Federal Court  Cour fédérale

Date: 20220908

Docket: T-821-21

Citation: 2022 FC 1138

Ottawa, Ontario, September 8, 2022

PRESENT: The Honourable Mr. Justice Favel

BETWEEN:

KELSEY LORENTZ

Applicant

and

LOREEN SUHR AND CLAYTON CHARLIE

Respondents

JUDGMENT AND REASONS

I. Nature of the Matter

[1] This is an application pursuant to section 31 of the *First Nations Elections Act*, SC 2014, c 5 [*FNEA*] contesting the April 14, 2021 Ts'il Kaz Koh Burns Lake [Burns Lake] by-election for Chief [By-election]. Kelsey Lorentz [Applicant] is a member and elector of Burns Lake. Loreen Suhr [Respondent Suhr], was the electoral officer [EO] for the By-election, and Clayton Charlie [Respondent Charlie] was the successful candidate for Chief [collectively, Respondents].

[2] The Applicant seeks an Order setting aside the By-election pursuant to section 31 and subsection 35(1) of the *FNEA.*

[3] The application is allowed. Three ballots were improperly delivered to electors contrary to paragraph 14(b) of the *FNEA* and subsection 16(2) of the *First Nations Elections Regulations*, SOR/2015-86 [*FNER*].

II. Background

A. *Context*

[4] Burns Lake is a remote community in the interior of British Columbia. It consists of approximately 130 members, 80 of whom live off-reserve. The governing body of Burns Lake is composed of one Chief and two Councillors.

[5] The *FNEA* and *FNER* [together, the FNEA Regime] apply to First Nations that have opted out of the *Indian Act*, RSC 1985, c I-5 [*Indian Act*] election regime and into the FNEA Regime. Burns Lake is a participant under the FNEA Regime. The FNEA Regime prescribes specific timelines for elections and allows off-reserve electors to vote by mail-in ballot.

B. *Events leading to the By-election*

[6] In January 2021, the former Chief of Burns Lake, Chief Gerow, resigned effective immediately. This triggered the By-election. The Band Administrator retained Respondent Suhr as the EO, whose appointment was formalized by a February 3, 2021 Band Council Resolution.

Respondent Suhr previously acted as EO for two other Burns Lake elections. Given the urgent need for a new Chief, the Band Administrator and Respondent Suhr set the date of the By-election for April 14, 2021.

[7] On February 8, 2021, Burns Lake provided Respondent Suhr with a list of all eligible voters for the By-election. The list included electors' last known addresses [Voter's List].

[8] On February 13, 2021, Respondent Suhr sent the Notice of Nomination Meeting, Mail-in Nomination Form, and Mail-in Ballot Request Form [Notice of Nomination Materials] to the addresses included on the Voter's List. Following this, she updated her own spreadsheet [Notice of Nomination Mailing List]. The Notice of Nomination Mailing List includes the name, address, and date that Notice of Nomination Materials were sent.

[9] The Notice of Nomination Meeting referenced two dates incorrectly. The By-election date was mistakenly referred to as Thursday, April 14, 2021 instead of Wednesday, April 14, 2021. The Ballot Request Form similarly stated that the By-election would be held on Thursday, April 14, 2021. The Ballot Request Form stated that the deadline to request a mail-in ballot was Thursday, April 8, 2021.

[10] Respondent Suhr began receiving completed Mail-in-Ballot Request Forms throughout February and March. She created a list of electors that requested a Mail-in Ballot Package [Mail-in Ballot List]. When making the Mail-in Ballot List, Respondent Suhr copied the name, address, email, and phone number provided by the elector on their Mail-in Ballot Request Form.

[11] On March 16, 2021, after the candidates were nominated and confirmed, Respondent Suhr mailed a Mail-in Ballot Package to every elector that had submitted a completed Mail-in Ballot Request Form. Those Mail-in Ballot Packages included a Notice of Election, which correctly stated that the By-election would be held on Wednesday, April 14, 2021. That Notice of Election also indicated that the deadline to request a Mail-in Ballot Package was April 7, 2021 (one day earlier than the date included on the Ballot Request Form).

[12] Respondent Suhr received more Mail-in-Ballot Request Forms until April 7, 2021. She deposes that she went to Canada Post every day to check for Mail-in Ballot Request Forms and to send Mail-in Ballot Packages.

[13] The Applicant submits that there were a number of procedural/technical irregularities that contravened the FNEA Regime. As a result, at least three members of Burns Lake were not given the Notice of Election; three were denied Mail-in Ballot Packages; and six (seven including the Applicant) were denied their right to vote in the By-election. The specific complaints of these electors are canvassed below.

C. *Mail-in Ballot Delivery and Collection Arrangement*

[14] On April 8, 2021, Respondent Charlie contacted Respondent Suhr via email asking how three electors (Norman Gerow, Bob Garcia, and Juanita Symington), who did not receive their Mail-in Ballot Package, could vote in the By-election. Later that day, the Respondents had a telephone conversation where they discussed the possibility of electors designating a Band member to hand deliver their Mail-in Ballot Packages and return them to Respondent Suhr

[Delivery and Collection Arrangement]. Respondent Charlie advised that his brother, Ron, could act as the designated courier for the three identified electors. He also told Respondent Suhr that he would accompany Ron on the drive.

[15] Later that day, Respondent Suhr called Judy Szonyi from Indigenous Services Canada [ISC], who approved of the Delivery and Collection Arrangement. Ms. Szonyi said she would be in touch with the three electors. At 6:27 p.m., Ms. Szonyi sent an email to former Chief Gerow and the two Councillors to ask them to inform all members about the Delivery and Collection Arrangement. Ms. Szonyi's email stated that the deadline to request a ballot package was "today, April 8th." The Applicant states that Respondent Suhr's emails indicated that she set a non-advertised deadline of 8:00 p.m. on April 8, 2021, approximately 90 minutes after Ms. Szonyi emailed former Chief Gerow and the Councillors.

