

Federal Court



Cour fédérale

**Date: 20220601**

**Docket: T-1197-21**

**Citation: 2022 FC 805**

**Ottawa, Ontario, June 1, 2022**

**PRESENT: The Honourable Madam Justice Strickland**

**BETWEEN:**

**MICHAEL (JOE) FLETT  
NORMAN JOSEPH LAGIMODIERE  
CHARLES BOUCHER  
TRACY PASHE  
JOSEPH BOUCHER  
JOHN NEAPEW**

**Applicants**

**and**

**PINE CREEK FIRST NATION  
DEREK NEPINAK  
DON CHARTRAND  
CINDY MCKAY  
HARTLEY CHARTRAND  
ANGELA MCKAY  
BURKE RATTE**

**Respondents**

**JUDGEMENT AND REASONS**

[1] The Applicants bring this application, pursuant to s 31 of the *First Nations Elections Act*, SC 2014, c 5 [FNE Act], contesting the election of Chief and Council of the Pine Creek First Nation and seeking to have the election set aside.

## **Background**

[2] The Pine Creek First Nation [Pine Creek] is a participating First Nation in, and conducts its elections pursuant to, the FNE Act. The election for Chief and Council contested in this application was held on June 29, 2021 [Election]. Three advance polls were held: one in Dauphin on June 22, 2021; one in Brandon on June 23, 2021; and one in Winnipeg on June 24, 2021.

[3] A total of 1088 ballots were cast for the position of Chief and for the positions of Councillor. Derek Nepinak was elected Chief, receiving 401 votes. He is a respondent in this application. The runner-up for the position of Chief was Charles Boucher (375 votes); he is an applicant. The successful candidates for Council were Hartley Chartrand (337 votes), Cindy Campbell-McKay (263 votes), Don Chartrand (254 votes) and Angela McKay (233 votes). They are all named respondents in this application. The first runner-up for Councillor was Johnny Neapew (233 votes), he is an applicant in this matter as are Michael (Joe) Flett (221 votes), and Joseph Boucher (196 votes).

[4] The Applicants allege that Mr. Nepinak attempted to buy the votes of electors by providing tickets for a hot dog and drink outside the building where the Winnipeg advance poll was being held. Further, that the Electoral Officer, Burke Ratte, failed to adequately identify persons who cast votes in the Election and permitted other irregularities in its conduct. The Electoral Officer is also a named respondent in this matter. In these reasons, he will be referred to as the Electoral Officer and the remaining named respondents will collectively be referred to as the Respondents.

[5] The Respondents and the Electoral Officer deny the allegations made against them.

## Relevant Legislation

*First Nations Elections Act, SC 2014, c 5*

Prohibition — any person

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

- (a) vote or attempt to vote knowing that they are not entitled to vote;
- (b) attempt to influence another person to vote knowing that the other person is not entitled to do so;
- (c) knowingly use a forged ballot;
- (d) put a ballot into a ballot box knowing that they are not authorized to do so under the regulations;
- (e) by intimidation or duress, attempt to influence another person to vote or refrain from voting or to vote or refrain from voting for a particular candidate; or
- (f) offer money, goods, employment or other valuable consideration in an attempt to influence an elector to vote or refrain from voting or to vote or refrain from voting for a particular candidate.

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.

...

Prohibition

27 A person must not, in a manner that this Act does not otherwise prohibit, intentionally obstruct the conduct of an election.

...

#### Contestation of election

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

...

#### Court may set aside election

35 (1) After hearing the application, the court may, if the ground referred to in section 31 is established, set aside the contested election.

### *First Nations Elections Regulations, SOR/2015-86 [Regulations]*

#### Ballot

21 (1) Subject to subsection (3), the electoral officer or deputy electoral officer must provide a ballot on which their initials have been placed to any person who has not voted at an advance poll, who attends at a polling station and whose name is set out in the voters list.

#### Marked voters list

(2) The electoral officer or deputy electoral officer must place a mark on the voters list next to the name of each elector who was given a ballot.

#### Mail-in ballot

(3) An elector who received a mail-in ballot package under section 16 may obtain a ballot and vote in person at a polling station if the elector

(a) returns the unused mail-in ballot to the electoral officer or deputy electoral officer; or

(b) provides the electoral officer or deputy electoral officer with a sworn affidavit stating that they have lost their mail-in ballot.

### **Issues**

[6] The issues raised in this matter can be appropriately framed as:

- i. Did Mr. Nepinak contravene the FNE Act or Regulations?

- ii. Did the Electoral Officer contravene the FNE Act or Regulations?
- iii. If so, were the contraventions likely to have changed the result of the Election?
- iv. Should the Court exercise its discretion pursuant to s 35 of the FNE Act to set aside the Election?

### **Preliminary Observation**

[7] The Applicants, the Respondents, and the Electoral Officer have each filed application records. Each of these records contains evidence filed in this application.

[8] The Applicant's record contains:

- i. Affidavit of Michael (Joe) Flett, sworn on July 29, 2021
- ii. Affidavit of Norman Joseph Lagimodiere, sworn on July 29, 2021
- iii. Affidavit of Tracey Pashe, sworn on August 27, 2021
- iv. Affidavit of Charles Boucher, sworn on August 28, 2021
- v. Affidavit of Justine Neapew, sworn on September 6, 2021
- vi. Affidavit of Norma Joseph Lagimodiere, sworn on October 22, 2021
- vii. Affidavit of Freda Virginia Watson, sworn on October 22, 2021
- viii. Affidavit of Elizabeth Kayla Marie Flett, sworn on October 22, 2021
- ix. Affidavit of Jedidiha Nostradomus Flett
- x. Cross-Examination of Derek Nepinak
- xi. Cross-Examination of Burke Ratte
- xii. USB stick with video footage of Pine Creek First Nation polling station.

[9] The Respondent's record contains:

- i. Affidavit of Derek Nepinak, sworn October 1, 2021
- ii. Affidavit of Derek Nepinak, sworn November 4, 2021
- iii. Transcript of Cross-Examination on Affidavit of Tracy Nora Pashe, November 12, 2021
- iv. Transcript and Exhibits of Cross-Examination on Affidavit of Norman Joseph Gustave Lagimodiere, November 12, 2021
- v. Transcript and Exhibits of Cross-Examination on Affidavit of Freda Virginia Watson, November 12, 2021
- vi. Transcript of Cross-Examination on Affidavit of Charlie Willie Boucher, November 12, 2021
- vii. Transcript of Cross-Examination on Affidavit of Justin Neapew, November 12, 2021
- viii. Transcript of Cross-Examination on Affidavit of Michael Joseph Flett, November 12, 2021
- ix. Transcript of Cross-Examination on Affidavit of Jedidiha Nostradomus Flett, February 18, 2022.

[10] The Electoral Officer's Record contains:

- i. Affidavit of Burke Ratte, sworn October 6, 2021
- ii. Transcript of Cross Examination on Affidavit of Norman Joseph Gustave Lagimodiere with Exhibits A and B, November 12, 2021
- iii. Transcript of Cross Examination on Affidavit of Tracy Nora Pashe, November 1, 2021

[11] While I have reviewed and considered all of this evidence, for purposes of these reasons – in particular in light of the concessions made by the Applicants at the hearing which will be discussed below – it is not necessary mention or refer to each individual item. In my analysis, I have referenced the most pertinent evidence in the context of the issue being addressed.

