

Federal Court



Cour fédérale

**Date: 20200402**

**Docket: T-2063-18**

**Citation: 2020 FC 475**

**Ottawa, Ontario, April 2, 2020**

**PRESENT: The Honourable Madam Justice McVeigh**

**BETWEEN:**

**LAURA S. BIRD  
MATTHEW W. ADAM**

**Applicants**

**and**

**BERNIE MAKOKIS  
ELECTORAL OFFICER  
PAUL BAND (FIRST NATION)**

**Respondents**

**JUDGMENT AND REASONS**

I. Introduction

[1] This is an application contesting the election held by Paul Band First Nation [PBFN] on November 2, 2018 [the Election] pursuant to section 31 of the *First Nations Elections Act*, SC

2014 c 5 [*FNEA*]. Due to several alleged breaches of the FNEA the Applicants seek relief that includes quashing the election and ordering a new election.

II. Background

[2] Laura S. Bird and Matthew W. Adam [the Applicants] are two members of PBFN. Ms. Bird and Mr. Adam are both self-represented and both Applicants made oral submissions during the hearing.

A. *Prelude*

[3] In the written materials the Applicants indicated it was not fair that they had no lawyer given they had no legal training. The Applicants said this was unfair because they had no money to hire a lawyer and yet the Respondent did. They say that the “cited caselaw indicates that a lawyer was needed throughout these proceedings.”

[4] There is no rule that the Applicants cannot self-represent though it may have been preferable to hire a lawyer. Representing yourself is not unfair even if it may not be the preferable way. The Application was case managed by a Prothonotary which would have been assistive for the Applicants. The individual Applicants were afforded every courtesy and consideration by the Court in order for them to present their arguments given they had no legal training. There was no inherent unfairness.

[5] The Applicants during the course of the hearing wished to present further hearsay and other evidence *viva voce* as well as evidence they indicated they had on their telephones. This arose when they were presenting their arguments and I asked them to point to where the evidence was in the materials. The Applicants then indicated that they could obtain that evidence but had not filed it. I did not allow the alleged new evidence to be presented for the first time at the hearing given that: the case was managed by a Prothonotary; the evidence was available for a considerable length of time; and because the *FNEA* indicates an election challenge proceeds by application meaning the evidence is to be by sworn affidavit. The prejudice to the Respondents and the adherence to the *FNEA* and *Federal Courts Rules* (SOR/98-106) far outweighed allowing this type of evidence to surface at the hearing.

B. *Overview*

[6] The Applicants brought their application under the *FNEA* which is a statutory scheme for First Nations elections that was created in 2014. The *FNEA* provides First Nations with the ability to opt out of the *Indian Act*, R.S.C., 1985, c. I-5 and adopt the *FNEA* as their election model.

[7] PBFN opted into the *FNEA* on March 1, 2018. The Election for one chief and five council members was scheduled for November 2, 2018. Bernie Makokis (not a member of the band) was hired on August 28, 2018 as the Electoral Officer [EO] by a resolution. He is certified to be an electoral officer for elections under the *FNEA*. The EO in writing appointed three deputy officers ["Deputy"] on August 31, 2018. Of the three deputy officers, Veronica Rain Bearhead

and Shalanna Rain, were both band members and both voted in the eventual election, but Toni YoungChief is not a band member.

[8] After receiving the list of electors' names from PBFN, the EO prepared a voter list which was amended and finalized. It was determined that the Election would be held at the PBFN school gymnasium and by mail-in ballot. A notice was sent out to that effect.

[9] On September 28, 2018, the PBFN held a nomination meeting. After this meeting, 5 candidates delivered candidate declaration forms and fees to run for chief and 33 candidates were nominated to run for council. Although 7 candidates for council withdrew meaning 26 candidates appeared on the final council ballot.

[10] The Election was held on November 2, 2018 at the gymnasium and the EO was present at all times. After the polls closed at 8:00 pm, ballots were counted by four different vote-counting groups.

[11] One volunteer counter Dawn Rain says "There was not a set precedent and from my understanding, each group had a different system." Each counting group consisted of three volunteers and one electoral staff and they "manually tallied up the ballots." The electoral staff she referred to was a Deputy. Dawn Rain indicated that Deputy at their table opened the ballot and read the names aloud while the four people hand-tallied the votes. This was the same procedure as another counter Shannon Bird said was done at her table. Dawn Rain indicated in her group they were not shown the ballots except the one spoilt ballot. Shannon Bird said her

group the Deputy did set some ballots aside as being spoiled. Dawn said in other groups she was told that opened ballots were shared with the counters. In the counter's particular group she says that during the actual count they had to correct the Deputy as "she appeared to be in a rush as she tore many of the ballots as she unfolded them." As well Dawn Rain said in the Deputy's haste she mixed up candidates on her tally sheet and made mathematical errors. All of the tally sheets from that table were picked up by the Deputy but Dawn Rain said it was not verified which was the official one and they were placed in no distinct order and given to the EO. Shannon Bird said after the count they just signed the counting sheet and then the EO started displaying numbers on the wall.

[12] There were four mail-in ballots that were counted as valid and two were rejected because they had not filled in the voter declaration as directed. Again looking to Dawn Rain's evidence she stated that though she was not present at the recount that she had been told the mail-in ballots were not found until the recount occurred the following day and wonders why they were not presented prior to counting.

[13] Arthur Rain was elected as chief after the ballots were counted. The chief's ballot count is not in issue as Arthur Rain won by a margin of 54 votes over the second place chief candidate. The election for council was closer. There was a difference in either fewer than 5 votes (Shannon Bird sworn statement at para 2) or 9 votes (EO's affidavit at para 15) between the fourth, fifth, and sixth place candidates for council. Since the five highest-ranking candidates would be elected to the council and since the discrepancy in votes was so small, the EO announced his

decision to perform a recount the next day at noon. The EO and a Deputy then sealed the ballot boxes and kept the ballots in his possession overnight.

[14] On November 3, 2018, the EO returned the ballot boxes to PBFN school gymnasium and unsealed the ballot boxes at noon for recount of the ballots.

[15] There was evidence from a Shannon Bird a counter that the recount was done with the EO reading the ballots out loud and setting aside any spoiled ballots. Because no counters saw the actual names on the ballots about half way through the count there was a complaint that no one was seeing the ballots and after that a Deputy witnessed. Because of no witness at the start and the fact the count was different the recount was re-started with all ballots being counted except the chief's votes. An intoxicated man came in to the gym during the final count and was accused of being obnoxious but not interfering with the actual counting.

[16] The power in the gymnasium went out during the recount, but doors were opened to allow light into the vote-counting station and the EO moved the counters closer to the light. The power came back on when they started the final recount.

[17] The recount confirmed that of the votes for chief, 676 ballots were valid and 13 were spoiled. As for the votes for council, 675 ballots were valid and 16 were spoiled.

[18] During the final recount, there were reportedly more spoilt ballots than before and there was a different result from the first count, although the Court was not provided with the full data from the prior count.

[19] The EO declared the top 5 councillor candidates members of council:

- **Jason Rain Sr.** (209 votes) – elected
- **Simon D. House** (191 votes) – elected
- **Faron Bull** (179 votes) – elected
- **Baron Adams** (165 votes) – elected
- **Myrna Rabbit-Bearhead** (164 votes) – elected
- Roderick Burnstick (158 votes)
- Dwight Joseph Paul (147 votes)
- Russell Ted (Rusty) Bird (146 votes)
- Isaac Rain (140 votes)
- Calvin D. Bird (137 votes)
- Carl Bird (134 votes)
- Darren Samuel Rain (129 votes)
- Matthew Adam (120 votes)
- Warren Bird (118 votes)
- Joni House-Roux (110 votes)
- Wesley Ross Rain (91 votes)
- William Baldwin House (86 votes)
- Rodney Paul (74 votes)
- Jason Saulteaux (70 votes)
- Donovan N. Adams (67 votes)
- William Bearhead (60 votes)
- Shawn Eric Rain (57 votes)
- Marlene A. Adams (55 votes)
- Kyle Isaac Bird (53 votes)
- Duchess Bird (38 votes)
- Jonathan Adams (24 votes)

[20] The Applicants contested the results under section 31 of the *FNEA*, claiming that there was a breach of procedural fairness and several irregularities that impacted the result of the Election.

[21] The Applicants in their memorandum sought the following relief:

1. An order setting aside the election;
2. An order hiring a new electoral officer and deputies;
3. An order for advance polls;
4. An order for online voting and vote in-person on voting day;
5. An order for an interpreter and security to be present at the polling stations;
6. An order for costs; and
7. Such further and other relief as this Honourable Court deems Just and Appropriate.

