmonton Regional Airport Authority*, 2021 CarswellNat 540, 2021 FC 146 — It is generally recognized that the scope of a cross-examination on affidavit is more limited than an examination for discovery. The affiant must answer all questions upon which he can be fairly expected to have knowledge, without being evasive, which relate to the principal issue in the proceeding upon which his affidavit touches. The affiant may also be cross-examined on documents relevant to the determination of the issue even if those documents are not mentioned in the affidavit filed."

[106] To the same effect is, and I also adopt the decision of Justice Roy in *Thibodeau v Halifax International Airport Authority*, 2019 FC 1149 [*Thibodeau Halifax*] at para 28:

> [28] Cross-examination is an important tool in our adversarial system: someone who testifies, whether in court or by affidavit, is not immune from inquisitorial questions. Such witnesses bring forward evidence that must be open to questioning. Where, in addition, there are rules of admissibility, such as in this case the prior availability of the same material and the rule against the splitting of one's own case, cross-examination should be permitted in that regard. Put another way, whoever provides evidence is subject to cross-examination. As Justice Muldoon said in *Swing Paints Ltd. v Minwax Co*. [1984] 2 FC 521, p 531, evasive testimony is not permitted. He went on to say:
>
> > The person making the affidavit must submit himself to cross-examination not only on matters specifically set forth in his affidavit, but also to those collateral questions which arise from his answers. Indeed he should answer all questions, upon which he can be fairly expected to have knowledge, without being evasive, which relate to the principal issue in the proceeding upon which his affidavit touches if it does.
> >
> > [Emphasis added]

[107] Justice Russell in *Ottawa Athletic Club inc. (Ottawa Athletic Club) v Athletic Club Group inc*., 2014 FC 672 [*Ottawa Athletic Club*] recently concluded there isn't any mechanism to require disclosure in advance of the cross-examination. Justice Russell reviewed the law on undertakings generally, and specifically concluded that there is no mechanism requiring documentary disclosure by the examining party in advance of cross-examination:

> [141] Nor is there any mechanism to require disclosure in advance of the cross-examination (rather than at the cross-examination), though cost considerations could arise where a party is "ambushed" with an excessive volume of documents at the cross-examination: *Sierra Club*, above, at paras 10, 14-16, 20.

[108] I decline to establish such a precedent in any event. I see no reason why witnesses should not be subject to cross-examination on documents they have not seen before, and several reasons why they should. To order otherwise would eliminate valuable spontaneity from cross-examinations. In addition, it is well known that during a cross-examination counsel may not speak to their witness about matters that might come up during cross-examination, see *Archambault v Ministre du Revenu National*, [1998] FCJ No 635 [per Tremblay-Lamer J.] at para 21. To do as the Respondents suggest would open the door to those very discussions in advance of cross-examinations, with the same deleterious effect. This could result in carefully scripted lawyer-coached answers frustrating the search for the very truth for which cross-examination is designed. In addition, I very much doubt the efficacy of expending Court time on pre-approving all such documents without proper context.

[109] I conclude Tabs 86 to 251 are properly in evidence.

(b) Re Tabs 252 – 260: Admissibility of Mr Ratte's Reply to Undertakings of May 18, 2021, Tabs 252 – 260

[110] In brief, Mr Ratte gave a number of undertakings to produce documents at his cross-examination of October 26, 2020. He supplied the promised answers and documents in the answers and productions contained in his May 18, 2021 RTU.

[111] Tabs 252 – 260 are documents forming part of his May 18, 2021 RTU. They are copies of the text messages Mr Ratte exchanged on his cell phone with the Respondents, some of which concern Requests for Mail-in Ballots the Applicants say were obtained in contravention of *FNEA* and or *FNER* and or by serious electoral fraud. Other issues of controversy between the parties are also discussed in these text messages.

[112] When Mr Ratte was asked for communications between himself and the Respondents, it turned out Mr Ratte's cell phone was no longer working. However he still had it. Mr Ratte consented and undertook to try to have communications recovered by data recovery experts. The Tabs in question are the very documents recovered from Mr Ratte's cell phone by his data recovery experts.

[113] The Respondents, and those who supported them, objected to being cross-examined on these documents, alleging Mr Ratte's May 18, 2021 RTU was not admissible evidence. Justice Aylen ordered this issue determined by the hearings judge.

[114] In my respectful view, there is no merit to these objections. The documents at Tabs 252 to 260 of Mr Ratte's May 18, 2021 RTU are admissible.

[115] Some background first. Mr Ratte was originally cross-examined on September 14, 2020 on his affidavit dated August 27, 2020, during the course of which he gave a number of undertakings. He re-attended cross-examination pursuant to these undertakings on October 26, 2020 at which time he gave further undertakings. Mr Ratte subsequently delivered his May 18, 2021 RTU [AR Tab 252].

[116] The parties are sharply divided on whether Mr Ratte's May 18, 2021 RTU and its contents (Tabs 252 to 260) are admissible.

[117] While Mr Ratte takes no position on this issue in his Memorandum, when he was cross-examined on October 4, 2021, per his counsel's letter of September 24, 2021, he submitted that if the Applicants wished to seek production of additional material, or if they objected in any way to the May 18, 2021 RTU, they should have brought a motion pursuant to the June 18, 2021 direction of Justice Aylen.

[118] Before Justice Aylen, who was asked to decide this issue, the Respondents agreed with Mr Ratte.

[119] The Applicants disagreed. They asked Justice Aylen for leave to include the May 18, 2021 RTU documents in their Applicants Record, saying "….This issue is important to the just

resolution of this election appeal on its merits. The Applicants seek to have this issue addressed during case management and in the circumstances an order is sought expressly granting leave for its inclusion into the Applicants' Record" [Applicants' letter of September 24, 2021].

[120] Justice Aylen found in favour of the Applicants. By Amended Order of September 28, 2021, she ruled the admissibility of the May 18, 2021 RTU is a matter for this Court to decide on hearing the application: "**CONSIDERING** that the admissibility of the answers to undertakings of Mr Ratte will be a matter for the parties to address before the hearings judge; …." [Emphasis added].

[121] The Respondents persisted in this objection in their Memorandum. They argue Mr Ratte's May 18, 2021 RTU should not be admitted into evidence because the Amended Order of Justice Aylen dated September 28, 2021 also states:

> **Considering** the Applicants had the opportunity to bring a motion regarding the production of documents made by Mr. Ratte and declined to do so within the timetable set by the Court. The Court will not permit such a motion to be brought now, formally or informally, and will make no order requiring Mr. Ratte to produce the six photo text messages or to send any further communication to TrueData. Contrary to the assertion of the Applicants, this issue does not fall within paragraph 16(b) of the Order;

[122] Notably, the paragraph of Justice Aylen's preamble relied upon by the Respondents is in the same Order that contains the preamble relied on by the Applicants: both are in Justice Aylen's Amended Order of September 28, 2021. In my respectful view, the provision of that Order dealing directly with the admissibility of the answers to undertakings of Mr Ratte must

govern because it is made in direct response to the Applicants' submission of September 24, 2021. It is unambiguous and placed ahead the clause relied on by the Respondents.

[123] Therefore, as Justice Aylen Ordered, the admissibility of Mr Ratte's May 18, 2021 RTU, is properly "a matter for the parties to address before the hearings judge" at this time.

[124] The Respondents outline their argument in their Memorandum:

> 128 In regard to the Undertakings of Burke Ratte referenced by the Applicants, we refer the Court to paragraph 41 *supra*, of our review of the Applicants facts statements. The Applicants have inappropriately asked for undertakings in relation to affidavits and then have not made motion for the unenforceable undertakings' admission into evidence. Instead, those Undertakings were used in a clandestine and indirect manner. During cross-examinations the Applicants introduced those materials "by surprise" and without prior notice to the Respondents.
>
> 129 Those exhibit documents were actually sent by email to Respondents' counsel during the cross-examinations hearing at the same moment they were introduced. The surprise introduction of those materials was met with strenuous objection in every instance as is clearly evidenced in all of the transcripts of the cross-examinations of the Respondents witnesses. Even then, the Applicants did not make application under section 53 of the *Federal Court Act* for the introduction of those materials. The Respondents do not agree that the undertakings themselves form part of a witness's evidence, as the Applicants assert. However, that would not alter the requirement motions must be made for such evidence to become admissible.
>
> 130 It is noteworthy, the Applicants received the undertaking documents from the Electoral Officer on September 14, 2020 and then proceeded to cross-examine the Respondents' witnesses on those documents the very next day, without applying to the court for leave to use the said documents and without disclosing those documents to the Respondents. **(See the exchange between Applicants' Counsel and Burke Ratte on page 160 and 161 in the transcript of Burke Ratte dated September 14, 2020)**

> 132. The listed exhibits ought to have been disclosed by number to the Respondents in advance of the cross-examinations by way of application or motion. If the documents were found to be admissible in evidence, then the Court may also have granted time to review the documents with the proposed witnesses prior to cross-examination. The Respondents submit however that such a process is not permitted in the context of an Application for judicial review. At the very least, there should have been a Motion made by the Applicants for leave to do what was done. No such Motion or request was ever made.
>
> [Emphasis in original]

[125] Para 41 of the Respondents' Memorandum states:

> 40. The candidates the Applicants call "Team Clinton" were successful and won the election campaigning in compliance with the guidelines approved by ISC and sanctioned by Elections Canada. The materials referenced in Tab 253 are referred to in the following paragraph 41.
>
> 41. There is nothing but unfounded conjecture and accusations being expressed in this paragraph. <u>All of the references are to documents that have not been admitted into evidence in this proceeding as they are from the undertakings of Burke Ratte.</u> Those undertakings have not been allowed into evidence pursuant to the Order of this Honourable Court dated September 28, 2021, as follows:
>
> > **Considering** the Applicants had the opportunity to bring a motion regarding the production of documents made by Mr. Ratte and declined to do so within the timetable set by the Court. The Court will not permit such a motion to be brought now, formally or informally, and will make no order requiring Mr. Ratte to produce the six photo text messages or to send any further communication to TrueData. Contrary to the assertion of the Applicants, this issue does not fall within paragraph 16(b) of the Order;
> >
> > [Emphasis added]

[126] With respect, I have already considered and rejected this proposal, see paras 99 and following above (Part IV C (3)(a)). Briefly, I held there is no precedent for ordering such a new procedure, the argument is contrary to jurisprudence, and in any event there is no good reason to adopt this approach and reasons to reject it. With respect, there is no merit to this submission.

[127] The admissibility of Mr Ratte's May 18, 2021 RTU is important because Counsel for Mr Ratte and Counsel for the Respondents Chief Wuttunee and Councillor Dana Falcon, objected to witnesses answering questions related to photo text messages they had sent or received which were recovered from Mr Ratte's cell phone. In addition, Leroy Nicotine Jr., a non-party who supported the Respondents (see para 27 above) and who was directly involved in many *FNEA* contraventions and serious electoral frauds, also refused to answer questions related to the photo text messages recovered from Mr Ratte's cell phone, as contained in Tabs 252 to 260 of Mr Ratte's May 18, 2021 RTU.

[128] In a word, the photo text messages provide hard evidence that corroborates some of the Applicants' allegations that the Respondents and their supporters committed contraventions of *FNEA* and were involved in serious electoral fraud in this Election. This is not why the May 18, 2021 RTU is admissible, but a consequence of its admission.

[129] I should add the May 18, 2021 RTU was in fact originally marked as an Exhibit on Mr Ratte's cross-examination, but counsel for Mr Ratte then objected even though it had been shown to Mr Ratte and marked.

[130] I turn to my reasons for upholding the admissibility of these cell phone messages and answers.

[131] With respect, once again the Respondents have no case law to support their position.

[132] The parties do not dispute the genuineness of the May 18, 2021 RTU: it is signed by Mr Ratte's counsel, who confirmed this during cross-examination of Mr Ratte on October 4, 2021.

[133] Nor is it disputed that the principle issue in this case is whether the Respondents contravened *FNEA* or *FNER* and or were involved in serious electoral fraud during the course of the Election.

[134] It is also common ground Chief Wuttunee and other Respondents collected a large number of signed Request for Mail-in Ballots, and sent them to Mr Ratte by cell phone as texts and images. In this connection the Applicants submit and I agree Mr Ratte's May 18, 2021 RTU report the following individuals personally submitted Requests for Mail-in Ballots to Mr Ratte by photo text message:

1. Chief Wuttunee submitted 521 [AR Tab 253]
2. Councillor Gary Nicotine submitted 164 [AR Tab 254]
3. Councillor Shawn Wuttunee submitted 24 [AR Tab 255]
4. Councillor Dana Falcon submitted 18 [AR 256]
5. Councillor Henry Gardipy submitted 25 [AR Tab 257]
6. Councillor Mandy Cuthand submitted 49 [AR Tab 258]
7. Councillor Samuel Wuttunee submitted 31 [AR Tab 259]
8. Band Manager Cody Benson submitted 22 [AR Tab 260]

[135] Further, it is not disputed Mr Ratte's May 18, 2021 RTU contains the answers and documents Mr Ratte promised and agreed, i.e., undertook to produce on his cross-examination of September 14, 2020, including the recovered text messages between him and the Respondents.

[136] While undertakings as such are not dealt with in the *Federal Courts Rules*, SOR/98-106 [*Federal Courts Rules*], Rules 94 and 97 provide that a person who is to be examined (or cross-examined) is obliged to ("shall") produce for inspection at their examination all documents and other material requested in the Direction to Attend that are within that person's or party's possession and control unless a privilege is claimed or relief granted. This requirement may be relieved by the Court on motion if irrelevant or unduly onerous. Rule 97 sets out some of the consequences for non-compliance with attendance or production of documents:

Production of documents on examination	**Production de documents**
94 (1) Subject to subsection (2), a person who is to be examined on an oral examination or the party on whose behalf that person is being examined shall produce for inspection at the examination all documents and other material requested in the direction to attend that are within that person's or party's possession and control, other than any documents for which privilege has been claimed or for which relief from production has been granted under rule 230.	**94 (1)** Sous réserve du paragraphe (2), la personne soumise à un interrogatoire oral ou la partie pour le compte de laquelle la personne est interrogée produisent pour examen à l'interrogatoire les documents et les éléments matériels demandés dans l'assignation à comparaître qui sont en leur possession, sous leur autorité ou sous leur garde, sauf ceux pour lesquels un privilège de non-divulgation a été revendiqué ou pour lesquels une dispense de production a été accordée par la Cour en vertu de la règle 230.

Relief from production

(2) On motion, the Court may order that a person to be examined or the party on whose behalf that person is being examined be relieved from the requirement to produce for inspection any document or other material requested in a direction to attend, if the Court is of the opinion that the document or other material requested is irrelevant or, by reason of its nature or the number of documents or amount of material requested, it would be unduly onerous to require the person or party to produce it.

…

Failure to attend or misconduct

97 Where a person fails to attend an oral examination or refuses to take an oath, answer a proper question, produce a document or other material required to be produced or comply with an order made under rule 96, the Court may

(a) order the person to attend or re-attend, as the case may be, at his or her own expense;

Partie non tenue de produire des documents

(2) La Cour peut, sur requête, ordonner que la personne ou la partie pour le compte de laquelle la personne est interrogée soient dispensées de l'obligation de produire pour examen certains des documents ou éléments matériels demandés dans l'assignation à comparaître, si elle estime que ces documents ou éléments ne sont pas pertinents ou qu'il serait trop onéreux de les produire du fait de leur nombre ou de leur nature.

…

Défaut de comparaître ou inconduite

97 Si une personne ne se présente pas à un interrogatoire oral ou si elle refuse de prêter serment, de répondre à une question légitime, de produire un document ou un élément matériel demandés ou de se conformer à une ordonnance rendue en application de la règle 96, la Cour peut:

a) ordonner à cette personne de subir l'interrogatoire ou un nouvel interrogatoire oral, selon le cas, à ses frais;

(b) order the person to answer a question that was improperly objected to and any proper question arising from the answer;	**b)** ordonner à cette personne de répondre à toute question à l'égard de laquelle une objection a été jugée injustifiée ainsi qu'à toute question légitime découlant de sa réponse;
(c) strike all or part of the person's evidence, including an affidavit made by the person;	**c)** ordonner la radiation de tout ou partie de la preuve de cette personne, y compris ses affidavits;
(d) dismiss the proceeding or give judgment by default, as the case may be; or	**d)** ordonner que l'instance soit rejetée ou rendre jugement par défaut, selon le cas;
(e) order the person or the party on whose behalf the person is being examined to pay the costs of the examination.	**e)** ordonner que la personne ou la partie au nom de laquelle la personne est interrogée paie les frais de l'interrogatoire oral.
[Emphasis added]	[Je souligne]

[137] Undertakings are an important feature of litigation. This is emphasized by the fact undertakings, whether to provide information or documents, are not only enforceable promises made by one party to another: they are also promises to the Court: see *Psychologists Association of Alberta v Schepanovich*, 1991 ABCA 11 [per Côté JA] at para 10. In this connection, undertakings have the effect of an Order of the Court, and if not honoured, may be enforced including by motion to compel, motion to strike and ultimately by proceedings for contempt; *McLaughlin v. Canada (Attorney General)*, 2009 FCA 279 [per Noël JA], and *Hughes v Canada (Human Rights Commission)*, 2021 FC 728 at para 65, citing *Carey v Laiken*, 2015 SCC 17, [2015] 2 SCR 79 [Cromwell J] at paras 30 and 36.

[138] In a cross-examination, as noted by Justice Russell in *Ottawa Athletic Club, supra* at paras 134-136, 141, there is generally no obligation to give undertakings, but once given there is an enforceable obligation to respond. Justice Russell specifically addressed undertakings to disclose documents, concluding these must be honoured:

> [135] Undertakings to disclose documents must also be honoured, and a response to a question taken under advisement can constitute an implied undertaking: *Autodata Ltd v Autodata Solutions Co*, 2004 FC 1361 [*Autodata*].

[139] From this jurisprudence I conclude undertakings are matters worthy of great respect.

[140] Where given on cross-examination, the practice is for the giver of an undertaking to supply the promised information to the cross-examining party by delivering a Reply to Undertaking, although the Rules do not prescribe a specific form. The cross-examining party is thereupon entitled to require the re-attendance of the witness for cross-examination on the Reply to Undertakings to the same extent as if the information or documents in the Reply to Undertaking had been answered orally or delivered at the earlier examination.

[141] In order to resume cross-examination on a Reply to Undertaking, parties may again use a Direction to Attend, to which the examining party may add a direction to produce specific documents. The addition of a direction to produce triggers the document's mandatory ("shall") production under Rule 94(1).

[142] Given this, in my respectful view, Mr Ratte's May 18, 2021 RTU and the documents at Tabs 252 to 260 are as much in evidence as the rest of the evidence he gave during his earlier

cross-examination. The May 18, 2021 RTU are the answers and productions he would have given when asked for them.

[143] Despite the submissions of the Respondents, I see no reason in principle to treat Mr Ratte's productions and answers in his May 18, 2021 RTU any differently from the answers and productions he gave when he was originally cross-examined.

[144] Two additional factual circumstances reinforce the same conclusion. First, Mr Ratte filed an affidavit dated July 23, 2021, dealing with "the process for distributing Request for Mail-In Ballot Forms (Form 5-Ds) to First Nation members." These are the documents by which First Nation electors requested Mail-in Ballots for the upcoming Election. Importantly, Mr Ratte deposed in his affidavit at para 2 that the Election was "held in accordance with" the *FNEA* [RR 0170, PDF 0175]:

> 2. The 2020 election of the First Nation was held in accordance with the *First Nations Elections Act*, SC 2014, c 5 ("*FNEA*").

[145] Second, Mr Ratte attended the October 4, 2021 cross-examination in response to a Direction to Attend and Produce served by the Respondents. Notably, the Direction directed Mr Ratte to produce "Your May 18, 2021, Reply to Undertakings," i.e. his May 18, 2021 RTU. The other purpose of the Direction to Attend and Produce was that Mr Ratte attend "to be cross-examined on your affidavit sworn July 23, 2021 ("Affidavit") in this proceeding."

[146] I also note the Applicants had not concluded their previous October 26, 2020 cross-examination of Mr Ratte in the allotted time when it was ended. The Applicants said they had not

concluded [AR 0874, PDF 0883]. In my view and in the normal course, that cross-examination could have been continued by consent, by Direction to Attend and Produce or by Order if requested.

[147] I will explain these two additional factual circumstances in more detail.

(i) Mr Ratte's Affidavit of July 23, 2021

[148] In terms of Mr Ratte's affidavit, it is not disputed that the principle and central issues in this matter are possible contraventions of *FNEA* and *FNER* and serious electoral fraud – particularly by candidates or officials in the Election.

[149] Mr Ratte deposed the Election was held "in accordance with" *FNEA.*

[150] There is no dispute the Applicants were entitled to cross-examine Mr Ratte on his affidavit. Therefore such cross-examination would properly include questions relevant to possible contraventions of *FNEA* and or *FNER* and or electoral fraud and serious electoral fraud in the Election. There were the principle and central issues in this contestation.

[151] Important points regarding cross-examination are recently canvassed by Justice Roussel, who cited a number of authorities including the Federal Court of Appeal, in *Thibodeau Edmonton, supra*. I adopt Justice Roussel's conclusions that the scope of a cross-examination on affidavit is more limited than an examination for discovery, that an affiant who swears to certain matters should not be protected from fair cross-examination on the very information volunteered

in the affidavit, and should submit to cross-examination not only on matters set forth in the affidavit, but also to those collateral questions which arise from the answer(s): see para 13. In addition, an affiant must alsoanswer all questions upon which he or she can be fairly expected to have knowledge, without being evasive, which relate to the principle issue in the proceeding upon which his or her affidavit touches, and the affidant may also be cross-examined on documents relevant to the determination of the issue even if those documents are not mentioned in the affidavit filed – see para 14:

> [11] Cross-examinations on affidavit are governed by sections 83 to100 of the Rules. Section 97 of the Rules provides that if a person refuses to answer a proper question during an oral examination or to produce a requested document, the Court may, among other things, order that person to attend or re-attend a further oral examination at his or her own expense, and to answer a question that was improperly objected to and any proper question arising from the answer.
>
> [12] The scope of cross-examination on affidavit has been the subject of numerous court decisions (*CBS Canada Holdings Co v Canada*, 2017 FCA 65 at para 29 [*CBS*]; *Thibodeau c Administration de l'aéroport international d'Halifax*, 2019 CF 1149 (CanLII) at para 13; *Ottawa Athletic Club inc. (Ottawa Athletic Club) v Athletic Club Group inc*., 2014 FC 672 at paras 130–33 [*Ottawa Athletic Club*]; *Sierra Club of Canada v Canada (Minister of Commerce),* [1998] FCJ No 1673 (QL) at paras 9, 13 [*Sierra*]; *Merck Frosst Canada Inc. v Canada (Minister of Health)*, [1997] FCJ No 1847 (QL) at paras 4, 7–8 [*Merck Frosst 1997*]; *Merck Frosst Canada Inc. v Canada (Minister of National Health and Welfare*), [1996] FCJ No 1038 (QL) at para 9).
>
> [13] Recently, in *CBS*, the Federal Court of Appeal endorsed the principles laid down by this Court in *Ottawa Athletic Club* at paragraphs 130 to 133 on the extent of the affiant's obligations in providing documents or answering questions during cross-examination. It is generally recognized that the scope of a cross-examination on affidavit is more limited than an examination for discovery, that "[a]n affiant who swears to certain matters should not be protected from fair cross-examination on the very information he volunteers in his affidavit" and "should submit to cross-examination not only on matters set forth in his affidavit, but

> also to those collateral questions which arise from his answer" (*CBS* at para 29, citing *Ottawa Athletic Club* at para 132).
>
> [14] It is also recognized that the person must also "answer all questions upon which he can be fairly expected to have knowledge, without being evasive, which relate to the principle issue in the proceeding upon which his affidavit touches" (*Swing Paints Ltd v Minwax Co*, [1984] 2 FC 521 at para 19). The person may also be cross-examined on documents relevant to the determination of the issue even if those documents are not mentioned in the affidavit filed (*Sierra* at para 9).
>
> [Emphasis added]

[152] Much of the debate in this case involves relevance. I adopt Justice Russell's holding in *Ottawa Athletic Club inc. (Ottawa Athletic Club) v Athletic Club Group inc*., 2014 FC 672 [*Ottawa Athletic Club*] at para 130, pointing specifically to paragraph 7 of Justice Hugessen's analysis of relevance in *Merck Frosst Canada Inc v Canada (Minister of Health)*, [1997] FCJ No 1847 at para 7:

> [7] Formal relevance is determined by reference to the issues of fact which separate the parties. In an action those issues are defined by the pleadings, but in an application for judicial review, where there are no pleadings (the notice of motion itself being required to set out only the legal as opposed to the factual grounds for seeking review), the issues are defined by the affidavits which are filed by the parties. Thus, cross-examination of the deponents of an affidavit is limited to those facts sworn to by the deponent and the deponent of any other affidavits filed in the proceeding.
>
> [Emphasis in *Ottawa Athletic Club*]

[153] From this jurisprudence, and with respect, I conclude that not only Mr Ratte but others in this proceeding may be cross-examined on documents relevant to the determination of the principle issue "even if those documents are not mentioned in the affidavit filed" per para 14 of *Thibodeau Edmonton*. This is the case generally with Mr Ratte's May 18, 2021 RTU; these

documents are not mentioned in his affidavit but nonetheless are proper subjects of cross-examination and admissible as such because they relate to the principle issue in this case namely contraventions of *FNEA* and *FNER* and electoral fraud.

[154] In addition, it is Mr Ratte who deposed the Election was "held in accordance with" *FNEA.* That was his right. However, having done so he is subject to para 13 in *Thibodeau Edmonton* that "[a]n affiant who swears to certain matters should not be protected from fair cross-examination on the very information he volunteers in his affidavit" and "should submit to cross-examination not only on matters set forth in his affidavit, but also to those collateral questions which arise from his answer". I find both statements applicable to his May 18, 2021 RTU.

[155] To the same effect is, and I also adopt the decision of Justice Roy in Thibodeau *Halifax* at para 28:

> [28] Cross-examination is an important tool in our adversarial system: someone who testifies, whether in court or by affidavit, is not immune from inquisitorial questions. Such witnesses bring forward evidence that must be open to questioning. Where, in addition, there are rules of admissibility, such as in this case the prior availability of the same material and the rule against the splitting of one's own case, cross-examination should be permitted in that regard. Put another way, whoever provides evidence is subject to cross-examination. As Justice Muldoon said in *Swing Paints Ltd. v Minwax Co*. [1984] 2 FC 521, p 531, evasive testimony is not permitted. He went on to say:
>
> > The person making the affidavit must submit himself to cross-examination not only on matters specifically set forth in his affidavit, but also to those collateral questions which arise from his answers. Indeed he should answer all questions, upon which he can be fairly expected to have knowledge, without being evasive, which relate to

> the principle issue in the proceeding upon which his affidavit touches if it does.
>
> [Emphasis added]

[156] In my respectful view, these principles apply equally to the case at bar: Mr Ratte "is not immune from inquisitorial questions. Such witnesses bring forward evidence that must be open to questioning," and "whoever provides evidence is subject to cross-examination."