## **Alleged contraventions of the FNE Act or Regulations by Mr. Nepinak**

### *Applicants' position*

[12] The Applicants allege that Mr. Nepinak, as a candidate for the position of Chief, stood outside the building where the advance poll in Winnipeg was being held and offered people tickets for hot dogs and drinks if they would vote for him and his slate of candidates for Council. The Applicants submit that Mr. Nepinak was attempting to buy votes and that his actions were in contravention of s 16(f), s 17(b), s 20(b) and s 27 of the FNE Act. In support of this position, they rely on the affidavit evidence of Norman Lagimodiere, Freda Watson, Tracy Pashe, and Justin Neapew. The Applicants assert that Mr. Nepinak's responding affidavit evidence is not credible.

### *Respondents' position*

[13] The Respondents submit that Mr. Nepinak's evidence was that he distributed hot dog tickets outside of the polling station as a gesture of kindness and thanks for participating in the voting process. He did so without asking or telling anyone to vote for him or any other particular candidate. The Respondents submit that Mr. Nepinak's evidence should be preferred to the evidence submitted on behalf of the Applicants and that various contextual factors also favour Mr. Nepinak's version of events, including that he openly handed out the tickets and offered them to electors who had already voted, non-electors and opposing candidates. In any event, there can be no finding of vote buying in contravention of s 16(f) of the FNE Act because hot dog tickets are not "valuable consideration".

*Electoral Officer's position*

[14] The Electoral Officer takes no position as to whether Mr. Nepinak contravened the FNE Act.

*Legal backdrop*

[15] Section 31 of the FNE Act contains two elements that must both be met to successfully contest an election for chief or a councillor:

- i. There must be a contravention of the FNE Act or the Regulations; and
- ii. The contravention is likely to have affected the result of the election.

[16] Pursuant to s 35, the Court may, if these elements are established, set aside the contested election.

[17] Jurisprudence considering an application brought under s 31, and the potential setting aside of the contested election under s 35(1) (or similar provisions found in other legislation), has established the following general principles:

- A contravention can occur through an act of either commission or omission by an elector, an electoral candidate or an electoral officer (*Bird v Paul First Nation*, 2020 FC 475 [*Bird*] at para 29; *O' Soup v Montana*, 2019 SKQB 185 [*O'Soup*] at para 27);
- The onus, or legal burden of proof, is on the applicant to establish that a contravention of the FNE Act or the Regulations has occurred and that the



contravention was likely to have affected the result of the election [*Whitford v Red Pheasant First Nation*, 2022 FC 436 [*Whitford*] at para 75; *Bird* at para 28-30; *McNabb v Cyr*, 2017 SKCA 27 [*McNabb*] at para 23); *Opitz v Wrzesnewskyj*, 2012 SCC 55 [*Opitz*] at para 52; *Papequash v Brass*, 2018 FC 325 [*Papequash*] at para 33; *O'Soup* at para 29). “Likely” has been held to be more akin to ‘probable’ than to ‘possible’ or ‘may have affected the result’ (*Paquachan v Louison* 2017 SKQB 239 [*Paquachan*] at para 24; *O'Soup* at para 117);

- The standard of proof for establishing that the requirements of s 31 have been met is the balance of probabilities (*Good v Canada (Attorney General)*, 2018 FC 1199 at para 49 [*Good*]; *Papequash* at para 33; *McNabb* at para 23; *O'Soup* at para 29, 92; *Whitford* at para 75). If an applicant leads sufficient evidence to establish on a balance of probabilities that a contravention occurred that likely affected the outcome of the election, then the evidentiary burden may shift to the respondent to refute the alleged contravention or to establish that the contravention likely did not affect the election result (*Opitz* at para 61; *Paquachan* at para 23; *O'Soup* at para 92; *McNabb* at para 23);
- There is a “presumption of regularity”, that is, the Court shall presume that all necessary procedures were followed in the conduct of a challenged election, until the Applicant proves otherwise (*Opitz* at para 169; *Bird* at para 29; *O'Soup* at para 91; *McNabb* at para 26). In any election, irregularities in the election process are bound to occur in some form (*Opitz* at para 46; *Paquachan* at para 19). Such administrative errors should not result in an election being set aside unless it is established that those irregularities are likely to have affected the result of the

election (*Paquachan* at para 19; *Papequash* at para 33; *McNabb* at para 36; *Good* at para 49; *Whitford* at para 77);

- Not every contravention will justify overturning the election. The considerations may differ depending on whether the contravention involves technical procedural questions concerning the conduct of the election or fraud or corruption, such as vote buying. For example, in cases involving technical procedural questions, a mathematical approach such as the “magic number” test may be appropriately utilized to establish the likelihood of a different outcome. However, in cases where an election has been corrupted by fraud bringing the integrity of the electoral process into question, annulling the election may be justified regardless of the proven number of invalid votes (*Good* at para 54; *Papequash* at para 34; *McEwing v Canada (Attorney General)*, 2013 FC 525 [*McEwing*] at paras 81-82; *Bird* at para 32; *Gadwa v Kehewin First Nation*, 2016 FC 597 [*Gadwa*] at paras 88-89; *Whitford* at para 78);
  
- Even if the applicants have satisfied both statutory requirements, the Court ultimately retains discretion as to whether to order a new election. The exercise of this discretion includes situations involving fraud or other forms of corruption. This is because annulling an election has broad and serious consequences. It disenfranchises not only those whose votes were disqualified, but every elector who cast a vote; increases the potential for future litigation; undermines the certainty in the democratic outcomes; and, may lead to disillusionment and voter

apathy (*Bird* at para 31; *Paquachan* at para 20, 25; *Good* at para 55; *Opitz* at para 48; *O'Soup* at paras 31, 117, 123; *McNabb* at para 45; *McEwing* at paras 78, 82).

[18] It is against this legal backdrop that I will now consider the parties' submissions and the evidence.

*The parties' evidentiary submissions*

[19] It is not in dispute that Mr. Nepinak offered tickets for a hot dog and drink outside the building where the Winnipeg advance poll was being held. What is in dispute is whether the offering of the tickets was for the purpose of obtaining votes for Mr. Nepinak or other candidates he supported.

[20] In support of their allegation, the Applicants refer to the following evidence:

- i. The affidavit evidence of Norman Joseph Lagimodiere. In his affidavit Mr. Lagimodiere states that he was a volunteer scrutineer for candidate Michael (Joe) Flett in the Election. During the Winnipeg advance poll on several occasions he witnessed Mr. Nepinak standing outside the polling station handing out blue hot dog tickets to people entering to vote. He deposes that he was close enough to hear Mr. Nepinak on each of those occasions asking people to vote for him or his council candidates. This occurred between 1 and 6 p.m. He took a picture of Mr. Nepinak which is attached as an exhibit to his affidavit.