### III. Issues

[22] The issues are:

- A. Was there a violation of the Applicants' procedural fairness rights?
- B. Was there a contravention of the *FNEA* that was "likely to have affected the result" of the Election?

### IV. Analysis

A. *Was there a violation of the Applicants' procedural fairness rights?*

[23] The Applicants allege a violation of their procedural fairness rights without expanding upon how the EO should have treated them more fairly. I will consider the electoral procedures chosen by the EO below to ensure they complied with the *FNEA*. On the other hand, procedural fairness is a separate concept from administrative law which deals with which procedural



protections an administrative decision-maker must extend to an individual based on the importance of the decision to the individual, the nature of the decision being made, and other context-specific factors (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 77).

[24] Elections take place in a distinct context and section 31 of the *FNEA* provides a unique path to challenge them. As explained in *O'Soup v Montana*, 2019 SKQB 185 at para 112

[*O'Soup*]:

Section 31 allows an aggrieved elector to challenge an election result if he or she can demonstrate that a contravention of the *FNEA* or the *FNER* occurred. As Electoral Officer, Mr. Montana was required to follow procedures under those laws, which he did. He owes no duty of procedural fairness to any elector when fulfilling those responsibilities.

[25] Given that there is no administrative law duty of procedural fairness to individual members of the First Nation, the Applicants' procedural fairness argument cannot succeed.

B. *Was there a contravention of the FNEA that was "likely to have affected the result" of the Election?*

[26] The parties accept that PBFN opted into the *FNEA*. As stipulated in SOR/2018-175, PBFN held its first election under this regime on November 2, 2018. The Applicants expressed concerns that it was a very short time between when the PBFN elected to opt-in and when the Election was held. This short period they allege did not give the First Nation time to adjust to and become familiar with the new legislation and that is why some of the infractions alleged below occurred.

[27] The relevant sections of the *FNEA* are attached as Annex A. Notably, section 31 of the *FNEA* provides that:

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.

[28] On a contestation application, the Court is to examine the affidavit evidence and consider whether the Applicants have proved a breach of the *FNEA* on a balance of probabilities (*Good v Canada (Attorney General)*, 2018 FC 1199 at paras 49 and 57 [*Good*]).

[29] First, the Applicants must show a contravention of the *FNEA*. A contravention can “occur through an act of either commission or omission by an elector, an electoral candidate or an electoral official” (*O’Soup*, above, at para 27). The Court is to presume all necessary procedures were followed in the conduct of an impugned election (*O’Soup* at para 91).

[30] Second, in addition to proving a contravention, the Applicants must show that the contravention was “**likely to have affected the result**” of the election. As Justice Layh noted in *Paquachan v Louison*, 2017 SKQB 239 at para 19 [*Paquachan*], some allowance must be made for administrative errors in any election and contraventions unlikely to have affected the result will not trigger an overturning. On the question of whether a certain irregularity is “likely” to have affected the result, “persuasive evidence is needed” as the ramifications of ordering a new election are severe (*O’Soup* at para 117).

[31] Even if the Applicants satisfy both of these requirements, the case law indicates the Court has discretion to decline to order a new election. Annuling an election has sweeping consequences as it disenfranchises voters, increases the potential for future litigation, undermines the certainty in democratic outcomes, and may lead to disillusionment and voter apathy (*Paquachan*, above, at para 20).

[32] Moreover, in *Papequash v Brass*, 2018 FC 325, Justice Barnes explained that it will be harder to annul an election on cases involving procedural irregularities like the present case as opposed to cases of blatant corruption:

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

[33] The Applicants filed an affidavit from Laura Bird with attached sworn statements from band members Isaac Rain, Bernice Bird, Shannon Bird and Dawn Rain. Relying on the affidavit and sworn statements, the Applicants argue there were several perceived anomalies with the way the Election was conducted. They say each of these irregularities would likely have affected the

result. Their arguments can be sorted into the following five categories:

- a) Pre-election procedures;
- b) Language used on the ballots;
- c) Bribery;
- d) Election staffing; and
- e) Procedures for counting and recounting of ballots.

[34] In light of these five areas of irregularity, the Applicants ask this Court to set aside the Election results, order a new election, and to provide the other relief listed at paragraph 21 above.

[35] On the other hand, the EO's position is that there was no contravention of the *FNEA*. The EO responds to each allegation made by the Applicants, saying either that the *FNEA* does not impose that requirement, or that the *FNEA* requirements were complied with. In the alternative, even if the *FNEA* was breached, the Respondents indicate it must be a contravention that would "likely have affected the result" for a new election to be ordered, and none of these alleged contraventions meet this threshold.

- a) Pre-election procedures

[36] Under the first category, pre-election procedures, the Applicants criticize three decisions made by the EO. First, they say advance polls should have been set up to allow band members in Calgary and Edmonton to vote. Second, they suggest the nominations process violated section

9(4) of the *FNEA* which allows each individual to nominate only one candidate to run for council. Third, they challenge the way that the voting list was amended throughout the Election.

*i. Advance Polls*

[37] Exhibits A and B to Laura Bird's affidavit are two Facebook posts expressing concern about the lack of voting polls in Calgary and Edmonton for people who could not attend the election. At the hearing, the Applicants indicated PBFN had about 1,200 members on- and off-reserve and many people are unable to travel to vote on election day, so advance polls would have swayed the Election results.

[38] However, subsection 18(1) of the *Regulations* provides that the EO "may establish an advance polling station at any location that the electoral officer considers suitable and hold an advance poll." The word "may" shows it is not a mandatory obligation. There are no indications that anyone formally requested advance polling for the Election and the EO chose not to have an advance poll. The Applicants said they were entitled to advance polls but this is not the case.

*ii. Nominations*

[39] The Applicants filed evidence that individual band members filled out nomination forms for more than one candidate. This is argued to be a breach that should invalidate the Election. In oral arguments, the Applicants contended that the double-nomination issue shows the EO was applying the old *Indian Act* standards to this Election rather than the new *FNEA* procedures that PBFN opted into.

[40] With respect to the protocol concerning nominations, section 9(4) of the *FNEA* says “An elector must not nominate more than one candidate for each position to be filled.”

[41] Evidence was filed that nominees William Bearhead (candidate #14 on preliminary candidate list) and Cynthia Rain (#17) were both nominated by Gloria Bearhead. Likewise, nominees Larry Bird (#22) and Gordon Bull (#23) were both nominated by Cecillia Bull. This on the face of it is a violation of section 9(4).

[42] Yet, all of these improperly-nominated candidates withdrew and none were featured on the final ballot for 26 council candidates. Withdrawal is permitted “at any time prior to the close of polls” pursuant to section 10(1) of the *Regulations*. It is important to consider that the individual nominees who would have benefitted from this nomination violation did not stand in the Election as candidates.

[43] In *Good*, this Court found that the fact that an individual was unsuccessful in his election bid is relevant in considering whether it was a breach that is likely to have affected the election results (*Good* at paras 180–182). I find that this breach of section 9(4) was not one that was “likely to have affected the result” as required by section 31 for a contestation application to succeed given the candidates withdrew and were not part of the Election.

[44] I also do not accept that the cumulative effect of the evidence is that the EO did not know that he was conducting the Election in accordance with the *FNEA* and did not ensure he followed the *FNEA* procedures.

*iii. Voting List*

[45] An argument raised at the hearing was that changes to the voting list should have been initialed by the EO. The final voting list for 2018 had been filed by the Respondents. The list shows the amendments in handwriting. The amendments included when members were added or were noted as being deceased. I agree that there is no initial when one of these changes were made. It must be accentuated that the allegation is not that there was an error in the final voting list—the allegation is that there is no initial beside the changes.

[46] The EO explained the way that he updated the voting list throughout the election period as it came to his attention that some individuals were omitted and other individuals were deceased. In paragraph 7 of the EO's affidavit, it is clear that he was adequately updating the list as new information came to light.

[47] The requirements concerning the voting list are found at section 3 of the *Regulations*. Section 3 sets out how to compile the list (subsection 3(2)) and how to revise the list (subsection 3(3)). It does not state in the *FNEA* or *Regulations* that revisions must be initialed. Meanwhile other sections of the *Regulations* such as securing the ballot box and marking mail-in ballots do refer to initialing, suggesting if initialing were required it would be specified in the *Regulations*.

[48] The Applicants provided no support for their position that initials by the changes in the voters list are necessary other than that initialing is often done in legal situations.

