Federal Court  Cour fédérale

Date: 20240226

Docket: T-1437-22

Citation: 2024 FC 304

Ottawa, Ontario, February 26, 2024

PRESENT: The Honourable Mr. Justice Roy

BETWEEN:

SHANNON BRASS

Applicant

and

CLINTON KEY AND
THE KEY FIRST NATION

Respondents

JUDGMENT AND REASONS

[1] This application is made pursuant to section 31 of the *First Nations Elections Act*, (SC 2014, c 5) [FNEA]. An elector of a participating First Nation, the Key First Nation [KFN], brings his contestation of the election of Mr. Clinton Key as Chief of the KFN. Mr. Key was the successful candidate by four votes over Clarence Papequash and twelve votes over the Applicant, Mr. Shannon Brass. The election of councillors is not contested.

[2] The election was completed on June 12, 2022, for the position of Chief of the KFN, a Band as defined in the *Indian Act* (RSC 1985, c I-5). The members of the KFN are the descendants of the signatories to Treaty No. 4. The reserved lands for the KFN are located in Southern Saskatchewan; KFN has a total population of approximately 1,532 members, of which approximately 250 actually reside on KFN reserve lands.

[3] Out of 532 ballots cast, the successful candidate, the Respondent Clinton Key, received 147 votes, followed by Clarence Papequash with 143 votes, and Shannon Brass with 135. Five ballots were rejected; the rest of the ballots went to two other candidates, Jay-Cee Brass and Glenda (O'Soup) Brass.

[4] Before considering the merits of the application, the Court must first dispose of a motion made by Mr. Key to include a new affidavit late in the process.

I. Preliminary motion

[5] The Respondent, Clinton Key, made a motion dated February 6, 2023, the purpose of which was to be granted leave to file the second affidavit of Alvira Roulette sworn on February 6, 2023. Although the motion's title referred only to adding to the record one further affidavit, which has already been made the subject of extensive cross-examination by counsel for the Key First Nation [KFN] and counsel for the Applicant, Mr. Shannon Brass, the actual motion also requested that the Respondent be allowed to cross-examine again two affiants, Ms. Candace O'Soup and Ms. Amanda O'Soup. Furthermore, the Respondent was seeking the ability to tender

new expert evidence. The Respondent claimed his motion was made pursuant to rules 312 and 279 of the *Federal Courts Rules* (SOR/98-106, hereinafter "the Rules").

[6] The matter came before the Case Management Judge on January 26, 2023. An Order followed on February 15, 2023, stating that motions by either party under rule 312 would be the subject of adjudication by the "application judge". Accordingly, prior to hearing the case on its merits, the preliminary motion was heard.

[7] As for the addition of an expert, none was presented as I was advised that the request had been denied by the Case Management Judge. I was also advised during the hearing of that preliminary matter that counsel for the Respondent had written to counsel for the Applicant, confirming that the further cross-examination of Candace and Amanda O'Soup had been denied. That letter, however, was only read into the record after the matter was pressed by the Court: the letter itself was never filed by the parties.

[8] Counsel for Clinton Key wishes to read paragraph 5 of the Court Order of February 15, 2023, as encompassing the possibility to make a motion with respect to both the new (second) affidavit of Alvira Roulette and the cross-examination of Candace and Amanda O'Soup. That is because the Order grants leave to file a motion under rule 312, without specifying whether it is with respect to paragraph (a) or (b), or both. Here is rule 312:

Additional steps	**Dossier complémentaire**
312 With leave of the Court, a party may	**312** Une partie peut, avec l'autorisation de la Cour :

(a) file affidavits additional to those provided for in rules 306 and 307;	**a)** déposer des affidavits complémentaires en plus de ceux visés aux règles 306 et 307;
(b) conduct cross-examinations on affidavits additional to those provided for in rule 308; or	**b)** effectuer des contre-interrogatoires au sujet des affidavits en plus de ceux visés à la règle 308;
(c) file a supplementary record.	**c)** déposer un dossier complémentaire.

This assumes, of course, that the cross-examination of persons other than the affiant allowed to supply an additional affidavit in accordance with rule 312(a) is possible in accordance with rule 312(b).

[9] I begin with the request to allow new cross-examinations of Candace O'Soup and Amanda O'Soup. I was inclined at the hearing of the preliminary motion to reject the contention that rule 312(b) could find application such that it would be possible for the Respondent to literally re-open the cross-examinations of Candace and Amanda O'Soup on the basis that the new affidavit of Alvira Roulette opened up a new avenue to challenge the credibility of these two witnesses. First, there is the strong indication, coming from counsel for the Respondent himself, that rule 312(b) was not in play at this stage. It appears that the matter of re-opening the cross-examination had already been disposed of. Also, the request may be in breach of the collateral facts rule. Moreover, counsel admitted at the hearing of the motion that the cross-examinations were "less important".

[10] More fundamentally, if there exists a possibility to allow for the re-opening of a cross-examination already completed, it is doubtful that rule 312(b) is the appropriate vehicle and, at

any rate, it should not be allowed to split one's case. Rule 312 applies to circumstances that differ from the situation that presents itself in this case. That is the basis on which I have decided to dispose of that request.

[11] Section 31 of the FNEA provides for the contestation of the election of the Chief of a First Nation. The Act states that it is to be done by application to a competent court, which includes the Federal Court (s 33). The Rules prescribe in Part 5 the procedure to be followed where proceedings permitted under an Act of Parliament are to be brought by application (rule 300(b)), as in this case.

[12] It is rule 308 which makes it possible to conduct cross-examinations on affidavits. But the rule is clear; the cross-examination must be completed within a specified period of time. In fact, the whole Part 5 provides for strict timelines. Furthermore, rule 84 specifies that "a party who has cross-examined the deponent of an affidavit filed in a motion or application may not subsequently file an affidavit in that motion or application …". It also mentions expressly that "(a) party seeking to cross-examine the deponent of an affidavit filed in a motion or application shall not do so until the party has served … every affidavit on which the party intends to rely …". The point of the matter is that there are strict rules that govern the cross-examination of affiants. In *Federal Courts Practice* (Thomson Reuters, 2024), the authors offer this annotation:

> Rule 84 establishes the sequence for cross-examination on affidavits. A party may not cross-examine on its opponent's affidavits until the party has served its own affidavits: rule 84(1). If the party does cross-examine, it cannot subsequently file an affidavit: rule 84(2).

The order in which cross-examinations can take place counts. Here, the Respondent wishes to actually re-open a cross-examination that has already happened. The purpose of rule 84 is evidently to deny the ability for one to split its case (*R v Krause*, [1986] 2 SCR 466). Cross-examinations take place once the evidence by way of affidavits has been filed.

[13] Rule 312 operates in particular circumstances. It must be read together with rules 306 and 307 which provide for the affidavits that the parties, the applicant and the respondent to an application, will use in support of their case. The cross-examination on those affidavits takes place in accordance with rule 308. Candace and Amanda O'Soup have been cross-examined on their affidavits.

[14] The Rules allow for affidavits to be submitted outside the framework of rules 306 to 308. That is what the Respondent wishes to do here by having a second affidavit submitted by Ms. Roulette well after the window for affidavits and cross-examinations pursuant to rules 306 to 308 has closed. That possibility comes through rule 312.

[15] Counsel for the Respondent argues that rule 312(b) allows for the cross-examination of other affiants whose cross-examination has already been completed. I do not believe such is the effect of rule 312(b). The cross-examination that is contemplated by rule 312(b) is that which is "on affidavits additional to those provided for in rule 308", that is in our case, the additional affidavit of Ms. Roulette. The only cross-examination permitted by rule 312(b) is that on the additional affidavit. Rule 312(b) is limited to providing explicitly for the cross-examination of the person who submits an affidavit outside of the rules 306 to 308 framework.

[16] Candace and Amanda O'Soup have submitted affidavits on which they have been cross-examined. That was in accordance with rules 306 to 308. Neither one has submitted an additional affidavit as allowed, on leave, pursuant to rule 312.

[17] In *Recours et procédure devant les Cours fédérales* (LexisNexis, 2013, Letarte, Veilleux et al), the authors capture the essence of the rule when they state that when the Court allows the filing of additional affidavits, it may authorize the parties opposite to cross-examine on the additional affidavit (# 5-101). That is the mechanism created by rule 312. Candace and Amanda O'Soup have not submitted affidavits that open the door to a cross-examination pursuant to rule 312(b) simply because they have not submitted any "additional affidavit".

[18] The Respondent is not asking for the cross-examination of the author of the affidavit, Alvira Roulette, which would be the situation contemplated by rule 312(b), but rather he seeks to cross-examine persons who have not submitted any additional affidavit in accordance with rule 312(a). To put it simply, rule 312(b) was not meant to allow the cross-examination of someone who has already been cross-examined on her affidavit (in accordance with rule 308). The cross-examination provided for at rule 312(b) concerns the cross-examination on the additional affidavit submitted pursuant to rule 312(a). That does not apply to Candace and Amanda O'Soup.