[157] Moreover, Mr Ratte "should answer all questions, upon which he can be fairly expected to have knowledge, without being evasive, which relate to the principle issue in the proceeding upon which his affidavit touches if it does", per *Swing Paints Ltd. v Minwax Co*. [1984] 2 FC 521 [per Muldoon J] just quoted above. This is obviously the case with answers to questions concerning alleged contraventions of *FNEA* and *FNER*, and electoral corruption in the Election, which again are the principle issues in this case.

[158] Notably, the jurisprudence establishes it is not only Mr Ratte who may be cross-examined on his Reply to Undertakings and its documents. It is also the case that any person being cross-examined on an affidavit in this contestation "may also be cross-examined on documents relevant to the determination of the issue even if those documents are not mentioned in the affidavit filed", see *Sierra* para 9, cited in *Thibodeau Edmonton* at para 14.

[159] Therefore, my findings above apply not only to Mr Ratte, but also to Chief Wuttunee, Councillor Dana Falcon, and Leroy Nicotine Jr., and anyone else who refused to answer

questions related to the photo text messages and documents introduced into evidence through Mr Ratte's May 18, 2021 RTU.

(ii) Direction to produce May 18, 2021 RTU for examination

[160] I just discussed my conclusion that Tabs 252 to 260 are also admissible as relevant because of Mr Ratte's assertion in his affidavit that the Election was "held in accordance with" the *FNEA*. I turn now to the importance of the Direction to Attend and Produce which compelled his attendance *and notably* the production of his May 18, 2021 RTU.

[161] I find Mr Ratte's May 18, 2021 RTU and the documents and answers produced are also admissible because the Direction to Attend and Produce required him to produce them for inspection at his cross-examination.

[162] Rule 94(1) specifically provides that a person in receipt of a Direction to Attend and Produce requiring documents to be produced, has the mandatory obligation ["shall"] to produce those documents and to do so "for inspection at the examination". The only way for the Respondents to avoid production would have been to seek relief under Rule 94(2), which they did not do, and indeed could not do in this case because the documents were not from the Respondents but from Mr Ratte, who consented and undertook to provide conversations recovered from his cell phone.

[163] In my view the ability of a party to inspect and cross-examine on documents produced under Rule 94(1) i.e., in a Direction to Attend and Produce, is beyond doubt. That is the case with Tabs 252 to 260, all of which therefore are admissible in this contestation.

[164] I wish to deal with other submissions of the Respondents before concluding this discussion.

[165] The Respondents rely on *Preventous Collaborative Health v Canada (Health)*, 2020 CanLII 32965 (FC) [*Preventous*]. With respect, that reliance is misplaced. *Preventous* is a case where a cross-examining party demanded an undertaking to produce documents from a witness being cross-examined where the cross-examining party had not served a Direction to Attend identifying specified documents to produce. Here the facts are completely different. Mr Ratte was not being asked to, but had already given an undertaking to produce the documents in question. In addition, also different from *Preventous*, he had been served with a proper Direction to Attend and Produce calling specifically for his May 18, 2021 RTU. Fatal to the motion in *Preventous* was the fact no Direction to Attend that identified the requested documents was served:

> 15. Production of documents on a cross-examination on an affidavit can only be enforced if the documents have been listed, or sufficiently identified, in a direction to attend duly served before the cross-examination pursuant to Rule 91(2)(c): *Autodata Ltd. v. Autodata Solutions Co*., 2004 FC 1361 at para 19.

[166] Finally, the Respondents rely on subsection 53(2) of the *Federal Courts Act*, RSC, 1985, c F-7:

Evidence	Preuve
Admissibility of Evidence	**Admissibilité de la preuve**
53 (2) Evidence that would not otherwise be admissible is admissible, in the discretion of the Federal Court of Appeal or the Federal Court and subject to any rule that may relate to the matter, if it would be admissible in a similar matter in a superior court of a province in accordance with the law in force in any province, even though it is not admissible under section 40 of the *Canada Evidence Act.*	**53 (2)** Par dérogation à l'article 40 de la *Loi sur la preuve au Canada* mais sous réserve de toute règle applicable en la matière, la Cour d'appel fédérale et la Cour fédérale ont le pouvoir discrétionnaire d'admettre une preuve qui ne serait pas autrement admissible si, selon le droit en vigueur dans une province, elle l'était devant une cour supérieure de cette province.

[167] However, subsection 53(2) does not apply to Mr Ratte's May 18, 2021 RTU, because his May 18, 2021 RTU is admissible evidence. Subsection 53(2) applies to the opposite situation, namely to "evidence that would not otherwise be admissible" [emphasis added].

V. Analysis

A. *Outline of facts*

[168] The Applicants in their memorandum submitted a "Concise Statement of Facts", to which the Respondents responded. In this Part A of these Reasons. In some instances I will follow the same format and draw conclusions.

[169] In Part B of these Reasons I will address the involvement of Mr Ratte, the Electoral Officer.

[170] In Part C of these Reasons, I will conduct a ballot-by-ballot review of the contested ballots and the allegations of contraventions of *FNEA* and/or *FNER* and/or serious electoral fraud.

[171] Part D of these Reasons is the summary of my findings, and my conclusions with respect to each Respondent including what if any remedy is appropriate, that is whether the Election as a whole, or the election of any of the candidates for Chief or Councillor should be annulled for serious electoral fraud going to the integrity of the Election, keeping in mind the discretionary nature of an annulment order.

(1) The team of candidates and supporters

[172] Reverting to the contested "Concise statement of Facts", the Applicants submit and I agree all the Respondents jointly posed for photographs which were widely and publicly disseminated on Facebook and which represented themselves as supporting "Team Clinton", which group promoted and supported only its members for Election. The Respondents submit and I agree, promotional T-shirts were handed out during the campaign including T-shirts labelled "Team Clinton" as an effort to create excitement about their platform and to advertise candidates. The Respondents submit the fact one or more of the successful candidates campaigned together is not improper as there is no prohibition to running a block of candidates under the *FNEA* or the *FNER*. Court Comment: I find the Respondents, other than Mr Ratte, called themselves Team Clinton, and conducted themselves as a team. In this sense, they comprised a slate of candidates who acted in concert to achieve their respective elections. But in some cases identified in the ballot-by-ballot discussion, some of the Respondents worked closely

with others and their supporters to commit serious electoral fraud and or to contravene the *FNEA* and the *FNER*.

(2) Those who engaged in serious electoral fraud

[173] On my review, Chief Wuttunee and Councillor Gary Nicotine went far beyond acceptable conduct and both were directly involved both in serious electoral fraud and as indicated below, contraventions of *FNEA* and *FNER.* All of the remaining Councillors with the exception of Dana Falcon were directly involved in serious electoral fraud, although to a lesser extent. The actions of the Respondents and their supporters are canvassed in the ballot-by ballot discussion in Part C, and summarized with conclusions in Part D.

(3) Requesting Mail-in Ballots for others

[174] The Applicants submit Councillor Shawn Wuttunee, one of the Respondents, messaged Mr Ratte via text on February 11, 2020, at 2:02 pm, requesting a Mail-in Ballot. The Respondents submit many candidates sent Request for Mail-in Ballots to the Electoral Officer for voters and for the Applicants to suggest this is inappropriate is not legally or factually correct. Court Comment: I will go into the case-by-case ballot analysis in Part C. However, I find nothing improper nor unlawful about the Respondents, or any candidates or electors for that matter, asking Mr Ratte and his staff for blank Request for Mail-in Ballot forms (5-Ds), nor in the Respondents giving these request forms to electors, nor in the Respondents submitting Requests for Mail-in Ballot forms once completed, provided of course, they were not tainted by electoral fraud or involved a contravention of *FNEA* or *FNER*.

[175] The Applicants submit Councillor Dana Falcon, another of the Respondents, messaged Mr Ratte via text on February 11, 2020, at 5:44 pm, requesting a Mail-in Ballot. The Respondents submit all communications among the candidates, campaigners and the Electoral officer were completely legal and complied with ISC and the Electoral policy. Court Comment: I repeat my comment immediately above and will go into the case-by-case ballots in Part C of these Reasons. It is certainly not the case that all communications with the Electoral Officer were legal; some entailed legislative contraventions and or serious electoral fraud.

[176] The Applicants submit when Councillors Shawn Wuttunee and Dana Falcon started sending Requests for Mail-in Ballots to Mr Ratte directly, Chief Wuttunee all but stopped texting Mail-in Ballot applications to Mr Ratte. The Respondents submit Chief Wuttunee, as incumbent Chief, communicated with Mr Ratte forwarding Request for Mail-in Ballots received from electors needing help in getting their ballot. Other supporters working with the candidates also forwarded Requests for Mail-in Ballots to Mr Ratte. Court Comment: I find both submissions correct, except that not all Requests for Mail-in Ballots forwarded were from "electors needing help in getting their ballot". Specifically, both Requests for Mail-in Ballots and the Mail-in Ballots from a number of electors were products of serious electoral fraud and contraventions of *FNEA* and *FNER,* including ballots from Robin Dean Wuttunee from Darian Whiteford (daughter of the Applicant Veronica Whitford), from Rickell Frenchman and Romellow Meechance (Heather Meechance's niece and nephew) and from Breanna and Jerette Wahobin.

(4) Leroy Nicotine Jr.

[177] The Applicants submit Leroy Nicotine Jr. received a number of misdirected Mail-in Ballots at his residence and then knowingly marked the ballots and mailed them back to Mr Ratte, or gave them to a supporter of the Respondents rather than to the elector to whom they were sent. The Applicants also submit Leroy Nicotine Jr. participated in the forgery of Mail-in Ballots by signing as witness in the absence of the elector. Court Comment: I will deal with ballot-by-ballot issues later in these reasons. However, as will be seen below, I find Leroy Nicotine Jr. received a number of Mail-in Ballots at his address and then knowingly marked and mailed them back to Mr Ratte, or gave them to someone else to mark and return. I also find Leroy Nicotine Jr. falsified Mail-in Ballots by signing as witness on the Voter Declaratin forms in the absence of the elector. In this connection I have drawn several adverse inferences against Leroy Nicotine Jr. based on his refusal to answer questions on cross-examinationos related to his conduct and address:

- Leroy Nicotine Jr. refused to answer questions during cross-examination in relation to the mail-in ballot of Robin Dean Wuttunee, including whether Leroy Nicotine Jr. ever possessed the mail-in ballot of Robin Dean Wuttunee: [AR 2703-2717, PDF 2712-2726].

- Leroy Nicotine Jr. refused to answer questions during cross-examination about whether he was ever the tenant of 1291 97th Street, apartment 104, in North Battleford: [AR 2687, PDF 2696], which he gave as his address on the Mail-in Ballot Voter Declarations forms of Breanna Wahobin [AR 3445, PDF 3454], Jerette Wahobin [AR 3314, PDF 3323], Romellow Meechance [AR 3707, PDF 3716], Paul Tobaccojuice [AR 3757, PDF 3766], Michael Ernest Stevens [AR 3444, PDF 3453] and Petula Wuttunee [AR 3792, PDF 3801].

- Leroy Nicotine Jr. refused to answer relevant questions during cross-examination about whether the “signature of witness” on Breanna Wahobin’s voter declaration [AR 3445, PDF 3454] was his signature: [AR 2689-2695, PDF 2698-2704].

[178] The Applicants submit Leroy Nicotine Jr. gave certain electors a list of candidates to vote for in exchange for cash. This is denied by the Respondents. Court Comment: I go into ballot by ballot issues later. While I find Leroy Nicotine Jr. was directly involved in many serious electoral frauds, this was not one of them.

(5) Driving voters to the polls

[179] The Applicants submit and Leroy Nicotine Jr. agrees he drove electors to their polling stations. The Respondents submit Leroy Nicotine Jr. testified he wanted to help Chief Wuttunee win re-election and volunteered to help which included giving people rides to polling stations. The Respondents say this kind of volunteer work occurs in all elections: see also Exhibit "A" of the Affidavit of Chief Wuttunee dated September 13, 2021. [RR 0162, PDF 0167] This document sets out the policy on Canada Elections' website and addresses the question: "Is it acceptable to offer electors a ride to a polling station, or repay them for their travel expenses to get to a polling station". The answer is in the affirmative. Court Comment: In my respectful view, driving voters to the polls is does not contravene *FNEA* or *FNER* nor does it constitute electoral fraud.

(6) Shelley Wuttunee

[180] The Applicants submit what they call the corrupt circle was not confined to the Respondents and Leroy Nicotine Jr., but had broader reach to include others including Shelley Wuttunee, the wife of Respondent Councillor Shawn Wuttunee. Court Comment: I will deal with ballot-by-ballot issues later in these Reasons. However, Shelley Wuttunee admitted under oath

and I find she falsely signed as a witness on many Voter Declaration forms when in fact she did not witness the elector's signature. I note that on her cross-examination she refused to say how many times she falsely signed as a witness on Voter Declaration forms. She also refused to acknowledge her signature on Voter Declaration forms produced in evidence by Mr Ratte, including 3 of the 13 Voter Declaration Forms she witnessed for voters who obtained a Mail-in Ballots, sent them in, but subsequently went to the polls to vote (see item V. C. (13)) below in this Analysis). She took the position this information was not in her affidavit, and or was in the nature of discovery.

[181] Court Comment: I have already found witnesses on cross-examination may not object to relevant questions on the ground a question asks for information not in their affidavits. Nor are these questions akin to discovery; in this case they relate to the principle and central issue in this contestation namely alleged electoral fraud and contraventions of *FNEA* and *FNER*. These questions must be answered in accordance with *Thibodeau Edmonton* per para 14, and see paras 151 and following above:

> [14] It is also recognized that the person must also "answer all questions upon which he can be fairly expected to have knowledge, without being evasive, which relate to the principle issue in the proceeding upon which his affidavit touches" (*Swing Paints Ltd v Minwax Co*, [1984] 2 FC 521 at para 19). The person may also be cross-examined on documents relevant to the determination of the issue even if those documents are not mentioned in the affidavit filed (*Sierra* at para 9).

(7) Assistance with Voter Declaration forms, non-compliance with subsection 5(6) of *FNER* (witness attestation to elector's choice of candidate where assistance given)

[182] The Respondents admit Shelley Wuttunee "assisted" several band members to obtain their Mail-in Ballots. However, they do not define what "assisted" means. I take this as confirmation of Shelley Wuttunee's own evidence that she falsely signed as witness on many Voter Declaration forms purportedly signed by an elector whose signature she did not witness. It is significant she knew doing this was not proper but thought she could do so because she had known of the electors all her life in some cases. Falsely representing oneself as a witness to an elector's Voter Declaration form constitutes in my view electoral fraud. If money is involved, the conduct may become serious electoral fraud. I draw an adverse inference against Shelley Wuttunee's credibility and reliability based on her persistent refusal to say how many times she falsely witnessed electors' signatures on Voter Declaration, and her refusal to even acknowledge if it was her signature on three of 13 Voter Declarations identified by Mr Ratte as discussed in part V. C. (13) of this Analysis hereof that might have been the result of electoral fraud. I find it was her signature on all 3. Parenthetically I note the Applicants rely on subsection 5(5) of *FNER* which deals with Nomination Meetings which were not in issue. However in my view subsection 5(6) of *FNER* deals with Voter Declaration forms in relation to actual elections which is clear from its reference to section 17 which I find deals with actual elections.

(8) Red Pheasant employees

[183] The Applicants submit the alleged "corrupt circle" also included the use of Red Pheasant employees and resources to purchase votes and obtain forged replacement identification to obtain and forge Mail-in Ballots. They allege the Respondents used the Band Manager Cody Benson (son of Councillor Lux Benson) and Austin Ahenakew (Chief Financial Officer), to make corrupt payments to electors. They allege those payments were made to purchase Mail-in Ballots and in

some cases, payments were made for persons forging Requests for Mail-in Ballots and forging the Mail-in Ballots. The Respondents say there is no evidence to substantiate these allegations. The Respondents submit they did not "forge" Mail-in Ballots, indeed there were very few ballots called into question in this case. The Respondents direct the Court to the Applicants' "Table of Ballots" found at AR 3960, PDF 3969. Court Comment: I will discuss ballot by ballot issues later. However I have concluded the Applicants have not established on a balance of probabilities that band employees Deloris Peyachew (Indian Registry Administrator), Band Manager Cody Benson or Chief Financial Officer Austin Ahenakew committed electoral fraud, serious electoral fraud or contravened *FNEA* or *FNER*.

[184] The Applicants also submit Deloris Peyachew (Indian Registry Administrator) or someone purporting to be her, issued several forged replacement IDs for electors needing replacement IDs, which they had to file with their Requests for Mail-in Ballots. The Applicants submit the Respondents utilized those forged replacement identifications to further forge Request for Mail-in Ballots they submitted to Mr Ratte to misdirect Mail-in Ballot packages to the residence of Leroy Nicotine Jr. and others. Court Comment: I am not satisfied Deloris Peyachew was involved in issuing forged of falsified IDs for electors because I am not satisfied it is her signature on all or any of the Voter Declaration forms in question on which her signature purports to appear. She did not give evidence in this proceeding and was not cross-examined.

(9) Election result generally

[185] The Applicants submit the alleged circle of corruption was overwhelmingly successful. Five weeks prior to the March 20, 2020 election, Chief Wuttunee stated the Respondents had

already requested 433 Mail-in Ballots [AR 4334, PDF 4343]. In total, Chief Wuttunee personally submitted 521 Requests for Mail-in Ballots to Mr Ratte by photo text message [AR Tab 253]. The Respondents submit the Respondents and their supporters "were successful and won the election campaigning in compliance with the guidelines approved by ISC and sanctioned by Elections Canada." Court Comment: I will deal with specific Requests for Mail-in Ballots and Voter Declaration forms later in these Reasons. The Respondents won their respective elections, but aspects of the Election were not conducted in compliance or in accordance with *FNEA* and *FNER*, and I find serious electoral fraud was committed by all but one of the Respondents, and by two of their supporters.

(10) Many Request for Mail-in Ballots

[186] The Applicants submit the Respondents and their supporters submitted many Requests for Mail-in Ballots. Court Comment: I agree. Per Mr Ratte's May 18, 20221 RTU, I find the following submitted Requests for Mail-in Ballots to Mr Ratte by photo text message:

1. Chief Wuttunee submitted 521 [AR Tab 253]
2. Councillor Gary Nicotine submitted 164 [AR Tab 254]
3. Councillor Shawn Wuttunee submitted 24 [AR Tab 255]
4. Councillor Dana Falcon submitted 18 [AR 256]
5. Councillor Henry Gardipy submitted 25 [AR Tab 257]
6. Councillor Mandy Cuthand submitted 49 [AR Tab 258]
7. Councillor Samuel Wuttunee submitted 31 [AR Tab 259]
8. Band Manager Cody Benson submitted 22 [AR Tab 260]

[187] This only includes the known Requests for Mail-in Ballots submitted by photo text message to Mr Ratte. Others may have been submitted by mail, email, or personally delivered to Mr Ratte. Court Comment: I accept this information as accurate.

[188] In this connection, I note the Respondents once again challenge the admissibility of Mr Ratte's May 18, 2021 RTU at Tabs 254 to 260. These are the documents referred to in the preceding two paragraphs. The Respondents argue that Tabs 252 to 260 are not admissible despite the fact they are the documents delivered by Mr Ratte to the Applicants as his reply to undertakings, May 18, 2021 RTU. In my respectful view the documents at Tabs 252 to 260, part of Mr Ratte's May 18, 2021 RTU, are admissible evidence for the reasons discussed above at para 110 and following, Part IV 3(b) above. The number of Requests for Mail-in Ballots submitted by Mr Ratte is accepted by the Court.

B. *Role of Mr Ratte and his email exchange with Indigenous Services Canada regarding Requests for Mail-in Ballots*

(1) Naming Mr Ratte and his role in this contestation

[189] While Electoral Officer Mr Ratte is named in the Notice and Amended Notices of Application, the Applicants state he is named only to facilitate discovery and source documents. Neither Mr Ratte nor the Respondents object to this in their Memoranda. This was not contested. In my respectful view, naming the Electoral Officer as a Respondent makes sense because the Electoral Officer in addition to supervising the *FNEA* election in issue, is the First Nation's custodian of all *FNEA* related documents. This contestation must proceed by application according to section 31 of *FNEA*. However, unlike applications for judicial review in this Court, there is no administrative decision-maker nor administrative decision to review. A contestation under *FNEA* requires a first level original determination by this Court, on a record generated by the parties, of whether and to what extent *FNEA* and or *FNER* were contravened and whether and to what extent there was electoral fraud, serious or otherwise. Hence it is important and

necessary for the Court and parties to have direct access to the Electoral Officer through being named as a party.

[190] In this case, while the Applicants originally requested Mr Ratte to produce a Certified Tribunal Record (normally required on judicial review of administrative decisions), that request seems to have been abandoned. Instead, Mr Ratte filed an affidavit dated August 27, 2020, essentially reporting on the outcome of the Election, attached to which he supplied information as exhibits. He was cross-examined on September 14, 2020, when he gave a number of undertakings. He re-attended a cross-examination pursuant on October 26, 2020 and gave further undertakings.

[191] As discussed above, Mr Ratte supplied further information and documents in his May 18, 2021 RTU, on which he was cross-examined October 4, 2021. At that time he was also cross-examined on his affidavit of July 23, 2021.

(2) Allowing First Nation members to distribute Request for Mail-in Ballot forms to other members

[192] One of the documents exhibited by Mr Ratte in his affidavit of July 23, 2021 is an e-mail exchange between Mr Ratte and Indigenous Services Canada [ISC]. In this connection, the Respondents sought the guidance of Mr Ratte and ISC to ensure they complied with election guidelines in reaching out to as many voters as possible with Request for Mail-in Ballot forms. The email exchange is short:

From Burke Ratte on January 28, 2020

To Yves Denoncourt

Subject: Form 5-D RPCN

Morning Yves, I am appointed as the Electoral Officer for the Red Pheasant Cree Nation. We are conducting the Chief and Council election under the First Nations Elections Act. Election DATE: March 20, 2020

I have a question regarding the request for mail in ballot form-5d. Other than the initial mail in nomination package that includes form 5-d that is sent to electors on day 60 (based on address information sent to the EO by the first nation) of the process or by contacting the EO directly; is it acceptable for copies of this form to left at the band office and or allowing band members to distribute them accordingly?

Please advise.

Thanks, Burke

From Yves Denoncourt on January 28, 2020

To Burke Ratte

Subject: RE: Form 5-D RPCN

Hi,

Perfectly fine. After all, these are meant to assist as many electors as possible to vote.

Yves

[193] In my opinion, this email exchange is properly in evidence, despite the Applicants' objections that it is hearsay and an inadmissible conclusion of law. There is no suggestion the document is false or forged. Nor do I find any fault in Mr Ratte seeking the advice of ISC because, as is not in dispute, ISC is a relevant federal government department in terms of First Nation elections under *FNEA*.

[194] The email exchange between Mr Ratte and ISC contains the opinion of ISC that Mr Ratte could properly supply candidates and band members with Requests for Mail-in Ballot forms (5-D Forms) to give to other electors. In my view, there is no principled basis on which the exchange should not be in the record as a document that is what it purports to be. I see no need to require the ISC official to depose to the fact he or she sent the email and that he or she wrote what was is written. I understand the Applicants object to the content of the email, namely the advice given by ISC, but that is no basis for excluding the email exchange from the record as a document that is what it purports to be. The Applicants' objection is to the admission of the opinion for the truth of its contents, a point I need not decide because I have formed my own conclusion in this regard.

[195] In this respect, I have also concluded Mr Ratte was entitled to supply candidates and electors with Requests for Mail-in Ballot forms (5-D Forms) to give to electors, which is what he did. I see nothing in *FNEA* or *FNER* to the contrary. It is an entirely different matter for anyone to forge signatures or otherwise falsify Requests for Mail-in Ballots, Mail-in Ballots or Voter Declaration forms and send them back to Mr Ratte for processing: that may constitute serious electoral fraud.

C. *Ballot-by-ballot review of alleged FNEA and or FNER contraventions and or serious electoral fraud*

[196] The parties focussed their submissions on a number of alleged contraventions of *FNEA* and *FNER* and or serious electoral fraud or corruption relating to several specific ballots. These may involve Requests for Mail-in Ballots and the required ID, and returned Mail-in Ballots with required Voter Declaration forms. The submissions of the parties centred on the involvement of

candidate Respondents in this contestation, and their supporters (see para 27 above). Each ballot at issue will be discussed.

[197] While the Applicants did not point to specific provisions of the *FNEA* or *FNER* allegedly contravened by each Respondent, in some cases they did. I will address contraventions alleged by the Applicants in their context, which context may involve the conduct of other Respondents and their supporters.

[198] However, I find the Applicants' general boilerplate submission in this matter to be unacceptable. Their submission was to the effect the Court should consider more than 20 different contraventions against each Respondent and supporter. It is not the job of the Court to sort out the Applicants' submissions. Therefore I will not consider the following paragraph in the Applicants' Memorandum:

> 94. Several contraventions of *FNEA* subsections 14(a)/(b)/(c)/(d), 16(1)(a)/(b)/(c)/(e)/(f), 17, 18, 19(a), 20(c), 26, and 27, and *FNER* subsections 5(4)/(5)/(6), 15, 16, and 17 have been established in this case. The Applicants rely upon each of the instances of electoral corruption identified in Part I of this memorandum and those in their Amended Notice of Application.

[199] I will also discuss situations of electoral fraud and serious electoral fraud in their context. That context may in some also necessitate discussion of the conduct of other Respondents and their supporters.

(1) <u>Robin Dean Wuttunee</u>

[200] The Applicants allege in their Amended Notice of Application at para 12-16:

12. CLINTON WUTTUNEE, JASON JAKITA, SAMUEL WUTTUNEE, and SHAWN WUTTUNEE (on behalf of the Participants including themselves) engaged in electoral corruption and vote buying when they procured the forgery of a request for mail-in ballot, purchased the mail-in ballot, and forged the mail-in ballot declaration of Robin Dean Wuttunee who was incarcerated between January 12 and June 23, 2020, at the Edmonton Remand Centre.

13. CLINTON WUTTUNEE, JASON JAKITA, and SAMUEL WUTTUNEE had several communications with Robin Dean Wuttunee between January and the Election in which they arranged for the purchase of his mail-in ballot and provided instructions in relation thereto. They sent $300 to Heather Wuttunee by e-transfer that was to be forwarded by her to her brother, Robin Dean Wuttunee, for the purchase of his mail-in ballot.

14. Concerned that the Election was rapidly approaching, the Participants instructed Deloris Peyachew to forge a replacement for photo ID for Robin Dean Wuttunee, which she did on or about March 10, 2020, and filed same with a forged request for mail-in ballot with EO RATTE by text message to unlawfully procure the issuance of a mail-in ballot.

15. The Participants sent the mail-in ballot of Robin Dean Wuttunee to an address in North Battleford that they controlled with someone acting on their behalf, which is that of Leroy Nicotine Jr. or someone else.

16. The Participants then received the mail-in ballot of Robin Dean Wuttunee, and SHAWN WUTTUNEE (on his behalf and on behalf of the Participants) requested that his wife, Shelley Wuttunee, forge the mail-in ballot declaration of Robin Dean Wuttunee, which she did on or about March 17, 2020, indicating that she witnessed Robin Dean Wuttunee solemnly declare that he had appropriately cast his mail-in ballot in North Battleford on that date. However, Robin Dean Wuttunee was in the Edmonton Remand Centre and did not and could not have made that solemn declaration before Shelley Wuttunee in North Battleford. The Participants, or persons acting on their behalf, forged the mail-in ballot of Robin Dean Wuttunee and unlawfully cast votes for Chief and Council candidates.