[49] As the Applicants have not expressed specific concerns with the voting list I do not agree that not having an initial beside an amendment of the voters list is an infringement of the *FNEA* or the *Regulations*.

iv. *Pre-election procedures conclusions*

[50] The Applicants have ultimately not shown any of the EO’s pre-election decisions violated the *FNEA* or the *Regulations*, or that any violation would likely have altered the outcome of the Election.

b) Language used on ballots

[51] Next, the Applicants criticize language on the ballots for councillor (highlighting added):

**BALLOT FOR COUNCILLOR** My Commission ends  
May 22, 2021

Election of Councillors for the Paul First Nation held on the 2<sup>nd</sup> day of November, 2018. Mark your ballot paper by making an X or a ✓ within the space on the ballot paper to the right of the name of the candidates of your choice. Each elector may vote for no more than 5 Candidates for the position of Councillor, you may vote for less than 5 Candidates.

<b>CHOOSE UP TO 5</b>	
1. Matthew Adam	14. Roderick Burnstick
2. Baron Adams	15. Joni House-Roux
3. Donovan N. Adams	16. Simon D. House
4. Jonathan Adams	17. William Baldwin House
5. Marlene A. Adams	18. Dwight Joseph Paul
6. William Bearhead	19. Rodney Paul
7. Calvin D. Bird	20. Myrna Rabbit-Bearhead
8. Carl Bird	21. Darren Samuel Rain
9. Duchess Bird	22. Isaac Rain
10. Kyle Isaac Bird	23. Jason Rain Sr.
11. Russell Ted (Rusty) Bird	24. Shawn Eric Rain
12. Warren Bird	25. Wesley Ross Rain
13. Faron Bull	26. Jason Saulteaux



*i. Ballot Instructions*

[52] First, the Applicants say the ballot instruction “you may vote for less than 5 Candidates” was unnecessary and may have changed the outcome of the Election. They point to no actual evidence that this affected the Election at all.

[53] With respect to the ballot instructions, any lack of clarity was resolved with the heading “CHOOSE UP TO 5” in capital letters (see above para 51). Many voters did choose the maximum of five candidates. Ultimately, an EO exercises “broad supervisory powers over such an election” (*O’Soup* at para 63). EOs are hired to make decisions on issues such as the wording of the ballot. The EO attempted to strike a balance by encouraging voters to “CHOOSE UP TO 5”, while also informing voters of their ability to vote “for less than 5 Candidates” if they wanted. There is no prescribed ballot language in the *FNEA* and the EO’s approach was a sensible one. It would be an inappropriate result to interfere with minor word choice issues on the ballot or order a new election on this ground.

[54] I will further examine this allegation. If a voter on the ballot voted for more than 5 candidates then those ballots would be spoiled. It appears six ballots (numbered as 1365, 1371-1374, and 1380) were spoiled for voting for more than five candidates. However only one of these ballots attempted to vote for Roderick Burnstick. Roderick Burnstick was the highest-ranking unsuccessful council candidate as he placed 6<sup>th</sup> out of 26. Roderick Burnstick trailed the fifth-place candidate by six votes. When the spoiled ballots are examined 1365, 1371, 1372, 1373 and 1380 did not vote for Roderick Burnstick. Only ballot 1374 voted for him. Roderick Burnstick

needed all six of the spoiled ballots to have voted for him just for him to tie the fifth-place candidate. The evidence shows he only had one of the six spoiled ballots voting for him.

[55] There is no indication that the instructions somehow confused enough voters for it to have changed the outcome of the Election.

*ii. Name on the Ballot*

[56] Second, the Applicants say that the ballot's listing of "Isaac Rain" was misleading. They note that there is an Isaac Rain Sr. and also an Isaac Rain Jr. Isaac Rain Jr. ran in the Election and his full name is Isaac Mason Rain. The Applicants filed evidence that: (a) his cheque for the nomination form read Isaac Rain Jr., (b) his name is listed as #22 Isaac Rain Jr. on the undated official candidate list; and (c) on a hand written preliminary list of council candidates he is listed as number 7 Isaac Rain Jr. Moreover, the Applicants attached a sworn statement from Isaac Rain saying he was surprised the ballot did not say "Jr." after his name.

[57] At the hearing the Applicants alternatively told the Court that the way Isaac Rain Jr. filled out his nomination form with "Isaac Rain" in the given name line and "Rain" in the surname line meant that the ballot should technically have stated "Isaac Rain Rain."

[58] Concerning the listing of “Isaac Rain” on the ballot the document that has the most relevance and weight is the Candidate’s Declaration:

**CANDIDATE’S DECLARATION**

Sworn before me this 25 day  
of June A.D. 20 19

Bernie Matobakis  
A Commissioner for Oaths  
in and for Alberta  
My Commission Expires  
May 22, 2021

I Isaac Rain  
(name of nominee) having been duly nominated and seconded as a candidate in the election of the Band Council of the Red Deer  
Nation, scheduled to be held on September 28, 2018 do hereby accept my nomination as a candidate for the position of:

Chief  Councillor  (check one)

I further attest that I am a member of the said First Nation, at least 18 years of age and eligible to be a candidate at this election under the *First Nations Elections Act*.

Signature: Isaac Rain

Box 91 Driffield AB T0E-0N0  
Address City/Town/First Nation Province Postal Code

Telephone: (780) 292-4770 Email: Isaac.Rain@gmail.com

I want my name to appear on the ballot as (please print):

Rain Isaac Rain  
Surname Given name(s) (nicknames/alias)

**\*\*This form can be submitted to the Electoral Officer or Deputy Electoral by mail, email or fax, and must be received by 6 p.m. on Monday, October 1, 2018.\*\***

[59] As you can see from the image above the declaration document does not say he wished to appear on the ballot as Isaac Rain Jr. No where on the document does Jr. appear. He indicated “Rain” as his surname and “Isaac Rain” as his given name. It was logical for the EO to look at this declaration and place “Isaac Rain” as the name on the ballot. It would be an absurd result for the ballot to say “Isaac Rain Rain” because the candidate accidentally wrote Rain on both the given name and surname lines. The obligation was on the candidate to complete the form as he wished to be on the ballot and him now stating that he orally said “Jr.” does have the same weight as the evidence of the candidate’s declaration form. There is an inconsequential error on

the form saying the date of the election is September 28, 2018 which of course is incorrect as that was the date of the nomination meeting and the Election was held until November 2, 2018.

[60] The argument that it was an error to list him as Isaac Rain because in PBFN there were two Isaac Rains does not mean there was a breach by the EO. The EO's obligations included having a candidate on a form indicate how he wanted to be listed on the ballot. On the ballot you can see other candidates listed their nicknames or aliases such as Russell Ted (Rusty) Bird and others used their middle initial, all of which would distinguish themselves to voters. In contrast Isaac Rain did not indicate he wished to be distinguished by having Jr. on the ballot.

[61] It would be a more compelling argument if both Isaac Rain Sr. and Isaac Rain Jr. were running in the election for councillor but that was not the case because Isaac Rain Sr. was not nominated. Despite a sworn statement from Dawn Rain saying she thought she was voting for Isaac Rain Sr. and not Isaac Rain Jr., only one Isaac Rain was running for any position in the Election. Furthermore, Isaac Rain Jr. did not win one of the council seats and in fact placed ninth with 140 votes. The way this individual was described on the ballot did not breach the *FNEA* and would not have impacted the result of the Election in any event.

*iii. Ballot and Nomination form discrepancy*

[62] Third, the Applicants argue that the ballot's reference to William Baldwin House was misleading. Since he appeared as "William N. House" on the preliminary list of nominees and "William Baldwin House" on the ballot, the Applicants say this name conflicts with the name presented at the nomination meeting so is an infraction of the *FNEA*.

[63] This argument was not raised until the oral arguments and so the Respondents were not given a chance to respond or provide the candidate declaration form as they did for Isaac Rain (see para 58 above).

[64] When I canvas the documents it is confirmed that though he is #17 William N. House on the handwritten nomination form on the Official Candidate List and on the Statement of Votes he is listed at #17 as William Baldwin House. I have no evidence that William Baldwin House was not the same person who was nominated and on the ballot. Without more information about whether Mr. House himself or someone else requested the change, I do not find this to breach the *FNEA*. Additionally, Mr. House placed 17<sup>th</sup> out of 26 in the council voting and so the name as it appeared on the ballot would not have affected the Election result.

*iv. Language used on ballots conclusions*

[65] The language used on the ballots did not contravene the *FNEA* and the Applicants have not shown any alleged flaws in the ballots would have likely affected the result of the Election.

c) Bribery

*i. Jason Rain Sr. Luncheon*

[66] The third issue the Applicants put forward is bribery contrary to subsection 16(f) of the *FNEA*. The Applicants argue the EO should not have allowed Jason Rain Sr. (a successful candidate for council) to host a “luncheon” six days before the Election featuring soup bannock

and champagne. In oral argument the Applicant, Ms. Bird, indicated Jason Rain is her cousin but that he should have known better than to host an event like this.