[19] As for the additional affidavit of Alvira Roulette submitted on February 6, 2023, I have been reluctant to grant the leave needed for its filing. I was concerned that this may constitute case splitting and avoiding the requirement that a party put their best foot forward at the first

opportunity. The Federal Court of Appeal warned against the splitting of the case 20 years ago in *Rosenstein v Atlantic Engineering Ltd*, 2002 FCA 503 [*Rosenstein*]:

> [8] Pursuant to rule 306 of the *Federal Court Rules*, 1998, an applicant has thirty days from the filing of its notice of application to file its supporting affidavits and exhibits (appeals under section 56 of the *Trade-marks Act* fall within Part 5 of the Rules entitled "Applications" (rules 300 to 334) and therefore must be commenced by way of a notice of application). By exception, rule 312 allows a party, with leave of the Court, to file additional affidavits. Under that rule, the Court may allow the filing of additional affidavits if the following requirements are met:
>
> i) The evidence to be adduced will serve the interests of justice;
>
> ii) The evidence will assist the Court;
>
> iii) The evidence will not cause substantial or serious prejudice to the other side (see *Eli Lilly and Co. v. Apotex Inc.* (1997), 76 C.P.R. (3d) 15 (T.D.); *Robert Mondavi Winery v. Spagnol's Wine & Beer Making Supplies Ltd.* (2001), 10 C.P.R. (4th) 331 (T.D.)).
>
> [9] Further, an applicant, in seeking leave to file additional material, must show that the evidence sought to be adduced was not available prior to the cross-examination of the opponent's affidavits. Rule 312 is not there to allow a party to split its case and a party must put its best case forward at the first opportunity (see *Salton Appliances (1985) Corp. v. Salton Inc.* (2000), 181 F.T.R. 146, 4 C.P.R. (4th) 491 (T.D.); *Inverhuron & District Ratepayers Assn. v. Canada (Min. of Environment)* (2000), 180 F.T.R. 314 (T.D.)).

[20] The second Roulette affidavit seeks to explain why it was needed, given that she had already provided an affidavit only a few weeks earlier, on November 21, 2022. She was cross-examined on her first affidavit on December 15, 2022; she was to bring with her various documents of a financial nature on that occasion, as she was employed as the Director of Operations by the KFN at that time. Mrs. Roulette was employed in that capacity for seven

months, from July 4, 2022 to January 27, 2023. Obviously, the additional affidavit came after her employment with the KFN had been terminated.

[21] In order to justify submitting a new affidavit, Mrs. Roulette testifies in her additional affidavit that in preparation for her examination on her first affidavit in December 2022, she discovered documents that made her conclude that KFN documents had been forged and that funds belonging to KFN had been stolen by Candace and Amanda O'Soup. It is alleged that purchase orders were prepared without the required approvals.

[22] In the month before her dismissal as Director of Operations, Mrs. Roulette testified that she continued to investigate on her suspicions of malpractice and possibly fraudulent misconduct. At a meeting of Chief and Council taking place on January 10, 2023, two RCMP officers attended "to discuss the potential forgery and theft issue" (affidavit, para 16). Mrs. Roulette says that she was present. She says that she met again with an RCMP constable (who was present on January 10) to present her evidence and conclusions, despite, she says, having been instructed by "Quorum of Council" not to pursue the matter. "Quorum of Council", she contends, is constituted of councillors adverse to Chief Key. Subsequently, that same day, the constable indicated that an investigation had been opened. As of the date of the affidavit, February 6, 2023, there had not been any charges laid and the record is silent as to further developments.

[23] The Applicant, Shannon Brass, objected to the admissibility of the Roulette affidavit. He contended that it is irrelevant, and biased, that it is constituted of speculation, opinion and

conclusion of a legal nature from someone not trained as a lawyer. If the affidavit is to be admitted, its probative value is minimal. Moreover, the Applicant complains that Mrs. Roulette failed to produce relevant documentation she was requested to supply, documentation concerning requisitions for cheques and band membership assistance.

[24] Counsel for the Applicant acknowledged that rule 312(a) is suffused with discretion, but that the discretion must be exercised "with great circumspection" (*Mazhero v Canada (Industrial Relations Board)*, 2002 FCA 295). Counsel argues that Mrs. Roulette did not show due diligence, as required. In effect, the evidence is irrelevant and has no probative value.

[25] I readily accept that the opinions expressed by Mrs. Roulette about activities she considers to be illegal are not admissible: the witness is not a person trained in the law and these comments shall be disregarded. However, it is trite law that admissibility and probative value of evidence are two different things. Here, the Applicant's counsel confuses the two. It may be that the affiant has some hidden motivation for submitting her affidavit or that her allegations smear KFN employees. But that does not make her evidence inadmissible as such.

[26] My former colleague, Mr. Justice Luc Martineau, offered some advice, some 15 years ago, that still resonates by its wisdom in *Campbell v Electoral Canada*, 2008 FC 1080:

> [26] To sum up, the Court possesses vast discretion to allow a party to file additional material. Such discretion is incompatible with a mechanical application of any set test or formula, whether threefold or fourfold. The factors mentioned above are not exhaustive and the jurisprudence does not prescribe how they are to be weighed by the judge or the prothonotary. Further, because each decision is discretionary and will be fact-specific, there may be other factors in any given case.

> [27] Thus, it is fair to say that each case will involve a different weighing depending on the individual circumstances before the decision maker (*Solvay Pharma Inc. v. Apotex Inc.*, [2007] F.C.J. No.1190 (QL) at para. 12, 2007 FC 913). Overall, in exercising its discretion, the Court must always have in mind the general principle mentioned at rule 3 of the Rules that "[t]hese Rules shall be interpreted and applied so as to secure the just, most expeditious and least expensive determination of every proceeding on its merits".

[27] Although this case is far from the strongest, the Court finds that it should exercise its discretion in favour of admitting into evidence the additional affidavit of Alvira Roulette out of an abundance of caution. The conditions for its admissibility have been met, but for the affiant's opinion that irregularities amounted to criminal offences, an opinion she was not entitled to express due to her lack of legal expertise. The conditions are those articulated in *Rosenstein* (*supra*) and endorsed again in *Forest Ethics Advocacy Association v National Energy Board*, 2014 FCA 88. While more appropriate diligence may have produced the information offered in the affidavit in due course, the evidence, depending on its probative value, may be of assistance to the Court for or against the Applicant and the Respondent.

[28] Given that the affiant was questioned at length on her affidavit, there cannot be substantial or serious prejudice. Indeed, the Order of February 15, 2023, provided explicitly for the Applicant to submit his own additional affidavit if he so wished. At the end of the day, the overarching consideration that the additional evidence will serve the interests of justice was met. Given the extreme animosity between factions in the KFN, it is more appropriate to allow evidence, subject to its probative value in the grand scheme of things.

[29] I noted, however, that it remains unclear at this preliminary stage what is the proposition advanced by the Respondent that would make that "evidence" probative in some fashion in the case at hand since the cross-examination of Candace and Amanda O'Soup is not allowed. That is because the allegations appear to relate to alleged events that would have taken place after the contested election and, indeed, have arguably nothing to do with the election of Clinton Key. Nevertheless, I chose to err on the side of caution and allow the affidavit, subject to the probative value it may have once the final submissions are offered by counsel.

[30] The parties sought their costs on the motion. None will be granted.

II. Prior elections

[31] It is not disputed that both protagonists in this case are registered members of the KFN. This is not the first time they are involved in court cases concerning elections. KFN held its first election under the FNEA in October, 2016. The election results were annulled effective March 21, 2018, by a judgment in this Court (*Papequash v Brass,* 2018 FC 325 [*Papequash*]). Clinton Key was among the successful applicants, while Shannon Brass was one of the Respondents, together with Chief Rodney Brass. Mr. Justice Robert Barnes had found that there had been "vote buying and other dishonest attempts to influence electoral outcomes" (para 40). The decision was affirmed on appeal (*Rodney Brass v Papequash,* 2019 FCA 245).

[32] A new election had to take place; it occurred on June 12, 2018 and Clinton Key was elected as Councillor. That election was also challenged judicially, this time before the

Saskatchewan Court of Queen's Bench (*O'Soup v Montana*, 2019 SKQB 185 [*O'Soup*]). That time, however, the challenge did not succeed.

[33] The third election under the FNEA is now contested. I would echo the words of Justice Barnes in 2018 that it is unfortunate that there continues to be an extremely acrimonious atmosphere between two entrenched camps. Every election under the FNEA has been sharply contested with allegations that, at times, are not related to the actual election. Justice Barnes commented further at paragraph 40 of his reasons for judgment "that the corrupt practices employed by several of the Respondents during the 2016 Band election appear to reflect a long-standing tradition and acceptance by some members of vote buying and other dishonest attempts to influence electoral outcomes. These practices appear to be sufficiently entrenched that, in the election to follow, rigorous efforts will be required to ensure the integrity of the process". Even the retention of a law firm in connection with the contestation of the 2016 election was the subject of litigation (*The Key First Nation v Lavallee*, 2019 FC 1467; 2021 FCA 123).

[34] Justice Mitchell of the Saskatchewan Court of Queen's Bench quipped in 2019 that the case he heard was "the latest chapter in the troubled history of the Key First Nation band elections" (para 1). In that case, the new election ordered by Justice Barnes was contested by the appellant, Glen O'Soup, in view of his disqualification by the Electoral Officer as a candidate for the positon of Chief. It was said that Clinton Key, together with the Electoral Officer, strenuously resisted the appeal. In the end, the Saskatchewan Court of Queen's Bench found against the applicant and ruled that the candidacy of Glen O'Soup as Chief was properly rejected by the Electoral Officer.

[35] Thus, the first election under the FNEA, in October 2016, was annulled. The one held in June 2018 was also challenged, but the challenge was dismissed. The next election, which took place on June 12, 2022, the one that saw Mr. Clinton Key become Chief, is again challenged. And again, the main allegation relates to “vote buying”.

III. The election of June 12, 2022

[36] That takes us to the third election which was completed on June 12, 2022. Advance polls were held in three locations:

- June 2, 2022, in Vancouver;
- June 4, 2022, in Edmonton; and
- June 6, 2022, in Regina.

Each of the advance pools ran from 9:00 a.m. until 8:00 p.m., local time.