[16] Respondent Suhr deposes that, based on her consultation with ISC and the past election practices of Burns Lake, she thought the Delivery and Collection Arrangement was lawful. All of the parties agree that, in past Burns Lake elections, electors had candidates or other Band members collect their ballots and "walk" them into the polls. However, the Applicant states that in the past, candidates never delivered Mail-in Ballot Packages to electors – they only collected completed Mail-in Ballots, which is permitted under subsection 17(2) of the *FNER*.

[17] By the end of the day on April 8, 2021, Respondent Suhr received four requests to participate in the Delivery and Collection Arrangement. The new request was from the Applicant. The Applicant states that he only learned about the Delivery and Collection

Arrangement because his mother, Councillor Ellen Lorentz [Councillor Lorentz], was one of the original recipients of Ms. Szonyi's emails.

[18] Respondent Suhr prepared a Mail-in-Ballot Package and authorization form for the four electors wishing to participate in the Delivery and Collection Arrangement. She placed all of the materials in a sealed envelope. She then called Respondent Charlie and made arrangements for Ron to pick up the materials on either April 10 or 11, 2021 in Prince George.

[19] Respondent Charlie states that he and Ron delivered ballots to Norman Gerow, Bob Garcia, and Juanita Symington on April 10, 2021, and that he was not present when these electors marked their ballot. When they opened the sealed envelope to retrieve the Mail-in Ballot Packages for the first elector, they realized they also had the Applicant's ballot. Respondent Charlie states that he was surprised because the Applicant never contacted him to arrange for the delivery of his Mail-in Ballot Package, nor did anyone advise him of this request. Respondent Charlie subsequently contacted the Applicant via Facebook Messenger and phone to arrange delivery.

[20] The Applicant states that during the phone call, Respondent Charlie asked who the Applicant intended to vote for. The Applicant states that he said he was not sure yet but that he would meet Respondent Charlie in Vernon, British Columbia on April 12, 2021 at 1:00 p.m. to get his ballot. Respondent Charlie denies asking the Applicant who he was going to vote for and denies that he made plans to meet the Applicant at 1:00 p.m. in Vernon on April 12, 2021. Respondent Charlie states that, during the phone call, he told the Applicant that he would be in

Kelowna on April 11, 2021 and he made sure the Applicant had his number should he wish to arrange delivery. Respondent Charlie states that he was left with the impression that the Applicant was not interested in voting.

[21] It is undisputed that Respondent Charlie was in Vernon at 1:00 p.m. on April 12, 2021. Respondent Charlie deposes that two electors, John and Mike Creyke, contacted him the morning of April 12, 2021 about picking up their completed Mail-in Ballots. John was in Vernon and Mike was in Chilliwack. Respondent Charlie states that he travelled to Vernon from Kelowna on April 12, 2021 to meet with Mike. He states that while he was there, the Applicant never reached out to him.

[22] Councillor Lorentz texted Respondent Charlie three times on April 12, 2021 to coordinate the delivery of the Applicant's ballot. At approximately 10:30 a.m., she suggested that the Applicant's sister could pick the Applicant's ballot up from Respondent Charlie. Respondent Charlie did not reply until 2:00 p.m., at which point he advised that he had left Vernon. The Applicant deposes that he subsequently called Respondent Charlie twice but he did not pick up. The record shows that these calls were placed around 4:00 p.m. Respondent Charlie states that he heard nothing from the Applicant on April 12, 2021 until 4:25 p.m. that day.

[23] Respondent Charlie replied to Councillor Lorentz and the Applicant at 4:09 p.m. and 4:36 p.m., respectively. Respondent Charlie states that he replied to them while at a rest stop near Kamloops, during his journey to Chilliwack. Respondent Charlie states that he did not respond to their messages until after 4:00 p.m. because he was driving and he does not always have service

on the highway. He told the Applicant and Councillor Lorentz that a third party, such as the Applicant's sister, could not pick up the Applicant's ballot. In the same message, Respondent Charlie also told the Applicant that he might come through Vernon on April 13, 2021 because, at that point, he thought he was still going to travel to Chilliwack to meet Mike Creyke. This did not happen. Respondent Charlie deposes that when he was in Kamloops, Mike told him that he found someone else to courier his ballot. Therefore, Respondent Charlie and Ron decided to return to Burns Lake without communicating that decision to the Applicant.

[24] Respondent Charlie did not deliver the Applicant's ballot and the Applicant did not end up voting in the By-election.

[25] Councillor Lorentz swears that on April 15, 2021, the day after the By-election, Respondent Charlie told her at least twice that he purposefully ignored her and the Applicant because he was not sure if the Applicant was going to vote for him. Respondent Charlie denies saying this.

D. *The By-election*

[26] The By-election took place on April 14, 2021. That day, Ron delivered the ballots that he collected during the Delivery and Collection Arrangement to Respondent Suhr. Similarly, other Band members (including Councillor Lorentz) hand-delivered completed Mail-in Ballot Packages belonging to other electors.

[27] Respondent Charlie won the By-election by one vote. The official statement of the vote was recorded as: Dan George (4), Ryan Tibbett (23), Albert Gerow (23), and Clayton Charlie (24).

III. Preliminary Matters

A. *Respondent Charlie's Credibility*

[28] The Applicant asks this Court to reject Respondent Charlie's evidence regarding his departure from Vernon on April 12, 2021. Essentially, the Applicant submits that Respondent Charlie has made various inconsistent statements about his journey, which establish that he intentionally avoided the Applicant during the Delivery and Collection Arrangement.

[29] Respondent Charlie submits that the Court should reject the Applicant's assertion that Respondent Charlie's trip from Vernon to Kamloops is not credible. Respondent Charlie never deposed to the travel time, and there is no evidence of when his trip began, what traffic conditions were like, or whether he took any breaks. It is improper for the Applicant to try and impugn Respondent Charlie's credibility when he chose not to undertake cross-examination and failed to admit new affidavit evidence to contradict Respondent Charlie's evidence.

[30] I agree with Respondent Charlie that the Applicant should have exercised his right to cross-examination if he wished to challenge Respondent Charlie's evidence. It would be unfair for this Court to make a negative credibility finding without the issue of Respondent Charlie's travels being put to him first (*Flett v Pine Creek First Nation*, 2022 FC 805 at paras 23, 36). In

any event, the circumstances surrounding the attempt to deliver the Applicant's ballot are not relevant to the determination of this application.