[67] Jason Rain Sr. promoted this luncheon on Facebook:



[68] Subsection 16(f) states that a person must not “offer money, goods, employment or other valuable consideration in an attempt to influence an elector to vote or refrain from voting or to vote or refrain from voting for a particular candidate.”

[69] Justice Mandamin addressed vote-buying under a custom election code in *Henry v Roseau River Anishinabe First Nation Government*, 2017 FC 1038. He focused on the importance of electors having a free choice and the importance of trust and confidence in elected officials (paras 48–49). Yet, Justice Mandamin found “there is no bribery, or vote buying, when money is given without any condition to vote in a certain way” (para 59).

[70] In this case, the luncheon was on a Sunday afternoon and voting took place the following Friday. I accept the Respondents' general view that it is common in any election whether First Nations or otherwise to sponsor events including lunches during campaign periods. I do not find that this is bribery. But even if I am wrong, Jason Rain won a seat six days later by more than fifty votes over the top unsuccessful candidate for council. To attribute these fifty votes to the lunch alone would be speculative particularly given the fact that Jason Rain listed several platform points on his poster and this seems to have been a genuine campaign event to convey his ideas to the community.

*ii. Conclusion on Bribery*

[71] I will therefore dismiss the Applicants' claim on this ground as I do not find this was a contravention of the FNEA and even if it was it would not have affected the results.

d) Election staffing

[72] In terms of election staffing, the Applicants raise four concerns throughout their materials. First, they suggest a voter that needed assistance to vote was not assisted properly. Second, they say two deputy electoral officers should not have voted in the Election since they were supposed to be impartial. Third, the Applicants argue the vote counters were not independent. Fourth, they say the remuneration given to the EO was too high.

*i. Voter Assistance*

[73] The first staffing issue deals with voter assistance. Shannon Bird says she was not allowed to give voting assistance to Thomas Kimiksana Jr. who was a voter with a brain injury. Shannon Bird asked to accompany Thomas to the voting booth. She was not allowed to go but the EO “went with Thomas Jr. by himself, so I am unsure if Thomas voted correctly based on a fact that Thomas was without my help.” The Applicants said in oral arguments that Thomas should have been given an “assistant like a witness” but then do not expand on this.

[74] Section 21(6) indicates that an elector is to vote in the compartment by themselves so no one sees their ballot. Then Section 21(7) of the *Regulations* with the heading *Assistance* indicates the EO or a deputy “must” assist an elector who is unable to vote in the typical manner by marking their ballot for them “in the presence of a witness that the elector has selected.” If an EO or deputy assists an elector then this must be marked on the voters list.

[75] There is no authority in the *FNEA* or *Regulations* to allow a person other than an EO or a deputy to assist a person to vote. The EO was correct not to allow Shannon Bird to assist Thomas to vote but if the argument is that as a witness she should have seen the ballot then it would seem counterintuitive that the witness, the EO and the voter would all be allowed in the compartment given section 21(6) concerning Privacy. I would interpret the *Regulations* to mean that the EO and voter were to go in the compartment and the witness is not to see the actual ballot but to ensure that only the EO and voter enter the compartment and that nothing else inappropriate occurs. There is no evidence that Thomas Kimiksana Jr. (“Thomas”) was not able to vote for



who he wished to. Shannon Bird did witness the EO help Thomas with his ballot but she herself did not see the ballot.

[76] Alternatively, even if Shannon Bird as a witness should have been allowed to see the ballot meaning this was technically an *FNEA* breach, this would not have been likely to affect the result of the election as it was a single vote. Likewise even though the EO did not mark he gave assistance to Thomas on the voting list as he should have, this would not have been likely to affect the result of the Election.

[77] On these facts it is not alleged that the EO completed the ballot other than what Thomas indicated. Further, the Applicants acknowledged that the EO is not a band member, which undermines their position that he would have had a bias or other reason to influence Thomas's vote.

[78] I find no breach of the *FNEA* or *Regulations* by the EO assisting Thomas to vote.

*ii. Deputy Electoral Officers*

[79] The second alleged staffing infringement involved the deputy electoral officers Veronica Rain Bearhead and Shalanna Rain. The Applicants say there was a conflict of interest because these two deputies were both band members who voted in the Election and thus had a personal interest.

[80] According to section 15(2) of the *FNEA* the EO is not entitled to vote, but this is not the issue here as the EO never attempted to vote and is not even a band member. Subsection 2(4) of the *Regulations* permits the EO to appoint deputies but nothing in the *FNEA* or the *Regulations* specifies that a deputy cannot be a band member and cannot vote in the election. In the EO's affidavit he indicates that he appointed three deputies to help run the Election on August 31, 2018. Each of these three deputies signed a form saying they would carry out their duties in accordance with the *FNEA*. The *FNEA* and *Regulations* do not forbid a deputy from voting in their band's election. Nor have the Applicants articulated a bias or conflict that would prevent these deputies from carrying out their duties. I find that there was no breach of the *FNEA* or *Regulations* appointing deputy EOs that were band members who voted.

*iii. Independent counters*

[81] As set out above at paragraph 11 in the facts section, the Applicants' position is that the lack of independent counters is an infringement of the *FNEA* and *Regulations*. In this context a lack of independence seems to refer to the counters being band members or relatives of band members. Exhibit L1 of Laura Bird's affidavit is a statement sworn by Bernice Bird saying that during the original count she saw "The counters were wives, sisters of the candidates running in the election" along with "a few ladies that I do not know."

[82] A sworn declaration of Shannon Bird was filed by the Applicants and describes how the counts were preformed. Shannon Bird's evidence parallels what the EO said occurred (see para 11 in the facts section). There was no evidence of actual bias or any other infringement of the *FNEA* or *Regulations*. I find that the setup of the tallying using counters and a deputy EO at each

table is a fair procedure. The vote counting procedure has an oversight by independents as well as deputies under obligations to act fairly.

[83] With nearly 700 ballots cast in a small community with 26 candidates running for council and 5 for chief there was bound to be some potential conflicts among a pool of ballot counters. But deputies were stationed at each table during the November 2 count to avoid any tampering with the Election. Any lack of independence of a counter became a non-issue on November 3 when the Electoral Officer and Deputy Electoral Officers together performed the more careful recount which was the binding result. Any non-independent vote counters who could have somehow influenced the first count on November 2 were not the ones counting ballots during the November 3 recount. There was no evidence of any counters disputing the final results when the EOs and the deputies completed the final count.

[84] I find that there is no merit to the Applicants' argument that the Election was tainted because some of the counters were not independent.

*iv. Electoral Officer*

[85] Fourth, concerning the EO's remuneration, the Applicants say the EO was paid \$30,000 to \$40,000 to run the Election which was an "outstanding amount." As well the Applicants in oral argument often referred to the fact that this EO was known in the community and that this somehow made him ineligible or this was at least was enough for me to quash the election.

[86] The EO was properly appointed by a Band Council Resolution on August 28, 2018 (Exhibit L of Laura Bird affidavit). Aside from this, no evidence was led to support any of the allegations surrounding the appointment of the EO or his remuneration.

[87] I will not interfere on these facts with who the band appoints as an EO. The remuneration paid to the EO is not a ground for this Court to determine either given the valid appointment under the *FNEA*.

v. *Conclusion on Election Staffing*

[88] I do not find that any of the Election staffing issues to be contraventions of the *FNEA*.

e) Procedures for counting and re-counting of ballots

[89] Along with the variety of pre-counting issues discussed above, the Applicants raise concerns about how the ballots were counted and recounted. They argue the decision to perform a recount was inappropriate because a recount should only have been held if there was a margin of five or fewer votes. They further contend that when the decision to order a recount was made, the ballots were not secured properly overnight before the recount. The Applicants say mail-in ballots suddenly appeared during the recount and the way they were counted was not clearly explained. They have concerns that the recount had to be re-started part way through. The Applicants claim there was an overall lack of transparency in the process for counting ballots and declaring ballots to be spoilt.

[90] These concerns apply to the counting and re-counting of ballots for council, although the Applicants also raise an issue with the separate counting of ballots for chief. They say the Statement of Votes for the Chiefs, the official document displaying the results, was incorrect.

[91] The Applicants further suggest someone working at the Election should have removed an intoxicated individual who appeared at the polling station during the counting of ballots.

*i. Decision to Perform Recount*

[92] Turning to the first of these ballot counting allegations which is the decision made on the evening of November 2 to do a recount. Subsection 24(2) of the *Regulations* provides that a margin of five or fewer votes between a successful candidate and a candidate who would otherwise be declared elected is sufficient for a recount.