[37] The final report on the June 2022 election states that 53% of eligible voters took part in the election, that is that out of 1,001 eligible voters, 532 cast a ballot. As indicated before, the Applicant, Shannon Brass, came in third, 12 votes behind the winner, Clinton Key. The electoral system consists of the so-called “first past the post” system whereby the candidate who receives the plurality of votes is elected. At that same election, five councillors were elected: David Côté, Kimberly Keshane, Sidney Keshane, Fernie O’Soup and Solomon Reece. Their election was not contested, although it was alleged that Solomon Reece assisted Clinton Key in actions that contravened the FNEA.

IV. General principles

[38] In the case at hand, three provisions of the FNEA are in play. Section 16 consists of various prohibitions. Paragraph 16(f) prohibits specifically for any one to "offer money, goods, employment or other valuable consideration in an attempt to influence an elector to vote or refrain from voting for a particular candidate", when this is done "in connection with an election". The test to set aside an election pursuant to s 35 of the FNEA ("the court may, if the ground referred to in section 31 is established, set aside the contested election") is found in s 31.

[39] In *O'Soup* (*supra*), Justice Mitchell of the Saskatchewan Court of Queen's Bench usefully summarized the principles that govern an application made pursuant to section 31 of the FNEA. That provision reads:

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 contravention of a provision of this Act or the regulations is likely to have affected the result.	**31** Tout électeur d'une première nation participante peut, par requête, contester devant le tribunal compétent l'élection du chef ou d'un conseiller de cette première nation pour le motif qu'une contravention à l'une des dispositions de la présente loi ou des règlements a vraisemblablement influé sur le résultat de l'élection.

[My emphasis]

The governing principles are:

a) the burden is on an applicant to demonstrate that a contravention of a provision of the FNEA has taken place, a contravention being an action which violates a law;

b) the contravention need not be deliberate or motivated by malice. Negligence or inadvertence will do;

c) section 31 speaks of a contravention that is "likely to have affected the result". Thus the applicant, who bears the burden throughout, must demonstrate that it is more likely than not that the contravention affected the outcome of the election (*Papequash*, para 33). Put simply, it must be probable that the outcome was affected, which accords with the French version of s 31 ("a vraisemblablement influé sur le résultat de l'élection"). If the outcome of the election is not shown to have probably been affected, the test will not have been met. However, certainty that the outcome would have been different is not needed;

d) the case law in the Federal Court (*Papequash*, paras 34 to 36; *Good v Canada (Attorney General)*, 2018 FC 1199, paras 54-55) and in the Court of Queen's Bench for Saskatchewan (*Cyr v McNab*, 2016 SKQB 357; *O'Soup*, para 31) acknowledges that the language of ss 35(1) of the FNEA supports a discretion in the Court to set aside the contested election "if the ground referred to in section 31 is established", that is "the contravention is likely to have affected the result";

e) the presumption of regularity about the election applies. Put plainly, we start from the proposition that the election was properly conducted. That in my view is no great novelty. This goes hand in hand with the burden that falls on the shoulders of an applicant who chooses to challenge an election through the use of s 31 of the FNEA. It merely reinforces the notion that the starting point is that the election comports with the requirements of the law.

[40] The Court in *O'Soup* also remarked that annulment should be the remedy of last resort, in cases "where it is shown that the election result "would likely have been different but for the non-compliance" with the *FNEA* or the *FNER*" (para 31). That is because the annulment of an election disenfranchises all voters, and not only those whose votes are disqualified because of some voting irregularity.

[41] The issue is, of course, what constitutes in the words of s 31 of the FNEA "a contravention of a provision of this Act or the regulations [that] is likely to have affected the result". Does the test require that there be sufficient contraventions that the winner of the election would not be the same, the so-called "magic number" test, or is the "likely to have affected the result" test satisfied in spite of not being able to attain the magic number? And if the "magic number" test is not the only way to reach the "likely to have affected the result" test of s 31, what behaviour would need to be proven?

[42] Our Court found in *Papequash* at paragraphs 34 to 36 that there is a discretion in the judge to annul, in line with s 31, where the integrity of the election is jeopardized by fraud. Barnes J said that "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" (para 34). The Court in *Papequash* concluded that the "magic number" test was not the only one that could satisfy the requirement of s 31.

[43] Fortunately, two decisions from the Federal Court of Appeal bring much needed light on the issue. Indeed, these are of a binding nature on this Court.

[44] They involve the Red Pheasant First Nation [RPFN] whose elections are also governed by the FNEA. In a 500-paragraph decision, my colleague Justice Henry Brown had to decide whether the election to the position of Chief and a number of councillors should be annulled in application of s 31 of the FNEA (*Whitford v Red Pheasant First Nation*, 2022 FC 436). The Court of Appeal proceeded in two decisions. In *Whitford v Chakita*, 2023 FCA 17 [*Whitford* FCA 17], the Court examined the situation of seven councillors where, in spite of contraventions of the FNEA including electoral fraud, our Court had concluded that annulment of the election of the six councillors found to have contravened the Act was not the appropriate remedy (the seventh councillor was found not to have been in violation of the Act). In the other case, *Wuttunee v Whitford*, 2023 FCA 18 [*Wuttunee* FCA 18], our Court had reached the conclusion that the election of Chief Wuttunee and Councillor Nicotine had to be annulled.

[45] The Court of Appeal was careful to note that the particular circumstances of the cases were an essential feature in view of the discretion conferred on the Court by section 35 of the Act: when the ground referred to in s 31 has been established, "the court may … set aside the contested election". The existence of discretion makes no doubt in spite of the argument made by Mssrs. Wuttunee and Nicotine that the test of s 31 is the "magic number" test. The Court proceeds to articulate further the test of what "is likely to have affected the result".

[46] The starting point of the analysis is seen as being *Opitz v Wrzesnewskyj*, 2012 SCC 55, [2012] 3 SCR 76 [*Opitz*], a 4:3 decision concerning administrative errors in the Etobicoke Centre Riding federal election of May 2, 2011. The Court specified that "(t)here is no allegation of any fraud, corruption or illegal practices" (para 2). Nevertheless, the Supreme Court of Canada case

provides guidance because the *Canada Elections Act* (SC 2000, c 9) [the CEA] provides that a candidate may contest an election where "there were irregularities, fraud or corrupt or illegal practices that affected the result of an election" (s 524(1)(b) of the CEA). The issue to be decided is whether an election is compromised enough to justify an annulment.

[47] The Court of Appeal in *Wuttunee* FCA 18 finds that the Supreme Court of Canada in *Opitz* identifies two tests at paragraph 23:

> [38] In deciding whether to annul an election in a given case, the Supreme Court stated that "an important consideration is whether the number of impugned votes is sufficient to cast doubt on the true winner of the election <u>or</u> *whether the irregularities are such as to call into question the integrity of the electoral process*": *Opitz*, at para. 23.
>
> [Emphasis in para 38]

However, the Supreme Court of Canada did not depart from the "magic number" test in *Opitz*. Here is how the Court of Appeal characterizes the result in *Opitz*:

> [40] After considering the centrality of the constitutional right to vote, the enfranchising purpose of the *CEA*, the text and context of section 524 and the competing democratic values engaged, the Supreme Court concluded that an "irregularit[y] ... that affected the result" of an election "is a breach of statutory procedure that has resulted in an individual voting who was not entitled to vote". The Court observed that "[s]uch breaches are serious because they are capable of undermining the integrity of the electoral process": all quotes from *Opitz*, at para. 51. The Court recognized, however, that a declaration that an election is annulled is "the ultimate public consequence of violating provisions of the Act, and accordingly should be reserved for serious cases": *Opitz*, at para. 70.

The Court of Appeal saw at its paragraph 42 that the *Opitz* Court was opening the door to a different test in spite of its reliance on the "magic number" test in *Opitz*, as the Supreme Court of

Canada "did not rule out the possibility that a "more realistic method for assessing contested election applications might be adopted by a court in a future case": *Opitz*, para 73".

[48] The Court of Appeal reviewed cases from this Court where the issue was broached. Thus, in *McEwing v Canada (Attorney General)*, 2013 FC 525 [*McEwing*], a CEA case, the Court of Appeal refers to our Court having also noted that the Supreme Court of Canada had left open the possibility that, if the integrity of the electoral process was jeopardised, annulment of an election might be justified. That possibility would become more likely when fraud, corruption or illegality were found as opposed to technical irregularities. The *McEwing* court was, of course, concerned about disenfranchising every elector who actually voted. Hence, the bar is a rather high one, one where the "court should only exercise its discretion to annul an election where there is serious reason to believe that the results would have been different but for the fraud, *or* where an electoral candidate or agent is directly involved in the fraud" (*Wuttunee* FCA 18).

[49] The Court then discussed *Papequash* (*supra*) in this Court. It is stated that the case involved widespread unethical election practices, including using First Nation funds to purchase votes or convince candidates to decide not to run. The *Papequash* court was of the view (at para 34) that an election corrupted by fraud could be annulled if the integrity of the electoral process is in question: serious electoral fraud could vitiate an election result even when the "magic number" is not reached. What was the evidence in *Papequash*? The question is answered at paragraph 56 of *Wuttunee* FCA 18:

> [56] The Federal Court found in *Papequash* FC that there was clear evidence of widespread and openly conducted vote buying activity carried out by several individuals. The Court was further satisfied that the integrity of the Key First Nation Band election

> had been sufficiently corrupted by the misconduct of candidates such that the election had to be annulled and a new election conducted: at paras. 39, 40. Importantly, nowhere in the decision does the Federal Court find that the number of votes affected by the corrupt practices in issue were sufficient to have changed the winners of the election.

[50] Hence, what has emerged in *Wuttunee* FCA 18 is a test that focuses on misconduct that is such that it is the integrity of the electoral process that is called into question:

> [62] From all of this, I understand that the result of an election may well be affected where the misconduct in question is sufficiently severe that the integrity of the election was seriously corroded and compromised.