- ii. The affidavit of Freda Watson deposes that as she was exiting her daughter's car parked in front of the Winnipeg advance polling station Mr. Nepinak approached her, introduced himself and offered his hand to shake. She did not shake his hand because she was using a walker. She deposes that Mr. Nepinak then said, "If you voted for me, I will give you a ticket and then you go see those guys over there once you are done voting". She replied, "no thank you, I know who I am voting for". She states that she believes Mr. Nepinak wanted to buy her vote.
- iii. The affidavit of Tracy Pashe, who was a volunteer scrutineer for candidates Charles Boucher and Joseph Boucher in the Election, deposes that she was seated at the scrutineers section of the Electoral Officer's table in the Winnipeg advance poll and saw Mr. Nepinak standing outside the polling room station in the adjoining lobby giving tickets to the people coming in. He gave tickets to a person sitting at the entrance to the polling station room. Mr. Nepinak handed her five hot dog tickets and she attaches as an exhibit to her affidavit a photo of a string of six tickets marked "good for one drink". She also states that she believes that the Electoral Officer saw Mr. Nepinak giving her and others tickets. She says she stepped outside the polling station building several times and at least on one occasion saw Mr. Nepinak give hot dog tickets to one person entering the building to vote.
- iv. The affidavit of Justin Neapew, who was a volunteer for candidate Michael (Joe) Flett in the Election, deposes that on the day of the Winnipeg advance polls he was driving people to the polling station. When doing so he parked across the

street from the front doors of the polling station and he saw Mr. Nepinak standing and talking to voters and giving them hot dog tickets. He deposes that he asked about 15 such voters what Mr. Nepinak wanted and they all responded that he gave them tickets and asked them to vote for him and his group of candidates. Mr. Neapew also states that about 10-15 other voters, upon re-entering his vehicle, volunteered the same information. He states that every time he left the advance polling station he saw Mr. Nepinak standing outside talking to people with his hot dog tickets.

[21] The Respondents rely on the affidavit evidence of Mr. Nepinak.

- i. Mr. Nepinak's October 1, 2022 affidavit was made in response to the affidavit evidence of the Applicants. He deposes that he planned to vote at the Winnipeg advance poll and to distribute tickets to friends, family and others in the vicinity of the hotel where the poll was located. The tickets could be redeemed for a hot dog and a can of pop from Willy Dogs' mobile food cart. He had had purchased 60 tickets from Willy Dogs at a cost of \$6.25 per ticket for this purpose. He deposed that it is customary and cultural to offer food or feast in advance, during or after cultural or political events, noting he had offered a fish fry to electors and friends in advance of his election as Grand Chief of the Assembly of Manitoba Chiefs and again offered to feed friends and electors as a gesture of good will with respect to his re-election to that position.

Mr. Nepinak deposes that after casting his vote he left the hotel and walked about 32 metres south where he offered a ticket to an elderly woman who walked by headed north. She asked his name and he responded that it was Derek but did not give his full name or that he was running for Chief. She declined the ticket. In this same location, he also offered a couple of tickets to Norman Joseph Lagimodiere, which were accepted. Arthur McKay asked him for a ticket and was given six. Later, Mr. Nepinak approached about eight men, near the hotel front doors, who were dressed in red and black whom he believed to be associated with candidates running in the election, such as Charles Boucher. He offered tickets to the group, one of whom took two tickets. He did not tell anyone in the group that he was running for Chief. He then walked north about 70-80 feet where he stopped. A group of three people approached him from the south. One asked if he was running for Chief and he confirmed that he was and gave a ticket to each person plus extras for their children. Shortly after 2 p.m., Mr. Nepinak went to the hot dog cart, redeemed a ticket for a hot dog and a drink and then left the area in his vehicle. His recollection was that he was in the vicinity of the hotel from about 1:27 to 2:27 p.m., based on his parking receipt, a copy of which is attached as an exhibit to his affidavit. He returned to the hot dog cart shortly after 6:30 p.m., spoke with the operator of the hot dog cart, then went back to his motorcycle. While there, he encountered Charles Boucher and offered him tickets which he accepted. He was given two tickets and asked for a couple more and was given two more. Mr. Nepinak then left on his motorcycle.

In response to the affidavit of Tracy Pashe, Mr. Nepinak deposes that he may have given a ticket to a young man sitting outside the entrance to the polling station but did not know if he was a voter or had voted. In response to the affidavit of Norman Joseph Lagimodiere, Mr. Nepinak deposes that at no point when he was in or near the hotel did he ask or tell anyone to vote for him, or any other candidates, or to not vote for any candidate.

- ii. In his November 4, 2021 affidavit Mr. Nepinak responds to the affidavit of Freda Watson. Mr. Nepinak deposes that he does not personally know Freda Watson but recalled interacting with a woman on the day of the advance poll who was exiting a vehicle with a walker. He states that he approached the vehicle, which held a number of people including a young woman, introduced himself and asked if they were Pine Creek First Nation members. The young woman said that she was not. He then offered them hot dog tickets; he thought he gave four to the young woman who said she would give some to her children. He did not recall the individual that he now assumes was Freda Watson accepting a ticket from him and did not tell her to vote for him. Nor did he say that the ticket being offered was in exchange for a vote for him or that he would provide a ticket if she voted for him. He did not offer the ticket to her in an attempt to buy her vote as her affidavit asserts. He states that the offering of the ticket was a gesture of kindness and thanks for participating in the voting process.

[22] In their written submissions, the Applicants refer to the affidavit evidence set out above that supports their position. They address the explanation given by Mr. Nepinak in his affidavit, and elaborated upon on cross-examination, for why he was handing out hot dog tickets: that he viewed it as customary to offer food and had previously held fish fries before other elections, and, as an expression of gratitude, to be kind and present. The Applicants do not argue that offering food in connection with cultural events or political events is not customary. They submit, however, that the two examples provided by Mr. Nepinak refer only to his own actions. They then state that Mr. Nepinak point blank denied that he asked any electors to vote for him or any other candidates and submit that his evidence is not credible as “[t]here are many electors who emphatically stated that he did suggest who they should vote for while giving out gifts of food and beverage”.

[23] The Respondents submit that there is no vote buying when something is offered without any condition to vote in a certain way. Because the Applicants have not provided any evidence that the hot dog tickets were offered with a condition that the recipient vote in a certain way, they have failed to establish a contravention of s 16(f) of the FNE Act. Nor is there any evidence that Mr. Nepinak orally promoted the election of any particular candidate, therefore no breach of s 20(b) has been established. The Respondents submit that the Applicants now recognize this weakness in their position and therefore attack Mr. Nepinak’s credibility. The Respondents assert that the Applicants failed to cross-examine Mr. Nepinak on the key factual dispute in this case – what he said while handing out hotdog tickets. Because the Applicants did not impeach Nepinak’s credibility when he was cross-examined, it is not open to them to do so later in written submissions as Mr. Nepinak could no longer defend his credibility. The Respondents rely on



case law concerning testimony given at trial in support of this position. They also assert that the Applicants cannot challenge Mr. Nepinak's credibility solely on the existence of contradictory evidence from their own affiants on a critical factual issue that was not put to him on cross-examination. They submit that with no reason to disbelieve Mr. Nepinak's evidence that he did not tell or suggest to people how to vote, the Applicants cannot meet the first hurdle of s 31 of the FNE Act, that there was a contravention.

[24] The Respondents submit that, in any event, Mr. Nepinak's evidence ought to be preferred as it is in harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions, referencing *Faryna v Chorny*, 1951 CanLII 252, p 357. And, further, there can be no finding of vote buying in contravention of s 16(f) because hot dog tickets are not "valuable consideration".

#### *Analysis*

[25] The evidence of Tracy Pashe establishes only that Mr. Nepinak was offering hot dog tickets, which he acknowledges. Ms. Pashe does not state that she heard Mr. Nepinak say anything to electors when handing out the tickets. Her evidence does not establish that he was offering the tickets in exchange or as an inducement for her to vote for him or others. Indeed, even though she was a volunteer scrutineer for candidates Charles Boucher and Joseph Boucher in the Election, her evidence is that Mr. Nepinak gave her five tickets (she provided a photo of six). Her affidavit is silent on how it came about that Mr. Nepinak gave her these hot dog tickets. It also seems unlikely that Mr. Nepinak would have provided her with those tickets having any

expectation that she would vote for him, given her apparent allegiance to Charles and Joseph Boucher.