[93] Shannon Bird stated “There were 3 people with a difference of 5 votes so Bernie indicated that there would be a recount” for the fourth, fifth, and sixth place finishers for council. This would indeed be sufficient grounds for a recount. The EO’s affidavit gives a slightly different account: “The initial count indicated that the fourth and fifth place finishers for Council were both within 9 votes of the sixth place finisher.” The EO’s vague language suggests the gap between fifth and sixth may in fact have been greater than 5 votes contrary to subsection 24(2). Yet, even if the EO’s account was preferred, it is still possible there was a gap smaller than nine votes between the fifth and sixth place finishers. Due to the lack of data from the first count and the lack of clarity in the affidavits, and the fact that the burden is on the Applicants, I do not find the decision to order a recount was inappropriate.

[94] Subsection 20(4) of the *Regulations* provide that polls must stay open until 8:00 pm which was the case here. The EO specified the recount would be the next day at noon, which satisfied subsections 24(2) and 24(3) of the *Regulations*. Due to the fact that the first count of nearly 700 ballots went late after the polls closed, I do not find it was an issue to wait until the following day to do the recount. I will not interfere with the decision to perform a recount. I find this decision complied with the *Regulations*.

*ii. Handling of Ballots until the Recount*

[95] The next irregularity argued by the Applicants is that the EO did not properly handle the ballots between the first count and the recount. They argued that they do not know what happened that night and do not know where the ballots went or if they were tampered with. At the hearing the Applicant Ms. Bird said:

The ballots were not placed in a sealed or witnessed or something that shows me, Matthew, the people back here, our nation that the ballots were not tampered with when taken overnight... that's the transparency and accountability that we are also looking for... they should be initialed that there should be in a way that you can't open them... sealing them in yellow envelopes, to me, is not secure. To me, this is our nation safeguarding and securing them means to put them in a box, a metal box, leave the key with somebody else, and then come back the next day and set a time in front of everybody and unlock the box and give me the keys.  
[transcribed from DARS recording]

[96] Subsection 24(4) of the *Regulations* says if the recount is not going to be conducted immediately after the counting then the EO must seal the ballots and keep them safely until the recount. Specifically, the EO must “deposit all ballots in envelopes and seal them in a manner

that prevents them from being opened without breaking the seal” then initial the seal and deposit the sealed envelopes into a ballot box and seal the box.

[97] The affidavits and the arguments at the hearing confirmed the ballots were sealed in a yellow envelope and these envelopes were sealed in ballot boxes. The EO swore that “the ballot boxes were sealed and kept in my possession overnight between November 2, 2018 and November 3, 2018 until the recount was commenced.”

[98] Coreen House confirmed in writing as evidenced by the “Witness Declaration at the Opening of the Recount” dated November 3, 2018 that the ballots were unsealed at noon to perform the recount (Exhibit J of EO’s affidavit). Shannon Bird’s sworn statement, submitted by the Applicants, said the EO and a Deputy “sealed the ballots into an envelop[e] and said that they wouldn’t be opened till the count at noon to do the recount of the 3 people.”

[99] The only suggestion that the ballots were somehow stored inappropriately was paragraph 5 of the Applicant Laura Bird’s affidavit where she gives hearsay evidence that “Bernice Bird mentions the lack of a secured seal and upon placing envelopes on the table.” Bernice Bird did provide a sworn statement, however, which did not identify problems with overnight ballot storage.

[100] With respect to the oral submissions by the Applicants about ballots being improperly kept in a large yellow envelope rather than a metal box with a key given to someone else, these

arguments were not presented in the written materials and these specific protocols are not mandated by the *FNEA*.

[101] I do not find that the handling of the ballots overnight were a contravention of the *FNEA*.

*iii. Restarting the Recount*

[102] It seems the recount was restarted due to concerns raised by Shannon Bird and/or Elania Adams. No results were provided for the preliminary recount aside from the argument by the Applicants that it was 164 to 160 (a gap of 4 votes) between fifth and sixth place before the recount was restarted. After noticing the discrepancy between the initial count and the recount, Shannon Bird said she told Bernie “Bernie we the Paul First Nation pay you lots of money to run our election, so we expect things to be done properly.” Dawn Rain’s sworn statement at paragraph 29 confirms “ballots were recounted at least twice in the Paul School Gymnasium.”

[103] The EO could have done a better job of documenting the results of the November 2 count, the November 3 recount, and the rationale behind the decision to restart the recount. But no parties provided the Court with evidence that detailed the results from any count other than the actual ballots themselves.

[104] While the *FNEA* does not explicitly give the EO the ability to restart a recount what did occur could not be characterised as anything in breach of the *FNEA* or *Regulations* or if there was it would not have affected the outcome of the election. Furthermore as discussed below, the final recount led to the accurate result.



*iv. Spoilt Ballots*

[105] The Applicants advanced an argument that Shannon Bird claimed one of the counters during the November 2 count “read the votes without showing us the ballots” and “she did put aside some of the ballots indicating her opinion of a spoiled ballot.” Then during the recount on November 3 Shannon Bird said ballots were spoiled and put aside and “It was not mentioned why they were spoiled or shown to the counters.” In their oral arguments, the Applicants suggested 16 spoilt ballots suddenly appeared when there had been no spoilt ballots originally.

[106] That allegation by the Applicants is inconsistent with the evidence that they filed themselves from Shannon Bird and Dawn Rain. Both of those sworn statements confirm that at least some ballots were already deemed to be spoilt during the first count and Dawn had been shown the one spoilt ballot from her table and she did not disagree that it was spoilt.

[107] This Court has counted the 691 ballots (675 valid ballots, and 16 spoilt ballots) submitted by the EO. The Court’s count confirmed the results of the final recount to be a correct reflection of the top five vote recipients for council seats, and the total number of ballots matched the official results. The final 16 ballots for council included in the package of ballots were indeed spoilt as they either contained no votes, more than five votes, or unintelligible markings.

[108] Confirming there was nothing nefarious, in the separate ballots for chief there appear to have been 13 spoilt ballots and 676 valid ballots. The nearly identical number of spoilt ballots for

both chief and council suggests there was nothing suspicious in the fact that there were 16 spoiled council ballots.

[109] I do not find a contravention of the *FNEA* regarding the spoiled ballots.

v. *Mail-in Ballots*

[110] With respect to the mail-in ballots, Dawn Rain's sworn statement says mail-in ballots were not counted during the original count and instead were only included during the recount.

[111] In response, the EO indicates six sets of mail-in ballots were received, with four council ballots counted and two rejected for failing to complete the Voter Declaration Accompanying the Mail-In Ballot (para 12 of EO's affidavit).

[112] The protocol followed by the EO was consistent with section 22 of the *Regulations* concerning whether to accept or reject mail-in ballots. I note that Dawn Rain was a counter at only one of the counting tables and there is not evidence that the mail-in votes were not counted at another table in the first count. Dawn Rain further indicated that she did not attend the recount. In any case the evidence in the EO's affidavit and Ms. Rain's sworn statement together with the count above at para 104 suggest the four valid mail-in ballots were definitely properly included in the recount and therefore there is no contravention of the *FNEA*.

vi. *Chief Vote Counts*

[113] As for the perceived error in the Statement of Votes for Chiefs, this argument was based on the view that the Statement said there were 678 votes for chief when really there were 676 votes. I find no support for this allegation. At paragraph 19 of his affidavit, the EO notes that “676 ballots were counted as valid and 13 were rejected” for the position of chief. The official Statement of Votes for Chiefs says “Number of valid ballots cast for candidates for Chief: 676.” The votes for each of the five candidates (206 for Arthur Rain, 152 for Casey Bird, 147 for Aaron Bird, 143 for Daniel Paul, and 28 for Joe Bird) add up to 676. The EO even submitted all 676 valid ballots for chief numbered 1 through 676. There was no miscalculation on this form and no contravention of the *FNEA*.

vii. *Intoxicated individual*

[114] Finally, the Applicants indicated that an intoxicated individual appeared at the school gymnasium during the re-counting of ballots and that was a contravention of the *FNEA*. The Applicants have not specified how this contravened the *FNEA* or how this would have influenced the Election result. The Applicants’ position was simply that while the EO was elderly, he should have ordered this individual away when they were doing a recount.

[115] Subsection 21(1) of the *FNEA* provides that the EO or a deputy “may order a person to leave a polling station if the person is committing an offence under the Act that threatens the maintenance of order at the polling station...” but this allows the EO to exercise discretion.

[116] Based on the very limited evidence before the Court, the discretionary decision not to remove this individual when they were doing a recount when he was not interfering other than speaking is not a breach of the *FNEA*.

viii. *Conclusion on the Procedures for counting and recounting of ballots*

[117] The Applicants have not shown any issues with the counting and recounting of ballots that contravened the *FNEA* and was likely to affect the results of the Election.