B. *New Arguments Raised by the Applicant*

[31] At the hearing, Respondent Suhr objected to five of the Applicant's submissions on the basis that they were new arguments: (1) the constellation errors corrupted the integrity of the By-election; (2) the cumulative effect of the breaches on the required notice periods; (3) mailing during the long weekend; (4) the COVID-19 Regulations applicable to First Nations elections; and (5) the secrecy of voting and section 18 of the *FNEA*.

[32] During reply submissions, the Applicant acknowledged that submissions (4) and (5) were new and not supported by the record. At the conclusion of the hearing, Respondent Suhr withdrew objections to submissions (2) and (3).

[33] The remaining new issue for this Court to address is whether the integrity of the By-election was corrupted by the constellation of errors. I find that this submission is similar to the submission addressed by the Saskatchewan Court of Queen's Bench in *Cyr v McNab*, 2016 SKQB 357 [*McNab SKQB*], wherein the Court determined that a constellation of errors and irregularities did not amount to fraud or a corrosive effect sufficient to undermine the integrity of the election (at para 41). I agree. This principle applies to the present matter.

IV. Issues

[34] Having considered the parties' submissions, in my view, the issues are best characterized as:

1. Was there a contravention of the FNEA Regime on any of the following grounds that "likely affected the result" of the By-election?
    a. Compressing the By-election timeline;
    b. Providing the incorrect date in the Notice of Nomination Materials;
    c. Failing to post the Notice of Election;
    d. Failing to ensure delivery of urgent Mail-in Ballots;
    e. Failing to keep Mail-in Ballots safe;
    f. Delivering Mail-in Ballots through the Delivery and Collection Arrangement; and
    g. Intentionally obstructing the By-election.
2. If there was a contravention that likely affected the By-election result, should the Court exercise its discretion to set aside the By-election?

V. Parties' Positions

A. *Was there a contravention of the FNEA Regime that likely affected the result of the By-election?*

(1) Applicant's Position

(a) *Compressing the election timeline*

[35] Sections 5(1), 7(1), 14, and 16 of the *FNER* provide the minimum timelines for sending the Notice of Nomination Meeting, holding the Nomination Meeting, sending the Mail-in Ballot

Packages, and sending the Notice of By-election. In all cases, Respondent Suhr failed to adhere to these timelines by one or two days.

(b) *Providing the incorrect date in the Notice of Nomination Materials*

[36] Respondent Suhr contravened paragraph 5(2)(e) of the *FNER* because the Notice of Nomination Meeting included the date "Thursday April 14, 2021", which is not an actual date.

(c) *Failing to post the Notice of Election*

[37] Section 14 of the *FNER* requires the EO to issue the Notice of Election to members 30 clear days before the date of the By-election and to post this Notice in at least one conspicuous place on the reserve. Respondent Suhr has not produced evidence that she posted the Notice of the Election.

(d) *Failing to ensure delivery of urgent Mail-in Ballots*

[38] Subsection 16(2) of the *FNER* states: "…six or more days before the day on which the election is to be held, the electoral officer must mail, or deliver at an agreed time and place, a mail-in ballot package to the elector as soon as feasible after receipt of the request." Respondent Suhr contravened subsection 16(2) because she failed to use expedited postal services to ensure the timely delivery of Mail-in Ballot Packages to electors. Respondent Suhr also contravened subsection 16(2) by refusing to provide urgent ballots to four electors (Mr. Favelle, Mr. Holland, Mr. Lorentz, and Mr. Delisle).

(e) *Failing to keep Mail-in-Ballots safe*

[39] Subsection 17(4) of the *FNER* requires the EO to ensure the safekeeping of Mail-in Ballot Packages until they are opened. Respondent Suhr contravened subsection 17(4) when she allowed Canada Post to return the ballots of Darren, Ashley, Amanda, and Robert Gerow [the Gerow Package]. These ballots were delivered to the designated address provided by Respondent Suhr before the polls closed. Accordingly, Respondent Suhr had an obligation to ensure their safekeeping.

(f) *Delivering Mail-in Ballots through the Delivery and Collection Arrangement*

(g) *Intentionally obstructing the By-election*

[40] The Applicant addresses these sub-issues together. The first allegation relates to paragraph 14(b) of the *FNEA* and subsection 16(2) of the *FNER*. The second allegation, intentional obstruction of the By-election, related to the prohibition under section 27 of the *FNEA*.

[41] Section 27 of the *FNEA* prohibits the intentional obstruction of an election. The Respondents intentionally obstructed the By-election through the Delivery and Collection Arrangement. The Respondents created a special means to deliver and collect ballots to electors chosen by Respondent Charlie. That arrangement was also intended to be kept secret, as it was not widely advertised. As a result, Respondent Charlie was the only candidate given the inside track to deliver and collect ballots from electors.

[42] The Delivery and Collection Arrangement contravened paragraph 14(b) of the *FNEA* and subsection 16(2) of the *FNER*. Paragraph 14(b) prohibits the possession of a ballot not issued to the holder unless they are specifically authorized to possess it under the *FNER*. Subsection 16(2) of the *FNER* only provides for personal delivery of a mail-in ballot package by the EO. Taken together, the FNEA Regime only allows the EO to personally deliver Mail-in Ballot Packages to electors. Accordingly, the Mail-in Ballot Packages delivered by Respondent Charlie that were completed by Norman Gerow, Bob Garcia, and Juanita Symington are invalid. Although section 17 of the *FNER* permits anyone to assist electors by collecting their completed ballots, Respondent Charlie's actions go beyond that because he was fulfilling a core duty of the EO by issuing ballots to electors.