[51] It is against this backdrop that the Court of Appeal applied the test against eight Councillors and Chief Wuttunee of the RPFN to assess if the discretion that stems from s 35 of the FNEA was properly exercised. Where there is serious electoral fraud, severe enough that the integrity of the election is compromised, it would not be necessary to meet the "magic number".

[52] The *Wuttunee* FCA 18 is the case where the Court of Appeal is satisfied that the election of the Chief and one Councillor had to be annulled. Here are the elements, found by the Federal Court, which are held by the Court of Appeal as justifying departing from the "magic number" test because the integrity of the process was compromised:

- Mssrs. Wuttunee and Nicotine went far beyond acceptable conduct;
- they were directly involved in multiple instances of serious electoral fraud (*Wuttunee* FCA 18, para 18);

- they were engaged in "several contraventions of the *FNEA*, including vote buying and related activities, and of the *First Nations Elections Regulations*, relating to mail-in votes" (*Wuttunee* FCA 18, para 68);
- they used First Nation funds to purchase votes, what was characterized as "particularly grave electoral fraud" (*Wuttunee* FCA 18, para 70).

[53] Those facts were never challenged. The Court of Appeal found that it was open to the Federal Court to annul the election of Mssrs. Wuttunee and Nicotine in those circumstances even though it had not been shown that the "magic number" test was met.

[54] In the other case (*Whitford* FCA 17), the Court of Appeal did not disturb the exercise of discretion which resulted in a refusal to annul the election of seven Councillors, even though in six of the seven cases, there had been violations of the FNEA.

[55] It is important, in my view, to refer to the countervailing values, referred to as democratic values, found by the Court of Appeal to have to be factored in when considering the exercise of discretion:

- disenfranchising not only votes that are disqualified (or bought), but the votes cast by all the electors has broad and serious consequences (*Whitford* FCA 17, para 59);
- increasing the potential for future litigation which carries uncertainty in the democratic process (*Whitford* FCA 17, para 60);

- quoting from *Opitz*, a new election "is not a perfect answer", as it "will always be coloured by the perceived outcome of the election it superseded" (*Whitford* FCA 17, para 61);
- a new election may be inconvenient for voters (*Whitford* FCA 17, para 61);
- no guarantee that the new election will be free from additional problems (*Whitford* FCA 17, para 61);
- "frequent new elections" call into question "the security and efficiency of the voting mechanics, and this may lead to disillusionment" which itself may generate voter apathy (*Whitford* FCA 17, para 61);
- the use of institutions outside of the governance of First Nations to resolve issues involving the democratic process of First Nations is another consideration that may be taken into account. Courts will not shrink from the task given by Parliament to intervene where appropriate; indeed, First Nations elect to have their elections governed by the FNEA. It remains, says the Court of Appeal, that "courts must nevertheless be mindful of the fact that one of the purposes of the *FNEA* was to move away from the "antiquated and paternalistic" approach to First Nations' governance that existed under the *Indian Act*" (*Whitford* FCA 17, para 62);

Accordingly, I take it that the Court of Appeal signals that the annulment of an election should not be arrived at lightly, and that truly severe misconduct, once proven, will be a candidate to call for a new election.

[56] In that context, the evidence to support a case to be decided on a balance of probabilities, the one civil standard of proof at common law (*F.H. v McDougall*, 2008 SCC 53, [2008] 3

SCR 41) [*McDougall*], requires that "evidence must always be sufficiently clear, convincing and cogent" (*McDougall*, para 46; *Canada (Attorney General) v Fairmont Hotels*, 2016 SCC 56, [2016] 2 SCR 720, para 36 [*Fairmont*]). The quality of the evidence will help determine whether it is more likely than not that an alleged event occurred.

[57] In *Whitford* FCA 17, six councillors were found to have violated the FNEA. None of the violations were found to reach the severity level sufficient to exercise the discretion to annul the election:

- Councillor 1: "directly involved in one instance of serious electoral fraud relating to vote buying using RPFN funds", what was called by the Federal Court a "particularly grave electoral fraud" (*Whitford* FCA 17, para 8);
- Councillor 2: one contravention of the FNEA and one instance of serious electoral fraud relating to vote buying, but without using FN funds (*Whitford* FCA 17, para 9);
- Councillor 3: two instances of serious electoral fraud relating to vote buying, but without using FN funds (*Whitford* FCA 17, para 10);
- Councillor 4: one instance of serious electoral fraud relating to vote buying, without using FN funds (*Whitford* FCA 17, para 11);
- Councillor 5: three contraventions of the FNEA as well as being directly involved in three instances of serious electoral fraud relating to vote buying, but without using FN funds (*Whitford* FCA 17, para 12);

- Councillor 6: one contravention of the FNEA as well as being directly involved in one instance of serious electoral fraud relating to vote buying, but without using FN funds (*Whitford* FCA 17, para 13).

[58] The applicants in the contested RPFN election claimed that instances of vote buying require that the election be annulled: there is no discretion. Neither our Court nor the Court of Appeal agreed. Having found that the serious election fraud had occurred, was it still open to our Court to decline to annul the election of the six councillors? The answer was yes. As the Court of Appeal writes at paragraph 41, "Had Parliament intended that every election found to have been tainted by serious electoral fraud, corruption or illegality be annulled, it would have been open to it to have said so explicitly".

[59] The Court of Appeal notes that the misconduct was committed by eight members of the so-called "Team Clinton" and their agents. That brings a measure of added seriousness to the misconduct as it reflects "very poorly on the state of democratic governance within the RPFN" (para 43). The Federal Court stated that it could have annulled the whole election, but it chose to exercise its discretion not to do so. The Court of Appeal in *Whitford* FCA 17 did not find a palpable and overriding error in exercising the discretion in that fashion.

[60] Reviewing the case law from this Court, the Court of Appeal ascertained that every case under the FNEA found that this Court retains discretion not to overturn elections, including where there is fraud or other forms of corruption (*Good v Canada (Attorney General)*, 2018 FC 1199; *Flett v Pine Creek First Nation*, 2022 FC 805 [*Flett*]; *Bird v Paul First Nation*, 2020 FC

475; *Paquachan v Louison*, 2017 SKQB 239). In fact, the only outlier may be *Gadwa v Kehewin First Nation*, 2016 FC 597 [*Gadwa*]. It was affirmed on appeal without comment on this point (*Joly v Gadwa*, 2017 FCA 203). That case was not decided, notes the Court of Appeal, on the basis of the FNEA, but rather in accordance with the custom election act of that First Nation. Furthermore, the same colleague who found an absence of discretion in *Gadwa* came to a different conclusion in a subsequent case (*Flett*) under the FNEA.

[61] Thus, the Court of Appeal concluded that, as a matter of law, the discretion remains even in cases involving fraud or other forms of corruption. Was there a palpable and overriding error in *Whitford* FCA 17? The Court factors in the various relevant considerations listed at paragraph 55 herein. It reasserts that this is a matter in the discretion of the trial judge where a court of appeal does not have the power to reweigh the evidence, let alone retry the case.

[62] The difference between *Wuttunee* FCA 18, where the elections of the Chief and one Councillor were annulled, and the six Councillors in *Whitford* FCA 17, where the elections were not annulled in spite of the finding that they engaged in serious electoral fraud, resides in the lesser scale of misconduct than that committed by the Chief and the Councillor in *Wuttunee* FCA 18 (para 76). In effect, it is the magnitude of their misconduct that makes the difference. The use of FN funds is seen as a “particularly grave electoral fraud”. The access and exploitation of confidential electoral information, including the Requests for Mail-in Ballots, constitute an aggravating factor. The Chief and the Councillor occupied leadership positions where the expectation is that they act as bulwarks of First Nation democracy. Indeed, more aggravating factors were identified in *Wuttunee* FCA 18.

[63] The fact that the members of Team Clinton promoted and supported other Team members and that, in fact, the group acted in concert with the goal to achieve the election of each other, was not lost on the Federal Court. Nevertheless, the Federal Court was entitled to conclude that the culpability of the six was less than that of Chief Wuttunee and Councillor Nicotine. In a nutshell, the Court of Appeal, having compared the situation of the two groups, found that the discretion was properly exercised, considering the aggravating factors involved in *Wuttunee* FCA 18 as well as the other relevant mitigating considerations which were considered in *Whitford* FCA 17:

> [80] At the same time, the Court had regard to mitigating factors, including the fact that the respondents' misconduct was less egregious than that of Chief Wuttunee and Councillor Nicotine. The Court also noted that (unlike Chief Wuttunee and Councillor Nicotine) some respondents had not sent fraudulent documents to RPFN's electoral officer. In addition, with the exception of the one case noted earlier, none of the respondents had used band funds to purchase votes. The Federal Court also had regard to the fact that annulling the elections of the six respondents would disenfranchise the voters who had legitimately voted for them.

[64] It is certainly not that the behaviour of the six is to be encouraged or condoned, or that a bright light was established, thus allowing vote buying. It is more that various considerations must be considered and balanced.

[65] This Court's task is now to consider the allegations in this instant case, and what was effectively proven. It will then be possible to consider if the sufficiently clear, convincing and cogent evidence of contravention leads to a conclusion about how the discretion found in s 35 ought to be exercised. Is the magnitude of the misconduct, if any, enough to annul an election in spite of the "magic number" not having shown to have been reached?

V. The allegations and analysis

[66] The Applicant must satisfy the Court that the "magic number" has been attained in this case or that the misconduct of the Respondent has reached the level of being "sufficiently severe that the integrity of the election was seriously corroded and compromised" (*Wuttunee* FCA 18, para 62). In *Papequash* (*supra*), Barnes J put the proposition in the following terms:

> [40] I am satisfied on the evidence before me 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 that the election must be annulled and a new election conducted. I would add that the corrupt practices employed by several of the Respondents during the 2016 Band election appear to reflect a long-standing tradition and acceptance by some members of vote buying and other dishonest attempts to influence electoral outcomes. These practices appear to be sufficiently entrenched that, in the election to follow, rigorous efforts will be required to ensure the integrity of the process.