V. Conclusion

[118] The Applicants advanced an alternative position in oral arguments that all the little mistakes “add up” to require relief of a new election. However, the wording of section 31 of the *FNEA* is clear that I am to look for “a contravention of a provision of this Act or the regulations” that is “likely to have affected the result.” It is the single contravention, which must have been likely to affect the result, not the accumulation of several alleged issues with minor tweaks to candidate names or procedural technicalities. Based on my conclusion that any breaches of the *FNEA* did not affect the result of the Election, I will not be ordering a new election.

[119] The Applicants have not shown a breach of the *FNEA* warranting a new election or a breach of procedural fairness in the Paul Band First Nation. Accordingly, I would dismiss this application challenging the Election results.

[120] I had indicated at the hearing that I would amend the Style of Cause pursuant to Rule 303 of the *Federal Courts Rules* but I will not.

VI. Costs

[121] The Applicants sought \$30,000 in costs if they were successful. The Respondents left costs at the Court's discretion.

[122] Given the Applicants represented themselves and indicated that they were funding it themselves in this situation, I will not award costs and the parties will bear their own costs.

**JUDGMENT in T-2063-18**

**THIS COURT'S JUDGMENT is that:**

1. This application is dismissed; and
2. The parties will bear their own costs.

"Glennys L. McVeigh"

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Judge

## Annex A – Relevant legislation

<p><i>First Nations Election Act, SC 2014, c 5</i></p> <p><b>Limitation</b></p> <p>9(4) An elector must not nominate more than one candidate for each position to be filled.</p>	<p><i>Loi sur les élections au sein de premières nations, LC 2014, ch 5</i></p> <p><b>Limite</b></p> <p>9(4) Un électeur ne peut présenter plus d'une candidature par poste à combler.</p>
<p><b>Prohibition — any person</b></p> <p>16 A person must not, in connection with an election,</p> <p>(a) vote or attempt to vote knowing that they are not entitled to vote;</p> <p>(b) attempt to influence another person to vote knowing that the other person is not entitled to do so;</p> <p>(c) knowingly use a forged ballot;</p> <p>(d) put a ballot into a ballot box knowing that they are not authorized to do so under the regulations;</p> <p>(e) by intimidation or duress, attempt to influence another person to vote or refrain from voting or to vote or refrain from voting for a particular candidate; or</p> <p>(f) offer money, goods, employment or other valuable consideration in an attempt to influence an elector to vote or refrain from voting or to vote or refrain from voting for a particular candidate.</p>	<p><b>Interdictions générales</b></p> <p>16 Nul ne peut, relativement à une élection :</p> <p>a) voter ou tenter de voter sachant qu'il est inhabile à voter;</p> <p>b) inciter une autre personne à voter sachant que celle-ci est inhabile à voter;</p> <p>c) faire sciemment usage d'un faux bulletin de vote;</p> <p>d) déposer dans une urne un bulletin de vote sachant qu'il n'y est pas autorisé par règlement;</p> <p>e) par intimidation ou par la contrainte, inciter une autre personne à voter ou à s'abstenir de voter, ou encore à voter ou à s'abstenir de voter pour un candidat donné;</p> <p>f) offrir de l'argent, des biens, un emploi ou toute autre contrepartie valable en vue d'inciter un électeur à voter ou à s'abstenir de voter, ou encore à voter ou à s'abstenir de voter pour un candidat donné.</p>
<p><b>Prohibition — elector</b></p> <p>17 An elector must not, in connection with an election,</p> <p>(a) intentionally vote more than once in respect of any given position of chief or councillor; or</p>	<p><b>Interdictions visant l'électeur</b></p> <p>17 Nul électeur ne peut, relativement à une élection :</p> <p>a) voter intentionnellement plus d'une fois à l'égard de chacun des postes de chef ou de conseiller;</p>

<p>(b) accept or agree to accept money, goods, employment or other valuable consideration to vote or refrain from voting or to vote or refrain from voting for a particular candidate.</p>	<p>b) accepter ou convenir d'accepter de l'argent, des biens, un emploi ou toute autre contrepartie valable pour voter ou s'abstenir de voter, ou encore pour voter ou s'abstenir de voter pour un candidat donné.</p>
<p><b>Secrecy of voting</b></p> <p>18 Voting at an election is to be conducted by secret ballot.</p>	<p><b>Vote secret</b></p> <p>18 Le vote à une élection se tient par scrutin secret.</p>
<p><b>Prohibition — elector</b></p> <p>19 An elector must not, in connection with an election,</p> <p>(a) show their ballot, when marked, to reveal the name of the candidate for whom the elector has voted, other than in accordance with the regulations; or</p> <p>(b) in the polling station, openly declare for whom the elector intends to vote or has voted.</p>	<p><b>Interdictions visant l'électeur</b></p> <p>19 Nul électeur ne peut, relativement à une élection :</p> <p>a) montrer son bulletin de vote, une fois marqué, pour révéler le nom du candidat pour lequel il a voté, sauf en conformité avec les règlements;</p> <p>b) dans un bureau de scrutin, déclarer ouvertement en faveur de qui il a l'intention de voter ou pour qui il a voté.</p>
<p><b>Prohibition</b></p> <p>22 A person must not, in connection with an election, destroy, take, open or otherwise interfere with a ballot box knowing that they are not authorized to do so under the regulations.</p>	<p><b>Interdiction</b></p> <p>22 Nul ne peut, relativement à une élection, détruire, prendre, ouvrir ou autrement manipuler une urne sachant qu'il n'y est pas autorisé par les règlements.</p>
<p><b>Chief and councillor positions</b></p> <p>23 The chief and councillor positions of a participating First Nation are awarded to the candidates for those positions who receive the highest number of votes.</p>	<p><b>Postes de chef et de conseiller</b></p> <p>23 Les postes de chef et de conseiller au sein d'une première nation participante sont attribués aux candidats à ces postes qui ont obtenu le plus grand nombre de voix.</p>
<p><b>Prohibition</b></p> <p>26 A person must not intentionally obstruct an electoral officer or deputy electoral officer in the performance of their duties.</p>	<p><b>Interdiction</b></p> <p>26 Nul ne peut entraver intentionnellement l'action du président d'élection ou du président d'élection adjoint dans l'exercice de ses attributions.</p>



<p><b>Prohibition</b></p> <p>27 A person must not, in a manner that this Act does not otherwise prohibit, intentionally obstruct the conduct of an election.</p>	<p><b>Interdiction</b></p> <p>27 Nul ne peut, d'une manière qui n'est pas autrement interdite par la présente loi, entraver intentionnellement la tenue d'élections.</p>
<p><b>Means of contestation</b></p> <p>30 The validity of the election of the chief or a councillor of a participating First Nation may be contested only in accordance with sections 31 to 35.</p>	<p><b>Mode de contestation</b></p> <p>30 La validité de l'élection du chef ou d'un conseiller d'une première nation participante ne peut être contestée que sous le régime des articles 31 à 35.</p>
<p><b>Contestation of election</b></p> <p>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.</p>	<p><b>Contestation</b></p> <p>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.</p>
<p><b>Time limit</b></p> <p>32 An application must be filed within 30 days after the day on which the results of the contested election were announced.</p>	<p><b>Délai de présentation</b></p> <p>32 La requête en contestation doit être présentée dans les trente jours suivant la date à laquelle les résultats de l'élection contestée sont annoncés.</p>
<p><b>Competent courts</b></p> <p>33 The following courts are competent courts for the purpose of section 31:</p> <p>(a) the Federal Court; and</p> <p>(b) the superior court of a province in which one or more of the participating First Nation's reserves are located.</p>	<p><b>Compétence</b></p> <p>33 Pour l'application de l'article 31, constituent le tribunal compétent pour entendre la requête la Cour fédérale ou la cour supérieure siégeant dans la province où se trouve une ou plusieurs réserves de la première nation participante en cause.</p>
<p><b>Service of application</b></p> <p>34 An application must be served by the applicant on the electoral officer and all</p>	<p><b>Signification</b></p>