[43] The Delivery and Collection Arrangement also resulted in a conflict of interest. In carrying out the Delivery and Collection Arrangement, Respondent Suhr essentially deputized Respondent Charlie. This is a conflict of interest because an EO has an obligation to be independent and unbiased, as well as ensure that everyone can vote regardless of their voting preference. As a candidate, Respondent Charlie had a personal interest in who received ballots. The four persons entitled to ballot collection as part of the Delivery and Collection Arrangement were the three electors suggested by Respondent Charlie and the Applicant, who was added by Respondent Suhr. Respondent Charlie acted in a biased manner and obstructed the By-election by refusing to deliver the Applicant's ballot to him.

[44] The totality of these violations likely affected the outcome of the By-election. A single vote could have created a tie between Respondent Charlie and either of the runners-up, leading to

a tiebreaker. At least nine electors were denied their right to vote and the three votes collected by Respondent Charlie are invalid. In total, twelve votes makes it a foregone conclusion that the result of the By-election was likely affected. The unlawful compression of the By-election timeline likely affected many more votes, as evidenced by the low voter turn out.

(2) Respondent Suhr's Position

[45] Contrary to the Applicant's submissions, the threshold to find a contravention of the FNEA Regime is not a constellation of administrative irregularities that amount to a corrosive effect on the By-election (*McNab SKQB* at para 41). Rather, the specific violation must have likely affected the result of the By-election. The Applicant has not demonstrated this on the balance of probabilities.

(a) *Compressing the By-election timeline*

[46] Respondent Suhr concedes that the By-election timelines were accidently shortened by one day. Given that the mistake was consistent across all timelines, it can be inferred that Respondent Suhr counted "days" rather than "clear days."

[47] The Applicant has not tendered any "persuasive evidence" that this mistake likely affected the results of the By-election. The Applicant submits that Mr. Favelle, Mr. Delisle, and Mr. Holland did not receive the Notice of Nomination Materials. However, this was due to issues with Canada Post or their mailing addresses. Moreover, there is no evidence that an extra clear day would have affected the By-election result. Similarly, there is no evidence that the result

would be affected by an additional day between the Nomination Meeting and the Election or if the Mail-in-Ballot Packages were sent on March 15, 2021 instead of March 16, 2021. The Applicant's submission that an abridged timeline "increased the likelihood" that the Band's electorate was denied the right to vote is purely speculative.

(b) *Providing the incorrect date in the Notice of Nomination Materials*

[48] Respondent Suhr concedes that there was an error in the Notice of Nomination Materials. However, this does not contravene paragraph 5(2)(e) of the *FNER* because all By-election materials included the correct numerical date of April 14, 2021. Furthermore, all By-election materials following the Notice of Nomination Materials included the correct date, being Wednesday, April 14, 2021.

[49] Even if the typo is a contravention, the Applicant has not demonstrated that this mistake likely affected the result of the By-election. No affiant swears that the typo affected their ability to vote in the By-election.

(c) *Failing to post the Notice of Election*

[50] The Applicant has not established a contravention of section 14 of the *FNER*. The Applicant's submission ignores the presumption of regularity and seeks to reverse the burden of proof. In any event, Respondent Charlie deposed that he saw the Notice of Election posted outside the Band Office on March 10, 2021. Even if there was a contravention, the Applicant has provided no evidence that it likely affected the result of the By-election.

(d) *Failing to ensure delivery of urgent Mail-in-Ballots*

[51] This Court should reject the Applicant's interpretation of subsection 16(2) of the *FNER*. Subsection 16(2) does not impose a positive obligation on an EO to ensure that an elector receives a Mail-in Ballot Package. The plain language of subsection 16(2) is clear that an EO is only required to mail a Mail-in Ballot Package to voters as soon as feasible after receipt of their Mail-in Ballot Request Forms. There are no provisions within the FNEA Regime that place a positive obligation on an EO to use expedited mail. To find otherwise would improperly enlarge an EO's obligations under the FNEA Regime in a manner that is not supported by the text.

[52] Furthermore, Respondent Suhr did not "refuse" to send Mail-in Ballot Packages to Mr. Holland, Mr. Lorentz, Mr. Favelle, or Mr. Delisle. Mr. Holland never submitted a Mail-in Ballot Request Form. Therefore, pursuant to section 15 and subsection 16(1) of the *FNER*, Respondent Suhr was not permitted to send him a Mail-in Ballot Package.

[53] Mr. Lorentz's Mail-in Ballot Request Form was received on February 23, 2021 and his Mail-in Ballot Package was sent on March 16, 2021 – the first day Respondent Suhr began mailing Mail-in Ballot Packages. Likewise, Respondent Suhr received Mail-in Ballot Request Forms from Mr. Favelle and Mr. Delisle on March 25, 2021 and April 6, 2021, respectively. She promptly sent their Mail-in Ballot Packages to them on March 26, 2021 and April 6, 2021. Respondent Suhr complied with her obligations under subsection 16(2) to send the Mail-in Ballot Packages "as soon as feasible."

[54] Even if Respondent Suhr had a positive obligation to ensure that Mail-in Ballot Packages reached electors by a certain time, the Applicant has failed to establish how a breach of that duty likely affected the outcome of the By-election.

(e) *Failing to keep Mail-in-Ballots safe*

[55] Subsection 17(4) of the *FNER* was not contravened. The Gerow Package was returned by Canada Post before it ever reached Respondent Suhr. She was not responsible for "safekeeping" ballots that never came into her possession. Without further proof, it must be presumed that Respondent Suhr ensured the safekeeping of the ballots that came into her possession.

(f) *Delivering Mail-in Ballots through the Delivery and Collection Arrangement*

(g) *Intentionally obstructing the By-election*

[56] Respondent Suhr also addresses these sub-issues together. There was no contravention under section 27 of the *FNEA*. Respondent Suhr's sole intent was to ensure that voters were enfranchised. Respondent Suhr's uncontradicted evidence is that she has no interest in the outcome of the By-election and has no relationship with any of the candidates.

[57] Respondent Suhr only implemented the Delivery and Collection Arrangement after soliciting feedback from ISC. A similar delivery scheme was approved by this Court in *Good v Canada (AG)*, 2018 FC 1199 at para 195 [*Good*]).