[67] In order to reach that conclusion, the Court must be satisfied, on a balance of probabilities, that the severity of the misconduct seriously corroded or compromised the integrity of the election, in order to exercise its discretion to set aside the election in view of the contravention of provisions of the FNEA that likely affected the result (in spite of the fact that the "magic number" test is not met). As the Supreme Court of Canada put it in *McDougall* (*supra*), "(o)f course, context is all important and a judge should not be unmindful, where appropriate, of inherent probabilities or improbabilities or the seriousness of the allegations or consequences" (para 40). Thus, the quality of evidence needed to satisfy the balance of probabilities will require an acceptable level of clarity, persuasiveness and cogency (*Fairmont* (*supra*), para 36). In my view, that level was not attained on this record.

[68] Some technical irregularities were originally raised by the Applicant. That explained in large part the involvement in the litigation of the Key First Nation, which was represented by a different counsel than the other Respondent, Chief Clinton Key. These allegations were abandoned, with the effect that the role to be played by the Key First Nation was significantly reduced. For all intents and purposes, it was limited to urging the Court not to annul the election of the Chief because of the detrimental effect this has on the community. Counsel impressed upon the Court that this latest case constitutes the eighth trip to court involving election disputes.

[69] Rather, the Applicant chose to dwell on what he termed “corrupt practices” by the Respondent Clinton Key or persons said to act on his behalf. The Notice of Application of July 11, 2022, refers to two instances where the Respondent is said to have paid KFN members “to vote for him and/or did influence KFN members to vote”. That, states the Notice, constitutes practices that “affect the integrity of the Election and on this basis alone the Election ought to be annulled”. Be that as it may, the Applicant also sought to prove other malversations in his attempt to satisfy the requirement of s 31 of the FNEA.

[70] This is not a case of black and white. We are in shades of grey. The Court is faced with evidence in the form of affidavits which, with respect to some, leave a lot to be desired. Moreover, the Applicant sought to use bank statements submitted by the Respondent to argue that they are somehow evidence of payments that are troublesome, asking, or suggesting to, the Court that it should infer contraventions on provisions of the Act.

[71] Originally, the Applicant was contemplating proceeding with the assistance of eleven affidavits. However, four of those affidavits never saw the light of day.

[72] Out of the remaining seven affidavits, those of Tracy Brass and Edward Brass were submitted in spite of the fact that two scheduled attempts to cross-examine them on their affidavit proved unsuccessful as they never showed up. Counsel for the Applicant had to concede at the hearing that, in those circumstances, this is seriously problematic as counsel for the Respondent was set to conduct an extensive cross-examination of these two affiants.

[73] Professor Wigmore expressed the view that cross-examination is "beyond any doubt the greatest legal engine ever invented for the discovery of truth" (3 Wigmore, *Evidence* (Chadbourn rev, 1970, § 1367)). The Supreme Court echoed the indispensability of the cross-examination in the oft-quoted paragraph 1 in *R v Lyttle*, 2004 SCC 5; [2004] 1 SCR 193:

> 1 Cross-examination may often be futile and sometimes prove fatal, but it remains nonetheless a faithful friend in the pursuit of justice and an indispensable ally in the search for truth. At times, there will be no other way to expose falsehood, to rectify error, to correct distortion or to elicit vital information that would otherwise remain forever concealed.
>
> [Emphasis in original]

[74] In their *The Law of Evidence* (seventh ed., 2015, Irwin Law Inc) authors David M. Paciocco and Lee Stuesser remind us that "(t)he opportunity to cross-examine in order to test or to challenge a witness evidence is a vital part of the adversary process" (p 466). The cross-examination may seek to:

- show bias, interest, prejudice;

- attack the character;
- contradict through inconsistent statements;
- put contrary evidence to the witness;
- demonstrate a lack of capacity to observe, recall or communicate accurately;
- show that the witness' evidence is contrary to common experience.

At the hearing, counsel for the Applicant had to concede that little to no weight could be given to those affidavits. I lean towards giving these no weight, or so little that they could not alter the outcome of this case, in one direction or the other.

[75] That leaves five affidavits to review: those of Shannon Brass, the Applicant, as well as those of Candace O'Soup, Roxanne Stonechild, Jonathan Papequash and Amanda O'Soup (originally presented under the pseudonym of Jane Doe).

Shannon Brass

[76] In a four-page affidavit, Mr. Brass acknowledges not having witnessed anything done by Clinton Key as he kept his distance during the election campaign. The affidavit is a hodgepodge of hearsay statements. For instance, Mr. Brass refers to statements which never even became affidavits. He also refers to three affiants, Jonathan Papequash, Roxanne Stonechild and Candace O'Soup. Their affidavit evidence will speak by itself. Finally, Mr. Brass speaks of a statement made to him by someone who refused to testify by affidavit; what is more, that statement concerns events that allegedly happened after the election of June 12, 2022.

[77] The cross-examination of Shannon Brass confirmed he had no personal knowledge about the allegations he was making. Repeatedly he testified that he did not have personal knowledge and he did not independently verify contents of what he was repeating. The affidavit of Shannon Brass is of no assistance to his case or to the Court.

Candace O'Soup

[78] In a two and one-half page affidavit, Candace O'Soup testified about Councillor Clinton Key submitting requisition forms for band member assistance. The cheques issued are said to have been made in the name of Band Members, said to be in need of assistance. But, to say the least, the evidence lacked clarity. The witness was not able to recall when the cheques were requisitioned, whether they were before or after the election, or both. No cheque was produced. At least half of the affidavit is dedicated to the post-election behaviour of the Respondent. He is said to have a temper, with employees, including Roxanne Stonechild and Tracy Brass. The Director of Operations quit shortly after the election and Candace O'Soup states that she "was fired without notice" on September 21, 2022.

[79] It cannot be said that Candace O'Soup was enlightening during her cross-examination. In her affidavit, she testifies that Clinton Key made many requisitions for band member assistance; she says that they were made "without any reason as I recall". Although Candace O'Soup claims that this was unusual, she did not testify as to what actually happened to the requisition for band member assistance or, more importantly, whether the providing of assistance was for the purpose of buying votes or purely for assistance. As noted in *Beeds v Pelican Lake First Nation*, 2022 FC 1709 [*Beeds*], "(t)he evidence in this and other cases brought before this Court shows that it is

common practice in First Nation communities to provide financial assistance to members" (para 63). That is clearly the situation in this case.

[80] There is a complete absence of evidence around the alleged requisitions for band member assistance. Alvira Roulette, who took over as Director of Operations in July 2022 (until early 2023), testified as to the governance failure of the KFN concerning the tracking of cheques and requisitions for cheques for the purpose of providing assistance to band members. There was evidence of a requirement of two signatures on cheques. Whether that "process" was in place and it was followed, or not, is unknown. Similarly, there were suggestions that decisions had to be made by Chief and Council, yet there was no evidence whether the "process" existed and was followed, or not. In a word, even accepting that Clinton Key made requisitions for band member assistance, there is a lack of evidence as to what happened: there is no testimony or documentary evidence and the Court is left in the dark. Alvira Roulette was cross-examined on her own first affidavit of December 15, 2022. She answered a question posed by counsel for Chief Key in the following fashion:

> Q: Since becoming director of operations, you've mentioned a few times about the, you know, records of the nation or what's going on. What did you walk into? What was the the [*sic*] state of the nation's records when you started?
>
> A: Well, the state of the nation's records were almost non-existent. I was trying to find out for my staff, like, how long they had been here prior to me starting. I had – and then I was told that the prior – the prior director didn't like to keep paper records. So when I walked into this job, I expected to simply direct staff, you know, maybe hire a few additional staff, post some positions and, you know, keep the office running.
> But to work for the Key First Nation, it's a big, huge mess …
>
> (Applicant's Record, pages 795-796)

[81] Candace O'Soup's affidavit and cross-examination did not in any way disturb that comment from Alvira Roulette. Ms. O'Soup's evidence ends up being in the nature of innuendo leading to no more than some suspicion and speculation. It never rises to anything establishing vote buying. It is of no assistance to the Applicant.

Roxanne Stonechild

[82] A one-page affidavit was offered by Ms. Stonechild. She testified that over several phone calls to Mr. Key, who was seeking her support for the upcoming election, there was a heavy emphasis concerning upcoming land claims and what she calls "the vision that Mr. Clinton Key had for The Key First Nation". Ms. Stonechild went on to state at paragraph 4c of her affidavit:

> c. Mr. Clinton Key, stated he would ensure that each family member would receive $40,000 - $50,000, if we were to vote him and his team into council. He shared that he was for the people. I stated that when he shares these numbers with our less vulnerable persons, this would be taken advantage of as they endure such financial hardships who are extremely influenced.
>
> [transcribed as in original]

The Applicant contends that this constitutes an instance of vote buying. I disagree.

[83] It is quite evident from the affidavit itself, but also confirmed on cross-examination on the affidavit, that the land claims discussion was part of the vision Mr. Key was promoting as part of his electoral campaign. Indeed the nature of the conversation is acknowledged in the Applicant's factum where we read at paragraph 32 that "Ms. Stonechild explained that, "in her knowledge" that same election promises [*sic*] was made to a number of other members of Key First Nation". In fact other campaigners addressed the issue. Her concern appears to have been

that the windfall ($40,000-$50,000) was quite significant. Ms. Stonechild conceded on cross-examination that the money would be distributed to all members of the First Nation.