[26] The evidence of Justin Neapew is that he asked about 15 voters to whom he gave rides what Mr. Nepinak wanted and they all told him that Mr. Nepinak gave them tickets and asked them to vote for him and his group of candidates. Further, about 10-15 other voters re-entering his vehicle volunteered the same information. He states that every time he left the advance polling station he saw Mr. Nepinak standing outside talking to people with his hot dog tickets.

[27] I afford this evidence no weight. First, Mr. Neapew's evidence about what Mr. Nepinak said to electors is hearsay and is presumptively inadmissible. There is no evidence to suggest that it is admissible under a traditional exception to the hearsay rule or because it meets the "principled exception" requirements of necessity and reliability (*R. v. Khelawon*, 2006 SCC 57 at paras 2-3; *Johnstone v Mistawasis Nêhiyawak First Nation*, 2022 FC 492 at para 25). In fact, no explanation is offered for why no affidavit evidence was obtained from any of these electors on this critical point. When appearing before me, counsel for the Applicants conceded that this evidence is hearsay. I also agree with the Respondents that an adverse inference should be drawn from the failure of the Applicants to bring forward any evidence from any of these 25 to 30 electors who allegedly were directly asked by Mr. Nepinak to vote for him when he offered them hot dog tickets (*Federal Courts Rules*, SOR/98-106, Rule 81(2); *Split Lake Cree First Nation v Sinclair*, 2007 FC 1107 at paras 25-27).

[28] Second, Mr. Neapew's recounting of events that is based on his own personal knowledge conflicts with Mr. Nepinak's evidence. In his affidavit, Mr. Neapew alleges that he saw Mr. Nepinak outside the polling station every time he left the hotel. When cross-examined on his affidavit he testified that he made trips between 10:00 a.m. and 7:00 p.m. and he continued to stand by the statement that "every time" he was there he saw Mr. Nepinak handing out tickets. However, he later stated that he only meant "lunch time afterwards", although what he meant by this is somewhat unclear from the cross-examination transcript. Conversely, Mr. Nepinak deposed that he was in the vicinity of the polling station for about an hour, from 1:30 p.m. to just before 2:30 p.m. He corroborated this with a parking receipt attached as an exhibit to his affidavit that shows he was parked from 1:27 p.m. until 2:27 p.m. The parking receipt evidence was not challenged by the Applicants during cross-examination of Mr. Nepinak. Given this, I am more inclined to believe Mr. Nepinak's evidence about the time that he was at the polling station. This, in turn, brings into doubt a material aspect of Mr. Neapew's evidence and renders it less credible generally.

[29] I also have some concerns with the credibility of Mr. Lagimodiere's evidence. He swore his first affidavit on July 29, 2021. In response to the Electoral Officer's affidavit, he swore a second affidavit on October 22, 2021. In this second affidavit, he made a new and serious allegation of corrupt election practices. Specifically, that at the request of the Electoral Officer, Mr. Lagimodiere met with the Electoral Officer on June 4, 2021, at which time the Electoral Officer "demanded that applicant Flett and Boucher pay him \$10,000.00 and he further demanded that when they get elected he would get a Pine Creek contract to assess Pine Creek's

environment and waste. To confirm the contract respondent Ratte wanted me to meet with his partner Darrel Olsen to discuss his demand”.

[30] Under cross-examination on this second affidavit Mr. Lagimodiere initially maintained that the Electoral Officer had requested a meeting with him, at which meeting he made the demand. However, when confronted with text messages showing that it was Mr. Lagimodiere who requested a meeting, he changed his evidence and acknowledged that he was the one who requested the meeting. It is difficult to believe that the Electoral Officer arrived at a meeting requested by Lagimodiere and then demanded a payment of \$10,000. And, even if that were the case, it seems improbable that Mr. Lagimodiere would not raise the demand prior to the Election as such a demand by the Electoral Officer, who was running the Election process, would give rise to concerns as to the corruption of that process. In any event, it would be reasonable to expect such a serious allegation to have at least surfaced in Mr. Lagimodiere’s first affidavit. The magnitude of the \$10,000 demand, as compared to \$6.25 hot dog tickets, would appear compelling. While neither party relies on these allegations of bribery, in my view, they undermine the credibility of Mr. Lagimodiere’s evidence.

[31] Finally, as to Ms. Watson’s evidence, she is the only witness and the only elector to depose that Mr. Nepinak spoke directly to them offering a hot dog ticket in connection with a request for their vote. She deposes that Mr. Nepinak said “If you voted for me, I will give you a ticket and then you go see those guys over there once you are done voting”. She states that she believes Mr. Nepinak wanted to buy her vote.

[32] On cross-examination, Ms. Watson stated that she had already decided whom she was going to vote for when she arrived at the polling station. When asked if the offer of a hot dog ticket swayed her intention she said no, because she did not like hot dogs and she “actually thought it was a real hot dog”. When it was put to her that Mr. Nepinak had not said anything to her at the advance poll that could be understood as attempting to buy her vote she stated that she disagreed because he was trying to buy her vote. When asked if he was attempting to buy her vote with a hot dog she said no, “[w]ith a ticket not a hotdog”. When asked what she understood the ticket was for, she replied a hot dog and then “he was offering me a ticket. He suggested that the ticket was for a hot dog, but he didn’t says here’s a hot dog...”. When asked, “[s]o you don’t believe that it was for a hot dog” she responded that at the time she did. When asked whether that was now the case, she responded that she did not know and “I can’t answer that question”. When asked, “[s]o at the time you said you believed the ticket was to be exchanged for a hot dog?” she replied, “[y]es, is what he said, here’s a ticket, go see those guys over there, they’ll give you a hotdog. But when I looked over there, I did not see no hotdog stand”.

[33] Later, Ms. Watson was asked questions about Facebook posts that she had made offering free rides to voters to the advance poll and offering to provide voters with request forms to vote by mail-in ballot. She confirmed that she had also drafted and posted a campaign statement on behalf of her brother-in-law, John Neapew, one of the Applicants in this matter. Also, that she is a member of a private Facebook group called Pine Creek First Nation 2021 – Official Membership Notices, and a public page called Off Reserve Members of Pine Creek First Nation. When asked if these two Facebook pages provide a venue for Pine Creek First Nation members to post about important issues, like elections, she agreed. Later she stated that she had never seen

people talking about vote buying on the webpages. When asked if allegations of vote buying or trying to sell votes would be a serious issue in relation to an election, she agreed. She then volunteered that a lady had posted (on the Pine Creek First Nation – Official Notices page) that some of the candidates were trying to buy votes and that she had commented in response “because my brother was being scrutinized on the web page, and I stood up for him and put that he was a very honest man, there’s no way he would do something like that”. When asked to clarify that her testimony was that someone posted accusing her brother of trying to buy votes she denied this, saying that it was only the candidates that had been accused. When her prior testimony was put to her, that she had posted in response defending her brother, her reply was “I don’t know who she was referring to because there was no names. I don’t know who I was standing up for...”.

[34] She also confirmed that she did not post her allegation that Mr. Nepinak had tried to buy her vote on Facebook stating “no, because I didn’t have proof. Why would I post that?” and “No. Because I’m not one to slander somebody out of hearsay”.