[201] The Respondents allegedly implicated in the electoral corruption surrounding the vote of Robin Dean Wuttunee [Robin Wuttunee] are Chief Wuttunee, Councillor Jason Chakita, Councillor Samuel Wuttunee, and Councillor Shawn Wuttunee. Leroy Nicotine Jr. and Shelley Wuttunee (wife of Councillor Shawn Wuttunee), two of the named supporters, are also allegedly implicated. Para 8 of the Applicants' Memorandum alleges Leroy Nicotine Jr. participated in the forgery of Mail-in Ballots by signing as witness in the absence of the elector.

[202] The Applicants' evidence in relation to the Mail-in Ballot of Robin Wuttunee is contained in his affidavit. In response, the Respondents' rely on the Affidavit of Chief Wuttunee, Councillor Jason Chakita, Councillor Samuel Wuttunee, and Shelly Wuttunee (wife of Councillor Shawn Wuttunee).

[203] At all material times, that is between January 12 and June 23, 2020, Robin Wuttunee was incarcerated in the Edmonton Remand Centre [ERC].

[204] While in custody, Robin Wuttunee made several telephone calls all of which were monitored and recorded pursuant to ERC's policy to monitor and record all telephone calls between inmates and those outside the institution. A number of issues arise from these recordings.

(a) <u>Admissibility of transcripts and CD copies of Robin Wuttunee's phone calls from ERC to Councillor Samuel Wuttunee and Councillor Jason Chakita</u>

[205] All telephone conversations between an inmate such as Robin Wuttunee and someone outside beginning with an explicit automated notice that the call is being monitored and recorded.

[206] Robin Wuttunee deposed he had such telephone calls with Councillor Samuel Wuttunee and Councillor Jason Chakita, and that the calls related to the purchase of his vote.

[207] Acting under section 7 of the Alberta *Freedom of Information and Protection of Privacy Act* Chapter F-25, Robin Wuttunee through his counsel asked ERC for copies of the recordings. ERC delivered 2 CDs containing copies of the telephone conversations Robin Wuttunee had with Councillor Samuel Wuttunee and Councillor Jason Chakita from inside ERC during the Election period. While Alberta authorities originally provided unredacted copies, which were returned, they subsequently sent Applicants' counsel redacted copies of recordings on 2 CDS, *without* the names of anyone else on the call, and *without* the words spoken by those with whom he was speaking.

[208] Applicants' counsel informed Respondents' counsel of the inadvertence by Alberta authorities, and that he had redacted copies of the calls with Councillor Samuel Wuttunee and Councillor Jason Chakita. Applicants' counsel asked Respondents' counsel for their consent to release Councillors Samuel Wuttunee's and Jason Chakita's side of the calls. He was met with a "very firm objection" by Mr Stooshinoff.

[209] Councillors Jason Chakita and Samuel Wuttunee were subsequently served with Directions to Attend and Produce: to attend for cross-examination and to produce a copy of their side of their telephone calls with Robin Wuttunee. Both Councillor Jason Chakita and Samuel Wuttunee attended for cross-examination. Neither brought a copy of their side of the calls. Neither had sought relief from disclosure under Rule 94(2). Counsel for the Respondents, Mr Stooshinoff refused to permit his clients to answer any questions in relation to their conversations with Robin Wuttunee saying [in relation to Councillor Jason Chakita's cross-examination] [AR 1710-1711, PDF 1719-1720, starting at line 20]:

> Cross-Examination of Jason Chakita, September 30, 2020
>
> 20 MR. STOOSHINOFF: This is objectionable.
> 21 You know it's objectionable. You know we
> 22 have strenuously and vigorously opposed this.
> 23 MR. PHILLIPS: This is a lawful
> 24 recording.
> 25 MR. STOOSHINOFF: This is the matter –
> 1 MR. PHILLIPS: This is the recording
> 2 that was produced by the --
> 3 MR. STOOSHINOFF: I don't care.

[210] At the cross-examination of Samuel Wuttunee, Mr Stooshinoff reiterated his objection to answering questions in relation thereto:

> 1 EXHIBIT A-52:
> 2 2020-09-04 DIRECTION TO ATTEND - SAMUEL
> 3 WUTTUNEE

4 Q. And you're refusing to produce any other
5 documents, correct, sir?
6 MR. STOOSHINOFF: We're not refusing. We
7 reiterate our objection and the grounds for
8 the objection.

[211] The calls from Robin Wuttunee to both Councillor Jason Chakita and Councillor Samuel Wuttunee are referred to in the Affidavit of Robin Wuttunee. Copies of transcripts of these calls as redacted by the ERC and related documentation are found at AR Tabs 49-59. The actual CDs were filed through the affidavit of a legal assistant to Mr Phillips, counsel for the Applicants. A copy of the legal assistant's affidavit was filed in the Applicant's record without the attached CDs, just copies of their envelopes. The originals of the legal assistant's affidavit and the two CDs were subsequently filed, over the Respondents' objection, by Direction of Justice Aylen dated December 2, 2021.

[212] There is no issue the two CDs and transcripts are anything other than what they purport to be. The Respondents object to their being admitted because the legal assistant based her information on what Applicants' counsel Mr Phillips told her. With respect, the real issue for the Respondents is the admissibility of what is recorded as spoken in the CDs and what is written in the transcripts, not the recording and transcripts themselves. The CDs were sent by government of Alberta officials to counsel for the Applicants, Mr Phillips, and the transcripts were sent to Mr Phillips by the Certified Court Reporter who transcribed them. That is what he told his assistant and that is what is in her affidavit. In my view, in these limited circumstances, the 2 CDs and transcripts are properly in evidence notwithstanding they arrived as they did; I am not sure they

could arrive in this Court in any other manner except by evidence of the Alberta officials or the Certified Court Reporter. In the circumstances I consider them admissible under the exceptions to the hearsay rule because they are both necessary and reliable, see *R v Khan*, [1990] 2 SCR 531 [per McLachlin J as she then was]; *Gilead Sciences, Inc. v. Canada (Health),* 2016 FC 856 at para 51-58. I have no reason to doubt the authenticity of the two CDs, nor of the transcripts, both of which are in my view reliable. I am also of the view these came to this Court in the manner they did because it is necessary given the exigencies of the case: I do not expect counsel to become a witness in this case to testify as to what arrived in his mailroom.

[213] In this connection I also rely on *Coldwater First Nation v. Canada (Attorney General),* 2019 FCA 292 [*Coldwater*] per Stratas JA, leave to appeal to SCC refused, no. 39111 (2020-07-02), and in particular paragraphs 48 to 55 dealing with reliability and necessity:

> [49] In this case, much of the impugned evidence is reliable, supported as it is by documents, including summaries, notes and meeting minutes made in the course of consultations, all or some of which themselves may be admissible as business records.
>
> [50] At paragraph 72 of his affidavit, Mr. Tupper explains that these minutes were prepared by Canada with the intention that they would be joint and reflect a common understanding of what was discussed. They were shared with Tsleil-Waututh Nation for its comment and approval in accordance with the protocol developed for engagement. Under this process, Tsleil-Waututh Nation registered no objection to the accuracy of the minutes. <u>This sort of circumstantial guarantee of trustworthiness fulfils the reliability requirement.</u>
>
> [51] There is no suggestion the respondents are attempting to shield from scrutiny witnesses with first-hand information. Indeed, in many cases, the moving parties themselves have not given the sort of first-hand evidence they say in these motions the respondents should give. As well, there is nothing that suggests the moving parties have sought to examine the individuals they say have first-hand evidence or have moved for a Rule 41 summons (as discussed in *Tsleil-Waututh No. 1* at para. 103).

> [52] On the issue of necessity, three considerations should be kept front of mind.
>
> [53] First, necessity must be "given a flexible definition, capable of encompassing diverse situations" in which "the relevant direct evidence is not, for a variety of reasons, available": *R. v. Smith*, 1992 CanLII 79 (SCC), [1992] 2 S.C.R. 915 at 933-934. The "necessity [may not be] so great; perhaps hardly a necessity, only an expediency or convenience, can be predicated": *Smith* at 934, quoting J.H. Wigmore, *A Treatise on the Anglo-American System of Evidence in Trials at Common Law*, vol. III, 2d ed. (Boston: Little, Brown & Co., 1923) at §1420-22.
>
> [54] Second, section 18.4 of the *Federal Courts Act* provides that applications for judicial review "shall be heard and determined without delay and in a summary way" and, on top of that, this Court has ordered a highly expedited schedule for the consolidated applications. The need for speed and efficiency affects the necessity analysis.
>
> [55] Third, sometimes the nature and practical exigencies of a proceeding can affect the admissibility of evidence and, in particular, the Court's evaluation of necessity.
>
> [Emphasis added]

[214] The Respondents submit the Transcripts of Robin Wuttunee's side of his phone calls from ERC (Tabs 49-59) are not admissible because they were illegally obtained, and because the Applicants did not bring an application to include the recordings made by ERC, a third party. The Respondents also allege the use of the transcripts is the subject of a criminal complaint, and other criminal complaints may follow. In this connection the following is an exchange between counsel for the Applicants Mr Phillips, and counsel for the Respondents, Mr Stooshinoff on the cross-examination of Councillor Jason Chakita concerning the CDs and transcripts:

> Cross-Examination of Jason Chakita, September 30, 2020
>
> 24 MR. PHILLIPS: For the record, we have
>
> 25 Exhibit B to the Affidavit of Stephanie Reid.

MR. STOOSHINOFF: Mr. Phillips, don't trouble yourself, we're not going to be answering any questions about that. Mr. Phillips, that matter is under objection. It's a matter of a significant complaint, and it is our position that you may not produce and introduce that document or the recording that you have as being illegally obtained.

…

MR. STOOSHINOFF: This is objectionable. You know it's objectionable. You know we have strenuously and vigorously opposed this.

MR. PHILLIPS: This is a lawful recording.

MR. STOOSHINOFF: This is the matter –

MR. PHILLIPS: This is the recording that was produced by the --

MR. STOOSHINOFF: I don't care.

MR. PHILLIPS: This is the recording that was lawfully produced that's been severed. It only includes Robin Dean Wuttunee. I am playing it.

MR. STOOSHINOFF: It is objected to, and it is the matter of a criminal complaint, Mr. Phillips. Did you hear me? It's the matter

of a criminal complaint. In the event that you attempt to do this and produce and try to stuff this onto the transcript, we will be following up with further complaints, Mr. Phillips, not least of which will be to the Court.

MR. PHILLIPS: Mr. Stooshinoff --

MR. STOOSHINOFF: And you know very well --

MR. PHILLIPS: Mr. Stooshinoff, please do not interrupt.

MR. STOOSHINOFF: You know very well -- well, save yourself the breath, we're not putting it into evidence. If you attempt to do so before getting a court order, if you attempt to do so before getting a court order to this effect, we will be seeking an order against you and against these proceedings. Are we clear, Mr. Phillips? You are just not listening, are you? And you don't –

[Emphasis added]

[215] With respect, this objections has no merit. The CDs were obtained lawfully by Robin Wuttunee who properly applied for them under the relevant provisions of Alberta's *Freedom of Information and Protection of Privacy Act* Chapter F-25. What is put into evidence at Tabs 49 to

59 are transcripts of only Robin Wuttunee's side of the telephone conversations. Likewise, the CDs record only his side of the conversations.

[216] Notably, the Respondents themselves now appear to agree Robin Wuttunee may lawfully obtain and disclose such recordings, provided he consents, stating at paras 124 and 125 of their Memorandum:

> 124. The ERC has the authority to record the telephone communications of inmates under Section 14.4 of the *Corrections Act*, RSA 2000, c C-29. Recordings so made can be accessed by an application to the Privacy Commissioner under section 7 of the Alberta *Freedom of Information and Protection of Privacy Act* Chapter F-25. However, subsequent disclosure of the recording is not permitted without the consent of the persons who were recorded under Section 30 (notification) and section 40 (Consent) in the form set out in section 7 of the Regulations to the Act.
>
> 125. Moreover, regardless of the contents the recordings are not admissible as the parties involved have not consented to their release. It is submitted that even the redacted portions of such recordings are a breach of the privacy and constitutional rights of the parties as the recordings are being held out to relate their communications.

[217] It is beyond dispute Robin Wuttunee consented to the disclosure of his side of these conversations; after all it was he who applied for them. His consent is a complete answer to the Respondents' allegations of unlawfulness and criminality.

[218] The Respondents also object to the transcripts of the redacted telephone recordings. No one questions the accuracy of these transcripts; such an objection would be without merit because these transcripts are certified by a Certified Court Reporter. These transcripts are not inadmissible hearsay, but and in my view are admissible for the fact that they were made. They

are not introduced for the truth of what Robin Wuttunee said, but for the fact of what he said. As discussed and affirmed by the Federal Court of Appeal in *CBS Canada Holdings Co v Canada*, 2017 FCA 65 [*CBS*] referred to above at para 94:

> [19] The definition of hearsay evidence is an out of court statement tendered as proof of its contents. The *locus classicus* of the definition of hearsay is *Subramaniam v. Public Prosecutor (Malaya)*, [1956] UKPC 21, [1956] 1 W.L.R. 965 at 969:
>
> > Evidence of a statement made to a witness by a person who is not himself called as a witness may or may not be hearsay. It is hearsay and inadmissible when the object of the evidence is to establish the truth of what is contained in the statement. It is not hearsay and is admissible when it is proposed to establish by the evidence not the truth of the statement but the fact that it was made.

[219] In the alternative, and in my respectful view, the transcripts are admissible on the principled exception to the hearsay doctrine in that they are both reliable and necessary: *Coldwater*, paras 49 to 55. I see no need to call the certified court reporter to provide either oral or affidavit evidence in this respect.

[220] Given the above, in my respectful view, Councillor Jason Chakita should not have refused to answer questions related to Tabs 49 to 59, which were properly in evidence. Because he did not answer the questions, and because he did not bring a copy of his side of his conversation with Robin Wuttunee as required by the Direction to Attend and Produce, I draw the negative inference that, as deposed by Robin Wuttunee, Councillor Jason Chakita had a telephone conversation or conversations with Robin Wuttunee in which Councillor Jason Chakita offered to purchase Robin Wuttunee's Request for Mail-in Ballot. In this connection I note again Justice Aylen's Order of August 30, 2021 - SECOND MOTION: "10. The

Applicants' request for an order compelling the Respondents to answer all questions refused from the cross-examinations of the Respondents' affiants is dismissed, without prejudice to the right of the Applicants to ask the hearings judge to draw an adverse inference from the affiants' refusals to answer the questions. [Emphasis added]"

[221] It is also noteworthy that Chief Wuttunee, Councillor Samuel Wuttunee and Councillor Jason Chakita had several Facebook messages with Robin Wuttunee.

[222] It is admitted and I accept the Facebook messages in the name of Robin Wuttunee were in fact made with his authority by Heather Wuttunee to whom he gave his Facebook passcodes and instructions as to what to say.

[223] The Facebook messages with Councillor Samuel Wuttunee, very remarkably, include instructions for Robin Wuttunee to leave his Mail-in Ballot "blank" when selling it to him – "I need it blank though" - and Councillor Samuel Wuttunee asks where he should mail the Mail-in Ballot [AR0281, PDF 0290, para 19, and AR 0302-0303, PDF 311-312]:

> Samuel Wuttunee: I need it blank though
>
> Samuel Wuttunee: ??? [*sic*]
>
> Robin Wuttunee: Ya bro
>
> Robin Wuttunee: I talked to Heather already
>
> Samuel Wuttunee: Ok

[224] Notably, Robin Wuttunee's Request for Mail-in Ballot identified the address for sending the Mail-in Ballot package to, as Suite 104, 1291 97th Street, North Battleford. As discussed later

in these reasons, this is the address of Leroy Nicotine Jr., a supporter of the Respondents, who refused to answer questions regarding this address and against whom I draw a negative inference and find his addresss was Suite 104, 1291 97th Street, North Battleford.

[225] Moreover, the record establishes Councillor Jason Chakita also had Facebook conversations with Robin Wuttunee regarding transfer of funds ostensibly for Robin Wuttunee's prison "canteen". [AR 0295-0296, PDF 304-305] Again, it is admitted and I accept that Robin Wuttunee's side of these conversations were made by Heather Wuttunee to whom he gave his Facebook passcodes and instructions. Some of theses Facebook conversations include:

> Robin Wuttunee: It's been two weeks I'm still waiting for 60$.
>
> Jason Chakita: I feel you I ain't got not cash so your going to have to keep waiting until I get cash
>
> Robin Wuttunee: What's up
>
> Robin Wuttunee: Robin wants to know if u can drop any cash off by Tuesday night for canteen
>
> Jason Chakita: Trusttransfers.ca
>
> Robin Wuttunee: Ya slap some cash in there bro
>
> Jason Chakita: 3067133437
>
> Robin Wuttunee: What's the chiefs number Robin wants to know if u guys sent anything for his phone

[226] While the Respondents opposed the admissibility of the recordings and their transcripts, which objection I found without merit at para 205 and following (Part V.C. (1)(a)), in the alternative the Respondents submit the messages were made in passing regarding Robin Wuttunee's Mail-in Ballot. At RR 0882, PDF 887, line 13 of his cross-examination Robin Wuttunee states he was not "selling his vote" and that he wanted to vote lawfully:

10 Q. Okay. And it's your intention not to sell
11 your ballot. Your intention is to vote
12 lawfully --
13 A. Mmhmm.

[227] The Applicants submit and I find on a balance of probabilities that the first message between Robin Wuttunee and Chief Wuttunee on February 22, 2020, was Robin Wuttunee offering to sell his Mail-in Ballot to Chief Wuttunee. Thereafter Robin Wuttunee asked Chief Wuttunee to get his Mail-in Ballot. On March 3, 2020, the following Facebook messages are recorded: [AR 0289, PDF 0298]

> Clinton R Wuttunee: U want me to send for your ballot ? It's not in system yet so u r not getting one
>
> Robin D Wuttunee: Ok send that an noone sent nothing
>
> Clinton R Wuttunee: Ok what address u want me to use?

(b) Exchange of lists between Chief Wuttunee and Mr Ratte of electors with whose requests for Mail-in Ballots were accepted or not

[228] The Applicants submit and I find on a balance of probabilities that Chief Wuttunee knew Mr Ratte had not yet received a Request for Mail-in Ballot from Robin Wuttunee because it was not in Mr Ratte's mail-in ballot "system". Mr Ratte testified (and the parties do not dispute) it was not proper for Mr Ratte to advise candidates which electors had requested a Mail-in Ballot [AR 0933, PDF 0942]. However, I find on a balance of probabilities that Mr Ratte or someone in his election office did provide Chief Wuttunee or someone in his office with a list or lists at

various times of electors who had submitted Requests for Mail-in Ballot (see para 243). The pertinent text messages start at AR 4328, PDF 4337.

[229] The Respondents other than Mr Ratte submit the texts between Chief Wuttunee and Mr Ratte "indicate they were not discussing an improper sharing of information, rather they were seeking to confirm that the 5-D forms which were sent, were proper and appropriately received for the intended elector." In my view, this observation is without merit; Mr Ratte was clear he and his staff could only supply numbers, not names of individuals whose Requests for Mail in Ballots were accepted or not. Mr Ratte did not advance any exception of this type the Respondents now allege. If Chief Wuttunee or other Respondents had evidence of an exception, they should have put it in evidence. Instead, both Mr Ratte and Chief Wuttunee generally refused to answer questions on the text messages found on Mr Ratte's cell phone (see AR 1383, PDF 1392).

[230] Notably also, Chief Wuttunee texted to Mr Ratte "I will erase these texts" to which Mr Ratte replied "Yes please do" [AR 4352, PDF 4361] at the end of this text conversation.

[231] The Applicants correctly note that when cross-examined on this issue [see starting at AR 0970, PDF 0979], Mr Ratte ended his cross-examination. The Respondents say the reference to "erasing the texts" refers to the photographs of Request for Mail-in Ballots that did not come through correctly from Chief Wuttunee's phone to Mr Ratte's phone (both phones ultimately stopped working). The Respondents also say Chief Wuttunee's phone broke down which is why

the Respondents began using Gary Nicotine's phone (and the cell phones of others) to forward Requests for Mail-in Ballots.

[232] My difficulty with these assertions – supplied by Respondents' counsel (not counsel for Mr Ratte) - after Mr Ratte's cross-examination ended is that if true they could and should have been provided by Mr Ratte himself before his cross-examination ended, potentially by redirect or by answering questions relating to his own reply to undertakings: MAY 18, 2021 RTU. Had Mr Ratte done that, these unsworn suggestions from Respondents' counsel could have been properly tested if needed. However, Mr Ratte generally and with an exception declined to answer questions on the photo text messages based on objections to questions arising out of his own May 18, 2021 RTU. I am further unable to accept the submissions of Respondents' counsel because they are not in evidence when they could have been.

[233] At this point I note I have ruled the photo text messages exchanged between Mr Ratte and various of the Respondents as set out in Tabs 252 to 260 of the Applicants' Record are admissible evidence in this proceeding: see discussion at para 110 (Part IV C. (3)(b)) and following. In this connection I also found the Respondents, their supporters and Mr Ratte were all obliged to answer questions related to these text messages from Mr Ratte's cell phone and supplied by and with his consent in his May 18, 2021 RTU.

[234] That said, at the start of Mr Ratte's October 4, 2021 cross-examination, his counsel stated Mr Ratte would refuse to answer questions related to Mr Ratte's May 18, 2021 RTU unless they related to Mr Ratte's Affidavit of July 23, 2021: [AR 0893, AR 0902]

6 MR. ISFELD: [counsel for Mr. Ratte, ed.] Yeah. Okay. So the – this

7 isn't a -- a cross-examination on the

8 undertakings; I want to be clear. This is to

9 do with his July 23rd -- sorry, July 23rd

10 affidavit, okay?

11 MR. XIAO-PHILLIPS: [counsel for the Applicants] We -- we're just going to take

12 it question by question. I don't think that

13 there will be a contentious issue that arise,

14 but we'll take it question by question, okay?

15 MR. ISFELD: I'll just let you know, he's

16 not going to be answering questions on this

17 Reply to Undertakings unless they relate

18 directly to his affidavit here, okay?

19 MR. XIAO-PHILLIPS: Like I said, I don't think

20 it's going to be contentious.

21 MR. ISFELD: Okay.

22 MR. XIAO-PHILLIPS: I will simply go question by

23 question.

24 MR. ISFELD: Okay.

[Emphasis added]

[235] Thereafter, Mr Ratte refused, with one exception, to answer questions related to his May 18, 2021 RTU, and after being asked a number of times by counsel for the Applicants, and after

his counsel had warned several times, the October 4, 2021 cross-examination was terminated by Mr Ratte and his counsel.

[236] As counsel for Mr Ratte points out in his Memorandum, there was one exception. Mr Ratte testified it would be improper for him to provide candidates with lists identifying electors who had not filed acceptable or unacceptable Request for Mail-in Ballots. However, such sharing appears to have taken place, at least based on text messages between Mr Ratte and Chief Wuttunee. These text messages were supplied by Mr Ratte from his cell phone in his May 18, 2021 RTU.

[237] In cross-examination Mr Ratte said it would not be appropriate for him to provide candidates with the specific names of eligible electors who had made Requests for Mail-in Ballots, and that he had provided such names to Chief Wuttunee or the other candidates:

> Q. But this list that was publicly available
> certainly did not include who had already
> submitted a request for mail-in ballot to you
> in your capacity as Electoral Officer,
> correct?
> A. No, it did not. It did not. No. It
> wouldn't have.
> Q. Because that's private information;
> inappropriate to provide to candidates, for
> example.
> A. Well, the name -- the names only list is

what's -- legally I'm allowed to release; post it publicly.

Q. And you can't -- and you can't release anything else?

A. No. No.

Q. Including whether or not a voter had submitted a request for mail-in ballot to you?

A. I'm not sure how to answer that one. Now, are -- are we getting into the Form Ds, Nathan, and how that all works, kind of relevant to my email?

…

Q. Yeah. Request for mail-in ballot forms. So you can't release to a candidate a list of electors in relation to whom you had already received a request for mail-in ballot form, correct?

A. Well, I wouldn't -- I wouldn't release -- release the -- the information. As you -- as you're well of, we -- we -- it's redacted, right; treaty numbers and -- and addresses and stuff. When we're talking about numbers and -- I guess, you're referring to -- to the text, the Form 5D, which I've

submitted in my affidavit, is readily available for anyone to distribute. If you're an elector, it's your prerogative if somebody wants to give it to you and -- there's no -- there's no one method on how it gets back to me. So I'm not sure where to go with this, but -- John? Or, I don't know.

Q. I just want to be clear, Burke --

A. Yeah.

Q. -- this information that is appropriate or lawful to give to candidates in the election, it does not include whether or not a particular elector has submitted a request for mail-in ballot to you, correct?

A. Well, no. You don't want to -- you don't want to release names specifically. You know, Nathan sent me a Form 5D, and so-and-so did not. Or -- and I don't see that in these -- these text messages that, I guess, you're still trying to introduce into the questioning here, but I'm not sure. I'm not sure. I don't know. I'm doing the best I can here.

[238] The importance of this line of questioning lies in the fact the text messages between Mr Ratte and Chief Wuttunee [AR 4343-4352, PDF 4352-4361] reproduced in Mr Ratte's May 18, 2021 RTU reveal Mr Ratte, or possibly Mr Ratte through Debra Laliberty (his Deputy Electoral Officer, appointed and supervised by Mr Ratte) might in fact have sent Chief Wuttunee a list or lists naming electors with accepted and not accepted Requests for Mail-in Ballots. The following text messages were also recovered from Mr Ratte's cell phone: [AR 4343-4352, PDF 4352-4361]

> Chief Wuttunee: Good morning Burke. Upon review of the mailing list sent to us by Debra we have found that many of the addresses submitted by team are not on the list. We have 433 addresses that have been submitted, but when we cross reference these addresses we can only fins 324 addresses. This has left 109 addresses that are not matching up. How can we better reference this discrepancy.
>
> Mr Ratte: I'll check as we are closer to 400 according to my record. the others are being held for the following reasons: not on Voters list, incomplete form 5-D or unable to read Documents sent from 5-d.. I'll have it for you soon just getting the mail out in the mail today. thanks, Burke
>
> Chief Wuttunee: Hi Burke I send from I phone but seems like some of my pictures go in blurry
>
> Chief Wuttunee: What is your ph ? Android ?
>
> Mr Ratte: 204-228-4786 my cell
>
> Mr Ratte: iPhone [emoji]
>
> Mr Ratte: We will figure it out
>
> …
>
> Chief Wuttunee: Let me know if these are legible
>
> Mr Ratte: They are good
>
> Mr Ratte: Confirmed
>
> Chief Wuttunee: Ok
>
> …

Mr Ratte: Confirmed

Chief Wuttunee: Gm when can you send the email re missing page and unreadable 5-d

Mr Ratte: Morning just just looking at things right now I'll have it over soon .. sending to Debra

Mr Ratte: I sent Debra the updated list 420 have been finalized to date and processed… I will work with her on the discrepancy ..