[84] This constitutes nothing more than an electoral promise made to the electors of the KFN. Ms. Stonechild may disagree with the rhetoric in the rough and tumble world of politics and elections. Promises are made and the citizenry understands fully that some will be fulfilled, some not. It seems to me to be clear that candidate Key was arguing that he would aggressively pursue land claim negotiations (or litigation) with a view to achieving the vision he was selling to his community. The Respondent is right to point to the fact that the funds are to be available to every band member. There is no favoritism. As such, whether someone votes for a candidate or not, or does not vote at all, is irrelevant. There is no *quid pro quo*. It follows that Ms. Stonechild's evidence is of no assistance to the Applicant.

Jonathan Papequash and Amanda O'Soup

[85] The evidence of Jonathan Papequash is perhaps, at first blush, the strongest evidence offered by the Applicant.

[86] There is no denying that Mr. Papequash would be falling on hard times and that Mr. Key would come to his assistance. They had a somewhat close relationship exemplified by each referring to the other as "uncle" (Mr. Key) and "nephew" (Mr. Papequash), despite Mr. Papequash denying under cross-examination the closeness of their relationship.

[87] The affidavit is one-page long. Mr. Papequash says that he believes Mr. Key was trying to bribe him for his vote (para 2). In support of that contention, Mr. Papequash offers evidence in the form of screenshots of e-transfers of payments made to him by Mr. Key and one of his associates, Solomon Reece:

Clinton Key:	March 17, 2022: $40 April 16, 2022: $100 April 27, 2022: $75 May 6, 2022: $50 May 23, 2022: $30
Solomon Reece:	April 18, 2022: $80 April 21, 2022: $60

[88] The affiant also includes an exchange of text messages on May 22, 2022, with Clinton Key; it reads:

> **Jonathan**: What you say uncle?
>
> **Chief**: Nephew how many times have I helped out
>
> **Jonathan**: I kept track 285 but uncle you got to remember your asking me to support people I don't even know you got my support already but it's the people you want me to support
>
> **Chief**: That money came from all of us. They don't have any money I'm carrying everyone. Send me a picture of your ballot
>
> **Jonathan**: I can't I'm on a texting app I'm out mins on my phone.
>
> **Chief**: Ok well figure out: send me a picture
>
> **Jonathan**: Why do I have to send picture any ways
>
> [transcribed as in original]

[89] The Respondent put into evidence more text messages between the two that put the relationship at the forefront and provide a different texture. Thus, Mr. Papequash seems to have

been supportive of Mr. Key's candidacy for the position of Chief well before the election was on the horizon, encouraging Mr. Key to run and offering to help:

> Dec. 23, 2021:
> **Jonathan**: Get some younger guys on your team uncle and I'll support yous.
> **Clinton**: Yes I will nephew thanks a lot and merry Christmas happy new year.
>
> Jan 23, 2022:
> **Jonathan**: Make it happen uncle get in for chief next election … I hear all these people talking about Clarence like he's a fucking king weenuk damn guys my blood and doesn't even associate with me … I believe you'll do good uncle I believe you'd be a better leader a better hustler.
> **Clinton**: Thanks for the compliment nephew.
>
> Mar. 17, 2022:
> **Jonathan**: I can help you too when it comes to campaign time just like I did with Daryl. I know lots of people in Regina I can get in contact with lots of band members just like I did that one year for Daryl when he became chief I went after Clarence's voters and got to them first
>
> Mar. 17, 2022:
> **Jonathan**: Uncle you need a new fresh solid team with you this election.
> **Clinton**: I am building the best team possible.
> **Jonathan**: I'll support you but won't support anyone else that's older than 40
> **Clinton**: Sounds great.
> **Jonathan**: Do you know that Solomon Brass guy?
> **Clinton**: Yes I do his running with me.
>
> [transcribed as in original]
>
> [Respondent's Record, p 102-103)]

[90] The evidence before the Court also brings some light on the various payments made to Mr. Papequash:

- March 17, 2022 ($40): for "gas money", as requested by Mr. Papequash.

- April 16, 2022 ($100): at the request of Mr. Papequash.
- April 18, 2022 ($80): for bus ticket to Regina because Mr. Papequash had to be in Court.
- April 21, 2022 ($60): “gas money” to go to work.
- April 27, 2022 ($75): money for milk and pampers for his child.
- May 6, 2022 ($50): “gas money” to go to work and an additional amount of $30 for milk for his child.
- May 23, 2022 ($30): unknown.

[91] The Respondent claims that Mr. Papequash could be quite insistent and persistent as he seems to be in serious need of assistance. The following exchanges, one on March 17 and one on May 5-6, give the flavour:

> Mar. 17, 2022:
> **Jonathan**: Able to help me out with a few bucks today uncle
> **Clinton**: Hi nephew I’m just waiting for a few dollars and I can send you a few dollars
> **Jonathan**: You want my email?
> **Clinton**: Yeah
> **Jonathan**: Hey uncle you able to help me out then? I’ve been stuck all day trying to get home
> Uncle Clinton??
> **Clinton**: I can send $40
> **Jonathan**: hockeyfanatic9787@gmail.com is my email uncle and I appreciate it
> Tough times
> **Clinton**: No problem nephew
> **Jonathan**: Hey uncle can you let me know when it’s done?
> **Clinton**: Yes
> **Jonathan**: Just needing gas and some food as soon as I can uncle and I’ll be able to leave as soon as I get it
> Your going to email transfer?
> Uncle??
> Hey uncle are you able to do that then please??
> Need gas to get home uncle??
> Uncle Clinton??
> Hey uncle still able to do that??
> ??
> So I’m not going to get anything am I?

I look forward to supporting you in upcoming election the time I need help and don't have family to ask you don't reply to me
Clinton: So you're not you're just getting finished supper here will get you right away

May 5, 2022 at 5:03 pm:
Jonathan: Able help me out one last time uncle needing gas all week for work

May 5, 2022 at 7:04 pm:
Jonathan: ??
Uncle ??
Come on uncle one last time
??
Uncle Clinton??
??

May 5, 2022 at 10:02 pm:
Jonathan: Uncle??

May 6, 2022 at 9:53 am
Jonathan: Good morning uncle are you able to help me out then
??
Uncle Clinton??
Clinton: Gm
Jonathan: Able to help me out one last time uncle needing gas till Wednesday for work?
Clinton: This is about the Fourth last time I heard
Im waiting for a deposit and I'll help you
Jonathan: Ok uncle
Sorry but damn gas for work is just a struggle I don't have anyone uncle else to ask
I'm out here all alone doing what I can
Clinton: OK keep it up and I'll look after it this evening
Jonathan: Ok I'll talk to you this evening
Clinton: Ok after 6

May 6, 2022 at 1:29 pm:
Jonathan: One last time uncle help me out good and I'll see you guys soon … boy needs milk for week and I'll need gas till Wednesday it's like 20 for trip there and back to work
Clinton: I said I will help you after six

May 6, 2022 at 5:00 pm:
Jonathan: Able to do 80 uncle will help 30 more please if u can please uncle
Clinton: Jonathan stop it now

> **Jonathan**: Was gunna ask 80 uncle last time before u were gunna send and tell you what it's for
> Ask is 30 more so can get my son's milk while I'm in town I filled up my tank thanks it helps for work but damn needed help one last thing uncle I'm working on getting my son
> And his allowance
> So this doesn't keep happening cuz I got bills bills bills always broke pretty much every month payday
> I'm trying
> **Clinton**: Try hard enough you because I can't be raising families I got my own family to think about and helping other people
> **Jonathan**: I do I ain't used to this it's all new to me but it's a struggle may have get two jobs a two week payday
> Idk uncle if u can do this last 30 so I can grab this and go drop it off then thanks if not then I guess we will talk later on
> **Clinton**: Stop it nephew
> **Jonathan**: Well damn I'm sitting here tryna figure out how to get this cash for this boys milk and this woman's just non stop making it seem like my fault
> Come on uncle help me this 30 please
> (texts end)
>
> [transcribed as in original]
>
> [Respondent's Record, p 326-328, 339, 343-345]

[92] The Respondent contends that exchanges like these show that the money transferred to Mr. Papequash was for financial assistance. In fact, the Applicant, Shannon Brass, stated in his affidavit (para 9) having provided assistance to First Nation members in need, "including Jonathan Papequash recently and after the election, when he asked for help with for example, bus money". Nevertheless, Jonathan Papequash answered the question "At any point in time have you sought money from Shannon Brass?", with "no" (Applicant's Record, p 334). When pressed with questions about support in kind, "gas in your truck", Mr. Papequash answered "no". Indeed, when asked "And you're positive about that, as you are with everything else in your affidavit?", he said "yes". Those are not the only difficulties which stem from Mr. Papequash's cross-examination.

[93] It was not easy to follow Mr. Papequash during his cross-examination on affidavit. For instance, he denied having faced personal and financial difficulties before the election of June 2022 (Applicant's Record, p 269 line 19 to p 270 line 3). The text messages show the opposite. When questioned about the various transfers he received from Clinton Key, he stated that the transfer of March 17, 2022 was to assist towards meeting grocery needs, clothing needs, diaper needs, work expenses and travel expenses. The transfer of April 16 assisted in meeting food needs as well as travel and work expenses. The transfer of April 27 was said to be for travel expenses only. The May 6 transfer was said to assist with meeting food needs, and work and travel expenses. The last transfer was said by the witness to be for food needs and travel expenses. However, later on in the cross-examination, Mr. Papequash limited the requests he did make to travel and work expenses: grocery, clothing and diaper needs for his child had disappeared.