[35] Reading Ms. Watson’s cross-examination testimony in whole, I find it to be less than forthright. With respect to her testimony about defending her brother, I fail to see how she could have posted in response that he was a very honest man, there’s no way he would do something like that, and then maintain that the only reference in the post had been to candidates generally and that she did not know who she was standing up for in her response. It is also difficult to reconcile her sworn affidavit statement about what Mr. Nepinak said to her at the advance polling station with her cross-examination testimony that she would not “slander somebody out

of hearsay”. While I recognise that Ms. Watson may not have fully appreciated the legal context of the terms she used, I am still troubled by the idea that she viewed her own alleged interaction with Mr. Nepinak as so untrustworthy that it could not be posted.

[36] Conversely, I agree with the Respondents that Mr. Nepinak’s affidavit evidence was not meaningfully challenged or refuted on cross-examination. While the Applicants may not accept his explanation as to why he was offering hot dog tickets – as a gesture of kindness and thanks for participating in the voting process – his explanation did not vary on cross- examination. If anything, he credibly elaborated on his affidavit evidence. And, as the Respondents point out, Mr. Nepinak’s evidence that he did not ask or tell anyone to vote for him, including Ms. Watson, and his evidence that he did not say that the hot dog ticket was being offered to her in exchange for a vote for him or that he would give her a ticket if she voted for him, was not challenged on cross-examination. In my view his testimony was also straightforward and does not give rise to concerns with credibility. I prefer Mr. Napinak’s evidence to that of Ms. Watson.

[37] Nor does the offer of food and beverages inevitably lead to a finding of vote buying. In *Good v Canada (Attorney General)*, 2018 FC 1199 [*Good*] one of the many allegations of vote buying made in that case involved the providing of a hospitality room at the hotel where an advance poll was located by a candidate for the position of chief where he provided food and soda. Having assessed the evidence, some of which was directly contradicted by other evidence, Justice McVeigh found that having a “come and go” hospitality room was not out of the ordinary for candidates in any and all political forums. And, on the facts before her, that the provision of the hospitality room or the events that occurred within it did not comprise an inducement to buy

a vote. She held that a contravention s 16(f) of the FNE Act had not been established (at paras 270-273).

[38] Similarly, in *Bird*, Justice McVeigh found that a candidate had not contravened s 16(f) of the FNE Act by hosting a soup, bannock and champagne luncheon six days before an election as it is common practice, in any election, to sponsor events, including lunches, during campaign periods (at paras 68-70). In the alternative, even if there was a contravention of s 16(f), it would not have affected the results of the election because it was speculative to assume that the lunch alone had successfully influenced 50 votes (at para 71).

[39] While I appreciate that the offer of food and drink in *Bird* occurred during campaigning, in *Good* the offer occurred in the hotel where an advance poll was being held – a similar circumstance to the matter before me.

[40] I also agree with the Respondents that Mr. Nepinak's evidence seems more in keeping with the probabilities surrounding the case as a whole. His uncontested evidence was that he offered and gave hot dog tickets to voters and non-voters alike, and to other candidates or people he believed to be associated with other candidates. These included Ms. Pashe, Mr. Lagimodiere and Mr. Charles Boucher. If Mr. Nepinak were attempting to influence votes, one would think he would likely have been more strategic in how he distributed the hot dog tickets.



[41] He also openly offered the hot dog tickets outside the advance polling station. Had he been attempting to buy votes, this manner of proceeding is anything but secretive and would have attracted a very high risk of detection.

[42] Further, the idea that Pine Creek First Nation members who had gone to the effort of attending the advance poll would be influenced in their voting decisions by a hot dog and a soda – or that Mr. Nepinak would think that they might be – seems unlikely at best.

[43] Further, if the offering of the hot dog tickets was conditional upon the elector agreeing to vote in a particular way, there is no evidence that Mr. Nepinak sought proof – such as a photo of the ballot when marked – that the condition had been met before handing over the hot dog ticket. If he offered hot dog tickets to electors entering the polling station, then they could vote freely and still get the benefit of the hot dog. As stated in *Henry v Roseau River Anishinabe First Nation Government*, 2017 FC 1038 at para 59, “there is no bribery, or vote buying, when money is given without any condition to vote in a certain way”.

[44] For all of these reasons I am not persuaded that the Applicants have met their burden of establishing, on a balance of probabilities, that Mr. Nepinak’s offer of hot dog tickets was an attempt to influence electors to vote for a particular candidate in contravention of s 16 (f) of the FNE Act.

*Valuable consideration*

[45] Section 16(f) prohibits offering “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”.

[46] I agree with the Respondents that a hot dog and drink ticket valued at \$6.25 is not “valuable consideration” as contemplated in s 16(f) of the FNE Act. The addition of the word “valuable” as a modifier for “consideration” implies that there is a *de minimis* threshold below which a person will not be captured by the provision. Mr. Nepinak’s offer of hot dog and drink tickets were unlikely to have swayed any individual voter to change their vote. Indeed, Freda Watson’s evidence was that her voting intention was not affected by the offer.

[47] In my view, the Applicants have not established that Mr. Nepinak provided valuable consideration to voters with the intent of influencing their votes. As a result, for this reason too, the Applicants have not demonstrated that Mr. Nepinak contravened s 16(f) of the FNE Act.

*Section 20(b)*

[48] Given my evidentiary findings above, the Applicants have also not established that Mr. Nepinak, within the hearing distance of a polling station, orally promoted or opposed the election of a candidate, in contravention of s 20(b) of the FNE Act.

*Section 27*

[49] The Applicants also allege that Mr. Nepinak's conduct contravened s 27 of the *FNEA* by intentionally obstructing the conduct of the Election. The Applicants have not particularized this claim and, in my view, it has no merit. The Applicants have not established that the conduct of the Election was obstructed or prejudiced in any way by Mr. Nepinak's distribution of hot dog tickets. There is no evidence that the vote was disrupted or that anyone was prevented from entering the polling station.

**Alleged contraventions of the FNE Act or Regulations by the Electoral Officer**

*Applicants' position*

[50] The Applicants submit that their affidavit evidence establishes that there were a number of irregularities and non-compliances with the FNE Act, such as failure to adequately identify electors to ensure their eligibility to vote and a failure to adequately secure the ballot boxes. They assert that the gross negligence or neglect of the Electoral Officer resulted in a degree of corruption and loss of confidence in the outcome of the Election that warrants overturning the Election results.

*Respondents' position*

[51] The Respondents submit that the Applicants have not particularized how the irregularities they have identified, being that the Election Officer did not take adequate precautions to ensure

the eligibility of persons casting votes and with respect to the treatment of the ballot boxes, constitute contraventions of the FNE Act or the Regulations.

*The Electoral Officer's position*

[52] The Electoral Officer submits that he did not contravene the FNE Act or the Regulations and did not fail to adequately identify electors who cast votes. He submits that there is no requirement under the FNE Act or the Regulations for electors to provide identification when attending to vote. The Electoral Officer acknowledges that in one instance a person had already voted in the real elector's name – an imposter – but when this came to light it was dealt with in accordance with the Electoral Officer's Handbook published by Indigenous and Northern Affairs Canada. There was no contravention of the FNE Act or Regulations. The Electoral Officer denies being reckless or negligent in carrying out his duties and submits that the Applicants have presented no evidence that he failed to perform his obligations under the FNE Act or the Regulations.

*Analysis*

[53] At the hearing of this application, counsel for the Applicants advised that the Applicants were abandoning their allegation that there had been a failure to adequately secure ballot boxes. Accordingly, that allegation will not be addressed in these reasons.