(3) Respondent Charlie's Position

[58] Respondent Charlie adopts Respondent Suhr's submissions about the alleged violations pertaining to her responsibilities as EO. For the same reasons articulated by Respondent Suhr, Respondent Charlie submits that those alleged violations are not likely to affect the outcome of the By-election.

[59] Respondent Charlie's submissions focus on the Applicant's allegations related to the Delivery and Collection Arrangement and intentional obstruction. Respondent Charlie notes that the Applicant does not separate these arguments in his submissions. A contravention of paragraph 14(b) of the *FNEA* cannot constitute obstruction under section 27 because section 27 only covers conduct that the *FNEA* "does not otherwise prohibit."

(a) *Delivering Mail-in Ballots through the Delivery and Collection Arrangement*

[60] If the Applicant submits that Respondent Charlie contravened paragraph 14(b) of the *FNEA* as an independent violation outside of intentional obstruction, that argument must fail for two reasons. First, this Court must reject the Applicant's interpretation that subsection 16(2) of the *FNER* limits the delivery of Mail-in Ballot Packages by the EO personally and the EO alone. The Applicant's interpretation defies the purpose of the *FNEA*, prohibits electors from obtaining ballots through means other than mail (which subsection 16(2) expressly provides), and is inconsistent with other federal legislation that clearly distinguishes between a ballot being "delivered" by anyone and "personally delivered" by enumerated individuals.

[61] Second, section 17 of the *FNER* does not limit the type of assistance an elector may receive. Subsection 17(1) provides a method whereby an elector "may vote" and subsection 17(2) states that if that elector is unable to use that method, the elector may enlist the assistance of another person. Interpreting subsection 17(2) as permitting assistance for the purpose of returning ballots but not delivering them serves no purpose and is not supported by the text. In this case, certain electors were unable to use the method in subsection 17(1), as they were unable to obtain their mail-in-ballots on time. That entitled them to enlist Respondent Charlie's assistance under subsection 17(2). Subsection 16(2) of the *FNER* empowered Respondent Suhr to permit the Delivery and Collection Arrangement. This is not a breach of paragraph 14(b) of the *FNEA*.

[62] Even if Respondent Charlie did breach the FNEA Regime by possessing and delivering ballots, curing that breach would not have affected the By-election result. Had Respondent Suhr delivered those ballots, as suggested by the Applicant, the result would have been the same.

(b) *Intentionally obstructing the By-election*

[63] Respondent Charlie submits that there are three components to making out the "offence" on intentional obstruction under section 27 of the *FNEA*. He submits that the wording of this section indicates that the alleged conduct: (1) cannot be a breach of another section of the *FNEA*; (2) must be done with the specific intent of causing obstruction to the conduct of the By-election; and (3) must actually obstruct the conduct of the By-election, not merely be unhelpful.

[64] The Applicant has failed to explain how a conflict of interest constitutes obstruction under section 27. Even if Respondent Charlie was in a conflict of interest the Court must assess the alleged conflict in the context of past election practices. It is common practice for members of Burns Lake to enlist the help of others, including candidates, to get their completed Mail-in Ballot Packages delivered on or before the date of an election. Accordingly, while the practice of assisting off-reserve electors with voting may appear as a conflict of interest, it is clearly not when considered in context.

[65] Respondent Charlie's alleged failure to deliver a Mail-in Ballot Package to the Applicant does not amount to obstruction under section 27 for two reasons. First, the real reason the Applicant did not get his Mail-in Ballot Package was because he failed to make plans with Respondent Charlie and Ron. Even if this Court accepts that Respondent Charlie agreed to meet the Applicant on April 12, 2021 at 1:00 p.m. in Vernon, the Applicant failed to show up. The Applicant waited until 4:25 p.m. to contact Respondent Charlie. Second, the Applicant has not explained how the elements of section 27 are satisfied. For the alleged conduct to violate section 27, it would have had to (a) actually obstruct the conduct of the By-election, not merely make it harder for an elector to vote; and (b) be done with the specific intent of obstructing the conduct of the By-election.

[66] The first element is not satisfied because, even if Respondent Charlie intentionally failed to deliver the Applicant's Mail-in Ballot Package, Respondent Charlie was under no legal obligation to make such a delivery. Respondent Charlie had a legal obligation under subsection 17(2) of the *FNER*, to deliver ballots to Norman Gerow, Bob Garcia, and Juanita Symington,

which he fulfilled. As part of the Delivery and Collection Arrangement, Respondent Charlie only ever acted under subsection 17(2). As confirmed by Respondent Suhr, at no point was Respondent Charlie acting as an EO or a Deputy Electoral Officer. There is no evidence to indicate otherwise. Respondent Charlie was not obligated to bring the Applicant a Mail-in Ballot Package under subsection 17(2) because the Applicant did not arrange with Respondent Charlie to deliver his ballot. Additionally, Respondent Charlie's alleged failure to bring the Applicant his Mail-in Ballot Package did not obstruct the conduct of the By-election because the Applicant had other means of voting in the By-election. An inconvenience does not amount to obstruction.

[67] The second element is not satisfied because Respondent Charlie did not intentionally fail to deliver the ballot or obstruct the By-election. On the contrary, Respondent Charlie contacted the Applicant when he learned that Ron had the Applicant's ballot. The Applicant made no arrangements to get the ballot or, alternatively, failed to appear at the scheduled meeting place.

[68] Even if Respondent Charlie did obstruct the conduct of the By-election by failing to deliver a Mail-in Ballot Package to the Applicant, that breach did not likely affect the result of the By-election. The Applicant remained able to vote. The Applicant was unable to vote because of his own inaction. Various examples from the record illustrate that the Applicant made no plans to obtain his ballot and instead, relied on others. He also decided not to vote in-person despite his mother driving from his town to Burns Lake for the By-election.