<p>the candidates who participated in the contested election.</p>	<p>34 Le requérant signifie sa requête au président d'élection et aux candidats ayant participé à l'élection contestée.</p>
<p><b>Court may set aside election</b></p> <p>35 (1) After hearing the application, the court may, if the ground referred to in section 31 is established, set aside the contested election.</p>	<p><b>Décision du tribunal</b></p> <p>35 (1) Au terme de l'audition, le tribunal peut, si le motif visé à l'article 31 est établi, invalider l'élection contestée.</p>
<p><b>Duties of court clerk</b></p> <p>35(2) If the court sets aside an election, the clerk of the court must send a copy of the decision to the Minister.</p>	<p><b>Transmission de la décision</b></p> <p>35(2) Lorsque le tribunal invalide une élection, le greffier expédie un exemplaire de la décision au ministre.</p>
<p>First Nations Elections Regulations, SOR/2015-86</p> <p><b>Appointment of electoral officer</b></p> <p>2 (1) The council of the First Nation must, by resolution, appoint an electoral officer or, if it is not possible for the council to form a quorum, the Minister must appoint an electoral officer, who</p> <p>(a) has not been found guilty of an offence under the Act within the last two years before the appointment; and</p> <p>(b) is certified in accordance with subsection (2).</p>	<p>Règlement sur les élections au sein de premières nations, DORS/2015-86</p> <p><b>Président</b></p> <p>2 (1) Le président d'élection est nommé par résolution du conseil de la première nation ou, lorsque le conseil ne peut atteindre le quorum, par le ministre, et doit satisfaire aux exigences suivantes :</p> <p>a) ne pas avoir été déclaré coupable d'une infraction à la Loi dans les deux ans qui précèdent la nomination;</p> <p>b) être accrédité conformément au paragraphe (2).</p>
<p><b>Certification</b></p> <p>2(2) A person is certified if they successfully complete a training program that is approved by the Minister on the responsibilities of the electoral officer under the Act and these Regulations.</p>	<p><b>Accréditation</b></p> <p>2(2) Pour être accrédité, une personne doit réussir la formation, approuvée par le ministre, sur les obligations qui incombent au président d'élection en application de la Loi et du présent règlement.</p>
<p><b>Revocation of certification</b></p>	<p><b>Perte d'accréditation</b></p>

<p>2(3) The certification is revoked if the electoral officer is found guilty of an offence under the Act.</p>	<p>2(3) S'il est déclaré coupable d'une infraction à la Loi, son accréditation est révoquée.</p>
<p><b>Appointment of deputy electoral officer</b></p> <p>2(4) The electoral officer may appoint one or more deputy electoral officers.</p>	<p><b>Adjoint au président d'élection</b></p> <p>2(4) Il peut nommer un ou plusieurs présidents d'élection adjoints.</p>
<p><b>Voters List</b></p> <p><b>Provision of information</b></p> <p>3(1) At least 65 days before the day on which an election is to be held</p> <p>(a) the First Nation must provide the electoral officer with the information set out in subsection (2), if the First Nation holding the election has assumed control of its own membership under section 10 of the Indian Act; and</p> <p>(b) the Registrar must provide the electoral officer with the information set out in subsection (2), if the Band List of the First Nation holding the election is maintained in the Department under section 11 of the Indian Act.</p>	<p><b>Liste des électeurs</b></p> <p><b>Communication de renseignements</b></p> <p>3 (1) Au moins soixante-cinq jours avant l'élection, les renseignements visés au paragraphe (2) sont communiqués au président d'élection :</p> <p>a) par la première nation qui tient l'élection, si celle-ci a choisi de décider de l'appartenance à ses effectifs en vertu de l'article 10 de la Loi sur les Indiens;</p> <p>b) par le registraire, si une liste de bande est tenue au ministère pour la première nation qui tient l'élection, au titre de l'article 11 de la Loi sur les Indiens.</p>
<p><b>Compilation of list</b></p> <p>3(2) The electoral officer must compile a voters list that contains the following information:</p> <p>(a) the names of all electors, in alphabetical order; and</p> <p>(b) each elector's band membership or Register number or, if the elector does not have a band membership or Register number, their date of birth.</p>	<p><b>Liste des électeurs</b></p> <p>3(2) Le président d'élection compile une liste des électeurs qui contient les renseignements suivants :</p> <p>a) le nom des électeurs placés en ordre alphabétique;</p> <p>b) le numéro de membre de bande ou le numéro de registre de chacun des électeurs ou, à défaut de ces numéros, leur date de naissance.</p>
<p><b>Revision of list</b></p>	<p><b>Révision</b></p>

<p>3(3) The electoral officer must revise the voters list if it is demonstrated that</p> <p>(a) an elector's name has been omitted from the list;</p> <p>(b) an elector's name is incorrectly set out in the list; or</p> <p>(c) the name of a person not entitled to vote is included in the list.</p>	<p>3(3) Il corrige la liste des électeurs s'il est établi que l'une des situations suivantes existe :</p> <p>a) le nom d'un électeur a été omis de la liste;</p> <p>b) l'inscription du nom d'un électeur est inexacte;</p> <p>c) la liste comporte le nom d'une personne inhabile à voter.</p>
<p><b>Withdrawal of candidacy</b></p> <p>10 (1) A candidate may withdraw their candidacy at any time prior to the close of the polls by submitting to the electoral officer a written declaration of withdrawal, signed by the candidate in the presence of the electoral officer, a justice of the peace, a notary public or a commissioner for oaths.</p>	<p><b>Retrait de candidature</b></p> <p>10 (1) Le candidat peut retirer sa candidature avant la fermeture du scrutin en soumettant au président d'élection une déclaration écrite signée en présence de ce dernier, d'un juge de paix, d'un notaire public ou d'un commissaire à l'assermentation.</p>
<p><b>Mail-in ballot</b></p> <p>15 An elector who wants to receive a mail-in ballot must make a written request to the electoral officer that includes a copy of their proof of identity.</p>	<p><b>Demande de bulletin de vote postal</b></p> <p>15 L'électeur qui désire obtenir un bulletin de vote postal présente au président d'élection une demande écrite accompagnée de la copie d'une preuve d'identité.</p>
<p><b>Advance poll</b></p> <p>18 (1) The electoral officer may establish an advance polling station at any location that the electoral officer considers suitable and hold an advance poll for the period beginning on the tenth day and ending on the fifth day before the day on which the election is to be held.</p>	<p><b>Bureau de vote par anticipation</b></p> <p>18 (1) Le président d'élection peut établir un bureau de vote par anticipation à tout emplacement qu'il juge convenable et tenir un vote par anticipation durant la période commençant le 10<sup>e</sup> jour avant l'élection et se terminant le 5<sup>e</sup> jour avant l'élection.</p>
<p><b>Hours</b></p> <p>20(4) Polling stations must be open from 9:00 a.m. to 8:00 p.m. on the day of the election.</p>	<p><b>Heures d'ouverture</b></p> <p>20(4) Le jour de l'élection, les bureaux de vote sont ouverts de 9 h à 20 h.</p>

<p><b>Sealed ballot box</b></p> <p>20(6) The electoral officer or deputy electoral officer must, before the polling station is opened, open the ballot box, call all persons present to witness that it is empty, seal the box in a manner that prevents it from being opened without breaking the seal and place it in a location that is visible to the voters.</p>	<p><b>Préparation de la boîte de scrutin</b></p> <p>20(6) Avant l'ouverture du scrutin, le président d'élection ou le président d'élection adjoint ouvre la boîte de scrutin et demande aux personnes présentes de constater qu'elle est vide. Il scelle ensuite la boîte de façon qu'il soit impossible de l'ouvrir sans en briser le sceau et la dépose à un endroit bien en vue des électeurs.</p>
<p><b>Seal</b></p> <p>20(7) The seal of a ballot box must not be broken and the ballot box must not be opened during the time that the polling station is open.</p>	<p><b>Intégrité de la boîte de scrutin</b></p> <p>20(7) Le sceau doit demeurer intact et la boîte fermée pendant toute la durée du scrutin.</p>
<p><b>Repeat of procedure</b></p> <p>20(8) If another ballot box is required during the time that the polling station is open, the electoral officer or deputy electoral officer must repeat the procedure set out in subsection (6).</p>	<p><b>Boîte de scrutin supplémentaire</b></p> <p>20(8) Si une boîte de scrutin supplémentaire est nécessaire pendant la tenue du scrutin, le président d'élection ou le président d'élection adjoint répète les étapes énumérées au paragraphe (6).</p>
<p><b>Procedure</b></p> <p>21(4) After receiving a ballot, an elector must</p> <p>(a) immediately proceed to the compartment provided for marking ballots;</p> <p>(b) mark the ballot with a cross, check mark or other mark that clearly indicates the elector's choice, but does not identify the elector, next to the name of the candidates for whom they intend to vote;</p> <p>(c) fold the ballot in a manner that conceals the candidates' names and any marks on the ballot without hiding the initials on the back; and</p>	<p><b>Marche à suivre</b></p> <p>21(4) Après avoir reçu un bulletin de vote, l'électeur :</p> <p>a) se rend immédiatement à l'isoloir aménagé pour le marquage des bulletins de vote;</p> <p>b) marque son bulletin, en regard du nom des candidats pour qui il souhaite voter, en apposant une croix, un crochet ou toute autre marque qui indique clairement son choix mais ne permet pas de l'identifier;</p> <p>c) plie le bulletin de manière à cacher le nom des candidats ainsi que toute marque sans toutefois cacher les initiales qui figurent au verso;</p>