Mr Ratte: Also the candidates list to be posted

Mr Ratte: GM

Chief Wuttunee: Ok

…

Mr Ratte: Can this be sent to be via Debra on a file ?

Chief Wuttunee: Burke; after carefully reviewing the material provided these names do not show up on your current list

Chief Wuttunee: Ok

Mr Ratte: Ok send me the spread sheet please

Mr Ratte: I will update ..

Chief Wuttunee: Ok

Mr Ratte: Debra and I will work on it

Mr Ratte: Thanks [emoji]

Chief Wuttunee: 77 is a large number and very important to us

Chief Wuttunee: I will erase these texts

Mr Ratte: It will be updated

Mr Ratte: Yes please do

Chief Wuttunee: Done

Chief Wuttunee: I sent Debra the file via email

[Emphasis added]

[239] I note this text exchange concludes with Chief Wuttunee confirming he will “erase these texts” and Mr Ratte responding “Yes please do”. In my respectful view, these messages suggest Mr Ratte and Chief Wuttunee might have been acting improperly in that Mr Ratte (or someone on his staff) may have been providing Chief Wuttunee with election lists naming electors whose Requests for Mail-in Ballots were accepted, and those whose request were not accepted.

[240] The fact remains Mr Ratte terminated his cross-examination over the objections of the Applicants. It is of concern that one reason for termination was Mr Ratte’s reluctance to, and the advice of his counsel that he not, answer questions related to text messages recovered from his cell phone, as counsel stated at the start of his cross. I also note in his Affidavit of July 23, 2021, Mr Ratte deposed the Election was “held in accordance” with the *FNEA*.

[241] In my view, alleged impropriety in sharing confidential voter information with Chief Wuttunee was a legitimate basis for the Applicants to pursue their cross-examination of Mr Ratte. I come to this conclusion because the principle and central issues in this contestation are contraventions of *FNEA* and or *FNER* and electoral fraud: see *Thibodeau Edmonton*, above at paras 13 and 14 (see above para 151). Witnesses on cross-examination are obliged to answer questions on the principle issues between the parties.

[242] In my respectful view, because his photo text messages were in evidence, the questions concerned a principle issue in this contestation and also flowed from Mr Ratte’s Affidavit, and in the other circumstances as noted at paras 110 and following (see above Part IV. C. (3)(b)), Mr

Ratte should not have objected to being questioned on his photo text messages. He should have allowed the questions to be asked, and he should have answered them.

[243] What then are the consequence for Mr Ratte's refusal to answer relevant questions on the issue of the possibly unlawful provision by him or his staff of lists with the names of First Nation electors whose Requests for Mail in Ballot were accepted and whose were not? I conclude I am entitled to, and do find on a balance of probabilities that Mr Ratte, or someone he was responsible for supervising, did in fact provide Chief Wuttunee or others with Chief Wuttunee's knowledge, with confidential information including a list or lists at various times of the names of electors who had submitted a Requests for Mail-in Ballot and whose were accepted or not. I draw an adverse inference to that effect. I note this objection to answering was one made by his counsel, but this does nor relieve Mr Ratte from this consequence.

(c) Falsification of elector identification documents (ID)

[244] The Applicants submit Chief Wuttunee requested Robin Wuttunee to provide a photograph of his ID to be submitted with his Request for Mail-in Ballot because Robin Wuttunee was incarcerated and unable to send Chief Wuttunee a copy [AR 0292, PDF 0301].

[245] The Applicants say the Respondents or those on their behalf either purported to be Deloris Peyachew (Indian Registry Administrator for Red Pheasant and allegedly under the direct control of Team Clinton) or caused her to issue a forged replacement ID in the name of Robin Wuttunee on March 10, 2020 [AR 4453, PDF 4462].

[246] The Respondents respond by saying the suggestion any of the replacement IDs were "forged" is simply not true. Robin Wuttunee requested his ballot to vote and was unable to share his ID because he was in jail. The persons "who helped him were simply trying to enable him to vote" [Respondents' Memo para 48].

[247] In my view, if Chief Wuttunee had an explanation as to how he obtained a voter ID for Robin Wuttunee, the time to provide it was when being cross-examined or in redirect.

[248] Given the hard evidence of Facebook messages between Chief Wuttunee and Robin Wuttunee (whose messages were made at his direction by Heather Wuttunee), the Applicants submit Chief Wuttunee repeatedly lied under oath when he denied he requested a mail-in ballot for Robin Wuttunee.

[249] There is no doubt and I find the independent documentary photo text messages between Chief Wuttunee and Mr Ratte establish on a balance of probabilities that Chief Wuttunee photo texted Mr Ratte a falsified Request for Mail-in Ballot for Robin Wuttunee. The record shows Chief Wuttunee did this on March 10, 2020, at 8:19 pm [AR 4157-4158, PDF 4166-4167].

[250] I therefore find Chief Wuttunee did not tell the truth at para 27 of his August 28, 2020 Affidavit when he deposed "I was not able to help [Robin Wuttunee] to apply for it. I did not get a mail-in ballot for [Robin Wuttunee]." Chief Wuttunee did not tell the truth during cross-examination when he testified "I didn't send for it" [AR 1314, PDF 1323], "It wasn't me" [AR 1325, PDF 1334], "I never ordered for his ballots…There's no proof there that I ordered for his

ballot" AR 1327, PDF 1336]. I find Chief Wuttunee was not telling the truth when he testified he was not aware the Respondents and their supporters sent in mail-in ballot requests of other electors [AR 1334, PDF 1343]. This last point is also contrary to Chief Wuttunee's assertion (through his counsel) that the other Respondents started to send requests for mail in ballots directly to Mr Ratte when his (Chief Wuttunee's) cell phone broke down.

[251] The Respondents submit the falsified Robin Wuttunee's Request for Mail-in Ballot was not "fraudulent" because it was made at the urging of Robin Wuttunee. They also allege it is reasonable to assume Chief Wuttunee did not know he had sent it given the "hectic" nature of an election campaign and all the demands on his time.

[252] I do not accept these submissions. I was pointed to no authority in the *FNEA* or *FNER* allowing anyone other than an elector to sign a Request for Mail-in Ballot (as opposed to a Mail-in Ballot itself). In addition, Chief Wuttunee's argument is contradicted by the text message revealing he in fact sent Robin Wuttunee's Request for Mail-in Ballot to Mr Ratte. Moreover, the "hectic" argument is counsel's after the fact submission. It is not in evidence where it certainly could and should have been (if true) but for the fact Chief Wuttunee chose to refuse to answer questions on his photo text messages with Mr Ratte.

[253] I also note Robin Wuttunee's Voter declaration form [AR 0287, PDF 0296] was delivered to Mr Ratte via mail [the envelope it was sent in is at AR 3758-3761, PDF 3767-3770]. Mr Ratte confirmed in cross that Robin Wuttunee's Mail-in Ballot was accepted and placed in the ballot box [AR 0821, PDF 0830, starting at line 13].

[254] Importantly, what I find is the forged (someone else signed Robin Wuttunee's name to it and obtained what may be a falsified ID) Request for Mail-in Ballot submitted by Chief Wuttunee, also falsely provided an incorrect address for Robin Wuttunee, namely 1291 97th Street, apartment 104, in North Battleford. However, Robin Wuttunee does not know whose address that is and did not give it to anyone, see para 23 of his Affidavit. Mr Ratte confirmed he delivered Robin Wuttunee's mail-in ballot to that address.

[255] Notably this is the address of Leroy Nicotine Jr., who is involved in other instances of serious electoral fraud where mail-in ballots were sent to his address instead of to the electors who purportedly requested them. Specifically Leroy Nicotine Jr.'s address was falsely used as the address on the Voter Declaration forms of Breanna Wahobin [AR 3445, PDF 3454], Romellow Meechance [AR 3707, PDF 3716], Paul Tobaccojuice [AR 3757, PDF 3766], and Michael Ernest Stevens [AR 3444, PDF 3453], each signed by Leroy Nicotine Jr. as witness giving that address. I note Leroy Nicotine Jr. refused to answer questions in relation to the Mail-in Ballot of Robin Wuttunee, including whether Leroy Nicotine Jr. ever possessed Robin Wuttunee's Mail-in Ballot: [AR 2703-2717, PDF 2712-2726]. Leroy Nicotine Jr. also refused to answer questions during cross-examination about whether he was ever the tenant of the address in question [AR 2687, PDF 2696], and whether it was his signature [AR 2689-2690, PDF 2698-2699]. In these circumstances, given his refusal to answer relevant questions, I draw a negative inference and find on a balance of probabilities that Leroy Nicotine Jr.'s address was 1291 97th Street, apartment 104, in North Battleford. This after all is the address Leroy Nicotine Jr. himself gave on the four Voter Declaration forms just mentioned.

[256] The Respondents say there is no evidence Leroy Nicotine Jr. had possession of Robin Wuttunee's ballot. The Respondents submit the evidence is that Robin Wuttunee's ballot was placed into the ballot box and the ballot was something he needed his sister to procure. Robin Wuttunee agrees Heather Wuttunee was doing all of his text and Facebook communicating with people on his behalf [RR 856, PDF 861].

[257] Notwithstanding the Respondents' submissions, I find on a balance of probabilities that Leroy Nicotine Jr. obtained Robin Wuttunee's Mail-in Ballot because it went to his address. I draw a further adverse inference from his refusal to answer relevant questions about his address that Leroy Nicotine Jr. gave Robin Wuttunee's Mail-in Ballot to Shelley Wuttunee (wife of Councillor Shawn Wuttunee). In her Affidavit and during cross-examination, Shelley Wuttunee admits she signed as witness to the execution of Robin Wuttunee's Mail-in Ballot Voter Declaration form on March 17, 2020. Shelley Wuttunee further admitted Robin Wuttunee was not with her when she purported to sign as witness. [RR 0152-0153, PDF 0157-0158, para 4-5]

[258] In addition, Shelly Wuttunee admitted she signed several other Voter Declaration forms in relation to the Election, but later repeatedly refused to say how many she had "witnessed" without the elector being present. Also of concern to the integrity of the Election, Shelley Wuttunee testified this was an acceptable practice to her [AR 1563-1564, PDF 1572-1573]. With respect, this was not an innocent mistake by Shelley Wuttunee: she testified she knew it was a requirement that the elector must be present with her when she signed as a witness on the Voter Declaration form [AR 1560, PDF 1569]. The Respondents submit Shelley Wuttunee was "very emotional because she was subjected to a long, accusatory and acrimonious cross-examination"

and Shelley Wuttunee's evidence was that she signed the 5-D form brought to her by Robin Wuttunee's girlfriend.

[259] In this regard the Respondents rely on sections 15 and 17(2) of the *FNER* to submit there was nothing illegal with the steps taken to assist Robin Wuttunee secure his mail-in ballot so he might vote:

Mail-in ballot	**Demande de bulletin de vote postal**
15 An elector who wants to receive a mail-in ballot must make a written request to the electoral officer that includes a copy of their proof of identity.	**15** L'électeur qui désire obtenir un bulletin de vote postal présente au président d'élection une demande écrite accompagnée de la copie d'une preuve d'identité.
Assistance of another person	**Assistance**
17(2) If an elector is unable to vote in the manner set out in subsection (1), the elector may enlist the assistance of another person.	**17(2)** L'électeur qui est incapable de voter de la manière prévue au paragraphe (1) peut demander l'assistance d'une personne.

[260] The difficulty with this argument is that subsection 17(2) of *FNER* applies to Voter Declaration forms sent with a Mail-in Ballot. It does not apply to a Request for a Mail-in Ballot. If and to the extent the Respondents and Leroy Nicotine Jr. are arguing it was proper for someone to mark and sign Robin Wuttunee's Mail-in Ballot and Voter Declaration form, sections 15 and 17(2) do not assist. While 17(2) allows an elector to have his or her ballot prepared with the assistance of another person, subsection 5(6) of the *FNER* states the Voter Declaration form must "be signed by a witness that attests to the fact that the elector is the person

whose name is set out in the form and that the ballot was marked in the manner directed by the elector". There is no such attestation on Robin Wuttunee's Voter Declaration form:

Witness	**Témoin d'une personne incapable**
5(6) The voter declaration form of the elector who enlisted the assistance of another person under subsection 17(2) must be signed by a witness that attests to the fact that the elector is the person whose name is set out in the form and that the ballot was marked in the manner directed by the elector.	**5(6)** Dans la cas d'une personne qui demande l'assistance d'une personne pour voter en vertu du paragraphe 17(2), la déclaration d'identité de l'électeur est signée par un témoin qui atteste que le bulletin de vote a été marqué selon les instructions de l'électeur et que cet électeur est celui dont le nom figure sur le formulaire.
[Emphasis added]	[Je souligne]

[261] Moreover, and in any event, I am not satisfied Robin Wuttunee enlisted the assistance of Shelley Wuttunee. Not only is there no attestation per subsection 5(6) of *FNER*, but at RR 0889 PDF 0894, Robin Wuttunee testified if someone brought his Mail-in Ballot to Shelley Wuttunee to sign on his behalf, that would not have been OK with him.

[262] I also conclude that Shelley Wuttunee committed electoral fraud in purporting to be a witness on Robin Wuttunee's Voter Declaration form when in fact she did not witness his signature. I understand this might be a relatively minor matter if it was once and if she knew the elector. However the record establishes she persistently refused to say how many times she falsely purported to be a witness on Voter Declaration forms:

20 Q. Ms. Wuttunee, did you sign voter declaration

forms?
A. I'm not answering that.
…
Q. Your lawyer just suggested the question to pose. He just implicitly conceded the propriety of the question. I am posing the question to you, Ms. Wuttunee, and I think the Court deserves an answer. Ms. Wuttunee, did you sign voter declaration forms in the course of the March 20th --
A. I'm not answering that. You can ask me that over and over again. I'm not answering it.
…
Q. Ms. Wuttunee, did you sign voter --
A. I'm not answering that. You can ask me that over and over again; I'm not going to answer it.
Q. Let the record reflect that the witness is raising her voice now.
…
Q. How many voter declaration forms did you --
A. I'm not answering that. You can ask me that over and over again.
…
MR. PHILLIPS: Mr. Stooshinoff, the

witness already conceded that she signed a lot of voter declaration forms in the course of this election.

MR. STOOSHINOFF: She did not.

MR. PHILLIPS: I would like the Court to be aware of approximately how many.

…

MR. STOOSHINOFF: I'm not obstructing the cross-examination. She's already answered the question, she's given her position, you have recorded it on the record, so move on.

…

Q. Are you objecting on the basis of relevancy, or what is the basis of your objection here, Ms. Wuttunee? Because your lawyer hasn't intervened.

A. Because I'm not answering you, that's why, because they're not on there. I'm not answering you; I'm sorry.

Q. Did you sign more than 50?

A. I'm not answering that. I said it's not on my Affidavit.

…

Q. Ms. Wuttunee, did you sign more than 50 voter declaration forms?

21 A. I'm not answering you. You can ask me that
22 over and over again. I'm not answering you.
23 Q. Ms. Wuttunee, did you sign more than 100
24 voter declaration forms?
25 A. I'm not answering you. You can answer that
1 over and over again, ask me that 100 times.
2 I'm not answering you.

[263] In these circumstances I find on a balance of probabilities that Shelley Wuttunee was directly involved in numerous instances in which she falsely purported to witness Voter Declaration forms submitted with mail-in ballots, thus committing serious electoral fraud.

[264] The Applicants submit Chief Wuttunee paid $300 for Robin Wuttunee's Mail-in Ballot, see paras 8 and 11 of his Affidavit, and that this money is not Band Member Assistance ["BMA"]. In response, Chief Wuttunee denies he paid $300 to Heather Wuttunee for Robin Wuttunee's mail-in ballot. The Respondents say there is no evidence from Heather Wuttunee indicating a transfer of funds occurred.

[265] The Respondents' submission is that Robin Wuttunee simply believes there was a payment of money which however he did not receive. I accept this submission on a balance of probabilities, and do so primarily because there is no corroboration of a payment by Chief Wuttunee to Robin Wuttunee. Heather Wuttunee refused to cooperate from which I infer no money was received by her from Chief Wuttunee for Robin Wuttunee's Request for Mail-in Ballot or Mail-in Ballot.

[266] However, I find on a balance of probabilities that an offer of payment was made to Robin Wuttunee by Councillor Jason Chakita and Councillor Samuel Wuttunee. In this connection, I draw a negative inference from Councillor Jason Chakita's refusal to answer questions related to his telephone conversations with Robin Wuttunee, and his refusal to produce on his cross-examination either CDs or transcripts of his side of the telephone calls he had with Robin Wuttunee in prison, notwithstanding they were required by the Direction to Attend and Produce served by the Applicants. The negative inference is that Councillor Jason Chakita, as well as Councillor Samuel Wuttunee, made Robin Wuttunee an offer to purchase his Request for Mail-in Ballot and the Mail in Ballot itself for $300. The fact it was not paid does not negative the fact this was both an act of serious electoral fraud and a contravention of subsection 16(f) of *FNEA*:

Prohibition — any person	**Interdictions générales**
16 A person must not, in connection with an election,	**16** Nul ne peut, relativement à une élection:
…	…
(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.	**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.

[267] In this connection the Applicants further submit the Respondents contravened numerous provisions of the *FNEA* and *FNER*:

> 95**.** For example, a false name was provided to obtain the mail-in ballot of Robin Wuttunee (*FNEA* s.14(a)), forged ID for Robin Wuttunee was purportedly issued in the name of Deloris Peyachew

> and submitted to Mr. Ratte (*FNER* s.15), Leroy Nicotine Jr., Shelley Wuttunee, and other members of Team Clinton possessed the mail-in ballot of Robin Wuttunee that was not lawfully provided to them (*FNEA* s.14(b)), Clinton Wuttunee, Jason Chakita, Samuel Wuttunee, and other members of Team Clinton purchased the mail-in ballot while Robin Wuttunee sold it to them (*FNEA* s.14(d), s.16(f)), members of Team Clinton voted more than once by in addition to using their personal vote they used the mail-in ballot of Robin Wuttunee (*FNEA* s.17(a)) in relation to which they knowingly used that forged ballot (*FNEA* s.16(a)/(b)/(c)), someone other than Robin Wuttunee fraudulently purported to sign his mail-in ballot voter declaration form (*FNER* s.5(4), s.17(1)(d)), and Shelley Wuttunee purported to witness the execution of the mail-in ballot in the absence of Robin Wuttunee (*FNER* s.5(5)).
>
> 96. Moreover, *FNEA* sections 26 and 27 contain a broad prohibition against intentionally obstructing the electoral officer in the performance of their duties or obstructing the conduct of an election. Causing forged ID to be issued in the name of Deloris Peyachew and submitting same to Mr. Ratte knowing that he would act upon it, forging the request for mail-in ballot of Robin Wuttunee, receiving it at the address of Leroy Nicotine Jr., forgoing the mail-in ballot and having Shelley Wuttunee knowingly purport to witness its execution in the absence of Robin Wuttunee and then submitting it to Mr. Ratte without a doubt contravenes *FNEA* sections 26 and 27.

[268] The Respondents submit overall:

> 159. The Respondents submit that the only breaches of the *FNEA* were made by the Applicants witnesses who compromised their credibility by confessing to lies, deception and criminal acts. Some of the Respondents were implicated but none were complicit in the witness's corruption. The Respondents simply met with prospective voters and tried to assist voters as they were encouraged to do by *ISC*.
>
> 160. If some electors were unable to vote after making questionable ballot requests, then the process worked and their ballots were spoiled. Voters who followed the rules and approached the electoral officer to vote at the polling station were able to vote regardless of whether they tried to "squeeze money" out of candidates at the polling stations.

> 161. There is no undisputed evidence that any of the Respondents tried to buy votes or favours by giving money to electors. The evidence is that there are a few limited instances of needy band members being assisted, which assistance the Applicants try to characterize as corruption.

[269] Analysis: The record establishes and I find on a balance of probabilities that Chief Wuttunee used his personal cell phone to text a forged Request for Mail-in Ballot to Mr Ratte in the name of Robin Wuttunee [AR 0314, PDF 0323] which falsely showed Leroy Nicotine Jr.'s address as Robin Wuttunee's. I find Chief Wuttunee's affidavit evidence and testimony to the contrary to be untruthful. I also find on a balance of probabilities that the forged Mail-in Ballot and Voter Declaration form in Robin Wuttunee's name, falsely witnessed by Shelley Wuttunee also falsely identifying Leroy Nicotine Jr.'s address, was signed and delivered by Shelley Wuttunee to Mr Ratte. From Leroy Nicotine Jr.'s refusal answer questions relating to what I find to be his address, I draw an adverse interest against him and find this was done with the knowledge and consent of Leroy Nicotine Jr.

[270] Given Chief Wuttunee obtained and then photo texted Robin Wuttunee's forged Request for Mail-in Ballot to Mr Ratte, and that Chief Wuttunee knew (Chief Wuttunee exchanged Facebook messages with him) Robin Wuttunee was incarcerated, I find on a balance of probabilities that Chief Wuttunee did so knowing the Request for Mail-in Ballot was forged. I also find on a balance of probabilities that Chief Wuttunee knew Councillors Jason Chakita and Samuel Wuttunee were implicated in buying Robin Wuttunee's vote. I also find on a balance of probabilities that Chief Wuttunee knew Leroy Nicotine Jr. would be and was involved in obtaining Robin Wuttunee's mail-in ballot package given the use of Leroy Nicotine's address.

[271] In the result I conclude on a balance of probabilities that Chief Wuttunee was directly involved in serious electoral fraud (attempted vote buying) in relation to the vote of Robin Wuttunee. I also find Chief Wuttunee was directly involved in a contravention of subsection 16(f) of *FNEA*:

Prohibition — any person	**Interdictions générales**
16 A person must not, in connection with an election,	**16** Nul ne peut, relativement à une élection:
…	…
(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.	**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.

[272] I also find the falsified Voter Declaration form in Robin Wuttunee's name along with his marked ballot [AR 0287, PDF 0296] were on a balance of probabilities, prepared and mailed by or with the knowledge of Leroy Nicotine Jr. after being mailed to Leroy Nicotine's residence, despite Robin Wuttunee in his Affidavit deposing he did not vote or live there [AR 0278, PDF 0287, para 3] and was incarcerated during the Election period. Moreover, Leroy Nicotine Jr. refused to answer questions when he was asked about this particular address during his cross-examination, neither confirming nor denying he was ever the tenant at 1291 97th Street, apartment 104. [AR 2687, PDF 2696], from which I confirm and again draw the negative inference that was his address, which is confirmed by the fact he used it on this and other Voter Declaration forms signed by him. While he did not sign this Voter Declaration form, I find on a balance of probabilities that Leroy Nicotine Jr. knew his address was going to be and had been

used by Mr Ratte to send out the mail-in ballot to Robin Wuttunee. Therefore I find Leroy Nicotine Jr. was directly involved in both serious electoral fraud (attempted vote buying) and a contravention of subsection 16(f) of *FNER*:

Prohibition — any person	**Interdictions générales**
16 A person must not, in connection with an election,	**16** Nul ne peut, relativement à une élection:
…	…
(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.	**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.

[273] The Affidavit of Robin Wuttunee establishes that Councillors Jason Chakita and Samuel Wuttunee had telephone conversations with Robin Wuttunee regarding his mail-in ballot. I have admitted the CDs and transcripts of the telephone calls monitored and recorded by ERC in evidence. The record also establishes Councillor Samuel Wuttunee had conversations with Robin Wuttunee on Facebook about needing his mail-in ballot "blank" ("I need it blank though"). Why would Councillor Samuel Wuttunee want the ballot "blank", except to be marked by Councillor Samuel Wuttunee or someone else with his knowledge, which I also find on a balance of probabilities. [AR 0302-0303, PDF 0311-0312] The record further confirms Councillor Jason Chakita had conversations with Robin Wuttunee via Facebook regarding the transfer of funds for "canteen"; I find on a balance of probabilities the word "canteen" was code for money needed to purchase Robin Wuttunee's vote. [AR 0295, PDF 0304]

[274] Moreover, by accepting the payment, I am satisfied on a balance of probabilities that Robin Wuttunee contravened subsection 17(b) of the *FNEA*:

Prohibition — elector	**Interdictions visant l'électeur**
17 An elector must not, in connection with an election,	**17** Nul électeur ne peut, relativement à une élection:
…	…
(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.	**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.

[275] In coming forward with these accusations Robin Wuttunee was of course admitting he contravened of subsection 17(b) of the *FNEA* and that he committed serious electoral fraud in selling his vote. I caution myself in terms of accepting his evidence in this respect given the unlawful nature of what he did, but maintain my findings based on a balance of probabilities notwithstanding.

(2) Rickell Frenchman and Romellow Meechance

[276] The Applicants allege in their Amended Notice of Application at para 18-19:

> GARY NICTOINE (on behalf of the Participants including himself) engaged in electoral corruption, and in particular vote buying, when he attended to the house of Heather Meechance on Red Pheasant First Nation on or about February 9, 2020, and persuaded and assisted Heather Meechance to forge a request for mail in ballots in relation to each of her niece and nephew, Rickell Frenchman and Romello Meechance, in exchange for which

> GARY NICTOINE (through his agent Rosalie Kelly) provided Heather Meechance $100 through etransfer. While Heather Meechance did not have some of the required information to forge the request for the mail in ballots, GARY NICTOINE already possessed and provided same to assist Heather Meechance in forgoing the said ballots. GARY NICTOINE also offered Heather Meechance and/or her family members $200 for each mail in ballot that was given to GARY NICTOINE.
>
> On February 18, 2020, Heather Meechance received the mail in ballots of Rickell Frenchman and Romello Meechance. GARY NICTOINE and MANDY CUTHAND (on behalf of the Participants including themselves) met with Heather Meechance, got her to purport to be Rickell Frenchman and Romello Meechance and to forge the voter declaration cards, and picked up the said mail ballots, at which time they called CLINTON WUTTUNEE and placed him on speakerphone. CLINTON WUTTUNEE told Heather Meechance that he would send her money in exchange for the mail in ballots. Heather Meechance then waited with GARY NICTOINE and MANDY CUTHAND until she received the etransfer of $400 from CLINTON WUTTUNEE (through his agent Austin Ahenakew), at which time Heather Meechance provided the mail in ballots to GARY NICTOINE and MANDY CUTHAND.

[277] The Respondents allegedly implicated in the electoral fraud surrounding the votes of Rickell Frenchman and Romellow Meechance [Rickell and Romellow, respectively] are Councillor Gary Nicotine, Councillor Mandy Cuthand, and Chief Wuttunee. Chief Financial Officer Austin Ahenakew is also alleged to be implicated. Leroy Nicotine Jr. is also allegedly implicated: para 8 of the Applicants' Memorandum alleges he participated in the forgery of Mail-in Ballots by signing as witness in the absence of the elector.

[278] Rickell and Romellow also were both incarcerated at the time of the Election [AR 0189, PDF 0198, para 2]. The Applicants submit that at the request of Councillor Gary Nicotine, on February 9, 2020, Heather Meechance pretended to be her niece (Rickell Frenchman) and

nephew (Romellow Meechance) and forged their Requests for Mail-in Ballots. In exchange, Councillor Gary Nicotine offered to give Heather Meechance $100. Councillor Gary Nicotine's wife (Rosalie Kelly) paid the $100 e-transfer to Heather Meechance the same day [AR 0199, PDF 0190]. Councillor Gary Nicotine then offered $400 to Heather Meechance for the Mail-in Ballots of Rickell and Romellow when Heather Meechance received them.