B. *If there was a contravention that likely affected the election result, should the Court exercise its discretion to set aside the By-election?*

(1) Applicant's Position

[69] The Applicant submits that this Court should exercise its discretion to set aside the By-election because the unlawful compression of the election timeline increased the likelihood that the electorate of Burns Lake would be denied their right to vote. Declining to set aside the By-election would set a poor precedent for future First Nation elections involving off-reserve electors. The Supreme Court of Canada has denounced discriminatory treatment of off-reserve members in election matters (*Corbiere v Canada (Minister of Indian and Northern Affairs)*, [1999] 2 SCR 203, 173 DLR (4th) 1 [*Corbiere*]). Furthermore, setting aside the By-election would deter last minute schemes and send a strong message that they are no substitute for a properly organized election.

(2) Respondent Suhr's Position

[70] The Applicant has failed to establish contraventions that likely affected the result of the By-election. If this Court finds otherwise, the Court should still decline to exercise its discretion to set aside the By-election.

[71] Setting aside an election is extreme and a court should not do so lightly. The alleged contraventions are administrative mistakes made in good faith (as opposed to fraud or corruption) and do not merit the setting aside of the By-election. Doing so would disenfranchise every elector who voted in the By-election and plunge Burns Lake into its third election since November 2020. This would erode public confidence in the finality and legitimacy of the electoral process within a Nation that has already faced significant electoral turmoil in recent years, at great cost (*O'Soup v Montana*, 2019 SKQB 185 at paras 122-125 [*O'Soup*].

(3) Respondent Charlie's Position

[72] Respondent Charlie's submissions on this issue are similar to Respondent Suhr's. Respondent Charlie adds that by the time this judgment is released, he will likely only have two more years left to serve as Chief. Furthermore, Respondent Charlie urges the Court to consider that the Applicant has really brought this application as a form of political reprisal.

VI. Analysis

A. *Was there a contravention of the FNEA Regime that likely affected the result of the By-election?*

[73] In *Bird v Paul First Nation*, 2020 FC 475 [*Bird*], Justice McVeigh summarized some of the key principles applicable under the FNEA Regime:

> [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. Annulling 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 [FNEA] or [FNER] 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).
>
> [Emphasis in original.]

[74] In the present case, the parties disagree on who bears the burden of proof in a contested election proceeding. The Applicant submits that, once he establishes a *prima facie* contravention,

the onus switches to the Respondents. The Respondents, on the other hand, submit that the Applicant bears the onus throughout.

[75] In *Johnstone v Mistawasis Nehiyawak First Nation*, 2022 FC 492 [*Johnstone*], I stated the following:

> [32] Section 31 of the FNEA requires that, on the balance of probabilities, an applicant establishes a prima facie case that (1) a "contravention of a provision of [the] Act or the regulations" occurred and (2) that this contravention "is likely to have affected the result" of the election. If an applicant establishes a prima facie case, the responding party "runs the risk of having their votes set aside, unless he or she can adduce or point to evidence from which it may reasonably be inferred that no [contravention] occurred, or that despite the [contravention], the votes in question were nevertheless valid" (*McNabb v Cyr*, 2017 SKCA 27 at para 23 [*McNabb*], citing *Opitz v Wrzesnewskyj*, 2012 SCC 55 [*Opitz*]. See also *O'Soup v Montana*, 2019 SKQB 185 at paras 29-30 [*O'Soup*]; Good at para 52).
>
> [33] The Court in *McNabb* also stated that the "presumption of regularity is reflected in the onus and evidentiary burden imposed on an applicant to demonstrate that a contravention that likely affected the result of an election has occurred" (at para 26).
>
> [Emphasis added.]

[76] In short, an applicant must establish a *prima facie* case that a contravention occurred and that the contravention likely affected an election. If a respondent does not respond with sufficient evidence, it runs the risk of having the election overturned.

[77] The Applicant has not framed any of his allegations in terms of fraud or corruption. In my view, the violations pointed out by the Applicant are all technical or procedural in nature. Therefore, the reverse magic number test is appropriate in the circumstances. Under that test,

"[t]he election should be annulled when the number of rejected votes is equal to or greater than the successful candidate's margin of victory" (*Opitz v Wrzesnewskyj*, 2012 SCC 55 at para 73 [*Opitz*]). The parties agree that in this case, the magic number is one.

[78] The Applicant submits that the totality of the alleged violations likely affected the outcome of the By-election. I agree with the Respondents that the Applicant must demonstrate that each technical allegation impugned a vote and that in total, there are enough impugned votes to likely affect the result of the By-election (*Bird* at para 118; *McNab SKQB* at para 41; *Johnstone* at para 81). In my view, absent an allegation of fraud or corruption, the Court may not look to the conduct of the election as a whole and decide to set aside the election. There must be a causal connection between an impugned vote and a technical violation.

(1) Compressing the By-election timeline

[79] The Respondents concede that Respondent Suhr contravened sections 5(1), 7(1), 14, and 16 of the *FNER* by inadvertently compressing the By-election timeline. I agree with the Respondent that the Applicant has not tendered persuasive evidence that this mistake likely affected the outcome of the By-election.

[80] At least two electors (Jason Delisle and Lynda Gerow) deposed that they did not return their completed Mail-in Ballot Package because they felt it would not reach Respondent Suhr's PO Box prior to the By-election. If the election timeline was lengthened by one day, it is possible that those electors would have returned their ballots. It is less likely, but still possible, that those ballots would arrive before the By-election. Ultimately, however, this reasoning is speculative.

The Court requires "persuasive" evidence to conclude that a contravention likely affected the result of the By-election (*Paquachan v Louison*, 2017 SKQB 239 at para 24 [*Paquachan*]; *O'Soup* at para 117). I am not satisfied that the Applicant has discharged his burden.

(2) Providing the incorrect date on the Notice of Nomination Materials

[81] In my view, failing to include the correct date in the Notice of Nomination Materials is a *prima facie* violation of paragraph 5(2)(e) of the *FNER*. I find it immaterial that all communications included the correct numerical date of April 14, 2021. The confusion stemmed from the inclusion of the words "Wednesday" and "Thursday" before the numerical date. Furthermore, I am not persuaded by the Respondent's submission that there was no contravention because subsequent By-election materials, such as the Mail-in Ballot Packages, included the correct date of the By-election. These materials only reached some electors. In my opinion, Respondent Suhr should have worked with Burns Lake to correct this mistake.