[54] The issues of elector identity raised by the Applicants are as follows:

- Michael (Joe) Flett's affidavit states that his niece Elizabeth Kayla Marie Flett did not vote in the Election. This is confirmed by an affidavit of Elizabeth Kayla Marie Flett. However, on the Electoral Officer's list, Elizabeth Kayla Marie Flett's name is marked as having voted in person in Brandon. Michael (Joe) Flett's scrutineer record for the Brandon advance poll lists Elizabeth Kayla Marie Flett's name twice.
  
- Michael (Joe) Flett's affidavit states that Margaret Sylvia Pascal "appears on the advance poll and election date" but that she was in an institution in Quebec and therefore could not have voted in person. The Affidavit of Joseph Lagimodiere states that he made the Electoral Officer aware that the person who came to vote as Margaret Sylvia Pascal was not that person. The Electoral Officer's evidence is that at no time did Joseph Lagimodiere inform him of any individuals claiming to be someone other than who they were and that (a person presenting themselves as) Margaret Sylvia Pascal voted in person at the advance poll in in Winnipeg on June 24, 2021 having first and sworn an affidavit affirming her identity and stating that she had lost her mail in ballot.

The Electoral Officer's List, which is an exhibit to his affidavit, denotes voting in person in Winnipeg and records the completing of an affidavit by a person identifying themselves as Margaret Sylvia Pascal.

- Michael (Joe) Flett's affidavit states that Jedidiha Nostradomus Flett "was set out in the advance poll on election day" but he was institutionalized in Manitoba and could not have voted. The affidavit of Jedidiha Nostradomus Flett confirms that he was incarcerated at the time of the Election and did not vote. Michael Flett's scrutineer record lists Jedidiha Nostradomus Flett as having voted at the Brandon advance poll. The Electoral Officer's affidavit states that (a person presenting themselves as) Jedidiha Nostradomus Flett voted at the Brandon advance poll on June 23, 2021.

The Electoral Officer's List marks Jedidiha Nostradomus Flett as voting in person in Brandon.

- Michael (Joe) Flett's affidavit states that Thomas Ducharme is marked as having voted but he could not have as he passed away before the Election. Michael Flett's scrutineer record lists Thomas Ducharme as having voted at Winnipeg [AR 28]. The Electoral Officer's affidavit states that (a person identifying themselves as) Thomas Ducharme voted at the Winnipeg advance poll on June 24, 2021 after completing an affidavit stating that he had lost his mail-in ballot.

The Electoral Officer's List denotes a person identifying themselves as Thomas Ducharme voting in person in Winnipeg having first and sworn an affidavit affirming his identity and stating that he had lost his mail in ballot

- Michael (Joe) Fletts' affidavit states that Alvin Steven Junior Richard was marked as voted but he could not have done as he passed away before the election. Michael Flett's scrutineer record lists Alvin Steven Junior Richard as having voted at Pine Creek. The Electoral Officer's affidavit states that Alvin Steven Junior Richard did not vote in the 2021 Election. His name is not listed on the Electoral Officer's List.

- The affidavit of Tracey Pashe states that at the Brandon advance poll she recorded on her voters (scrutineer) list Destiny Brandi Schewenzer as having voted (on the voters list, her name is spelled "Destiny Brandi Schwenzer"). At the Winnipeg poll, a different person identified herself as Destiny Brandi Schewenzer. Ms. Pashe states that she "challenged" the Electoral Officer that this person was not eligible to vote but that the Electoral Officer said that he had no choice but to let her voted as she had produced identification.

The affidavit of the Electoral Officer states that neither the FNE Act or the Regulations address a situation where someone claims to be a voter who has already voted. However, s 8.7.3 of the Electoral Officer's Handbook states that if the voters list shows that someone has already voted in the name of an elector who now wants to vote, this voter must first prove that they are the person whose name appears on the list. The Electoral Officer was satisfied, based on the identification provided by Destiny Brandi Schewenzer, that she was in fact the elector named on the Voter's list and that the individual who had voted at the Brandon advance poll had been an imposter. The Electoral Officer deposed that Destiny Brandi Schewenzer voted at the Winnipeg advance poll on June 24, 2021. The Electoral Officer's List shows Destiny Brandi Schwenzer as having voted both in Brandon and in Winnipeg.

- The affidavit of Norman Joseph Lagimodiere states that he let the Electoral Officer know that that person who came into vote as Richard Catchway was not that person. He states that Richard Catchway is his cousin and a street person with no interest in voting. Richard Andrew Catchway is listed on Mr. Lagimodiere's scrutineer record and on Tracy Pashe's scrutineer record as having voted by mail-in ballot. The Electoral Officer's affidavit states that at no time did Joseph Lagimodiere inform him of any individuals claiming to be someone other than who they were, and states that Richard Catchway voted by mail-in ballot. The Electoral Officer's List appears to mark Richard Catchway as having voted by mail-in ballot.

[55] The Applicants' allegation was that these seven irregularities with elector identification demonstrate that the Electoral Officer contravened the FNE Act.

[56] However, as their counsel conceded when appearing before me, there is no requirement in the FNE Act or the Regulations that voters must provide identification or that the Electoral Officer must make specific efforts to confirm a voter's identity.

[57] As submitted by the Electoral Officer, the only relevant provision is s 21(1) of the Regulations, which constrains who may be provided with a ballot. In that regard, the only requirements are that the person: has not voted at an advance poll; attends at a polling station; and whose name is set out in the voter's list. Where a person meets all of those criteria, the Electoral Officer must provide the individual a ballot:

**Ballot**

21 (1) Subject to subsection (3), the electoral officer or deputy electoral officer must provide a ballot on which their initials have been placed to any person who has not voted at an advance poll, who attends at a polling station and whose name is set out in the voters list.

[58] The Electoral Officer's Handbook, while not binding, is instructive as to what is expected of the Electoral Officer. Relevant to this matter are the following sections:

### **8.6.1 Identity of the Elector**

When a person presents him or herself to you or your Deputy at the polling station, he or she should state his or her name. You will then verify that the elector's name appears on the voters list.

### **8.6.3 Issuing a Ballot**

Once you or your Deputy have determined that a person is a qualified voter, and that he or she has not been issued a mail-in ballot or has not voted at an advance polls, take a ballot, place your initials on the back and fold it in a manner which will allow your initials to be visible while at the same time hiding the front of the ballot. Hand the ballot to the elector requesting that it be returned in the same manner. Draw a line through the elector's name on the voters list indicating that a ballot was given.

### **8.7.2 Someone has Already Voted In the Voter's Name**

If the voters list shows that someone has already voted in the name of an elector who now wants to vote, this voter must first prove to you or your Deputy that he is the person whose name appears on the list. If you or your Deputy are satisfied that such person is qualified to vote and has not already voted, you may issue a ballot.

On the voters list indicate that the initial voter was an impersonator but that the rightful voter did exercise their right to vote. Although a voter is not required to present identification prior to voting, it would be beneficial to have someone who is familiar with the community, such as the membership clerk, to be present during the voting process to discourage any impersonators.

[59] Section 14(a) of the FNE Act makes it a contravention for a person to provide a false name in order to obtain a ballot. Thus, those unknown persons who did so in the Election contravened the Act. However, as the Applicants now concede, the Electoral Officer did not contravene the Act or the Regulations by not requiring voters to provide identification. I also decline the invitation of the Applicants, made at the hearing of this matter, for me to divine the



intent of the FNE Act and to fill in an alleged gap in the legislation in this regard. This is a new and unsupported argument.