[279] Heather Meechance in her Affidavit dated May 1, 2020, deposes when she received the Mail-in Ballots for Rickell and Romellow, Councillors Gary Nicotine and Mandy Cuthand attended her home. In the presence of Councillors Gary Nicotine and Councillor Mandy Cuthand, Heather Meechance deposes she forged the Voter Declaration Forms of both Rickell and Romellow. When she asked about the promised payment ($400), Heather Meechance deposes Councillor Gary Nicotine called Chief Wuttunee, who said he would e-transfer $400 in exchange for the Mail-in Ballots of Rickell and Romellow. Heather Meechance agreed and waited with Councillors Gary Nicotine and Mandy Cuthand until the $400 e-transfer was received. Heather Meechance received the $400 e-transfer from Chief Financial Officer Austin Ahenakew on February 18, 2020, the same day identified on the Voter Declaration Forms of Rickell and Romellow [RR 0009, PDF 0014].

[280] The Respondents say Heather Meechance is "a troubled and addicted person" and that they "believe" she falsely characterized the purpose for the payment. Partly based on these stereotypes, they allege she should not be believed. The Respondents submit Heather Meechance was provided with $400 in BMA and that Councillor Gary Nicotine also bought her groceries. The grocery list Heather Meechance provided Councillor Gary Nicotine is said to be located in

the Respondents' Correspondence to the Court dated September 13, 2021 (in response to Clause 4 of Justice Aylen's Order dated August 30, 2021) at pages 30-33. The Respondents do not explain why it was not produced earlier.

[281] Chief Financial Officer Austin Ahenakew in his Affidavit deposes he received a directive from Cody Benson (Band Manager) to transfer BMA payment to Heather Meechance. Chief Financial Officer Austin Ahenakew points to an iMessage exchange at Exhibit A of his Affidavit to prove the $400 e-transfer was BMA [RR 0007, PDF 0012]; however, the iMessage exchange with Band Manager Cody Benson is not time stamped and lacks detail connecting this payment to BMA:

> Cody Benson: [email address of Heather Meechance deleted by the Court]
>
> Cody Benson: 400
>
> Austin Ahenakew: Sent. Plus rooms are booked

[282] The e-transfer receipt from Chief Financial Officer Austin Ahenakew indicates he caused the First Nation to transfer $400 to Heather Meechance on February 18, 2020. Exhibit "B" to his Affidavit is a copy of an e-transfer receipt to Mr Ahenakew advising the First Nation's transfer to Heather Meechance was deposited, stating: "Message: Bma" [RR 0009, PDF 0014].

[283] However, Chief Wuttunee in cross-examination [AR 4013, PDF 4022] states there are proper forms and documentation filed when BMA is provided. Chief Financial Officer Austin Ahenakew in his cross-examination on January 7-8, 2021 conceded that while he had looked for documentation to support the legitimacy of the alleged $400 BMA payment to Heather

Meechance, he could not locate any [AR 2340, PDF 2349]. Despite Chief Financial Officer Austin Ahenakew's concession, the Respondents' Correspondence to the Court dated September 13, 2021 (in response to Clause 4 of Justice Aylen's Order dated August 30, 2021) at page 24 contains (for the first time) an invoice to Red Pheasant Cree Nation entitled "Invoice for Expenses paid for RPCN". This document indicates that on February 20, 2020, Heather Meechance was paid a total of $400 and is indicated as "5025 Assistance – Financial".

[284] Notably, the material submitted by the Respondents September 13, 2021, does not offer any explanation why this alleged invoice was not provided over a year earlier when Chief Financial Officer Austin Ahenakew filed his Affidavit dated August 28, 2020. It was then that he filed the e-transfer note discussed above. There is also no explanation why this document was not discovered back in August 2020 when it was looked for. I also note the delay in filing effectively prevented cross-examination on this point. Given this, given the absence of any official documentation to support the $400 as BMA in August 28, 2020, given the assertion again on his cross-examination January 7 and 8, 2021 that the Chief Financial Officer Austin Ahenakew couldn't find any official documents regarding this alleged BMA, given this First Nation should have records of legitimate BMA payments, and the absence of a satisfactory explanation for the fact no records were kept for this transaction, I find on a balance of probabilities that the $400 payment was not for BMA but was to purchase the votes of both Romellow and Rickell with First Nation's money. In this respect, I note First Nations money was also used to purchase the vote of Paul Tobaccojuice. In that instance as here I find on a balance of probabilities that this was not a genuine BMA payment.

[285] Councillor Gary Nicotine in his Affidavit deposes his wife (Rosalie Kelly) also sent $100 to Heather Meechance for food for her children. At para 14 of his Affidavit, Gary Nicotine deposes "I did not ask Heather to forge any documents and I deny any money was given to Heather as payment to 'forge documents'". However, the Respondents' Correspondence to the Court dated September 13, 2021 (in response to Clause 4 of Justice Aylen's Order dated August 30, 2021) at page 28 reveals the following exchange via Facebook messages:

> Heather on Feb. 9, 2020 at 11:43 A.M.:
>
> Good morning I got those papers filled out just need their treaty number n to find Frenchman or meechance
>
> For romellow
>
> Gary:
>
> Your not going to go in and vote?
>
> Heather:
>
> I'm going to go vote lol just got these papers filled out for rickell n romellow
>
> [Emphasis added]

[286] In these circumstances, I find on a balance of probabilities that Councillor Gary Nicotine knew Heather Meechance was completing false Requests for Mail-in Ballots for Rickell and Romellow.

[287] Deloris Peyachew (Indian Registry Administrator) issued replacement IDs for each of Rickell and Romellow [AR 3706 & 3696, PDF 3715 & 3705]. Rickell's Request for Mail-in Ballot is at AR 3695, PDF 3704, Romellow's Request for Mail-in Ballot is at AR 3705, PDF 3714, Rickell's Voter Declaration Form is at AR 3695, PDF 3706, and Romellow's Voter

Declaration Form is at AR 3707, 3716. Romellow's Voter Declaration is signed by Leroy Nicotine Jr. and Rickell's Voter Declaration is signed by Councillor Mandy Cuthand – both impossibilities given these electors were incarcerated. Councillor Mandy Cuthand deposes in his Affidavit at para 5 that he had no contact with Heather Meechance as she alleges because he was bed ridden for the entire month leading up to the Election and for a period of time following the Election.

[288] The Respondents submit that in his cross-examination, Councillor Mandy Cuthand "did not unequivocally accept that he was aware of the document [the Voter Declaration Form with his signature ed.] or that he had signed the document", pointing to the following exchange [AR 1006-1007, PDF 1015-1016]. With respect I find no merit in this submission which is highly tenuous and in my view not supported by the record:

25 Q. Very good. We'll move on, then. Mr.
1 Cuthand, this is your name, again? This is a
2 new document here. Can you please confirm
3 that's your name?
4 A. Yes.
5 Q. That's your signature?
6 A. Yes.
7 Q. You signed this document?
8 A. It looks like it -- huh?
9 Q. You signed this document?
10 A. I was a witness.
11 Q. You signed this document, right?

A. Yes.
Q. You signed this document on February 18th, 2020?
A. February 18, I can't recall the date, like, but must have signed it as a witness.
Q. But you recall --
A. I'm a witness on it.
Q. You recall specifically signing this document?
A. Why are you bringing these up when I'm supposed to be talking about any Affidavit?
Q. Mr. Cuthand --
A. I'm not answering anymore questions because I want to go on with my Affidavit.

[Emphasis added]

[289] The Respondents submit Councillor Mandy Cuthand did not recall signing that document. They say "it is no stretch to consider whether Heather Meechance had forged Councillor Mandy Cuthand's signature as well as the ones she has already confessed to forging." However, in addition to the above, at his cross-examination, Councillor Mandy Cuthand confirmed his signature and that he signed Exhibit A-12 [AR 3297, PDF 3306] which is Rickell's Voter Declaration form. But when counsel for the Applicants started to question him about his signature in relation to Rickell's Mail-in Ballot, Councillor Mandy Cuthand refused to answer questions: [AR 1009-1010, PDF 1018-1019]:

Q. Exhibit A-12 that the witness just confirmed that he signed, that's his name, and that's his signature. He's not sure if it was on February 18th or not.
Is that correct, sir?
A. I just told you I'm not answering anything except my Affidavit. It doesn't say nothing about anything like this. I'm just answering my Affidavit.
Q. Mr. Cuthand --
A. No, no, I'm not answering anything to do with the screen. I'm here to answer my Affidavit.
Q. Mr. Cuthand, do you see that this is the voter declaration form that purports to be in relation to Rickell Frenchman?
A. I just told you, I'm not answering anything except for what's on my Affidavit.
Q. Mr. Cuthand, this is what purports to be a voter declaration form in relation to Rickell Frenchman. You see that on the screen, correct, sir?
A. I'm just telling you I'm not answering nothing except my Affidavit. I was brought here for the Affidavit, and I'm trying to wait for my questions on what's going on

22 here. Can you answer --
23 Q. You have confirmed that --
24 A. I'm only answering my Affidavit.

[290] As noted already, the proposition that a witness being cross-examined is not required to answer questions on information not in his or her affidavit has been rejected in this Court's jurisprudence as confirmed in *Thibodeau Edmonton* at paras 14, where it is stated "a person may be cross-examined on documents relevant to the determination of the issue even if those documents are not mentioned in the affidavit filed (*Sierra* at para 9)." See above at paras 151 and following (Part IV. C. (3)(b)(i)).

[291] The Request for Mail-in Ballot and the Voter Declaration Forms of both Rickell and Romellow identify Heather Meechance's locked post office box and her phone number [AR 1888, PDF 1897]. Mr Ratte testified he delivered the Mail-in Ballots for Rickell, Romellow and Heather Meechance to the same post office box [AR 0797, 0827-0828, PDF 0806, 0836-0837]. The only person with access to that locked post office box was Heather Meechance [AR 1888, PDF 1897, line 20-23]. I agree with the Applicants it is not physically possible for these Mail-in Ballots to have been returned to Mr Ratte unless Heather Meechance collected them from her locked post office box. The Respondents however, submit the use of these documents cannot be attributed to the Respondents.

[292] Analysis: In my respectful view, the record establishes and I find on a balance of probabilities that Councillor Gary Nicotine knew Heather Meechance forged Rickell and Romellow's Requests for Mail-in Ballot. Moreover, Councillor Mandy Cuthand was directly

involved in this serious electoral fraud in that Counsellor Mandy Cuthand falsely witnessed Rickell's Voter Declaration form. I also find Leroy Nicotine Jr. falsely signed as witness to Romellow's Voter Declaration form, constituting serious electoral fraud. Neither was possible because both were incarcerated. Therefore, I find Mandy Cuthand's actions constitute serious electoral fraud, in relation to which I find Councillor Gary Nicotine was directly involved. I find Leroy Nicotine Jr. thereby committed serious electoral fraud in relation to vote buying concerning Romellow Meechance.

[293] As noted above, while I find this First Nation paid Heather Meechance $400, I am not satisfied that payment was BMA. I find on a balance of probabilities that the $400 in First Nations funds paid to Heather Meechance was for her to forge the Requests for Mail-in Ballots and Voter Declaration forms of both Romellow and Rickell. This is the evidence of Heather Meechance which I accept.

[294] Regarding the actions of Councillor Mandy Cuthand, I have drawn an adverse inference against him because of his reluctance to answer questions related to his signature on Rickell's Mail-in Ballot Voter Declaration form. I also note Councillor Mandy Cuthand deposed in his Affidavit that he had no contact with Heather Meechance as she alleges because he was bed ridden for the entire month leading up to the Election and for a period of time following the Election. Yet Councillor Mandy Cuthand falsely signed Rickell's Request for Mail-in Ballot as witness on February 18, 2020. I find this inconsistency gravely telling against Councillor Mandy Cuthand.

[295] I find on a balance of probabilities the Applicants have established that Councillor Mandy Cuthand committed serious electoral fraud by falsely signing as witness on Rickell's Voter Declaration form. I would also find the Applicants established on a balance of probabilities that Leroy Nicotine Jr. committed serious electoral fraud by falsely signing as witness on Romellow's Voter Declaration form.

[296] I also find on a balance of probabilities that Councillor Gary Nicotine was directly involved in and committed serious electoral fraud in that he knew and approved Heather Meechance forging the Requests for Mail-in Ballots of both Romellow and Rickell, and knew of and approved Heather Meechance forging Voter Declaration forms for both Romellow and Rickell, and that he knew these Voter Declaration forms were falsely witnessed by Leroy Nicotine Jr. and Councillor Mandy Cuthand.

[297] In terms of Chief Wuttunee's direct involvement in this matter, Heather Meechance deposed:

> 9. When I asked about the promised payment, in my presence Gary Nicotine called the Repsondent Clinton Wuttunee and placed him on speakerphone. Clinton Wuttunee sounded busy, however he spoke with Gary Nicotine and Mandy Cuthand who informed him that I was present and that they were busy as they had other voters lining up outside their van to also sell their mail-in ballots. Gary Nicotine and Mandy Cuthand were listening to the speakerphone when Clinton Wuttunee told me that he would send me an e-transfer for $400 in exchange for the mail-in ballots of Rickell Frenchman and Romello Meechance. I agreed, however I did not trust him and requested payment prior to handing over the mail-in ballots. I therefore waited with Gary Nicotine and Mandy Cuthnad until the $400 e-transfer was received, at which time I provided the blank mail-in ballots and forged Voter Declarations for Rickell Frenchmen and Romello Meechance to Gary Nicotine and Mandy Cuthand.

[298] With respect, and notwithstanding the Respondents' attacks on her character and difficult life, I accept the evidence of Heather Meechance. Her evidence is detailed. It is not disputed funds were paid and paid quickly. Her evidence is consistent with the facts that both the Requests for Mail-in Ballots and Voter Declarations forms were successfully forged, and importantly, the former were mailed to her post office box to which she alone had access.

[299] I agree with the Respondents that Heather Meechance through her evidence confessed to serious electoral fraud in making these accusations, but I am unable to rule out her narrative on that basis.

[300] Based on the above I find on a balance of probabilities Chief Wuttunee was directly involved and knew of and sanctioned not only Heather Meechance forging the Requests for Mail-in Ballot for both Rickell and Romellow but her forging the Voter Declarations for Rickell and Romellow as well. I also find Chief Wuttunee knew and approved the payment of First Nation funds to Heather Meechance under the guise of BMA as stated in Heather Meechance's affidavit. In the result I am satisfied on a balance of probabilities that Chief Wuttunee was directly involved in serious electoral fraud.

[301] Turning to Heather Meechance, I accept this evidence and find on a balance of probabilities that she was paid $100 to forge the Requests for Mail-in Ballot for both Rickell and Romellow, and a further $400 to forge the Voter Declaration forms for both Rickell and Romellow. I find on a balance of probabilities she did both and was paid for both. Otherwise there is little if any reason for her to do what she did. I reject the recently proffered grocery list

and purported band internal payment document because neither came to Court under oath when they could and should have, and the lack of a sufficient explanation why they were not presented more than a year earlier when they could and should have been.

[302] The Respondents in written and oral argument submit Heather Meechance, if her narrative is accepted, admits she contravened the *FNEA* in forging both Rickell and Romellow's Requests for Mail-in Ballots, had them delivered to a false address namely her own post office box, and then forged their Voter Declaration forms. I agree. I find these actions establish Heather Meechance's direct involvement in serious electoral fraud. I caution myself in this regard recognizing the unlawful nature of Heather Meechance's conduct, but maintain my findings on a balance of probabilities.

(3) Breanna Wahobin and Jerette Wahobin

[303] The Applicants allege in their Amended Notice of Application at para 20:

> GARY NICTOINE (on behalf of the Participants including himself) engaged in electoral corruption, and in particular vote buying, when on March 5, 2020, he offered to purchase the mail in ballot of Breanna Wahobin ($50 when the request for mail in ballot was sent, and $300 upon receipt of the purchased ballot) and then on March 10, 2020, he in fact purchased the mail in of ballot of Breanna Wahobin for ~~$300~~ $350, and the mail-in ballot of Jerette Wahobin for $350.

[304] The Respondent allegedly implicated in the corruption surrounding the votes of Breanna Wahobin and Jerette Wahobin [Breanna and Jerette, respectively] is Councillor Gary Nicotine. Leroy Nicotine Jr. is also allegedly implicated: para 8 of the Applicants' Memorandum alleges

he participated in the forgery of Mail-in Ballots by signing as witness in the absence of the elector.

[305] In response to the Affidavit of Breanna Wahobin, the Respondents rely on the Affidavit of Councillor Gary Nicotine.

[306] Breanna deposes in her Affidavit at paras 5-9 that after instructing her by text message, a copy of which she exhibited in her Affidavit [AR 0215, PDF 0224], not to mark her Mail-in Ballot ("don't mark anything"), Councillor Gary Nicotine met with her and purchased the Mail-in Ballots of Breanna and Jerette for $350 each in cash. The text messages state:

> "Ok 30 minute <u>don't mark anything</u>"
>
> "I need the address"
>
> "Come outside"
>
> [AR215, PDF0224]
>
> [Emphasis added]

[307] In contrast, Councillor Gary Nicotine denies paying $350 to Breanna and Jerette for their ballots and at paragraph 26 of his affidavit he deposes how unbelievable it is that he would ever try to "buy the vote" of someone who has such a long history of very public animosity towards him and the Chief and Council [RR 0064, PDF 0069].

[308] The Applicants submit Councillor Gary Nicotine gave confusing and contradictory evidence on cross-examination within AR Tabs 79-80. They submit, and Councillor Gary Nicotine admitted his memory is generally not accurate, and he suffered a traumatic brain injury

that especially affects his memory. Therefore the Applicants say his testimony is not credible and should be rejected [AR 1921-19222, 1931-1932, PDF 1930-1931, 1940-1941]. Councillor Gary Nicotine further testified he did not know whether Jerette (Breanna's brother) finished his Request for Mail-in Ballot [AR 2011, PDF 2020], and that he did not know how Breanna's Request for Mail-in Ballot got to Mr Ratte [AR 1978-1979, PDF 1987-1988].

[309] However, I find and prefer the independent documentary evidence which directly conflicts with that of Councillor Gary Nicotine because among the 164 Requests for Mail-in Ballots submitted by Councillor Gary Nicotine to Mr Ratte recovered from Mr Ratte's cell phone, are those of both Breanna and Jerette [AR 4573 and 4580, PDF 4582 and 4589].

[310] The Respondents submit that Breanna's "cross-examination leaves the impression that she is very unhappy with and opposed to the Chief and Council because she and her husband wanted a house on reserve and couldn't get one." I find this unconvincing. The Respondents further submit the documentation relied on by the Applicants has not been admitted into evidence. I have rejected that submission in that the documentation in question was supplied by Mr Ratte in his Reply to Undertakings of May 18, 2021; see discussion above at paras 110 and following.

[311] The Respondents submit that when Breanna was questioned about rumours of individuals allegedly "driving the Applicants' appeal had paid several of the Applicants' witnesses for their evidence", Breanna admitted she suddenly had cash to buy expensive toys. However, she refused to disclose where the money came from, notwithstanding she also admitted asking Councillors

for money before and after the Election because she was broke. The Respondents say her contradictions undermine her claim that she received $350 from Gary Nicotine. There is some merit in this suggestion.

[312] However, the hard evidence recovered from Mr Ratte's cell is that Councillor Gary Nicotine used his cell phone to submit both Breanna and Jerette's Requests for Main-in Ballots to Mr Ratte. The Respondents submit the Request for Mail-in Ballots being sent by his phone does not mean he was aware of each request that was sent. I am not persuaded because again the record contradicts his argument such that I find Councillor Gary Nicotine knew what he was doing – he sent them after all. In addition there is a text message from Councillor Gary Nicotine to Mr Ratte immediately after his photo texts of Jerette's Request for Mail-in Ballot (Jerette had sustained a serious injury to his hand and arm) which says: [AR 4581, PDF 4590]

> "The guy had to write with his left hand ,got slashed with a
> Machete on right arm so hope it pass's [verbatim from original]"

[313] Notably as well, the hard evidence of the text messages between Councillor Gary Nicotine and Breanna establish on a balance of probabilities that Councillor Gary Nicotine instructed Breanna "don't mark anything" which I have no difficulty finding on a balance of probabilities is a reference to the mail-in ballots of both Breanna and Jerette which Breanna then had her possession. Why would Councillor Gary Nicotine ask Breanna not to mark anything except to enable him or someone acting for him to mark them? This gravely if not fatally contradicts the testimony of Councillor Gary Nicotine.

[314] In addition, the Voter Declarations of both Breanna [AR 3445, PDF 3454] and Jerette [AR 3314, PDF 3323] are signed by Leroy Nicotine Jr., yet Breanna testified she does not know who Leroy Nicotine Jr. is [RR 0563, PDF 0568]. I have found Leroy Nicotine Jr. falsely witnessed several other Voter Declaration forms (Romellow Meechance, Paul Tobaccojuice, Michael Stevens and Petula Wuttunee), and I conclude on a balance of probabilities he falsely witnessed those of Breanna and Jerette Wahobin as well. In addition, I find Leroy Nicotine Jr. marked or gave the Mail-in Ballots for each of Breanna and Jerette to someone else to be marked.

[315] Analysis: The record establishes Councillor Gary Nicotine was not truthful in his testimony. He testified he did not know whether Jerette finished his Request for Mail-in Ballot and that he did not know how Breanna's Request for Mail-in Ballot got to Mr Ratte. However, the hard evidence from Mr Ratte's cell phone establishes Councillor Gary Nicotine both witnessed Jerette writing with his hand injury, and equally importantly, personally submitted both Requests for Mail-in Ballots to Mr Ratte. Councillor Gary Nicotine also instructed Breanna "don't mark anything" which I find on a balance of probabilities referred to the Mail-in Ballots of both Breanna and Jerette which she sold to Councillor Gary Nicotine. Therefore, I find on a balance of probabilities that Councillor Gary Nicotine engaged in serious electoral fraud in relation to vote buying. I also find that Leroy Nicotine Jr. falsely signed Breanna and Jerette's Voter Declaration Forms as witness. Breanna testified she does not know who Leroy Nicotine Jr. is. Importantly, Leroy Nicotine Jr. refused to answer questions related to Breanna [AR 2753, PDF 2762]. I note that Leroy Nicotine Jr. used as his address 1291 97 (Street) 104 (unit), North Battleford, SK, S9A 0J6. However, he refused to answer questions about this address on his

cross-examination from which I have drawn the negative inference, as I do again, that is his address, and that is where the Mail-in Ballot packages were sent leading me to conclude Leroy Nicotine Jr. obtained, and marked both Breanna Wahobin's and Jerette Wahobin's Mail-in Ballots before sending or delivering them back to Mr Ratte, or gave them to someone else to mark and return. I note Leroy Nicotine Jr.'s signature and his address are shown on Breanna's Voter Declaration form. The address was redacted by Mr Ratte on Jerette's Voter Declaration form, although again Leroy Nicotine Jr. signed as witness. I make no comment on the reason for this redaction. However I have no difficulty drawing an adverse inference against Leroy Nicotine Jr. from his refusals to answer questions relating to his address, and because his name and signature were on both Voter Declaration forms, that his address was also on Jerette's Voter Declaration form just as it was on Breanna's. I find Leroy Nictoine Jr.'s name, signature and address were on both Voter Declaration forms. I also find on a balance of probabilities that Leroy Nicotine Jr. knew of the fact Councillor Gary Nicotine had offered and paid Breanna for the Requests for Mail-in Ballots and the Mail-in Ballots of both Breanna Wahobin and Jerette Wahobin. I find Leroy Nicotine Jr. thereby committed serious electoral fraud in relation to vote buying concerning both Breanna Wahobin and Jerette Wahobin.

(4) Michael Ernest Stevens and Ardella Benson

[316] The Applicants allege in their Amended Notice of Application at para 28:

> HENRY GARDIPY (on behalf of the Participants including himself) engaged in electoral corruption, and in particular vote buying, when he purchased the mail in ballots of Michael Ernest Stevens and Ardella Benson prior to the Election for $60 each.

[317] The person allegedly implicated in the corruption surrounding the votes of Michael Ernest Stevens [Michael Stevens] and his aunt, Ardella Benson [Michael and Ardella, respectively] is Councillor Henry Gardipy. Leroy Nicotine Jr. is also involved: para 8 of the Applicants' Memorandum alleges he participated in the forgery of Mail-in Ballots by signing as witness in the absence of the elector. The Applicants say in their Memorandum at para 46: "The mail-in ballot of Michael Stevens was blank when he sold it to Henry Gardipy. Notably, Leroy Nicotine Jr. purported to sign as witness to the mail-in ballot voter declaration form of Michael Stevens: AR3444."

[318] In response to the Affidavit of Michael Stevens, the Respondents' rely on the Affidavit of Councillor Henry Gardipy.

[319] Michael Stevens in his affidavit deposes Councillor Henry Gardipy purchased his and Ardella Benson's Mail-in Ballots. He deposes Councillor Henry Gardipy paid him $60 in cash and that his Mail-in Ballot was blank when he sold it to Councillor Henry Gardipy. Councillor Henry Gardipy in his affidavit denies he bought either Mail-in Ballot, but says Michael Stevens is a street person and "always in need and we never part without him asking me if I can "help him out", which I always do because he is Band member who needs financial support and I see it as my duty as a Councillor to help our members."

[320] Neither Michael Stevens nor Councillor Henry Gardipy were cross-examined.

[321] Notably, however, Leroy Nicotine Jr. signed as witness to the Voter Declaration form of Michael Stevens [AR 3444, PDF 3453]. However, Leroy Nicotine Jr. refused to answer any questions in relation to Michael Stevens or his Mail-in Ballot, including whether Leroy Nicotine Jr. met with him to sign as witness or whether he even knew Michael Stevens [AR 2755, PDF 2764 and AR 2758, PDF 2767 for example].

[322] Analysis: I draw an adverse inference against Leroy Nicotine Jr. from his refusals to answer questions relating to his address on what purports to be Michael Stevens' Voter Declaration form. I find on a balance of probabilities Leroy Nicotine Jr. falsified Michael Stevens' Voter Declaration form as a witness, and either marked and mailed Michael Stevens' mail-in ballot or gave it to someone else to mark and return. I find Leroy Nicotine Jr. thereby committed serious electoral fraud in relation to vote buying.

[323] Further I find on a balance of probabilities that Councillor Henry Gardipy paid Michael Stevens' for his mail-in ballot, and gave it to Leroy Nicotine Jr. to complete and submit, thereby being directly involved in serious electoral fraud in relation to vote buying.

[324] The evidence does not satisfy me that Ardella Benson either contravened the act of regulations, or committed electoral fraud.