[82] With that said, the Applicant has not established that this contravention likely affected the outcome of the By-election. The affidavits of Lynda Gerow and Brian Favelle confirm that the incorrect date was communicated to them. Mr. Favelle further states that there was "confusion over what date was the actual election date." However, no affiant has stated that they were ultimately unaware of the date of the By-election or that this mistake affected their ability to vote in the By-election.

(3) Failing to post the Notice of Election

[83] I do not find a violation of section 14 of the *FNER*. The onus rests with the Applicant to establish contraventions of the FNEA Regime. The Applicant has not provided any evidence to substantiate his claim that Respondent Suhr failed to post a Notice of the Election in at least one conspicuous place on the reserve. I agree with the Respondents that absent any evidence to the contrary, this Court must presume that Respondent Suhr complied with her obligations under the FNEA Regime (*McNabb v Cyr*, 2017 SKCA 27 at paras 25-26 [*McNabb SKCA*]; *Paquachan* at para 21; *O'Soup* at para 33). Furthermore, I accept Respondent Charlie's uncontradicted evidence that he saw a Notice of Election outside the Band Office on March 10, 2021.

(4) Failing to ensure receipt of Urgent Mail-in Ballots

[84] I do not agree with the Applicant's interpretation of subsection 16(2) of the *FNER*. The principled approach to statutory interpretation requires that the words of subsection 16(2) be read in their "entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament" (*Rizzo & Rizzo Shoes Ltd (Re)*, [1998] 1 SCR 27 at para 21, 154 DLR (4th) 193). When subsection 16(2) is read in light of subsection 16(1), it is clear that the legislature intended to give electors the chance to vote even when they have failed to request their mail-in ballots within the 30 day timeline prescribed by subsection 16(1) (*Paquachan* at para 93). I accept the Applicant's position that this intention is consistent with *Charter* principles and the fundamental importance of the right to vote that belongs to First Nation peoples, including off-reserve Band members (*McNab SKQB* at paras 22-25; *Corbiere* at para 17). However, notwithstanding this intention, I do not accept that subsection 16(2) goes so far as to impose a positive obligation on EOs to ensure electors receive Mail-in Ballot Packages by a certain time.

[85] The structure of subsection 16(2) indicates that the words “as soon as feasible” apply to the action of mailing or delivering a Mail-in Ballot Package. Contrary to the Applicant’s submission, there is no way to read this sentence such that the words “as soon as feasible” describe the timing of when a Mail-in Ballot Package is received. I similarly do not find that the FNEA Regime imposes an obligation on an EO to use expedited or registered mail for urgent mail-in ballot requests. The Applicant has not provided an authority to support this interpretation. In my view, the word “mail”, in its ordinary sense, refers to regular postal service. I agree with the Respondents that to find otherwise would impermissibly broaden an EO’s statutory obligations.

[86] This is not to say that an EO should or cannot use expedited mail when electors request it. Indeed, in many circumstances it may be prudent for an EO to use expedited mail for urgent Mail-in Ballot Packages. I note that Respondent Suhr sent a Mail-in Ballot Package by Xpresspost to Mr. Delisle after he requested that she use overnight shipping. In comparison, Ms. Gerow never requested that Respondent Suhr send her package by Xpresspost. Ultimately, I find that Respondent Suhr’s failure to send Lynda Gerow, or any other elector, a Mail-in Ballot Package by Xpresspost is not a contravention of subsection 16(2).

[87] Similarly, I do not agree that Respondent Suhr refused to provide urgent ballots to the Applicant, Mr. Favelle, Mr. Holland, or Mr. Delisle. The evidence establishes that Respondent Suhr tried to send the Applicant a Mail-in Ballot Package twice. Both times, Canada Post returned the packages to Respondent Suhr because the address did not exist. Having reviewed the Applicant’s Request for a Mail-in Ballot Form, I accept Respondent Suhr’s position that she

included the wrong address because the Applicant failed to spell and write his address legibly. I note that Respondent Suhr could have referenced the Voter's List to confirm she addressed the second package properly. However, it appears that the Applicant's address was also misspelled on the Voter's List. The Applicant's street name on the Voter's List was misspelled as "Mable" instead of "Mabel." I find that Respondent Suhr made reasonable efforts to send the Applicant an urgent Mail-in Ballot Package "as soon as feasible."

[88] I also accept Respondent Suhr's evidence that Mr. Holland never submitted a Mail-in Ballot Request Form. On April 7, 2021, Mr. Holland's mother, Jean Sam, called Respondent Suhr to request a Mail-in Ballot Package for her son. Ms. Sam deposes that Respondent Suhr told her that a Mail-in Ballot Package had been sent to Mr. Holland and that she could not provide further assistance. Respondent Suhr states that Ms. Sam misunderstood her. Respondent Suhr deposes that she told Ms. Sam that she could not send Mr. Holland a Mail-in Ballot Package until she received his Mail-in Ballot Request Form. As noted by the Applicant, Mr. Holland's name does not appear on Respondent Suhr's Mail-in Ballot List. This indicates that Mr. Holland never submitted a Mail-in Ballot Request Form. Absent a written request from Mr. Holland with proof of identification, Respondent Suhr was not permitted to mail Mr. Holland's Mail-in Ballot Package or "deliver" it "at an agreed time and place" in Prince George.

[89] Finally, I agree with the Respondents that Respondent Suhr sent Mail-in Ballot Packages to Mr. Favelle and Mr. Delisle "as soon as feasible" upon receipt of their completed Mail-in Ballot Request Forms.

[90] The Voter's List provided by the Band detailed Mr. Favelle's address incorrectly as "210 Nikola Road." His correct address is "120 Nikola Road." Respondent Suhr recorded the incorrect address in her Notice of Nomination Spreadsheet. I accept that Respondent Suhr sent Mr. Favelle's Notice of Nomination Materials (including his Mail-in Ballot Request Form) to the wrong address. However, the Applicant has not adequately explained how this error itself amounts to a contravention of the FNEA Regime. Under subsections 4(1) and 5(1) of the *FNER*, it is the Band's responsibility to provide EOs with up to date contact information.