[60] It is also of note that the evidence establishes that when Destiny Brandi Schwenzer, attended the Winnipeg advanced poll and it was determined that a vote had already been recorded in her name in Brandon, the Electoral Officer followed the procedure set out in the Electoral Officer's Handbook by confirming her identity to his satisfaction and then providing her with a ballot to vote.

[61] Further, that individuals claiming to be Margaret Sylvia Pascal and Thomas Ducharme each swore an affidavit prior to being given a ballot to vote in person at the Winnipeg advance poll on June 24, 2021. This procedure is also consistent with the requirements of s 21(3)(b) of the Regulations which states that:

21(3) An elector who received a mail-in ballot package under section 16 may obtain a ballot and vote in person at a polling station if the elector

(a) returns the unused mail-in ballot to the electoral officer or deputy electoral officer; or

(b) provides the electoral officer or deputy electoral officer with a sworn affidavit stating that they have lost their mail-in ballot.

[62] In conclusion, given the above and the Applicants' belated concession, their allegation that the Electoral Officer acted in contravention of the provisions of the FNE Act and Regulations with respect to the identification of electors is unfounded and cannot succeed. Similarly, although they state that they "will not make submission as to whether the recklessness

and negligence of the respondent Electoral Officer Burke Ratte amounts to fraud”, it must be said that there was absolutely no evidence put forward by the Applicants to support any inference, if not a direct allegation, of fraud by the Electoral Officer.

**Are the contraventions likely to have affected the result of the Election?**

*Applicants’ position*

[63] The Applicants repeat their allegations of vote buying and voting irregularities or fraud and refer to the statement in *Papequash* that a distinction is not infrequently made between cases involving technical procedural irregularities and those involving fraud or corruption.

Specifically, that the former may call for a mathematical approach to determine if the results were altered, whereas the latter conduct may justify an annulment regardless of the proven number of votes affected (at para 34). The Applicants allege that Mr. Nepinak’s fraudulent conduct, combined with the “recklessness and negligence” of the Electoral Officer creates a “degree of corruption” that warrants overturning the results of the Election. The Applicants submit that it is impossible to know how many votes were affected, and, citing *Opitz*, they submit that the Election should be annulled if the winner is in doubt.

*Respondents’ position*

[64] The Respondents maintain that Mr. Nepinak’s conduct did not contravene the FNE Act or the Regulations. But, even if the Court were to find otherwise, the rationale for the stricter approach outlined in *Papequash* does not apply in these circumstances. In this case, the alleged hot dog offers were made in the open, not secretly and there is no evidence that Mr. Nepinak’s

conduct went further than handing out the hot dog tickets as set out in his evidence. This is unlikely to have influenced the outcome of the Election. Further, this Court should not assess all of the alleged breaches together to determine whether they all could ‘add up’ to a material effect on the result of the Election. And, in any event, the Applicants have not established that the contraventions changed the result of the Election.

*The Electoral Officer’s position*

[65] The Electoral Officer denies the Applicants’ allegations against him but submits that even if they were taken as true, the Election should only be set aside if there are serious reasons to believe that the results would have been different but for the alleged fraud, referencing *Papequash* at para 36. Further, the number of votes affected does not meet the magic number test set out in *Opitz*. The Electoral Officer also submits that the Applicants have not established any alleged nexus between Mr. Nepinak’s alleged vote buying and the alleged irregularities in voter identification. Finally, the Electoral Officer submits that the Court is only empowered to overturn the Election under s 35 of the FNE Act where it finds that a contravention of a provision of the FNE Act or the Regulations is likely to have affected the result. The Electoral Officer submits that the contraventions alleged could not have affected the results.

*Analysis*

[66] As I have found above, the Applicants have not established that Mr. Nepinak engaged in vote buying or otherwise contravened the FNE Act. Further, the Applicants have now abandoned their allegation that there was a failure by the Electoral Officer to secure ballot boxes and have

conceded that the elector identification issues they identified do not establish a contravention of the FNE Act by the Electoral Officer. Accordingly, as the first requirement of section 31 of the FNE Act has not been met – that a contravention occurred – the application cannot succeed.

[67] However, even if the contraventions as alleged by the Applicants had been established, they have not met the second requirement of s 31 – that the contraventions as alleged are likely to have affected the result of the Election. I will address this briefly.

[68] When appearing before me, counsel for the Applicants made a third significant concession being that even if all seven of the voting irregularities or voter fraud issues which they alleged were accepted as valid, this would be insufficient to meet the magic numbers test. I agree.

[69] The magic number test assumes that all of the rejected (or in this case ineligible) votes were cast for the successful candidate. An election can be set aside when the number of rejected (or ineligible) votes is equal to or greater than the successful candidate's margin of victory (*Opitz* at paras 71-73; *McNabb v Cyr*, 2017 SKCA 27 at para 23). In this case, the seven ineligible votes would not be enough to change the result of the election of either Chief (margin of victory of 26 votes) or Council members. Even if it is assumed that all of those ineligible votes favoured Angela McKay-Chartrand (the successful council candidate with the fewest votes, 244), she still would have been elected without those votes. Applying the magic number test, she would have received 237 votes over runner-up Johnny Neapew's 233 votes. I would add that, based on the

evidence before me, I would have found that at best the Applicants established five instances of voting irregularities or voter fraud.

[70] In any event, the Applicants now concede that they have failed to demonstrate that enough votes were cast in contravention of the FNE Act and the Regulations to change the outcome of the Election.

[71] In light of this, when appearing before me the Applicants' emphasis was that this was a circumstance where the Court should exercise its discretion to set aside the Election. The Applicant relied heavily on *Papequash* in support of that position.

[72] In *Papequash* Justice Barnes held:

[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).

[73] He went on to note and quote paragraphs 22 and 23 of *Opitz* and then stated:

[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.

[74] Justice Barnes held 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. He concluded that in the matter before him there was clear evidence of widespread and openly conducted vote buying activity carried out by four of the respondents and that none of the several affiants who witnessed these events were cross-examined on their evidence which, therefore, stood unchallenged. It was

also significant that one of the respondents attempted to buy-off the applicants from proceeding further with the application to have the election set aside by offering substantial sums of money.

[75] The Applicants assert that *Papequash* is the exact same situation as the matter before me as “there are so many irregularities from gross negligence or neglect of the Electoral Officer, and evidence of numerous ineligible voters casing votes, that the election results are in doubt” and merit the setting aside of the election. I do not agree.

[76] First, at issue in *Papequash* was widespread vote buying, which is not the circumstance in this matter and I have found above that the Applicants have not established that Mr. Nepinak engaged in vote buying. Second, as the Applicants now concede, the allegations pertaining to elector identity issues that they attributed to the Electoral Officer do not establish that the Electoral Officer acted in contravention of the FNE Act. Nor is there any evidence that the Electoral Officer was in anyway connected to the actions of the persons who impersonated other electors and cast votes in contravention of the FNE Act. Third, the Applicants have not led any evidence that would support their allegation that the voting irregularities arose from gross negligence or negligence of the Electoral Officer that would, in turn, support their assertion that this demonstrated a “degree of corruption” warranting the Court setting aside the Election. And, finally, although the Applicants allege some sort of nexus between the alleged vote buying and the alleged contraventions by the Electoral Officer, they have not particularized this in any way. Nor have they offered any evidence in support of this. I find this allegation to be without merit.

[77] Further, contrary to the Applicant's submissions, this is not a circumstance where the Election has been corrupted by fraud such that the integrity of the electoral process is in question, and an annulment may be justified regardless of the proven number of invalid votes. There is no evidence that, other than the seven identity issues raised above, there were other ineligible votes. And, with respect to the allegation of vote buying by Mr. Nepinak, even if this had been established, his offer of hot dog tickets was conducted in the open and not in secret and there is no suggestion that, other than offering hot dog tickets, there was any other vote buying activity. Therefore, there is no reason to believe that the "true extent of the misconduct" is not known (*Papequash* at para 34).