(5) Arnold Bruce Wuttunee

[325] The Applicants allege in their Amended Notice of Application at para 17:

> The Participants caused Deloris Peyachew to forge a replacement for photo ID for Arnold Bruce Wuttunee, and filed same with EO RATTE by text message approximately nine days prior to the Election to unlawfully procure the issuance of a mail-in ballot. CLINTON WUTTUNEE (on behalf of the Participants including himself) further engaged in electoral corruption, and in particular vote buying, when he caused Constance Johnston to purchase the mail-in ballot of Arnold Bruce Wuttunee on or about three days prior to the Election for $700, and gave her the cash to do so. Shelley Wuttunee (wife of SHAWN WUTTUNEE) on behalf of the Participants then forged the mail-in ballot declaration of Arnold Bruce Wuttunee, which she did on or about March 18, 2020, two days prior to the Election.

[326] The Respondent allegedly implicated in the electoral fraud surrounding the vote of Arnold Bruce Wuttunee is Chief Wuttunee. Shelley Wuttunee and Deloris Peyachew (Indian Registry Administrator) are also allegedly implicated.

[327] In response to the Affidavit of Arnold Bruce Wuttunee [Arnold Wuttunee], the Respondents' rely on the Affidavits of Chief Wuttunee and Constance Johnston (sister of Arnold Wuttunee).

[328] Arnold Wuttunee deposes in his affidavit at para 5, that he completed a Request for Mail-in Ballot form. On March 17, 2020, one of his sisters (Constance Johnston) gave him $700 cash in $100 bills, she said she received from Chief Wuttunee in exchange for this form. I note his affidavit says $700 but the Applicants' submission refers only to $300 which is a typographical error given Chief Wuttunee alleges $700 was given by the First Nation to Arnold Wuttunee. Arnold Wuttunee deposes he did not receive or sign his Mail-in Ballot, nor did he vote in the Election.

[329] The Respondents say Arnold Wuttunee "is a homeless person, suffering addiction to drugs and with neurological issues" and that the evidence confirms "Chief and Council respond to cries for help from the troubled and lost people of their community. Arnold being one such person."

[330] Chief Wuttunee deposes in his affidavit at paras 16-17, that the family of Arnold Wuttunee contacted him requesting emergency funding because they wanted to drive down to the United States (where Arnold Wuttunee has lived most of his life) to pick him up and bring him home. Chief Wuttunee and the Band Council were willing to help this family and the Band authorized funds of $700 as travel and sustenance for the family.

[331] Chief Wuttunee deposes he does not know Arnold Wuttunee nor does he know anything about Arnold Wuttunee's Mail-in Ballot:

> 17. That I don't know Arnold and don't know anything about his mail-in ballot or if he even voted in the last election. I did not buy his ballot and did not give any money to him or to anyone else for him.

[332] However the hard evidence recovered from Mr Ratte's cell phone, which I accept, is that Chief Wuttunee himself submitted Arnold Wuttunee's Request for Mail-in Ballot to Mr Ratte by photo text message on March 11, 2020, at 8:40 pm [AR 4153, PDF 4162].

[333] This evidence seriously contradicts and seriously weakens Chief Wuttunee's narrative.

[334] Moreover, neither Chief Wuttunee nor Chief Financial Officer Austin Ahenakew supplied any evidence that the First Nation's payment of $700 to Arnold Wuttunee was BMA. Therefore I find on a balance of probabilities the payment by the First Nation for Arnold Wuttunee in the amount of $700 was not BMA.

[335] Given this $700 came from Red Pheasant, and was not BMA, I find on a balance of probabilities that these funds were provided at the direction of Chief Wuttunee to purchase Arnold Wuttunee's Request for Mail-in Ballot. In this connection, I draw a negative inference from Chief Wuttunee's failure to answer questions relating to his text messages recovered from Mr Ratte's cell phone [AR 1383 PDF 1392], compounded by his untruthfulness about his involvement with Arnold Wuttunee's Request for Mail-in Ballot, and Arnold Wuttunee's evidence he neither received nor submitted a Mail-in Ballot, and I find on a balance of probabilities that Chief Wuttunee was directly involved in this scheme to buy Arnold Wuttunee's vote with money belonging to Red Pheasant.

[336] The Respondents also submitted the text messages recovered from Mr Ratte's cell phone "have not been admitted as evidence", an argument rejected at paras 110 and following of these Reasons (Part IV. C. (3)(b)).

[337] Thus, Arnold Wuttunee was sent a Mail-in Ballot, and his ballot was returned, put in the ballot box and eventually counted.

[338] Arnold Wuttunee's Voter Declaration form was submitted [AR 3305, PDF 3314] and signed by Shelley Wuttunee as witness. Shelley Wuttunee admitted she also signed the Voter Declaration form without witnessing the elector signing [as she did with in the cases of Robin Wuttunee, Dion Bugler, Wesley Wuttunee, and Burton Ward also discussed in these Reasons].

[339] The record also established that Deloris Peyachew (Indian Registry Administrator) issued a replacement ID for Arnold Wuttunee [AR 4154, PDF 4163]. Chief Wuttunee offered no explanation as to how he came to possess Arnold Wuttunee's replacement ID.

[340] Analysis: The record establishes Chief Wuttunee submitted Arnold Wuttunee's Request for Mail-in Ballot to Mr Ratte despite swearing he does not know anything about Arnold Wuttunee's Mail-in Ballot. The evidence from Mr Ratte's cell phone contradicts Chief Wuttunee's evidence, as it does a similar assertion by Chief Wuttunee that he knew nothing of sending Mr Ratte Arnold Wuttunee's replacement ID: he also sent Mr Ratte Arnold Wuttunee's ID.

[341] I find on a balance of probabilities that Chief Wuttunee's actions constitute serious electoral fraud in relation to vote buying.

[342] Moreover, the record establishes Shelley Wuttunee signed Arnold Wuttunee's Voter Declaration form as a witness in his absence as the elector. In my respectful view, Shelley Wuttunee's actions also constituted electoral fraud, and in the context of her falsely signing many other such Voter Declarations, her action constituted serious electoral fraud.

[343] I am not satisfied the actions of Deloris Peyachew (Indian Registry Administrator), if indeed they were her actions in relation to the allegedly falsified IDs, constitute electoral fraud. I am not satisfied who signed or put what purports to be her signature on any or all of the IDs on which appears.

(6) Tomas Pritchard

[344] The allegation made regarding Tomas Pritchard are not included in the Applicants' Amended Notice of Application because Justice Aylen granted the Applicants' motion pursuant to Rule 312 to file the Affidavit of Tomas Pritchard sworn February 8, 2021 after the Amended Notice of Application was filed.

[345] The persons allegedly implicated in the corruption surrounding the vote of Tomas Pritchard are Leroy Nicotine Jr. and Wallace Wuttunee. The allegations against Leroy Nicotine Jr. are set out in paras 51 to 54 of the Applicants' Memorandum and allege attempted vote buying and vote buying for $300 cash at the polling station after Tomas Pritchard voted.

[346] In response to the Affidavit of Tomas Pritchard, the Respondents rely on the Affidavits of Leroy Nicotine Jr.

[347] Tomas Pritchard and Leroy Nicotine Jr. are cousins.

[348] Tomas Pritchard deposes in his affidavit at paras 10-15, that Leroy Nicotine Jr. picked him up outside his school, drove him to the Saskatoon polling station, gave him a list of names to

vote for that included each of the Respondents on Team Clinton, and instructed him to take a picture of his marked ballot. Moreover, Leroy Nicotine Jr. instructed Wallace Wuttunee to follow Tomas Pritchard into the polling station to show him what to do and to confirm whether he was able to take a photo of his completed ballot. However, security at the polling station ejected Wallace Wuttunee and Tomas Pritchard was unable to take a picture of his completed ballot due to security. Nevertheless, Tomas Pritchard deposes Leroy Nicotine Jr. gave him $300 in cash at para 13, ". … Leroy Nicotine Jr. then said that we know that you are good for it, pulled out a wad of cash, and gave me $300 in cash."

[349] The Applicants submit Facebook messages between Leroy Nicotine Jr. and Tomas Pritchard reveal Leroy Nicotine Jr. attempted to obtain Tomas Pritchard's Mail-in Ballot [AR 0530-0533, PDF 0539-0542]:

> Leroy Nicotine Jr.: Did you send for you ballot
>
> Tomas Pritchard: No I didn't yet
>
> Leroy Nicotine Jr.: [image of request for mail-in ballot form]
>
> Leroy Nicotine Jr.: Go print this off somewhere than talk to me I'll tell you how to fill it out
>
> Leroy Nicotine Jr.: Faster you print it off the faster you will be able to send for your ballot
>
> Tomas Pritchard: Alright than
>
> Leroy Nicotine Jr.: Love you
>
> Tomas Pritchard: Love you too take care inbox once I have it
>
> Leroy Nicotine Jr.: Sounds good
>
> Leroy Nicotine Jr.: You ever fill out that paperwork I told you fill out

> Tomas Pritchard: Been busy with school gonna go vote in the city here on the 13th
>
> Leroy Nicotine Jr.: Alright .. well I'll come see you when I get back …
>
> Tomas Pritchard: Alright sounds good
>
> Leroy Nicotine Jr.: What's up
>
> Tomas Pritchard: teaching in class

[350] However, during cross-examination, Tomas Pritchard added that Leroy Nicotine Jr. consulted with Chief Wuttunee before handing him $300 he alleges to have received. The Respondents take issue with this addition revealed in cross-examination and submit Tomas Pritchard made up evidence as he testified. I find this does affect his credibility.

[351] Leroy Nicotine Jr. deposes in his affidavit that Tomas Pritchard contacted him in February or March of 2020 "to assist him in getting his mail-in ballot as he said he did not know how to get it" and denies giving Tomas "money to buy his ballot."

[352] Instead, Leroy Nicotine Jr. deposes he gave Tomas $150 "to help him out" because he said "he was not working and needed money because of the lock-down" [RR 0156-0157, PDF 0161-0162].

[353] It appears there was a change of plans. Instead of using his Mail-in Ballot, Leroy Nicotine Jr. testified in cross-examination that he picked Tomas Pritchard up from outside his school and drove him to the Saskatoon polling station while Wallace Wuttunee was in the truck.

[354] Leroy Nicotine Jr. admitted Wallace Wuttunee followed Tomas Pritchard into the polling station, and Wallace Wuttunee returned to the truck before Tomas Pritchard did [AR 2840, PDF 2849].

[355] Leroy Nicotine Jr. was cross-examined on his involvement in the Election to which the transcript reveals:

- He refused to answer questions as to how many electors he assisted with getting their Mail-in Ballots [AR 2767-2769, PDF 2776-2778]
- While Leroy Nicotine Jr. admitted someone else had given him the truck to drive electors to the polling station, he could or would not identify the person who had let him borrow their truck [AR 2744, PDF 2753]
- Leroy Nicotine Jr. could not identify how many electors he had given a ride to or their identities [AR 2823, PDF 2832]

[356] Tomas Pritchard deposes he is afraid of Leroy Nicotine Jr. and the Respondents, thereby suggesting he may have been in duress when he went to the polling station with Leroy Nicotine Jr. on March 13, 2020. However, this evidence was weakened in the cross-examination of Tomas Pritchard when he retracted paragraph 22 of his affidavit regarding his fear of the Respondents: [RR 1396, PDF 1401]

13 Q All right. So you're prepared to retract
14 that portion of your affidavit, paragraph 22,
15 as being inaccurate?
16 A Yes, mostly because I was uneducated before I
17 wrote it.

[357] The Applicants submit Leroy Nicotine Jr. contravened subsections 16(f) and 17(b) of *FNEA* when he gave Tomas Pritchard $300 to vote for the Respondents, as well as section 18 of *FNEA* (secrecy of the ballot) when he requested that Tomas Pritchard take a picture of his completed ballot and by sending Wallace Wuttunee into the polling station with Tomas Pritchard for that purpose:

Prohibition — any person	**Interdictions générales**
16 A person must not, in connection with an election,	**16** Nul ne peut, relativement à une élection:
…	…
(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.	**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	**Interdictions visant l'électeur**
17 An elector must not, in connection with an election,	**17** Nul électeur ne peut, relativement à une élection:
…	…
(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.	**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	**Vote secret**
18 Voting at an election is to be conducted by secret ballot.	**18** Le vote à une élection se tient par scrutin secret.

[358] I note subsections 16(f) and 17(b) of *FNEA* are aimed at different persons. Subsection 16(f) is aimed at preventing persons offering valuable consideration to influence an elector to vote one way or the other. The person liable may or may not be an elector. Subsection 17(b) is aimed at preventing electors from accepting valuable consideration to vote one way or the other. Only an elector may be liable. Thus in the normal course, those offering to buy to vote of an elector would liable under subsection 16(f) but not under subsection 17(b).

[359] Analysis: In light of the absence of corroborative evidence and retractions in the cross-examination of Tomas Pritchard, I am not satisfied Leroy Nicotine Jr. contravened *FNEA* in relation to Tomas Pritchard.

[360] However, I conclude Leroy Nicotine Jr. did have Wallace Wuttunee follow and try to take a picture of Tomas Pritchard's marked ballot. In my respectful view this constituted direct involvement by Leroy Nicotine Jr. in serious electoral fraud.

[361] I make no finding against Wallace Wuttunee in that he is not a party and is not named in the Notice of Application or the Amended Notice of Application.

[362] For the same reason – insufficient evidence and retractiosn in cross-examination - I am unable to find Tomas Pritchard contravened subsection 17(b) of *FNEA*.

(7) Dion Bugler

[363] The Applicants allege in their Amended Notice of Application at paras 24-26:

> GARY NICTOINE (on behalf of the Participants including himself) engaged in electoral corruption, and in particular vote buying, when he offered and then paid Dion Bugler $50 for requesting his mail-in ballot. GARY NICTOINE and the Participants then caused Deloris Peyachew to forge a replacement for photo ID for Dion Bugler, and filed same with the forged request for mail-in ballot with EO RATTE by text message to unlawfully procure the issuance of a mail-in ballot.
>
> GARY NICTOINE (on behalf of the Participants including himself) engaged in electoral corruption, and in particular vote buying, when prior to the Election he offered to purchase the mail in ballot of Dion Bugler prior to the Election for $150.
>
> CLINTON WUTTUNEE and DANA FALCON (on behalf of the Participants including themselves) engaged in electoral corruption, and in particular vote buying, when they purchased the mail in ballot of Dion Bugler for $500 prior to the Election. DANA FALCON handed Dion Bugler $300 in cash, which he obtained from an e-transfer from CLINTON WUTTUNEE and/or persons acting on his behalf. The remaining $200 was paid by e-transfer from Austin Ahenakhew on behalf of CLINTON WUTTUNEE and the Participants to Loraine Bugler, the mother of Dion Bugler on or about March 17, 2020.

[364] The Respondents allegedly implicated in the corruption surrounding the vote of Dion Bugler are Councillor Gary Nicotine, Chief Wuttunee, and Councillor Dana Falcon. Chief Financial Officer Austin Ahenakew, Shelley Wuttunee and Deloris Peyachew are also allegedly implicated.

[365] In response to the Affidavit of Dion Bugler, the Respondents' rely on Affidavits of Chief Wuttunee**,** Councillor Gary Nicotine, Councillor Dana Falcon**,** Shelley Wuttunee, Councillor Jason Chakita and Chief Financial Officer Austin Ahenakew.

[366] Dion Bugler in his affidavit at paras 3-9, deposes Councillor Gary Nicotine approached him and asked if he had his Mail-in Ballot. When Dion Bugler said no, Councillor Gary Nicotine produced a blank Request for Mail-in Ballot and said he would have Dion Bugler's Mail-in Ballot sent to an address that was not his own. Even though Dion Bugler asked for his Mail-in Ballot to be sent directly to him, Councillor Gary Nicotine refused. Councillor Gary Nicotine asked him to sign the Request for Mail-in Ballot, and when he did, gave him $50 cash. A few days later Councillor Gary Nicotine approached Dion Bugler with his blank Mail-in Ballot and offered $150 for Dion Bugler to sign and return it to him blank. Dion Bugler said he wanted $500 which Councillor Gary Nicotine declined.

[367] Dion Bugler further deposes at paras 10-17 that a few days later, Councillor Dana Falcon asked if he had his Mail-in Ballot and how much he wanted for it - he still had it and wanted $500. Councillor Dana Falcon communicated with Chief Wuttunee to arrange payment. Dion Bugler says Councillor Dana Falcon paid his $300 in cash and told him he would receive a further $200 from Chief Wuttunee. The $200 was sent by e-transfer to Dion Bugler care of his mother because he did not have the ability to receive the e-transfer.

[368] Dion Bugler deposes he did not vote in the election because he sold his Mail-in Ballot to Councillor Dana Falcon. Despite his deposition, Dion Bugler's Voter Declaration form was submitted to Mr Ratte [AR 3311, PDF 3320].

[369] Shelley Wuttunee signed as witness to Dion Bugler's Voter Declaration form and Deloris Peyachew (Indian Registry Administrator) appears to have issued a replacement ID for him [AR 3312, PDF 3321] or at least what purports to be her signature is on the replacement ID.

[370] The Respondents submit Dion Bugler is an illiterate person who could not read his affidavit or the documentation attached to it. Councillor Jason Chakita in his affidavit deposes at para 20 he had a conversation on the street with Dion Bugler and that Dion Bugler indicated that his entire affidavit was false and that Reggie Bugler promised him $10,000 for his affidavit once the "millions come in". However, during cross-examination, Dion Bugler claims to have been lying when he told Councillor Jason Chakita that he was offered $10,000 from Reggie Bulger (Dion's uncle). [RR 0751-0752, PDF 0756-0757]

23 Q. And then Mr. Chakita asked you: "Did he say
24 he was going to give you something"?
25 A. Yeah, but I lied to him about that.
1 Q. Oh, you lied to him about what?
2 A. Reggie give me something. (Indiscernible).
3 I told him if Reggie said he wouldn't -- the
4 feel, I told him Reggie might give me
5 10,000 bucks. I was just lying to him to see
6i f he would give me more money.

[371] Councillor Gary Nicotine in his affidavit deposes at para 20 that he and Dion Bugler are cousins. He deposes at para 22-23 that he gave Dion Bugler $50 to obtain ID because he had lost his. On cross-examination, Dion Bugler confirms he did not sign any papers with Councillor

Gary Nicotine. [RR 0732 PDF 0737, line 22-24]. However, if Councillor Gary Nicotine gave Dion Bugler $50 to obtain ID, the fact Deloris Peyachew issued a replacement ID for Dion Bugler is highly suspect and calls into question whether the purpose of the $50 was indeed for Dion Bugler to obtain ID or to purchase his Request for Mail-in Ballot or his Mail-in Ballot.

[372] Chief Wuttunee in his affidavit deposes at para 10 that he saw Dion Bugler at some point before the 2020 Election, and that Dion Bugler asked for money because he was behind in rent. On cross-examination, Dion Bugler confirms he had asked Chief Wuttunee to help him with rent and asked for $200 or more [RR 0740, PDF 0745, line 7-12]:

7 Q. So you texted the chief for help with your
8 rent and you asked for $200?
9 A. Yes. I asked for the money. I can't
10 remember if it was $200 of more. I know I
11 asked him about it. I was short for rent,
12 yeah.

[373] The $200 was sent to Dion Bugler's mother as an e-transfer because he could not receive deposits in his bank account [RR 0737, PDF 742, lines 13-20]. The bank transfer to Dion Bugler's mother from Chief Financial Officer Austin Ahenakew includes the letters "Bma" indicating the money was sent as BMA payment [RR 0011, PDF 16]. However, the Respondents were unable to produce any formal documentation to establish this was a legitimate BMA payment.

[374] The Applicants submit Councillor Gary Nicotine and Councillor Dana Falcon offering money in exchange for Dion Bugler's Request for Mail-in Ballot and Mail-in Ballot contravenes *FNEA* s.16(f), and if the facts are established I would agree:

Prohibition — any person	**Interdictions générales**
16 A person must not, in connection with an election,	**16** Nul ne peut, relativement à une élection:
…	…
(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	**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	**Interdictions visant l'électeur**
17 An elector must not, in connection with an election,	**17** Nul électeur ne peut, relativement à une élection:
…	…
(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.	**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.

[375] The Applicants also submit the mail-in ballot of Dion Bugler was fraudulent.

[376] Analysis: The record establishes Dion Bugler's Voter Declaration form was submitted and signed by Shelley Wuttunee as witness despite his deposing in his affidavit he did not vote in the Election. The record is not determinative of whether Chief Wuttunee, Councillor Gary Nicotine or Councillor Dana Falcon "bought" or tried to buy Dion Bugler's vote, especially because: 1) Dion Bugler confirmed in cross the $200 he received was BMA for his rent; 2) Dion Bugler testified in cross that did not sign any papers with Councillor Gary Nicotine which directly contradicts his own affidavit; and 3) Dion Bugler later admitted to lying about the $10,000 he was offered for his affidavit. In my view, Dion Bugler did not appear to be a credible witness because his affidavit evidence and cross-examination are contradictory. Moreover, the $200 e-transfer from Chief Financial Officer Austin Ahenakew indicates "Bma"; although the e-transfer is not an official record documenting BMA.

[377] In my view, Councillor Gary Nicotine's evidence is not consistent with the record. Councillor Gary Nicotine deposes he gave Dion Bugler $50 to obtain ID but the replacement ID issued by Deloris Peyachew (Indian Registry Administrator) [AR 3312, PDF 3321] contradicts this. This calls into question Councillor Gary Nicotine's evidence.

[378] That said, I find in relation to allegations surrounding Dion Bugler that the Applicants have not established on the balance of probabilities a contravention of the *FNEA* or *FNER* or electoral fraud.

(8) Paul Tobaccojuice

[379] The Applicants allege in their Amended Notice of Application at paras 21-22:

> CLINTON WUTTUNEE, LUX BENSON, and Cody Benson (on behalf of the Participants including themselves) engaged in electoral corruption, and in particular vote buying, when during the first week of February, 2020, they paid Paul Tobaccojuice $200 to request his mail-in ballot, and offered to purchase his mail-in ballot when it arrived.
>
> GARY NICTOINE (on behalf of the Participants including himself) engaged in electoral corruption, and in particular vote buying, when he purchased the mail in ballot of Paul Tobaccojuice for $200 on or about February 14, 2020.

[380] The Respondents allegedly implicated in the corruption surrounding the vote of Paul Tobaccojuice are Chief Wuttunee, Councillor Gary Nicotine, and Councillor Lux Benson. Band Manager Cody Benson is also allegedly implicated.

[381] In response to the Affidavit of Paul Tobaccojuice, the Respondents' rely on the Affidavits of Band Manager Cody Benson**,** Councillor Lux Benson and Councillor Gary Nicotine.

[382] Paul Tobaccojuice is a cousin of Councillor Lux Benson and Councillor Gary Nicotine. Paul Tobaccojuice deposes he met with Chief Wuttunee, Councillor Lux Benson, and Band Manager Cody Benson in the first week of February 2020. He deposes Band Manager Cody Benson gave him a blank Request for Mail-in Ballot form and instructed him how to fill it out. After Paul Tobaccojuice completed the form, they took a picture and submitted it to Mr Ratte by text message. He deposes Band Manager Cody Benson gave him $200 by cheque to pay for his Request for Mail-in Ballot. He deposes that Chief Wuttunee, Councillor Lux Benson and Band Manager then offered to purchase his Mail-in Ballot when it arrived "for more money, and to get me set up including a vehicle."

[383] Paul Tobaccojuice deposes that on February 14, 2020, Band Manager Cody Benson notified him that Councillor Gary Nicotine would drive him to his sister's house to pick up his Mail-in Ballot. Councillor Gary Nicotine picked up Paul Tobaccojuice and during the drive, Councillor Gary Nicotine told Paul Tobaccojuice about Mail-in Ballots he was purchasing, and that they were trying to get more people to send in a Request for Mail-in Ballot. When Councillor Gary Nicotine collected Paul Tobaccojuice's Mail-in Ballot, Councillor Gary Nicotine instructed him to sign his Mail-in Ballot Voter Declaration, but instructed him to leave his ballot blank. Paul Tobaccojuice did so and returned his blank Mail-in Ballot to Councillor Gary Nicotine who paid him $200 in cash.

[384] Councillor Lux Benson in his affidavit deposes Paul Tobaccojuice came to the Band Office because he was having trouble getting his car running and needed money to purchase tires so he could get to Alberta to look for work. While at the Band Office, he spoke with Band Manager Cody Benson, Councillor Lux Benson and Chief Wuttunee requesting assistance and was approved for a BMA payment for him to get the tires he needed. Band Manager Cody Benson deposed in his affidavit that the $200 band cheque was for tires and not to pay for his Request for Mail-in Ballot form. A copy of the band cheque for $200 is in the Respondents' Record [RR 0045, PDF 0050].

[385] However, it is unclear whether this cheque was made as BMA payment, although there is a trace of an indication it might be a BMA payment on a side of the cheque. While Chief Wuttunee testified there was specific documentation for BMA payments, no proper documentation was ever produced in relation to the $200 band payment to Paul Tobaccojuice

either by Chief Wuttunee or by Chief Financial Officer Austin Ahenakew. With respect, I am not satisfied this band cheque for $200 was for BMA, I find it more likely than not that this band cheque was used to pay Paul Tobaccojuice for his Request for Mail-in Ballot.

[386] Councillor Gary Nicotine in his affidavit deposes he did not give Paul Tobaccojuice $200 for his Mail-in Ballot.

[387] The Respondents submit the cross-examination of Paul Tobaccojuice gives the impression he is mad at the Chief and Council and that they owe him money: [RR 0453 starting at line 8 to 0455 line 2, PDF 0458-0460]. While there some truth to this suggestion, more importantly I note from the following that Paul Tobaccojuice was not shaken in his evidence that he was given the $200 First Nation cheque for his vote:

8 Q. Okay, but you had a car with no tires?
9 A. That's when I was given that car.
10 Q. Okay. So you had a car with no tires?
11 A. Yeah. That was in -- I just got given to
12 that car.
13 Q. Yeah, I hear you.
14 A. Yeah.
15 Q. Okay. So you got a car with no tires, and
16 then you had to get tires put on it?
17 A. Yes.
18 Q. Okay. And you were given money to put those
19 tires on the car?

A. Not specifically with those tires. I was given money to vote for them or whatever.
Q. I see.
A. What they wanted.
Q. I see.
A. Yeah.
Q. But you used the money to put tires on the car?
A. Yes, I used the money, yeah.
Q. Sorry?
A. Yes, I used the money to put the tires on, but --
Q. On the car?
A. Yeah, but they told me they were going to pay for the tires, which they didn't.
Q. Oh, I see. Okay.
A. And you could talk to Clint Wuttunee for that one because they still owe me money.
Q. So they told you they were going to pay for the tires?
A. Yes.
Q. Okay. All right. And then, I guess, you received a cheque, did you?
A. Yes, I received a cheque, the first one, yes.
Q. For 200 bucks?

20 A. 200.

21 Q. Yeah. And you had a bank account? You were

22 able to deposit it?

23 A. No, I didn't have a bank account.

24 Q. Okay. So you had to go to the bank, and --

25 A. Just cashed it.

1 Q. -- you got cash for it?

2 A. I went to Red Pheasant store to cash it.

[Emphasis added]

[388] Paul Tobaccojuice's Voter Declaration Form is found at [AR 3757, PDF 3766]. It was witnessed by Leroy Nicotine Jr. However, Leroy Nicotine Jr. refused to answer questions about Paul Tobaccojuice in cross-examination [AR 2757-2758, PDF 2766-2767]. Leroy Nicotine Jr. is also allegedly implicated: para 8 of the Applicants' Memorandum alleges he participated in the forgery of Mail-in Ballots by signing as witness in the absence of the elector. Therefore, I find Leroy Nicotine Jr. thereby committed serious electoral fraud in relation to vote buying concerning Paul Tobaccojuice.