[94] And there is more. Taking each of the five transfers made to him by Mr. Key, Mr. Papequash answered each time that he did not know at the time the transfer occurred that they were conditional on him voting for Mr. Key and Solomon Reece. Each time Mr. Papequash said that he knew that such was the case only because of the exchange of May 22, the text of which is reproduced at paragraph 88. It is rather odd that after having received five transfers in what appears to be financial assistance dearly needed as well as requested by Mr. Papequash because of urgent needs, he realized his vote which, back in March 2022 and probably as early as December 2021, appears to have already been in Clinton Key's camp, had been bought.

[95] It is also worth referring to the following exchange during the cross-examination of Mr. Papequash:

> Q MR. PICARD: So I'll repeat the question a little bit slower and a little bit clearer.
>
> To the best of your recollection, Mr. Papequash, prior to the June 12, 2022, election, did you ever offer to give Solomon Reece your support in exchange for money?
>
> A No.
>
> Q To the best of your recollection, Mr. Papequash, prior to the June 12, 2022, election, did you ever offer to give Clinton Key your support in exchange for money?
>
> A Can you repeat that.
>
> Q Sure. To the best of your recollection, Mr. Papequash, prior to the June 12, 2022, election, did you ever offer to give Clinton Key your support in that election in exchange for money?
>
> THE WITNESS: I don't know how to answer that question.
>
> A Can you repeat it one more time.
>
> Q MR. PICARD; Certainly. To the best of your recollection, Mr. Papequash, prior to the June 12, 2022, election, did you ever offer to give Clinton Key your support in that election in exchange for money?
>
> A No.
>
> [Applicant's Record, pp 271 to 273]

[96] Amanda O'Soup presented an affidavit originally under the pseudonym of "Jane Doe". It is another one-page affidavit. At the time Ms. Amanda O'Soup affirmed her affidavit (October 17, 2022), she was employed with the KFN and she claimed she feared reprisal or harassment from the Respondent in order to explain the use of a pseudonym.

[97] The affiant states: “The Chief paid me the $500 through the now Councillor Solomon Reece and to my boyfriend, in two separate payments of $200 and then $300” (para 3). The two payments by Solomon Reece are documented by two e-transfer screenshots dated June 10, 2022, one, for $200, received at 1:32 p.m. and the other, for $300, at 3:08 p.m. The circumstances surrounding the two payments by Solomon Reece to Amanda O’Soup’s boyfriend are not explained in the affidavit. It is through her cross-examination that some details emerge.

[98] The Applicant refers to the exchange which led to two payments during the cross-examination:

> Q And so you say you were in discussions with him. Were those discussions in person or over the phone or by text or how?
>
> A They were mostly over-the-phone conversations. I always – Clinton has actually bought my vote several times over the years, so it wasn’t an uncomfortable conversation for us to have. And he, more than once – and why there was two payments was because he had promised me $500. And I phoned him, and I told him, “Well, I’m not coming out to the reserve for $300. That’s not what you told you were going to give me.” And so that’s when the second payment arrived from Solomon, and it was that evening that I received that second payment that I went out to the reserve to vote.
>
> [Applicant’s Record, pp 350-351]

The difficulty with this passage is that it does not correspond with the documentary evidence presented in support of Ms. O’Soup’s affidavit. The first payment was for $200, not $300. In this passage, she refers to a telephone call which took place between the first and second e-transfers. This is the only passage offered by the affiant in support of the explanation for the two transfers. It does not correspond to the documentary evidence: the first transfer was for $200, and not

$300. The passage in cross-examination suggests that the first transfer was for $300. Counsel tried to clear that up by stating at paragraph 28 of the Applicant's factum that "Ms. O'Soup called the Chief to explain that the promise was for $500, and she only received $200". Rather, Amanda O'Soup seems to say that the $300 received was not enough to travel back to Saskatchewan. Ms. O'Soup's oral testimony does not seem to reflect what the documentary evidence is.

[99] Ms. O'Soup also claims she was offered a job by the Respondent. For the job of Social Assistance Coordinator, it emerges from her cross-examination that she applied for the job that was vacant since May 2022. Ms. O'Soup, who was residing in Winnipeg prior to her return by car to the Regina area (a six-hour drive according to her testimony) on June 10, 2022, actually applied for the job, submitting her curriculum vitae to Clinton Key and Alvira Roulette (the new Director of Operations), but also to two newly elected Councillors, including one to her uncle with whom she resided upon her return to the reserve lands. Her CV, which was made the subject of cross-examination, was showing significant work experience in various areas over some twenty years of work experience. Although it is not disputed that Chief Key supported Ms. O'Soup's hiring, and made the suggestion that she would be a good candidate for some vacant jobs, Alvira Roulette was adamant that hiring and firing decisions were her responsibility. While Ms. O'Soup said that she was hired at the "behest" of the Chief, that was denied by the Director of Operations. I accept Mrs. Roulette's evidence as a review of Ms. O'Soup's cross-examination tends to show that she is not always rigorous in her testimony, as the passage about the e-transfers tends to show, and she is somewhat prone to some embellishment and exaggeration. For instance, it is clear from her cross-examination that she was in some financial difficulties.

Her explanation for the e-transfers to her boyfriend instead of to her directly is that he was "paying a lot of things for her" (Applicant's Record, p 361); indeed her landscaping job prior to leaving Winnipeg was going through difficult times, yet she discounted those difficulties later in her cross-examination.

[100] In that same vein, she sought to downplay her performance as the Social Assistance Coordinator because she was not qualified, yet she took over a job where the "portfolio was a mess" (Applicant's Record, p 393) and performed well:

> Q Okay. So you had to recreate records and files, then; right?
>
> A Yes.
>
> Q And essentially a system from scratch?
>
> A I think "from scratch" would be an overstatement. I did have to do some digging for past files and charts and reports and kind of reconnecting with people and stuff like that to make sure things were done accurately as far as – as far as they were supposed to be, to my knowledge.
>
> Q Sure. And someone needed to organize a fairly chaotic scene, then, at the SA [social assistance] desk?
>
> A Yes.
>
> Q And your skill set in creating the – things like the Champs stock coordinator position and program and your experience in HR and finance helped build those organizational skills; right?
>
> A Yes.
>
> Q And do I understand the SA position, that sometimes people need help with things like clothing or other personal effects if they're in need?
>
> A Yes.
>
> Q Okay. So, again, the experience at Champs, retail experience of dealing with somebody not necessarily

> scheduling an appointment, but coming to you in a moment, saying, "Hey, I need whatever that piece of clothing or product is" is something, again, that was a skill set that may have helped in that SA position?
>
> A That's correct
>
> [Applicant's Record, p 394-395]

The impression to be conveyed was of someone unqualified for the job, which would show political preference. The evidence tends to show to the contrary someone hired for a position left vacant who had significant work experience and did perform well. In effect, Ms. O'Soup took on a more senior position with a salary raise shortly thereafter.

[101] The Respondent testified and argued that the e-transfers were in response for Ms. O'Soup asking "for gas money" to travel to Saskatchewan. He claims that there was no need to pay Ms. O'Soup to vote for him as she had supported him in the past in three elections.

[102] These are the only two witnesses to testify that they were offered money (and employment) in an attempt to influence their vote. The evidence of both is less than stellar. In my view, the evidence of Jonathan Papequash is subject to significant caution. The exchanges of messages with Clinton Key show someone who was clearly in need of assistance for the necessities of life. His claim that he realized *ex post facto* that he was offered money to influence him to vote for Clinton Key has not been established through clear, convincing and cogent evidence that satisfies the balance of probabilities test. In my estimation, his evidence is unreliable. There is no evidence that the payments made by Mr. Key, after Mr. Papequash insisted in being in dire straits, have not been established as being a *quid pro quo*. The evidence

is neither clear nor convincing and it is certainly not cogent. In fact, it is far from that requirement.

[103] As for Amanda O'Soup, I find that the evidence to support her contention that she was offered a job at the KFN to vote for Mr. Key is not sufficient to reach that conclusion. The evidence is to the effect that the platform on which Mr. Key was running included making significant changes in the governance of the First Nation. That was put into effect shortly after his election, with the new Director of Operations conducting the hiring. Ms. O'Soup competed for a job left vacant for two months, a job of Social Assistance Coordinator in a community where social assistance was clearly needed. The evidence shows an absence of any system in place for the allocation of assistance and Ms. O'Soup saw to it that some improvements were achieved. We know from her evidence that Ms. O'Soup supplied her CV, was interviewed on a Saturday and offered the job by then newly arrived Director of Operations who was searching for assistance to sort out "a mess". It is not denied on this record that the Respondent supported Ms. O'Soup's candidature. Does that establish that prior to the election he offered employment in return for the vote? This is certainly not black or white. These are shades of grey. However, the Court is looking for clear, convincing and cogent evidence. That is not what was presented to the Court on that front.

[104] Conversely, however, the events surrounding Ms. O'Soup's trip from Winnipeg to Regina make me conclude that the $500 paid to Ms. O'Soup went beyond "gas money", as claimed by the Respondent. That is in spite of the story as told by the affiant not corresponding clearly to the documentary evidence. In my view, the discrepancy between the documentary

evidence and the order in which payments were made does not displace that payments were made. I have not found a dispute as to whether $500 was paid to her. On balance, it was in order to secure Ms. O'Soup's vote. While Mr. Papequash exercised his franchise through a mail-in ballot, Ms. O'Soup had to come and vote in person the day of the election. Although it is clear that some of the two e-transfers also accounted for her trip to Regina, it remains that the rest went to compensating her boyfriend who had been contributing to their household's expenses. To put it bluntly, $500 covers more than "gas money", even for a trip from Winnipeg. Mr. Key wanted to secure Ms. O'Soup's vote. I conclude, on balance, that the evidence has the degree of clarity, persuasiveness and cogency sufficient to influence Ms. O'Soup to come to the Regina area and cast her vote in favour of the Respondent.