[78] Further, Mr. Nepinak's evidence is that he had 60 tickets to distribute, which evidence was not challenged by the Applicants. Mr. Nepinak accounts for 29 of those tickets in his affidavits: four to Freda Watson's daughter (a non-elect); two to Norman Joseph Lagimodiere (scrutineer for an opposing candidate); six to Arthur McKay (candidate for council); two to men he believed to be associated with Charles Boucher; three or more tickets to a family approaching from the polling station, four to Charles Boucher (a candidate); six to Tracey Pashe (scrutineer for an opposing candidate); one to a man sitting outside the polling station; and one for himself. That leaves 31 tickets that might potentially have altered the results of the Election.

[79] In my view, it is highly unlikely that Mr. Nepinak could have influenced 26 votes for Chief (the difference between the votes for him and the runner up candidate) in one hour utilizing 31 hot dog tickets, particularly as the evidence establishes that he tended to give tickets away in groups and to electors as well as non-electors and those he knew would not be voting for



him. And, as discussed above, it is also unlikely that electors who took the trouble to attend the advance poll would be swayed by a \$6.25 hot dog ticket.

[80] When appearing before me, counsel for the Applicant submitted that the conduct of Mr. Nepinak corroded the democratic process because he was previously the Grand Chief of the Assembly of Manitoba Chiefs. The assertion being that while the hot dog ticket may have a low monetary value, given who he is, his actions would have had a greater impact on electors. Even if he did not ask people to vote for him, he is an influential person and it can be inferred from his presence that he was trying to influence votes. Further, if his actions are not sanctioned everyone could give out gifts at polling stations.

[81] However, there is no evidence before me suggesting that any electors knew of Mr. Nepinak's prior status and I am not convinced that the persuasiveness of the offer of a hot dog ticket was significantly enhanced by this. Nor is it the role of the Court to exercise its discretion to set aside an election for the purpose of sending a message or sanctioning what was, undoubtedly, ill-considered behaviour by a candidate. Discretion can be exercised where electoral fraud, corruption or illegal practices have been demonstrated but the Court determines that the circumstances do not warrant the drastic step of overturning the election. In this case, the Applicants have not established that Mr. Nepinak contravened s 16(f) of the FNE Act and, therefore, the discretion does not come into play. And, as discussed above, even there was a contravention, this is not likely to have affected the result of the Election.

[82] For all of these reasons, the application is dismissed.

## Costs

[83] In their Notice of Application, the Applicants seek costs but in their written representation, they seek cost on a solicitor and client basis but without further submissions. When appearing before me the Applicants submitted that even if they were not successful they had raised significant issues and that members should be able to stand up against the inappropriate practice of offering hot dog tickets at an advance poll and should not have costs awarded against them.

[84] The Respondents seek costs on a solicitor-client basis asserting that the Applicants have displayed reprehensible, scandalous or outrageous conduct, referencing *Microsoft Corporation v 9038-3746 Quebec Inc*, 2007 FC 659 [*Microsoft*] at para 11 and made lengthy written submissions in support of this position concluding that the cumulative effect of the Applicants' conduct warrants an award of solicitor-client costs. The Respondents also submit that the Applicants' very significant concessions made on the day of the hearing came too late and also serve to reinforce their points as to why solicitor-client costs are warranted.

[85] The Electoral Officer requests cost payable by the Applicants to him and agrees that the Applicants' concessions came too late.

[86] At the hearing, I requested all counsel to submit bills of costs for my review, which they have now done.

[87] Pursuant to Rule 400 of the Federal Courts Rules, the Court has full discretion over costs and in exercising that discretion may consider the factors set out in Rule 400(3). In this case I have considered not only the result of the proceeding but the fact that the conduct of the Applicants unnecessarily lengthened the duration and complexity of the proceedings. I am also of the view that the significant concessions made by the Applicants when appearing before me could, and should, have been made much sooner which would have at least significantly narrowed the issues. In particular, the Applicants were or should have been aware that the FNE Act and the Regulations did not require the Electoral Officer to establish the identification of electors beyond asking them to confirm their identity. Nor is this a circumstance where significant governance issues were raised by the Applicants. And, while the offering of \$6.25 hot dog tickets at the advance poll may have been ill-advised and inappropriate, I am inclined to think that the continued pursuit by the Applicants of all aspects of this application for judicial review right up to the hearing of the matter was more about sour grapes than hot dogs.

[88] That said, I am also not persuaded that the Applicants' conduct was so reprehensible, scandalous or outrageous (*Microsoft at para 11; Quebec (Attorney General) v Lacombe*, 2010 SCC 38 at paragraph 67) as to warrant an award of solicitor-client costs to the Respondents and the Electoral Officer.

[89] Accordingly, I will award costs to the Respondents on the basis of their submitted bill of costs, utilizing Column III of Tariff B, in the amount of \$12,385.55 which is inclusive of all fees,

disbursements, GST and PST. And on the same basis, I will award costs to the Electoral Officer in the amount of \$12,982.79.

**JUDGMENT IN T-1197-21**

**THIS COURT'S JUDGMENT is that**

1. The appeal is dismissed;
2. The Respondents Pine Creek First Nation, Derek Nepinak, Don Chartrand, Cindy McKay, Harley Chartrand and Angela McKay shall have their costs in the total amount of \$12,385.55; and
3. The Respondent Burke Ratte shall have his costs in the total amount of \$12,982.79.

"Cecily Y. Strickland"

---

Judge

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** T-1197-21

**STYLE OF CAUSE:** MICHAEL (JOE) FLETT, NORMAN JOSEPH LAGIMODIERE, CHARLES BOUCHER, TRACY PASHE, JOSEPH BOUCHER, JOHN NEAPEW v PINE CREEK FIRST NATION, DEREK NEPINAK, DON CHARTRAND, CINDY MCKAY, HARTLEY CHARTRAND, ANGELA MCKAY, BURKE RATTE

**PLACE OF HEARING:** BY VIDEOCONFERENCE USING ZOOM

**DATE OF HEARING:** MAY 16, 2022

**JUDGMENT AND REASONS:** STRICKLAND J.

**DATED:** JUNE 1, 2022

**APPEARANCES:**

John Prystanski  
Lionel Chartrand

FOR THE APPLICANTS

Ryan Savage  
Peter Mueller

FOR THE RESPONDENTS  
(PINE CREEK FIRST NATION, DEREK NEPINAK,  
DON CHARTRAND, CINDY MCKAY, HARTLEY  
CHARTRAND, ANGELA MCKAY)

John Isfeld and  
J.R. Norman Boudreau

FOR THE RESPONDENT  
(BURKE RATTE)

**SOLICITORS OF RECORD:**

Prystanski Law Office  
Winnipeg, Manitoba

FOR THE APPLICANTS

Taylor McCaffrey LLP  
Barristers and Solicitors  
Winnipeg, Manitoba

FOR THE RESPONDENTS  
(PINE CREEK FIRST NATION, DEREK NEPINAK,  
DON CHARTRAND, CINDY MCKAY, HARTLEY  
CHARTRAND, ANGELA MCKAY)

Boudreau Law  
Barristers and Solicitors  
Winnipeg, Manitoba

FOR THE RESPONDENT  
(BURKE RATTE)