[389] The Applicants submit the Respondents offering money in exchange for Paul Tobaccojuice's Request for Mail-in Ballot and Mail-in Ballot contravenes subsections 16(f) and 17(b) of the *FNEA.* I reiterate that subsection 17(b) is not available as a contravention by the Respondents; although in this case it does apply to Paul Tobaccojuice who sold his vote:

Prohibition — any person **Interdictions générales**

16 A person must not, in connection with an election,	**16** Nul ne peut, relativement à une élection:
…	…
(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	**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	**Interdictions visant l'électeur**
17 An elector must not, in connection with an election,	**17** Nul électeur ne peut, relativement à une élection:
…	…
(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.	**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.

[390] Analysis: In my respectful view, the allegations of Paul Tobaccojuice are credible. He says he was paid for his vote and that he was never paid for the additional $200 for tires he needed. I find on a balance of probabilities he was paid $200 by band cheque for his Request for Mail-in Ballot. I find he was also paid a further $200 cash by Councillor Gary Nicotine for his Mail-in Ballot, as Paul Tobaccojuice deposes. While the Respondents say the payment was BMA, I find the documentary evidence to corroborate this allegation not satisfactory. There is a faint note on the cheque but, importantly, there is no other documentation from Councillor Gary

Nicotine, Councillor Lux Benson, Chief Wuttunee or from Band Manager Cody Benson to corroborate that this cheque was a genuine BMA payment. Importantly, Chief Financial Officer Austin Ahenakew produced no corroborative evidence that this was a genuine BMA payment. Without further and better documentary evidence I find on a balance of probabilities the $200 band cheque payment was not a BMA payment, but was paid to purchase Paul Tobbacojuice's Request for Mail-in Ballot with band money.

[391] I find on a balance of probabilities that Councillor Gary Nicotine and Councillor Lux Benson both contravened subsection 16(f) of *FNEA* and committed serious electoral fraud in being directly involved in offering to buy both the Request for Mail-in Ballot Form, and the Mail-in Ballot and Voter Declaration form from Paul Tobaccojuice:

Prohibition — any person	**Interdictions générales**
16 A person must not, in connection with an election,	**16** Nul ne peut, relativement à une élection:
…	…
(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	**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.

[392] I am not satisfied Band Manager Cody Benson was directly involved in this election fraud; rather I find his presence was incidental in relation to the Request for Mail-in Ballot, and I am not satisfied on a balance of probabilities his involvement was other than as an instrumentality of Chief Wuttunee, Councillor Gary Nicotine and Councillor Lux Benson.

[393] Chief Wuttunee was not cross-examined and gave no evidence regarding Paul Tobaccojuice. However, according to Band Manager Cody Benson, Chief Wuttunee was present in the band office with Paul Tobaccojuice when the discussion of payment took place, and Chief Wuttunee spoke with Councillor Lux Benson and Paul Tobaccojuice in his presence. Band Manager Cody Benson says Chief Wuttunee instructed him to issue funds to Paul Tobaccojuice for tires and he did as he was instructed. On this basis I find on a balance of probabilities that Chief Wuttunee was aware and in fact was directly involved in directing the use of band funds to pay Paul Tobaccojuice $200 for his Mail-in Ballot in the knowledge and expectation that Paul Tobaccojuice's Mail-in Ballot would be subsequently obtained and used to vote for the Respondents. In this, I find Chief Wuttunee contravened subsection 16(f) of the *FNEA*:

Prohibition — any person	**Interdictions générales**
16 A person must not, in connection with an election,	**16** Nul ne peut, relativement à une élection:
…	…
(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	**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.

[394] For the same reasons I find on a balance of probabilities that Chief Wuttunee was directly involved in serious electoral fraud in relation to the purchase of Paul Tobaccojuice's Request for Mail-in Ballot and Mail-in Ballot.

[395] I also find that Paul Tobaccojuice contravened subsection 17(b) of *FNEA* and was involved in serious electoral fraud in agreeing to be paid for his Request for Mail-in Ballot and his Mail-in Ballot as outlined above:

Prohibition — elector	**Interdictions visant l'électeur**
17 An elector must not, in connection with an election,	**17** Nul électeur ne peut, relativement à une élection:
…	…
(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.	**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.

[396] In coming forward with this evidence, Paul Tobaccojuice in effect admitted he contravened of subsection 17(b) of the *FNEA* and committed serious electoral fraud in selling his vote. I caution myself in terms of accepting his evidence in this respect given the unlawful nature of what he did, but maintain my findings on a balance of probabilities.

(9) Wendall John Albert

[397] The Applicants allege in their Amended Notice of Application at para 27:

> HENRY GARDI~~D~~PY (on behalf of the Participants including himself) engaged in electoral corruption, and in particular vote buying, when he purchased the request for mail-in ballot and the mail in ballot of Wendall John Albert for $20 at the end of February, 2020. HENRY GARDIPY and the Participants then filed the forged request for mail-in ballot with EO RATTE by text message to unlawfully procure the issuance of a mail-in ballot,

> which the Participants forged to cast votes for Chief and Council in the Election. ~~While Wendall John Albert had not requested a mail in ballot, HENRY GARDIDPY already had a mail in ballot issued to Wendall John Albert which he had him sign. The votes to be cast for candidates were blank when it was signed and returned to HENRY GARDIDPY.~~

[398] The Respondent allegedly implicated in the corruption surrounding the vote of Wendall John Albert [Wendall Albert] is Councillor Henry Gardipy.

[399] In response to the Affidavit of Wendall Albert, the Respondents' rely on the Affidavit of Councillor Henry Gardipy.

[400] Wendall Albert deposes that while residing at a homeless shelter in North Battleford, Councillor Henry Gardipy approached him and told him he would pay $20 to sign some papers, take a photograph of his photo ID, and buy his vote. Councillor Henry Gardipy instructed Wendall Albert to fill out and sign the papers, which he did. Councillor Henry Gardipy took a picture of Wendall Albert's photo ID, and gave him $20 to buy his vote. Wendall Albert did not receive his Mail-in Ballot, nor was it delivered to his mother's address which was used on the Request for Mail-in Ballot Form.

[401] Councillor Henry Gardipy in his affidavit deposes he met Wendall Albert to assist with his Request for Mail-in Ballot Form and simply gave Wendall Albert $20 to help him out. There is no claim that this money was a BMA payment, nor any evidence that might corroborate that it was BMA. Given the small amount involved, and while there is his evidence to that effect, I am

unable to find on a balance of probabilities that this money was intended to buy Wendall Albert's Request for Mail-in Ballot.

[402] The Respondents submit the cross-examination of Wendall Albert reveals he had his ballot sent to the city of North Battleford rather than to Cando, Saskatchewan where his mother lived. I agree with the Respondents. Wendall Albert misdirected his ballot due to his own error, a mail-in ballot was sent but to the wrong address, and as a result Wendall Albert did not receive it: [RR 0816-0817, PDF 0821-0822].

[403] Cross-examination of Wendall Albert indicates he went to the polling station to vote but because he did not receive his ballot, he was not able to vote unless he signed an affidavit saying he lost his ballot [RR 0819, PDF 0824, line 9-25]. However, he was told he had to go to North Battleford to sign an affidavit; therefore, Reggie Bugler took Wendall Albert to North Battleford to sign an affidavit [RR 0334, PDF 0339] The affidavit Reggie Bugler had Wendall Albert sign was focussed entirely on impugning Councillor Henry Gardipy rather than helping Wendall Albert vote. According to the affidavit of Mr Ratte dated August 27, 2020, he rejected Wendall Albert's affidavit because it did not state that he had lost his ballot and therefore, did not issue a new ballot to Wendall Albert [RR 0184, PDF 0189, para 23].

[404] The Applicants submit offering money in exchange for Wendall Albert's Request for Mail-in Ballot Form and Mail-in Ballot contravenes *FNEA* subsections 16(f) and 17(b). Again I note subsection 17(b) would not apply to the Respondents:

Prohibition — any person **Interdictions générales**

16 A person must not, in connection with an election,	**16** Nul ne peut, relativement à une élection:
…	…
(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	**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	**Interdictions visant l'électeur**
17 An elector must not, in connection with an election,	**17** Nul électeur ne peut, relativement à une élection:
…	…
(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.	**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.

[405] Analysis: The evidence in this matter is not determinative of whether Councillor Henry Gardipy "bought" Wendall Albert's vote, especially in light of Wendall Albert admitting in cross-examination that he used the wrong address on his Request for Mail-in Ballot Form thereby misdirecting his ballot. In my respectful view, in relation to the allegations surrounding Wendall Albert, the Applicants have not established on the balance of probabilities a contravention of the *FNEA* or *FNER* or electoral corruption.

[406] For the same reason – insufficient evidence - I am unable to find Wendall John Albert contravened subsection 17(b) of *FNEA*.

(10) Veronica Whitford

[407] The Applicants allege in their Amended Notice of Application at para 31:

> SAMUEL WUTTUNEE and GARY NICTOINE (on behalf of the Participants including themselves) engaged in electoral corruption and vote buying when they paid $100 to Veronica Whitford to request her mail-in ballot at the beginning of February, 2020, and instructed Veronica Whitford to forge a request for mail-in ballot of her daughter, Darian Whiteford, and paid her a further $100 for doing so. GARY NICTOINE and the Participants then caused Deloris Peyachew to forge a replacement for photo ID, and filed same with the forged request for mail-in ballot with EO RATTE by text message to unlawfully procure the issuance of a mail-in ballot.

[408] The Respondents allegedly implicated in the electoral fraud surrounding the vote of Veronica Whitford are Councillor Samuel Wuttunee, and Councillor Gary Nicotine. Deloris Peyachew (Indian Registry Administrator), is also allegedly implicated.

[409] In response to the Affidavit of Veronica Whitford (daughter of Mary Linda Whitford, one of the Applicants), the Respondents' rely on the Affidavits of Councillor Gary Nicotine and Councillor Samuel Wuttunee.

[410] Veronica Whitford in her affidavit at para 4 deposes she met with Councillors Gary Nicotine and Samuel Wuttunee and with Heather Wuttunee at the beginning of February 2020. Gary Nicotine and Samuel Wuttunee paid $100 cash to each of Heather Wuttunee and Veronica Whitford to complete their Requests for Mail-in Ballots. Heather Wuttunee and Veronica

Whitford are cousins. Veronica's Request for Mail-in Ballot is at AR 3316, PDF 3325, and indicates her Request for Mail-in Ballot be sent to Heather Wuttunee's address [154 Dickinsfield Court].

[411] Veronica Whitford deposes when she was completing her Request for Mail-in Ballot, Councillors Gary Nicotine and Councillor Samuel Wuttunee requested that she also purport to be her daughter, Darian Whiteford (*sic*) and forge a Request for Mail-in Ballot for her as well. Councillors Gary Nicotine and Samuel Wuttunee offered to pay Veronica Whitford a further $100 to do so, and she agreed.

[412] At para 6 of her affidavit, Veronica Whitford admits to forging her daughter Darian Whiteford's Request for Mail-in Ballot.

[413] The forged Request for Mail-in Ballot of Darian Whiteford [AR 3307, PDF 3316] and Veronica Whitford's Request for Mail-in Ballot [AR 3316, PDF 3325] identify the same phone number and identify Heather Wuttunee's address for delivery. Mr Ratte in cross-examination confirmed he accepted Darian Whiteford's Request for Mail-in Ballot (the fraudulent one) and sent the Mail-in Ballot to Heather Wuttunee's address [AR 0679, PDF 0688].

> Veronica Whitford did not have a copy of her daughter's ID but Councillor Gary Nicotine indicated he was able to submit the Request for Mail-in Ballot without it as evidenced by the replacement ID issued by Deloris Peyachew (Indian Registry Administrator for Red Pheasant) [AR 3308, PDF 3317]. In issuing a fraudulent replacement ID for Darian Whiteford, I find Deloris Peyachew committed an act of electoral fraud.

[414] Darian Whiteford learned what her mother had done, and then submitted her own Request for Mail-in Ballot, located at AR 3309, PDF 3318 which included a copy of her legitimate ID (her driver's license) [AR 3310, PDF 3319. From this, I conclude Darian Whiteford was not initially aware of what her mother was doing; she promptly rectified the issue by phoning Mr Ratte and obtaining her own mail-in ballot.

[415] Veronica Whitford deposes at para 11-13, that after receiving the Mail-in ballots for her and her daughter, she did not feel right about Councillors Gary Nicotine and Samuel Wuttunee offering money to forge her daughter's Request for Mail-in Ballot and did not contact them further.

[416] The Respondents in their memorandum submit Veronica Whitford "is addicted to drugs and alcohol and is unpredictable" and say "She refused to discuss this fact on cross-examination." In addition to these stereotypical comments, Councillor Gary Nicotine adds in his affidavit at para 32 that "Veronica Whitford is known to me and unfortunately is a very troubled person with a severe drug addict." Councillor Samuel Wuttunee likewise deposed in his affidavit at para 9, "Veronica is a drug addict. She has had a difficult life and is known to live on the streets of Edmonton during her low times." I am not inclined to draw a negative inference against her on the basis of these stereotypical comments because her refusal could have been motivated by pride and reluctance to have her personal life opened to potentially irrelevant scrutiny. I am also concerned with the relevance of this line of personal attack on a witness in this application; it is the accuracy of evidence not the relative ease or difficulty of a person's life

that is important. Notably, these aspects of her life might be said to make her more vulnerable to untoward approaches by the Respondents.

[417] Councillor Gary Nicotine in his affidavit denies he had any communication with Veronica Whitford and denies he requested her to forge a Request for Mail-in Ballot for Darian Whiteford; he says her accusations are completely false.

[418] Councillor Samuel Wuttunee in his affidavit deposes he was not running for office at the time he saw Veronica Whitford in Edmonton.

[419] However Councillor Samuel Wuttunee agrees he gave Veronica Whitford money having agreed to pay $60 for a pair of stolen cowboy boots. Councillor Samuel Wuttunee deposes he gave Veronica Whitford a $30 cash down payment and agreed to give her $30 more when she gave him the stolen boots. He alleges he never received the stolen cowboy boots.

[420] In cross-examination, Veronica Whitford denied having a pair of cowboy boots and denied she tried to sell anything and was not shaken on cross-examination [RR 0647, RPD 0652, line 14-22]:

14 Q. Did you have a pair of cowboy boots?
15 A. No.
16 Q. Did you have things that you were trying to
17 sell?
18 A. No.
19 Q. Okay. Well, let's say they weren't stolen.

20 Let's just say -- were you selling things?

21 A. No, I had no items trying to sell to them.

22 That's false.

[421] The Applicants submit the Respondents' offering money in exchange for Veronica Whitford's Request for Mail-in Ballot and Mail-in Ballot contravenes subsections 16(f) and 17(b) of the *FNEA*:

Prohibition — any person	**Interdictions générales**
16 A person must not, in connection with an election,	**16** Nul ne peut, relativement à une élection:
…	…
(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	**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	**Interdictions visant l'électeur**
17 An elector must not, in connection with an election,	**17** Nul électeur ne peut, relativement à une élection:
…	…
(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.	**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.

[422] I note again subsections 16(f) and 17(b) of *FNEA* are aimed at different persons. Subsection 16(f) is aimed at preventing persons offering valuable consideration to influence an elector to vote one way or the other. The person liable to be convicted may or may not be an elector. Subsection 17(b) is aimed at preventing electors from accepting valuable consideration to vote one way or the other. Only an elector is liable to be convicted. Thus in the normal course, those offering to buy to vote of an elector would liable under subsection 16(f) but not under subsection 17(b).

[423] The Respondents submit Veronica Whitford's evidence is an admission she contravened subsection 17(b), and I agree.

[424] Analysis: I find on a balance of probabilities that Veronica Whitford forged the Request for Mail-in Ballot of her daughter, Darian Whiteford, and did so at the request of Councillors Samuel Wuttunee and Gary Nicotine in exchange for money. I find this on a balance of probabilities and because I see little other reason for her to forge her daughter's Request for Mail-in Ballot; the hard evidence is she forged her daughter's Request for Mail-in Ballot. I also find on a balance of probabilities that she sold her own Request for Mail-in Ballot to Councillor Samuel Wuttunee and Councillor Gary Nicotine.

[425] I also find Councillors Samuel Wuttunee and Gary Nicotine paid her for her own Request for Mail-in Ballot. They drove these transactions. I also note Councillor Samuel Wuttunee admits he gave money to Veronica Whitford, although he says it was for stolen boots. In this case, I find Councillors Samuel Wuttunee and Gary Nicotine were directly involved in offering

to pay Veronica Whitford $200 for the two Requests for Mail-in Ballots (for Veronica Whitford and Darian Whiteford). In doing so each contravened section 16(f) which prohibits vote buying:

Prohibition — any person	**Interdictions générales**
16 A person must not, in connection with an election,	**16** Nul ne peut, relativement à une élection:
…	…
(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	**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.

[426] In addition, I find the actions of Councillors Samuel Wuttunee and Gary Nicotine constituted serious electoral fraud in relation to vote buying regarding the votes of both Veronica Whitford and Darian Whiteford.

[427] Based on her own admission and the evidence above, I also find Veronica Whitford contravened subsection 17(b) of *FNEA* which prohibits vote selling by an elector. She also committed serious electoral fraud in selling both her vote and the vote of her daughter to Councillors Samuel Wuttunee and Gary Nicotine; this is so even though her daughter later sent for and obtained a genuine Mail-in Ballot:

Prohibition — elector	**Interdictions visant l'électeur**
17 An elector must not, in connection with an election,	**17** Nul électeur ne peut, relativement à une élection:

…	…
(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.	**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.

[428] In coming forward with these accusations Veronica Whitford was admitting not only her contravention of subsection 17(b) of the *FNEA*, but also having committed serious electoral fraud. That said, I am not persuaded to rule out her narrative on that basis. I caution myself in this regard recognizing the unlawful nature of what Veronica Whitford was directly involved in, but maintain my findings on a balance of probabilities.

[429] I am not satisfied that Deloris Peyachew (Indian Registry Administrator) contravened subsections 16(f) or 17(b) if indeed it is even her signature on the replacement ID.

(11) Wesley Wuttunee

[430] The Applicants allege in their Amended Notice of Application at para 32:

> The Participants forged a request for mail-in ballot for Wesley Wuttunee and received his mail-in ballot. SHAWN WUTTUNEE (on behalf of the Participants including himself) engaged in electoral corruption, and in particular vote buying, when he contacted and then met with Westly Wuttunee prior to the Election ~~on or about February 20, 2020~~. SHAWN WUTTUNEE already had the mail in ballot of Westly Wuttunee in his possession, which Westly Wuttunee then signed. SHAWN WUTTUNEE paid Westly Wuttunee $200 for the mail in ballot.

[431] The Respondent allegedly implicated in the corruption surrounding the vote of Wesley Wuttunee is Councillor Shawn Wuttunee.

[432] In response to the Affidavit of Wesley Wuttunee, the Respondents' relied on the Affidavits of Councillor Shawn Wuttunee, Councillor Jason Chakita, Chief Wuttunee and Shelly Wuttunee.

[433] Wesley Wuttunee deposed he lives in a homeless shelter. Prior to the Election, Councillor Shawn Wuttunee asked him to meet at a nearby Minute Muffler. Councillor Shawn Wuttunee's wife Shelley Wuttunee was also present. Councillor Shawn Wuttunee offered to give Wesley Wuttunee $200 if he signed his Mail-in Ballot. However, Wesley Wuttunee deposes at para 5 of his affidavit "I was surprised that Shawn Wuttunee had my mail-in ballot. I did not request a mail in ballot, and I did not tell anyone that they could request my mail-in ballot." However, after signing his Mail-in Ballot, Wesley Wuttunee gave it to Councillor Shawn Wuttunee. He later attended the Red Pheasant polling station where he asked Chief Wuttunee for money. Councillor Jason Chakita was in a vehicle parked beside Chief Wuttunee. He deposed Councillor Jason Chakita gave him $200 cash.

[434] Wesley Wuttunee deposes at para 6 of his affidavit "I did not vote in the Election." Despite this, Wesley Wuttunee's Request for Mail-in Ballot is found at [AR 3317, PDF 3326]. His Voter Declaration is found at [AR 3318, PDF 3327] and is signed by Shelley Wuttunee as witness.

[435] The Respondents strongly object to the Request for Mail-in Ballot of Wesley Wuttunee being in evidence, because it "has not been made evidence" and because the document was not attached to Wesley Wuttunee's affidavit. There is no merit to this objection. The Request for Mail-in Ballot was recovered from Mr Ratte's cell phone and is an exhibit to the cross-examination of Mr Ratte on September 14, 2020 marked as Exhibit-27 Tab 112 [AR 3317, PDF 3326] of the Applicants' Record. As Justice Roussel stated in *Thibodeau Edmonton*, at para 14, a person may be cross-examined on documents relevant to the determination of the issue even if those documents are not mentioned in the affidavit filed (*Sierra* at para 9), which is the case here (see discussion at para 151 and following):

> [14] It is also recognized that the person must also "answer all questions upon which he can be fairly expected to have knowledge, without being evasive, which relate to the principle issue in the proceeding upon which his affidavit touches" (*Swing Paints Ltd v Minwax Co*, [1984] 2 FC 521 at para 19). The person may also be cross-examined on documents relevant to the determination of the issue even if those documents are not mentioned in the affidavit filed (*Sierra* at para 9).

[436] The Respondents say Wesley Wuttunee's cross-examination reveals he needed money and was happy for any opportunity to "squeeze candidates" for money. This argument is equally consistent with the evidence of Wesley Wuttunee.

[437] Councillor Shawn Wuttunee in his affidavit at para 8 deposes he saw Wesley Wuttunee in or about mid-March 2020 where he asked for some money.

[438] Councillor Shawn Wuttunee admits he gave Wesley Wuttunee money but he deposes he can't recall how much but that the amount was small. This evidence is consistent with and

further corroborates Wesley Wuttunee's evidence except as to the amount involved. Councillor Shawn Wuttunee further deposes he "did not offer to buy Wesley's ballot nor was I ever in possession of Wesley's mail-in ballot." I discount this assertion because the latter statement might equally be technically true but only due to the fact it was his wife, Shelly Wuttunee, and not him, who took the mail-in ballot and falsely witnessed Wesley Wuttunee's Voter Declaration form.

[439] Shelley Wuttunee in her affidavit at para 13 deposes she did not meet with Wesley Wuttunee at the Minute Muffler as alleged by Wesley Wuttunee. Despite Shelley Wuttunee deposing this information in her affidavit, this is contradicted by the fact Shelley Wuttunee witnessed Wesley Wuttunee's Voter Declaration form [AR 3318, PDF 3327]. This is however consistent with Shelly Wuttunee conduct in falsely witnessing signatures on many other Voter Declaration forms.

[440] Also relevant is the following from Wesley Wuttunee's cross-examination:

- He needed money and was looking to "get a few dollars" from candidates when he attended the polling station [RR 0967, PDF 0972, line 7-18]
- He received money from Jason Chakita [RR 0964, PDF 0969, line 22-24] (although Jason Chakita denies this)
- He received $200 from Shawn Wuttunee, however Shawn Wuttunee did not ask him to vote for him [RR 0967, PDF 0972, line 2-6]

[441] The fact Councillor Shawn Wuttunee did not ask for his vote is consistent with the fact Councillor Shawn Wuttunee had already obtained his Mail-in Ballot which was to be falsely

witnessed by his wife Shelly Wuttunee. I note as well Wesley Wuttunee deposed *both* Councillor Shawn Wuttunee and Councillor Jason Chakita gave him money. I accept this evidence.

[442] Analysis: I find on a balance of probabilities that Councillor Shawn Wuttunee offered and gave money to Wesley Wuttunee for his Request for Mail-in Ballot and Voter Declaration form. I find that Councillor Shawn Wuttunee's actions constituted serious electoral fraud and also contravened subsection 16(f) of the *FNEA*:

Prohibition — any person	**Interdictions générales**
16 A person must not, in connection with an election,	**16** Nul ne peut, relativement à une élection:
…	…
(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.	**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.

[443] I am not satisfied on a balance of probabilities that Chief Wuttunee was directly involved in the serious electoral fraud committed by Councillor Shawn Wuttunee.

[444] In coming forward with these accusations Wesley Wuttunee effectively admitted he contravened of subsection 17(b) of the *FNEA*, and that he committed serious electoral fraud in selling his vote. I caution myself in terms of accepting his evidence in this respect given the unlawful nature of what he did, but maintain my findings on a balance of probabilities.

(12) Burton Ward

[445] The Applicants allege in their Amended Notice of Application at para 33:

> SHAWN WUTTUNEE and his wife Shelley Wuttunee (on behalf of the Participants including himself) engaged in electoral corruption, and in particular vote buying, when he contacted and then met with Burton Ward. SHAWN WUTTUNEE already had the mail in ballot of Burton Ward in his possession, however it was not shown to Burton Ward. SHAWN WUTTUNEE paid Burton Ward $300 for the mail in ballot.

[446] The Respondent allegedly implicated in the corruption surrounding the vote of Burton Ward is Councillor Shawn Wuttunee. Shelley Wuttunee, Councillor Shawn Wuttunee's wife, is also allegedly implicated.

[447] In response to the Affidavit of Burton Ward, the Respondents relied on the Affidavits of Councillor Shawn Wuttunee and Shelley Wuttunee.

[448] Burton Ward in his affidavit deposes he met Chief Wuttunee's father, Oliver Wuttunee, at the Red Pheasant store. Oliver Wuttunee said Councillor Shawn Wuttunee could get him a Mail-in Ballot to which Burton Ward said he wanted one. Approximately one week later, Councillor Shawn Wuttunee met Burton Ward at the Red Pheasant store and confirmed Burton Ward wanted a Mail-in Ballot. One week later Councillor Shawn Wuttunee was driving with his wife Shelley Wuttunee when they encountered Burton Ward. Councillor Shawn Wuttunee invited Burton Ward into his vehicle and gave him $300 while Shelley Wuttunee started filming. Councillor Shawn Wuttunee gave Burton Ward his Mail-in Ballot Voter Declaration Form and Burton Ward signed it. [AR 3507, PDF 3516].

[449] Notably, Burton Ward deposes Oliver Wuttunee told him that Councillor Shawn Wuttunee could get him a Mail-in Ballot. This is not submitted for the truth of what was said, merely for the fact this is what was said to him. Therefore it is not hearsay. Moreover, Burton Ward's Mail-in Ballot reveals Councillor Samuel Wuttunee signed as witness; however, there is no mention of Councillor Samuel Wuttunee signing the Mail-in Ballot in Burton Ward's affidavit; [AR 3507, PDF 3516].

[450] Despite Burton Ward's Mail-in Ballot being submitted, the record reveals Burton Ward attended the Red Pheasant polling station where he was allowed to vote in person. As such, the Respondents submit, in the end Burton Ward attended to the polling station on reserve and was able to vote in person. Therefore, the Respondents say "there is no basis to suggest there was a compromise of the electoral process in regards to Burton Ward's vote and no corrosive element emerges from his circumstance."