<p>(d) give the ballot to the electoral officer or deputy electoral officer.</p>	<p>d) remet le bulletin au président d'élection ou au président d'élection adjoint.</p>
<p><b>Privacy</b></p> <p>21(6) Subject to subsection (7), while an elector is in the compartment provided for marking ballots, no other person is allowed to be in the compartment or be in a position to see the manner in which the elector marks their ballot.</p>	<p><b>Confidentialité de l'isoloir</b></p> <p>21(6) Sous réserve du paragraphe (7), lorsqu'un électeur est dans l'isoloir pour marquer son bulletin de vote, aucune autre personne n'y est admise ou ne peut être placée de manière à voir l'électeur marquer son bulletin de vote.</p>
<p><b>Assistance</b></p> <p>21(7) At the request of any elector who is unable to vote in the manner set out in subsection (4), the electoral officer or deputy electoral deputy must, in the presence of a witness that the elector has selected, assist that elector by marking their ballot in the manner directed by the elector and return the ballot to the elector to deposit in the ballot box or, at the elector's request, deposit it in the ballot box.</p>	<p><b>Assistance</b></p> <p>21(7) À la demande de l'électeur qui est incapable de voter de la manière prévue au paragraphe (4), le président d'élection ou le président d'élection adjoint rempli, en présence d'un témoin choisi par l'électeur, le bulletin de vote de l'électeur selon ses instructions et le remet à l'électeur pour qu'il le dépose dans la boîte de scrutin ou, à la demande de l'électeur, le dépose dans la boîte de scrutin.</p>
<p><b>Rejection or acceptance of mail-in ballot</b></p> <p>22 At the time and on the date set for the counting of the votes in the notice referred to in section 14, the electoral officer or deputy electoral officer must, in the presence of everyone present, open each envelope containing a mail-in ballot that was received before the close of the polls and, without unfolding the ballot,</p> <p>(a) reject the ballot if</p> <p>(i) it is not accompanied by a voter declaration form or the voter declaration form is not signed or witnessed,</p> <p>(ii) the name of the elector set out in the voter declaration form is not on the voters list, or</p>	<p><b>Dépouillement</b></p> <p>22 À la date et à l'heure établies dans l'avis visé à l'article 14 pour le dépouillement du scrutin, le président d'élection ou le président d'élection adjoint ouvre, en présence de toute personne se trouvant sur les lieux, chaque enveloppe contenant un bulletin de vote postal reçue avant la fermeture du scrutin et, sans déplier le bulletin de vote postal qu'elles contiennent :</p> <p>a) soit rejette le bulletin si :</p> <p>(i) aucun formulaire de déclaration d'identité ne l'accompagne ou si celui-ci n'est pas signé par l'électeur ou un témoin,</p> <p>(ii) le nom figurant sur le formulaire de déclaration d'identité ne paraît pas sur la liste des électeurs,</p>

<p>(iii) the voters list shows that the elector has already voted; or</p> <p>(b) place a mark on the voters list next to the elector's name that is set out in the voter declaration form and deposit the ballot in a ballot box.</p>	<p>(iii) la liste des électeurs indique que l'électeur a déjà voté;</p> <p>b) soit fait une marque sur la liste des électeurs en regard du nom de l'électeur visé par le formulaire de déclaration d'identité et dépose le bulletin de vote postal dans une boîte de scrutin.</p>
<p><b>Declaration</b></p> <p>24 (1) Subject to subsection (2), after the completion of the counting of the votes, the electoral officer must, in the presence of everyone present, declare to be elected the candidates having the highest number of votes.</p>	<p><b>Élection des candidats</b></p> <p>24 (1) Sous réserve du paragraphe (2), après le dépouillement du scrutin, le président d'élection, en présence des personnes se trouvant sur les lieux, déclare élus les candidats ayant obtenu le plus grand nombre de voix.</p>
<p><b>Five or fewer votes</b></p> <p>24(2) If the difference between the number of votes of a candidate with the highest number of votes — who would otherwise be declared elected — and another candidate for the same position is five or fewer, the electoral officer must establish a date, time and place for a recount of the votes cast for those candidates and announce that date, time and place in the presence of everyone present.</p>	<p><b>Majorité inférieure à cinq</b></p> <p>24(2) Si la différence entre le nombre de voix en faveur de tout candidat qui devrait être élu parce qu'il a obtenu le plus grand nombre de voix et un autre candidat est de cinq ou moins, le président d'élection fixe une date, une heure et un lieu de recomptage des voix en faveur de ces candidats et en fait l'annonce en présence de toute personne se trouvant sur les lieux.</p>
<p><b>Time of recount</b></p> <p>24(3) A recount must commence within 24 hours after the announcement by the electoral officer that a recount is necessary.</p>	<p><b>Recomptage</b></p> <p>24(3) Le recomptage a lieu au plus tard dans les vingt-quatre heures qui suivent l'annonce du président d'élection.</p>
<p><b>Handling of ballots</b></p> <p>24(4) If the recount is not to be conducted immediately after the counting of the votes, the electoral officer must</p> <p>(a) deposit all ballots in envelopes and seal them in a manner that prevents them from being opened without breaking the seal;</p>	<p><b>Conservation pendant le recomptage</b></p> <p>24(4) Si le recomptage n'a pas lieu immédiatement après le dépouillement du scrutin, le président d'élection, à la fois :</p> <p>a) place tous les bulletins de vote dans des enveloppes qu'il scelle de façon qu'il soit</p>

<p>(b) place their initials on the seal and have any two people present do the same;</p> <p>(c) deposit the sealed envelopes into a ballot box and seal that box in a manner that prevents it from being opened without breaking the seal; and</p> <p>(d) ensure the safekeeping of the sealed ballot box until the time established for a recount.</p>	<p>impossible de l'ouvrir sans en briser le sceau;</p> <p>b) appose ses initiales sur le sceau et veille à ce que deux personnes présentes sur les lieux fassent de même;</p> <p>c) dépose les enveloppes scellées dans la boîte de scrutin qu'il scelle de façon qu'il soit impossible de l'ouvrir sans en briser le sceau;</p> <p>d) veille à ce que la boîte de scrutin scellée soit gardée en lieu sûr jusqu'au recomptage.</p>
<p><b>Recount</b></p> <p>24(5) On the date and at the time and place established for a recount, the electoral officer must open the sealed ballot box and the sealed envelopes in the presence of everyone present and conduct a recount.</p>	<p><b>Dépouillement au recomptage</b></p> <p>24(5) Aux date, heure et lieu établis pour le recomptage, le président d'élection ouvre, en présence de toute personne se trouvant sur les lieux, la boîte de scrutin scellée puis les enveloppes scellées et tient le recomptage.</p>
<p><b>Retention of documents</b></p> <p>25 (1) The electoral officer must deposit all ballots in envelopes, seal them and ensure their safekeeping along with other election documents, for a period of 120 days following the election.</p>	<p><b>Période de conservation</b></p> <p>25 (1) Le président d'élection insère les bulletins de vote dans des enveloppes, scelle ces enveloppes et veille à ce qu'elles soient gardées, avec les autres documents liés à l'élection, en lieu sûr pour une période de cent vingt jours après le jour de l'élection.</p>
<p><b>Destruction of documents</b></p> <p>25 (2) At the end of the period set out in subsection (1), the electoral officer must destroy the ballots and election documents, unless they are served, in accordance with section 34 of the Act, with an application to contest the election.</p>	<p><b>Destruction</b></p> <p>25(2) À moins qu'une requête en contestation ne lui ait été signifiée en application de l'article 34 de la Loi, le président d'élection détruit les bulletins de vote et les documents à la fin de la période établie au paragraphe (1).</p>



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

**DOCKET:** T-2063-18

**STYLE OF CAUSE:** LAURA S. BIRD, MATTHEW W. ADAM v BERNIE  
MAKOKIS, ELECTORAL OFFICER, PAUL BAND  
(FIRST NATION)

**PLACE OF HEARING:** EDMONTON, ALBERTA

**DATE OF HEARING:** MARCH 9, 2020

**JUDGMENT AND REASONS:** MCVEIGH J.

**DATED:** APRIL 2, 2020

**APPEARANCES:**

Laura S. Bird  
Matthew W. Adam

FOR THE APPLICANTS  
ON THEIR OWN BEHALF

David B. Yesdresyski

FOR THE RESPONDENTS

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