[105] It follows that the Court is satisfied that, on this record, there is evidence of one violation of s 16(f) of the FNEA, the e-transfers made to Amanda O'Soup on June 10, 2022. The e-transfer to Jonathan Papequash does not have the required clarity, persuasiveness and cogency in order to establish a nefarious purpose.

E-transfers and cash withdrawals

[106] In an attempt to get the Court to exercise its discretion to set aside the Chief's election as being sufficiently egregious that it meets the test "likely to have affected the result" of s 31 of the FNEA without satisfying the "magic number" test of *Opitz* (*supra*), the Applicant tried to make hay out of e-transfers out of Mr. Key's bank account and some cash withdrawals, all documents submitted by the Respondent.

[107] There was no evidence offered by the Applicant about the bank records of the Respondent, only the bank records themselves. Out of a large number of transactions, deposits as well as withdrawals, some are said in the Applicant's factum, but without any evidence, to involve members of the First Nation. In fact, there are many more e-transfers for the months of March to June 2022 than those identified by counsel as being directed towards First Nation members; there is no evidence on this record that the transfers identified by counsel were in effect to band members. Furthermore, there is no evidence whatsoever as to the purpose for transfers. The Applicant sought to imply some nefarious purpose for some transfers in the month preceding the election, withdrawals totaled $77,164, a larger amount than in the preceding months. However, the evidence also showed that there were deposits of $73,749. In my view, an oblique remark like this does not rise to anything beyond a weak suggestion.

[108] There is no evidence, either direct or forensic, to help explain these e-transfers: that was the Applicant's burden to establish through clear, convincing and cogent evidence that these e-transfers were for a nefarious purpose. There is no demonstration to that effect on a balance of probabilities, or reasonable grounds to believe or reasonable grounds to suspect. At best, there may be mere suspicions. Bank records without any reliable explanation are just that: bank records. There is no evidence that any of the people who appear to have received e-transfers were band members who were paid to vote in favour of the Respondent. The Court is not prepared to infer anything on the basis of some general suspicion. Innuendo is not a sound basis to infer blame.

[109] It certainly could have been possible to supplement the bank accounts with evidence seeking to breathe life into them. None was offered. In spite of having been allowed to present further affidavits as late as February 2023, it is counsel who sought to make a demonstration, suggesting more than proving, that some First Nation members had been the beneficiaries of e-transfers. In fact, it was known that the bank accounts were used by the Respondent in the operation of his business ventures. At any rate, it is the lack of evidence about who were the parties to these transactions (deposits and withdrawals) and the purpose of these various transactions that is clearly missing.

[110] The same can be said about cash withdrawals in Vancouver and Edmonton on days around advance polling having taken place. There were a few sheets of paper. Other than grasping at straws, with counsel seeking to “explain”, something that would have required evidence, there was nothing in support of a few pages. The Applicant tried to bolster his position by referring to “evidence” of people whose affidavits were withdrawn or the affiants did not submit themselves to cross-examination. Hence, the only evidence, again, is in the form of bank statements. There is no evidence as to who benefited from transfers and what the purpose of the transfers might be. Were they band members? There is no evidence on this record. Did they receive payments to influence their vote? There is no way of knowing. No evidence was offered to bridge an enormous gap. That is not sufficient to be the basis to establish any kind of influence to vote.

VI. Conclusion

[111] In the end, the record before the Court is thin. From eleven affidavits, there is only the evidence of Amanda O'Soup that remains. The Court has concluded that on a balance of probabilities, her evidence about an amount of $500 being received to come to Saskatchewan to vote for Clinton Key, was sufficiently clear, convincing and cogent to sustain a conclusion that constitutes a contravention of s 16(f) of the FNEA.

[112] Obviously, that does not meet the "magic number" test. But that is not the end of the matter. As our Court found in *Papequash* (*supra*), if the integrity of the election was sufficiently corrupted, the election can be annulled for a new election to be conducted (para 40). The Federal Court of Appeal in *Wuttunee* FCA 18 applied the same test:

> [62] From all of this, I understand that the result of an election may well be affected where the misconduct in question is sufficiently severe that the integrity of the election was seriously corroded and compromised.

In other words, that satisfies the test of s 31of the FNEA.

[113] In the *Whitford* FCA 17 case, the Court of Appeal was satisfied it should not intervene with the findings of the trial judge that six of the nine respondents, although having been in contravention of the FNEA as having engaged in serious electoral fraud, were not meeting the threshold. Only Chief Wuttunee and Councillor Nicotine had reached the magnitude of electoral misconduct to qualify as "likely to have affected the result". The one case of electoral fraud proven on this record does not even approach, in my estimation, the behaviour found in *Papequash* and *Wuttunee* FCA 18 as sufficiently grave to have corroded and compromised the

integrity of the election. In fact, in the *Whitford* FCA 17 case where the trial court was not satisfied the misconduct was likely to have affected the result, one of the six Councillors was involved in three instances of serious electoral fraud. In *Papequash* (*supra*), Barnes J found that "there is clear evidence of widespread and openly conducted vote buying activity …" (para 39). There were allegations made in this case that never rose to the level of evidence.

[114] Accordingly, I have concluded that the discretion found in s 35 of the FNEA should not be exercised to set aside the contested election. The magnitude of the electoral misconduct of the Chief was not proven to reach the level of *Papequash* and *Wuttunee* FCA 18. Furthermore, the other relevant considerations developed by the Court of Appeal in *Whitford* FCA 17 at paras 59 to 63, favour the conclusion that the discretion ought to be exercised against setting aside the election:

- there is the serious consequence that an annulment disenfranchises every elector;
- this is a community that has been involved in litigation about every election held under FNEA. The potential for future litigation does not need to be increased with an outcome that would be to set aside an election for one proven misconduct that was not especially egregious;
- frequent new elections have the effect of undercutting democratic stability because the security and efficiency of elections is put into question. The Court should not hesitate to step in where the integrity of the election is seriously corroded and compromised. But such is simply not the case where the only proven misconduct is paying for one elector to come from Winnipeg to cast her vote in an election. To

paraphrase Barnes J in *Papequash*, there is no clear evidence of widespread and openly conducted vote buying activity (para 39). Suspicions are not evidence;

- I am especially sensitive to avoiding an outside institution, like this Court, being asked to interfere in the democratic process of First Nations. Once again, the Court shall intervene when needed. That need has not been established on this record.

[115] In the case at bar, the issue, in the end, was whether the evidence was sufficient to prove misconduct on a balance of probabilities. There appears to have been assistance given to First Nation members, like Jonathan Papequash, and the need for such assistance does not end because there is an electoral campaign ongoing. However, that assistance close to an election might well raise eyebrows, if not more. Grammond J expressed a concern shared by many in his concluding comments in *Beeds* (*supra*). I add my voice to those of my colleagues:

> [63] The evidence in this and other cases brought before this Court shows that it is a common practice in First Nation communities to provide financial assistance to members. This may take several forms. Members may ask councillors personally to provide money out of their personal funds to meet an urgent need. Requests for financial assistance may be made to the council, which may accept or reject them on an ad hoc basis. Communities may also create more formal members' assistance programs that operate according to an established process and eligibility criteria: *Whitford*, at paragraphs 19–21.
>
> [64] It is not the Court's role to criticize the giving of financial assistance. Nevertheless, where candidates in an election make decisions regarding such assistance, this may well raise an appearance of impropriety, even in the absence of an intention to buy votes. See, for example, *Yellowbird v Samson Cree Nation*, 2021 FC 209.
>
> [65] Formalizing the processes for granting assistance may go a long way towards dispelling suspicion, but is unlikely to replace entirely the giving of assistance out of the personal funds of elected officials or candidates. Nevertheless, I join my voice to those of my colleagues who suggested that candidates in First

> Nations elections should agree to refrain from giving such form of assistance during an election campaign: *Good*, at paragraph 295; *Whitford*, at paragraph 22.

[116] As a result, the application made pursuant to s 31 of the FNEA is dismissed. The Applicant's request that he be awarded his costs in any event of the cause is held in abeyance. At the hearing of the application, the parties expressed their preference for addressing the issue of costs once Judgment has been rendered. The parties are invited to discuss the cost issue with a view to making a common suggestion to the Court. If unsuccessful in reaching a common understanding, submissions not exceeding seven pages per party represented in these proceedings will be expected three weeks after the date of this Judgment.

JUDGMENT in T-1437-22

THIS COURT'S JUDGMENT is:

1. The application made pursuant to section 31 of the *First Nations Elections Act* to contest the election of the Chief of the Key First Nation held on June 12, 2022, is dismissed.

2. The issue of costs will be addressed once the parties are ready to make a common recommendation to the Court. In case no common recommendation is to be forthcoming, written submissions no longer than seven pages per party represented in these proceedings will be made no later than three weeks from the date of this Judgment.

"Yvan Roy"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1437-22
STYLE OF CAUSE:	SHANNON BRASS v CLINTON KEY AND THE KEY FIRST NATION
PLACE OF HEARING:	HELD BY VIDEOCONFERENCE
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APPEARANCES:

Orlagh O'Kelly Bohdan Kruk	FOR THE APPLICANT
Hugh Willis Brian Anslow	FOR THE RESPONDENT, CLINTON KEY
Ed Picard	FOR THE RESPONDENT, THE KEY FIRST NATION

SOLICITORS OF RECORD:

Roberts O'Kelly Law Barristers and Solicitors Edmonton, Alberta	FOR THE APPLICANT
Willis Law Barristers and Solicitors Edmonton, Alberta	FOR THE RESPONDENT, CLINTON KEY
Alberta Counsel Barristers and Solicitors Edmonton, Alberta	FOR THE RESPONDENT, THE KEY FIRST NATION