[451] Councillor Shawn Wuttunee in his affidavit at para 3 deposes he helped Burton Ward sell a piece of his art to Bobby Cameron, the Chief of the Federation of Saskatchewan Sovereign Nations, for $150.00. Attached to Councillor Shawn Wuttunee's affidavit is an e-transfer from "bobby cameron" to "shawn" in the amount of $150. [RR 0150, PDF 0155] Regarding Councillor Samuel Wuttunee, I note once again that counsel for the Respondents objected to Councillor Samuel Wuttunee answering questions in relation to Burton Ward starting at AR 1772, PDF 1781, line 13 on the basis Burton Ward's Request for Mail-in Ballot was not in evidence for the purposes of Councillor Shawn Wuttunee's cross-examination. In my view, this objection had no merit – see pages 110 and following (Part IV C (3)(b)). Burton Ward's Request

for Mail-in Ballot was exhibited at A-100 and marked as an exhibit on Electoral Officer Mr Ratte's cross-examination of October 26, 2020. I again adopt and apply Justice Roussel's conclusion in *Thibodeau Edmonton* at para 14 that "a person may be cross-examined on documents relevant to the determination of the issue even if those documents are not mentioned in the affidavit filed (*Sierra* at para 9)."

[452] Analysis: The record does not persuade me on a balance of probabilities that Councillor Shawn Wuttunee bought or forged Burton Ward's Voter Declaration form, particularly in light of the e-transfer from Bobby Cameron allegedly for art work owned by Burton Ward. In my view the evidence relating to Shelley Wuttunee in this connection does not satisfy me that she committed electoral fraud. For the same reason I am not satisfied on a balance of probabilities that Burton Ward either contravened the act or regulations, or committed serious electoral fraud.

(13) Voter Declaration and mail-in ballots where elector voted in person

[453] The Applicants submit that in at least 13 known instances, an elector attempted to vote in person where a forged Mail-in Ballot had already been submitted in the name of that elector by the Respondents or a supporter.

[454] The Respondents argued these documents should not be in evidence. There is no merit to this objection. All 13 of these Voter Declarations forms were discussed in Mr Ratte's Affidavit of August 27, 2020, and admitted into evidence on Mr Ratte's cross-examination of September 14, 2020, when they were marked as Exhibit A-113. Mr Ratte also undertook to and did present these 13 Voter Declaration forms with personal information redacted – see AR, Tab 195, a

separate undertaking from his May 18, 2021 RTU. As discussed above at paras 110 and following, documents produced in response to an undertaking form part of the evidence in a proceeding. I again adopt and apply Justice Roussel's conclusion in *Thibodeau Edmonton* at para 14 that "a person may be cross-examined on documents relevant to the determination of the issue even if those documents are not mentioned in the affidavit filed (*Sierra* at para 9)." See Part IV C (3)(b).

[455] The Respondents submit from AR 0700, PDF 0709, line 11 to AR 0706, PDF 0715, line 23 (September 14, 2020 Cross-examination of Mr Ratte) that the Applicants improperly introduce the words "falsified or forged" in relation to the documents being discussed. The Respondents say those were not the words of Mr Ratte nor did he use or adopt the statements made by Applicants' counsel. Of those "13 instances" termed by the Applicants as "fraudulent", the voters were nonetheless able to vote in person and therefore no corrosive element from those ballots found its way into the 2020 Election.

[456] Analysis: On this last point, Mr Ratte referred to the conduct of these 13 voters as both "fraud" and "fraudulent" [at AR 0702, PDF 0711, line 11 to 15 he agreed it was "fraud" and at line 16 Mr Ratte uses the word "fraudulent"]. Mr Ratte produced the 13 Voter Declaration forms from electors to whom he sent Mail in Ballots, and from whom he received Mailed in Ballots, but who then showed up to vote claiming they had lost their Mail-in Ballots. He allowed them to vote because each gave him a Declaration or Affidavit they had lost their ballot.

[457] In my view the issue here is one of nomenclature. Generally I would agree a person who mails in a ballot is likely not telling the truth when they later declare they lost their ballot. In the normal course, that would not make sense and one might say the Declaration of loss was fraudulent. On close review of the transcript, it seems to me Mr Ratte referred to their Declarations of Lost Ballots as fraudulent. However Applicants' counsel construes him to refer to fraudulent Voter Declarations, i.e., not a Declaration of Loss but the Voter Declarations that must be sent in with the marked mail in ballot per 17(2) of *FNER*. That said, I find Mr Ratte was not referring to fraudulent Voter Declaration but in fact was referring to what might reasonably seem to be false Declarations of Loss from electors claiming they lost ballots they had in fact mailed in.

[458] Importantly, however, this was not a normal election. As has been seen in numerous instances, someone might have submitted a falsified Request for Mail-in Ballot, obtained the Mail-in Ballot, marked and mailed it in, without the elector knowing anything about it. It is also possible the elector did know all about it, having been paid to sell his or her vote.

[459] I note Mr Ratte refused to allow counsel for the Applicants to examine the actual 13 unredacted Mail-in Ballot packages including Voter Declaration forms citing federal *Privacy Act* concerns [AR 0702, PDF 0711, line 25]. Instead he redacted them and gave them to Applicants' counsel the next day. Therefore this Court does not have the unredacted documents. Parenthetically the Applicants could have asked the Court for a confidentiality Order admitting the unredacted documents under seal on conditions, and might have been successful, but did not.

[460] It may also be noteworthy that Councillor Samuel Wuttunee, Councillor Mandy Cuthand, Shelley Wuttunee, and Leroy Nicotine Jr. signed as witness on 8 of the 13 Voter Declaration forms [AR Tab 195] in issue. In these Reasons I make findings of serious electoral fraud against all these individuals. In particular, I note Leroy Nicotine Jr. falsely witnessed Voter Declaration forms in many other cases e.g., Robin Wuttunee, Michael Stevens, Romellow Meechance, Breanna Wahobin, Jerette Wahobin, Paul Tobaccojuice and Petula Wuttunee), and either fraudulently marked and returned them to Mr Ratte or gave them to someone else to mark and return. Para 8 of the Applicants' Memorandum alleges Leroy Nicotine Jr. participated in the forgery of Mail-in Ballots by signing as witness in the absence of the elector.

[461] However I am not satisfied on the record before me, and on a balance of probabilities that any of these 13 individuals were involved in electoral fraud in respect of their Voter Declarations, or in respect of their Declarations of Loss.

[462] The Applicants note one of the 13 Mail-in Ballots Voter Declaration forms is that of Petula Wuttunee. On March 16, 2020, Leroy Nicotine Jr. purported to sign as witness on her Voter Declaration form [AR 3792, PDF 3801]. Notably also, Councillor Henry Gardipy submitted her Request for Mail-in Ballot of Petula Wuttunee to Mr Ratte on March 6, 2020 [AR 4645-4646, PDF 4654-4655]. Para 8 of the Applicants' Memorandum alleges Leroy Nicotine Jr. participated in the forgery of Mail-in Ballots by signing as witness in the absence of the elector.

[463] The Respondents say the Applicants exaggerate the nature of what happened with this ballot to claim that there was wide-spread "voter fraud". They argue there is no indication of

fraud concerning Petula Wuttunee's ballot. But, and with respect, in this the Respondents overlook the fact Leroy Nicotine Jr. signed as witness to Petula Wuttunee's Voter Declaration form.

[464] As he did in other instances, Leroy Nicotine refused to answer what I consider relevant questions about Petula Wuttunee, and refused to answer even whether it was his signature on this allegedly fraudulent mail-in ballot:

> [AR 2758, PDF 2767]
>
> 4 Q. Do you know who Petula Wuttunee is
>
> 5 A. We're done. I just told you.
>
> …
>
> [AR 2783, PDF 2792]
>
> 13 Q. MR. XIAO-PHILLIPS: You're going to be given
>
> 14 the opportunity to answer them, and if you
>
> 15 refuse to do so, the Court will consider it
>
> 16 in imposing an appropriate sanction. Up on
>
> 17 the screen we have Exhibit A-129. This is
>
> 18 the voter declaration form with respect to
>
> 19 the mail-in ballot of Petula Wuttunee.
>
> 20 Mr. Nicotine, is that your signature in the
>
> 21 witness declaration section?
>
> 22 MR. STOOSHINOFF: Please move on,

[465] The Respondents submit Petula Wuttunee merely signed an affidavit stating she did not have her Mail-in Ballot and so she was able to vote in person. In fact, Petula Wuttunee's Voter Declaration Form is marked with the notation "VIP" meaning voted in person. That means her Mail-in Ballot was withdrawn and she and so there was no corrosive effect related to this ballot.

[466] Analysis: I draw an adverse inference from Leroy Nicotine Jr.'s refusal to answer questions related to Petula Wuttunee and about his signature on her Voter Declaration card, and find that he was involved in generating a fraudulent Request for Mail-in Ballot and what I find more probably than not a fraudulent Mail-in Ballot for Petula Wuttunee. This constituted serious electoral fraud.

D. *Summary of conclusions regarding Respondents and named supporters*

(1) Chief Clinton Wuttunee

[467] Based on the foregoing, I find the Respondent Clinton Wuttunee committed 2 contraventions of the *FNEA* subsection 16(f). I also find Clinton Wuttunee was directly involved in 5 instances of serious electoral frauds relating to vote buying (Robin Wuttunee, Rickell Frenchman, Romellow Meechance, Arnold Wuttunee, and Paul Tobaccojuice).

[468] In each case, the Court has a discretion whether to annul an election when a candidate has committed serious electoral fraud going to the integrity of the election, see *Papequash FC* at paras 34 to 38:

> [34] Not every contravention of the Act or regulations will justify the annulment of a band election. A distinction is not infrequently

made between cases involving technical procedural irregularities and those involving fraud or corruption. In the former situation, a careful mathematical approach (eg reverse magic number test) may be called for to establish the likelihood of a different outcome. However, where an election has been corrupted by fraud such that the integrity of the electoral process is in question, an annulment may be justified regardless of the proven number of invalid votes. One reason for adopting a stricter approach in cases of electoral corruption is that the true extent of the misconduct may be impossible to ascertain or the conduct may be mischaracterized. This is particularly the case where allegations of vote buying are raised and where both parties to the transaction are culpable and often prone to secrecy: see *Gadwa v Kehewin First Nation*, 2016 FC 597, [2016] FCJ No 569 (QL).

[35] In *Opitz v Wrzesnewskyj*, 2012 SCC 55, 351 DLR (4th) 579, the Court considered language in the *Canada Elections Act*, SC 2000, c 9 that closely mirrors that found in section 31 of the *First Nations Elections Act*, above. In describing the basis for the exercise of judicial discretion in cases involving procedural irregularities or fraud, the Court had this to say:

> [22] Under those provisions, if the grounds in para. *(a)* of s. 524(1) are established (the elected candidate was ineligible), then a court must declare the election null and void. In such circumstances it is as if no election was held. By contrast, if the grounds in para. *(b)* are established (there were irregularities, fraud or corrupt or illegal practices that affected the result of the election), a court *may* annul the election. Under these circumstances, a court must decide whether the election held was compromised in such a way as to justify its annulment.
>
> [23] In deciding whether to annul an election, an important consideration is whether the number of impugned votes is sufficient to cast doubt on the true winner of the election or whether the irregularities are such as to call into question the integrity of the electoral process. Since voting is conducted by secret ballot in Canada, this assessment cannot involve an investigation into voters' actual choices. If a court is satisfied that, because of the rejection of certain votes, the winner is in doubt, it would be unreasonable for the court not to annul the election.

[36] In light of the above statement, the idea that serious electoral fraud can vitiate an election result cannot be seriously doubted. What must not be overlooked, however, is the Court's admonition that a reviewing court retains a discretion to decline to annul an election even in situations involving fraud or other forms of corruption. This was a point more recently noted in *McEwing v Canada (Attorney General)*, 2013 FC 525, [2013] 4 FCR 63, where Justice Richard Mosley stated:

> [81] What may constitute a corrosive effect on the integrity of the electoral process will depend on the facts of each case. I do not read the comments of the majority in paragraph 43 of *Opitz* as providing authority for the proposition that the Court may overturn election results in every case in which electoral fraud, corruption or illegal practices have been demonstrated. In that paragraph, the Supreme Court cited *Cusimano v Toronto (City)*, 2011 ONSC 7271, [2011] OJ No 5986 (QL) at para 62: "An election will only be set aside where the irregularity either violates a fundamental democratic principle or calls into question whether the tabulated vote actually reflects the will of the electorate."
>
> [82] At paragraph 48 of *Opitz*, the majority cautioned that annulling an election would disenfranchise not only those persons whose votes were disqualified (in the context of an irregularities case) but every elector who voted in the riding. That suggests, in my view, that the Court should only exercise its discretion to annul when there is serious reason to believe that the results would have been different but for the fraud or when an electoral candidate or agent is directly involved in the fraud.

[37] Justice Mosley's remark that electoral corruption conducted by a candidate or agent ought generally to be treated more strictly is also reflected in the following passage from Justice Cecily Y. Strickland's decision in *Gadwa v Kehewin First Nation*, above:

> [88] It must first be stated that a candidate who engages in vote buying is attempting to corrupt the election process. Therefore, regardless of the number of votes that the candidate purchased, or attempted to purchase, and regardless of whether the candidate wins the election by a greater margin than the number of votes that were purchased, this

> cannot save the candidate and his or her election must still be vitiated. Fraud, corruption and illegal election practices are serious (*Opitz* at para 43).
>
> [38] What can be taken from the relevant authorities is that attempts by electoral candidates or their agents to purchase the votes of constituents are an insidious practice that corrodes and undermines the integrity of any electoral process.
>
> [Emphasis added]

[469] See also *Good* at paras 54 and 55:

> [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.
>
> [Emphasis added]

[470] Moreover the Federal Court of Appeal endorsed the decisions of both Justice Barnes in *Papequash FC* and of Justice Strickland in *Gadwa* in its appeal decision in *Papequash FCA* at para 13:

> [13] It bears emphasis that the Judge thoroughly reviewed the filed affidavits, which, for the most part remained unchallenged. The Judge also considered the relevant sections in the *FNEA* and correctly applied the jurisprudence in the context of this case (*Gadwa v. Kehewin First Nation*, 2016 FC 597, [2016] F.C.J. No. 569 (QL), aff'd 2017 FCA 203; *Opitz v. Wrzesnewskyj*, 2012 SCC 55, [2012] 3 S.C.R. 76). On the basis of the record before him, it was open to the Judge to make a finding of "widespread and openly conducted vote buying activity" and to conclude that "the integrity of the Key First Nation Band election conducted on October 1, 2016 was sufficiently corrupted by the misconduct of Rodney Brass, Glen O'Soup, Sidney Keshane, and Angela Desjarlais" to order that the election be set aside (Judge's reasons at paras 39 and 40).
>
> [Emphasis added]

[471] As noted, the Federal Court of Appeal also endorsed Justice Strickland's decision in *Gadwa* in its appeal decision *Gadwa FCA* at para 3:

> [3] I would dismiss the appeal for the reasons given by the Federal Court judge. No error has been identified either in the judge's assessment of the standard of review of the Elections Officer's decision, nor in the application of that standard to the evidence before her.

[472] In the case of Chief Clinton Wuttunee, in the exercise of my discretion I have decided to annul his election. I do so for several reasons, the first of which is the leadership role the Chief of Red Pheasant is expected but failed to play in the Election. A first Nation Chief should be expected to be one of the bulwarks of First Nation democracy. Here Chief Wuttunee was not. Moreover, and in my view, Mr Ratte as Electoral Officer was entitled to accept Requests for Mail-in Ballots from the Chief of this First Nation in good faith: here in some instances Chief Wuttunee seriously disappointed. I also take into account the number of instances of serious electoral fraud (five). In my respectful view, Chief Wuttunee's conduct seriously corroded and

compromised the integrity of the Election. I also note Chief Wuttunee authorized the use of band money to pay for the votes of not one but two band members (Arnold Bruce Wuttunee and Paul Tobaccojuice), which in my view are particularly grave electoral frauds. I appreciate the magic number is not reached in terms of the number of ballots corrupted by Chief Wuttunee's serious electoral frauds, and that in annulling his election the Court takes away the votes all those who supported him. However, in my view Chief Wuttunee's conduct is sufficiently corrosive to the integrity of his election such that, and in my discretion, the election of the Respondent Chief Clinton Wuttunee must be annulled.

(2) Councillor Gary Nicotine

[473] Based on the foregoing, I find the Respondent Gary Nicotine committed 3 contraventions of the *FNEA* subsection 16(f). I also find Gary Nicotine was directly involved in 7 instances of serious electoral frauds relating to vote buying (Romellow Meechance, Rickell Frenchman, Breanna Wahobin, Jerette Wahobin, Paul Tobaccojuice, Veronica Whitford, and Darian Whiteford).

[474] Again, I emphasize the Court has a discretion to annul an election where a candidate has committed serious electoral fraud. In the case of Councillor Gary Nicotine, I have determined to annul his election. I do so for several reasons. Once again, I do so because of the leadership role Red Pheasant Councillors are expected to carry out in this Election and elections generally. Councillors, in addition to First Nation Chiefs are expected to be bulwarks of First Nation democracy. Here Councillor Gary Nicotine failed in this important role. Moreover, as with the Chief, Mr Ratte as Electoral Officer was entitled to accept Requests for Mail-in Ballots from

Councillor Gary Nicotine in good faith: here Councillor Gary Nicotine seriously disappointed. I also take into account the number of instances of serious electoral fraud he committed and the number of contraventions committed – again, seven. Councillor Gary Nicotine was also directly involved in the purchase of Paul Tobaccojuice's ballot with band funds – a particularly grave electoral fraud. I appreciate the magic number test is not met. However, in my view Councillor Gary Nicotine's conduct was on a par and only slightly less egregious than that of Chief Wuttunee. In my respectful view, Councillor Gary Nicotine's conduct seriously corroded the integrity of the Election. Such conduct must not be met with impunity. Therefore, in my discretion I find the election of the Respondent Councillor Gary Nicotine must be annulled and will so Order.

(3) Councillor Lux Benson

[475] Based on the foregoing, I find the Respondent Councillor Lux Benson committed 1 contravention of the *FNEA* subsection 16(f). I also find Lux Benson was directly involved in 1 instance of serious electoral frauds relating to vote buying (Paul Tobaccojuice).

[476] Again, I start by noting the Court has a discretion whether to annul an election where a candidate has committed serious electoral fraud. In the case of Councillor Lux Benson, I have decided not to annul his election. While Red Pheasant Councillors are expected to carry leadership roles in First Nations elections, and are expected to be one of the bulwarks of First Nation democracy. Here Councillor Lux Benson failed in these important roles. While Councillor Lux Benson did not send documents to Mr Ratte as Electoral Officer, and was only implicated in one instance of serious electoral fraud, I cannot overlook the fact he was directly

involved in the serious electoral fraud concerning Paul Tobaccojuice, whose vote was bought with band money, a particularly grave electoral fraud. On balance however and in my discretion I do not find his conduct warrants annulment and the disenfranchisement of all those who voted for him.

[477] Therefore, I have concluded in my discretion that the election of the Respondent Councillor Lux Benson should not be annulled.

(4) Councillor Jason Chakita

[478] Based on the foregoing, I find the Respondent Jason Chakita committed 1 contravention of the *FNEA* subsection 16(f). I also find Jason Chakita was directly involved in 1 instances of serious electoral frauds relating to vote buying (Robin Wuttunee).

[479] I repeat my comments concerning Councillor Lux Benson immediately above, and I note the matter Councillor Jason Chakita was involved in was not a fraud that used band money to buy the vote of a band member. I do not find his conduct warrants annulment and the disenfranchisement of all those who voted for him.

[480] Therefore, I have concluded in my discretion that the election of the Respondent Councillor Jason Chakita should not be annulled.

(5) Councillor Mandy Cuthand

[481] Based on the foregoing, I find the Respondent Mandy Cuthand was directly involved in 2 instances of serious electoral fraud relating to vote buying (Rickell Frenchman and Romellow Meechance).

[482] I repeat my comments concerning Councillor Lux Benson above, and once aging note the matter Councillor Mandy Cuthand was involved in was not a fraud that used band money to buy the vote of a band member. I do not find his conduct warrants annulment and the resulting disenfranchisement of all those who voted for him.

[483] Therefore, I have concluded in my discretion that the election of the Respondent Councillor Mandy Cuthand should not be annulled.

(6) Councillor Dana Falcon

[484] Based on the foregoing, I find the Respondent Councillor Dana Falcon has not committed contraventions of the *FNEA*, nor was he directly involved serious electoral fraud. No further action is required by the Court.

(7) Councillor Henry Gardipy

[485] Based on the foregoing, I find the Respondent Councillor Henry Gardipy was directly involved in 1 instance of serious electoral fraud relating to vote buying (Michael Stevens).

[486] I repeat my comments concerning Councillor Lux Benson above, and once again note the matter Councillor Henry Gardipy was involved in was not a fraud that used band money to buy the vote of a band member. I do not find his conduct warrants annulment and the resulting disenfranchisement of all those who voted for him.

[487] Therefore, I have concluded in my discretion that the election of the Respondent Councillor Henry Gardipy should not be annulled.

(8) Councillor Samuel Wuttunee

[488] Based on the foregoing, I find the Respondent Councillor Samuel Wuttunee committed 3 contraventions of the *FNEA*, subsection 16(f). I also find Samuel Wuttunee was directly involved in 3 instances of serious electoral frauds relating to vote buying (Robin Wuttunee, Veronica Whitford, and Darian Whiteford).

[489] I repeat my comments concerning Councillor Lux Benson above, and once aging note the matter Councillor Samuel Wuttunee was involved in was not a fraud that used band money to buy the vote of a band member. While the number of serious electoral frauds is higher than some of the Respondents, I am unable to conclude his conduct warrants annulment and the resulting disenfranchisement of all those who voted for him.

[490] Therefore, I have concluded in my discretion that the election of the Respondent Councillor Samuel Wuttunee should not be annulled.

(9) Councillor Shawn Wuttunee

[491] Based on the foregoing, I find the Respondent Councillor Shawn Wuttunee committed 1 contravention of the *FNEA*, subsection 16(f). I also find Shawn Wuttunee was directly involved in 1 instance of serious electoral fraud relating to vote buying (Wesley Wuttunee).

[492] I repeat my comments concerning Councillor Lux Benson above, and once again note the matter Councillor Shawn Wuttunee was involved in was not a fraud that used band money to buy the vote of a band member. I do not find his conduct warrants annulment and the resulting disenfranchisement of all those who voted for him.

[493] Therefore, I have concluded in my discretion that the election of the Respondent Councillor Shawn Wuttunee should not be annulled.

(10) Leroy Nicotine Jr.

[494] During the course of these reasons, I found Leroy Nicotine Jr. was directly involved in 8 instances of serious electoral fraud related to vote buying. These were in relation to the votes of Robin Wuttunee, Michael Stevens, Tomas Pritchard, Petula Wuttunee, Romellow Meechance, Breanna Wahobin, Jerette Wahobin, and Paul Tobaccojuice.

[495] However, while named in and served with the Amended Notice of Application and the Applicants' Memorandum of Fact and Law, and represented by counsel throughout (the same counsel who represented the Respondents and other supporters), Leroy Nicotine Jr. is not a party

to this proceeding. His repeated misconduct and electoral fraud was egregious, and I find it seriously corroded the integrity of the Election. While he was a candidate, Leroy Nicotine Jr. was not elected. I conclude the *FNEA* does not provide this Court with a remedy it may impose on a candidate who commits multiple acts of serious electoral fraud, but is not elected. No further action is available to this Court.

(11) Shelley Wuttunee

[496] By her own admission Shelley Wuttunee falsely signed as witness to numerous Voter Declaration forms, which electors needed to submit with a Mail-in Ballot. I repeat my comments at Part V. A. (6) above. In the ballot-by-ballot discussion above, I specifically found she committed two instances of serious electoral fraud (Robin Dean Wuttunee and Arnold Bruce Wuttunee). I find on a balance of probabilities – as she admitted – that the number of times she falsely signed as witness is very significantly higher. She persistently refused to answer proper and relevant questions as to how many times she falsely signed as a witness on Voter Declaration forms.

[497] However, while named in and served with the Amended Notice of Application, and represented by counsel herein, Shelley Wuttunee is not a party to this proceeding. Her repeated serious electoral frauds was egregious.

[498] Once again, I conclude the *FNEA* does not provide the Court with a remedy to impose on Shelley Wuttunee.

(12) Band employees Cody Benson (Band Manager), Austin Ahenakew (Chief Financial Officer) and Deloris Peyachew (Indian Registry Administrator)

[499] As noted in the ballot by ballot discussion (see Part V.A.(8)), I am not satisfied these First Nation employees contravened either the *FNEA* or *FNER*, or that they committed electoral fraud.

VI. Conclusion

[500] The contestation is granted in part and the elections of Chief Clinton Wuttunee and Councillor Gary Nicotine will in my discretion be annulled because their numerous and gravely serious electoral frauds corroded the integrity of the Election regardless of the number of votes they received.

VII. Costs

[501] The parties within 25 days of the date of these Reasons are at liberty to file draft bills of costs and to make cost submissions thereon in writing limited to 20 pages, which must also state what all-inclusive (fees, disbursements, taxes etc.) lump sum award of costs should be awarded to them.

JUDGMENT in T- 474 - 20

THIS COURT'S JUDGMENT is that:

1. This contestation is granted in part.
2. The elections of Chief Clinton Wuttunee and Councillor Gary Nicotine are annulled.
3. The contestation against the elections of Councillor Lux Benson, Councillor Jason Chakita, Councillor Mandy Cuthand, Councillor Dana Falcon, Councillor Henry Gardipy, Councillor Samuel Wuttunee, and Councillor Shawn Wuttunee are dismissed.
4. The parties within 25 days of the date of these Reasons are at liberty to file draft bills of costs, and to make cost submissions thereon in writing limited to 20 pages, which must also state what all-inclusive (fees, disbursements, taxes etc.) lump sum award of costs should be awarded to them.

"Henry S. Brown"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Nathan Xiao-Phillips Mervin C. Phillips	FOR THE APPLICANTS
Nicholas J. Stooshinoff, Q.C. Darren Winegarden	FOR THE RESPONDENTS (FOR RED PHEASANT FIRST NATION, CLINTON WUTTUNEE, LUX BENSON, JASON CHAKITA, MANDY CUTHAND, DANA FALCON, HENRY GADRIPY, GARY NICOTINE, SAMUEL WUTTUNEE, SHAWN WUTTUNEE)
John Isfeld J.R. Norman Boudreau	FOR THE RESPONDENT (BURKE RATTE)

SOLICITORS OF RECORD:

Phillips & Co. Phillips Legal Professional Corporation	FOR THE APPLICANTS

Barristers & Solicitors
Regina, Saskatchewan

Lakefield LLP
Saskatoon, Saskatchewan

FOR THE RESPONDENTS
(FOR RED PHEASANT FIRST NATION, CLINTON WUTTUNEE, LUX BENSON, JASON CHAKITA, MANDY CUTHAND, DANA FALCON, HENRY GADRIPY, GARY NICOTINE, SAMUEL WUTTUNEE, SHAWN WUTTUNEE)

Boudreau Law LLP
Barristers and Solicitors
Winnipeg, Manitoba

FOR THE RESPONDENT
(BURKE RATTE)