[91] Respondent Suhr deposes that on or before March 25, 2021, Mr. Favelle's Notice of Nomination Materials were "returned to sender." The Applicant submits that Respondent Suhr most likely received the returned Notice of Nomination Materials well before March 25, 2021. He points to the fact that other returned mail was sent back to Respondent Suhr within three to ten days after they were sent. Again, the Applicant has not connected this alleged contravention to a specific provision within the FNEA Regime. Furthermore, it would be speculative to find that Respondent Suhr ignored returned mail without further evidence.

[92] On March 25, 2021, Respondent Suhr called Mr. Favelle to clarify his address. She updated her Mail-in Ballot List with his correct address. She did not update her Notice of Nomination Spreadsheet or the Voter's List provided by the Band. Mr. Favelle sent Respondent Suhr a completed Mail-in Ballot Request Form that day. The next day, Respondent Suhr sent Mr. Favelle a Mail-in Ballot Package. Mr. Favelle deposes that he never received that Mail-in Ballot Package. Again, the Applicant asks this Court to speculate that Respondent Suhr sent Mr. Favelle's Mail-in Ballot Package to the wrong address a second time because Respondent Suhr

did not update the Notice of Nomination Spreadsheet or the Voter's List with Mr. Favelle's correct address. In my view, there is insufficient evidence for this Court to make that inference. It is just as likely that Mr. Favelle's second Mail-in Ballot Package was lost in the mail. Respondent Suhr's Mail-in Ballot List reflects the correct address. Ultimately, Respondent Suhr sent Mr. Favelle's Mail-in Ballot Package the day after he made a written request. I am satisfied that she complied with her statutory obligations under subsection 16(2) of the *FNER*.

[93] The parties disagree about whether Respondent Suhr ever tried to send Mr. Delisle his Notice of Nomination Materials. The documentary evidence indicates that the Band never gave Respondent Suhr a postal address for Mr. Delisle. However, the Applicant points out that an incorrect address is listed beside Mr. Delisle's name in the Notice of Nomination Spreadsheet and that according to the Notice of Nomination Spreadsheet, he was sent Notice of Nomination Materials on February 13, 2021. This submission has no merit. Even if Respondent Suhr sent Notice of Nomination Materials to that address, the Applicant has failed to identify a specific provision of the FNEA Regime that has been violated. More importantly, it would make no difference – this would not have enabled Mr. Delisle to vote. I again emphasize that under subsections 4(1) and 5(1) of the *FNER*, it is the Band's responsibility to provide EOs with up to date contact information.

[94] Respondent Suhr first heard from Mr. Delisle on April 5, 2021. He submitted his completed Mail-in Ballot Request Form to Respondent Suhr on April 6, 2021, and she sent his Mail-in Ballot Package to him the next day via Xpresspost. I am satisfied that in the

circumstances, Respondent Suhr sent Mr. Delisle his Mail-in Ballot Request Form as soon as feasible upon receiving his Mail-in Ballot Request Form and correct mailing address.

[95] For all these reasons, I do not find that Respondent Suhr contravened subsection 16(2) of the *FNER*.

(5) Failing to keep Mail-in Ballots safe

[96] The Applicant and Respondent Suhr agree that a Canada Post employee returned the Gerow Package because Respondent Suhr's PO Box was "closed." However, all the evidence on this point is hearsay (the Applicant relies on statements made by a Canada Post employee to Mr. Gerow's wife, and Respondent Suhr relies on statements made by various Canada Post employees). The only reliable evidence comes from Respondent Suhr, who deposes that her PO Box had not, at any point, been closed.

[97] I accept Respondent Suhr's position that the Gerow Package was mistakenly returned by Canada Post after it arrived in Prince George. There is no evidence that the Gerow Package ever reached Respondent Suhr's PO Box. The Applicant has not rebutted the presumption of regularity. I find no breach of subsection 17(4) of the *FNER*.

(6) Delivering Mail-in Ballots through the Delivery and Collection Arrangement

[98] To the extent that the Applicant submits that paragraph 14(b) of the *FNEA* and subsection 16(2) of the *FNER* were violated independent of section 27, I agree.

[99] Paragraph 14(b) prohibits the possession of a ballot not issued to a person unless they are specifically authorized to possess it under the *FNER*. Therefore, the key question under this sub-issue is whether the *FNER* permits an individual, other than the EO, to deliver mail-in ballots to electors. To answer this question, the Court must interpret subsection 16(2) and section 17 of the *FNER*.

[100] I agree with the Applicant that subsection 16(2) only empowers an EO to mail or personally deliver urgent mail-in ballots to electors. The Respondent states that this interpretation is contrary to the purpose of the *FNEA*, which is to provide an alternative electoral process for Indigenous communities in Canada (*Good* at para 47). I take Justice McVeigh's comments in *Good* to mean that the FNEA Regime provides an alternative to elections under the *Indian Act*. I do not agree that interpreting subsection 16(2) in the manner proposed by the Applicant runs contrary to this intention. In fact, in my view, the Applicant's interpretation of subsection 16(2) upholds the intent of the FNEA Regime. The Regulatory Impact Analysis Statement for the *FNER* states that an objective of the FNEA Regime is to decrease the "loose distribution of mail-in ballots" and "fraudulent activities surrounding mail-in ballots" (First Nations Election Regulations: Regulatory Impact Analysis Statement, (2015) C Gaz II, Vol 149, No 8 at 1178, 1185). While the Applicant has not alleged fraudulent activities in the present case, such activities may be one of the unfortunate practical implications of permitting candidates to deliver mail-in ballots to electors.

[101] I similarly disagree with the Respondent that the Applicant's interpretation of subsection 16(2) prohibits the delivery of mail-in ballots by means other than mail. In my view, subsection

16(2) permits personal delivery by the EO. This is expressed through the language, “at an agreed time and place.”

[102] Finally, I am not persuaded by Respondent Charlie’s submission that Parliament chose the words “personally deliver” to signal its intention that only enumerated individuals may make the delivery in question. Subsection 16(2) states: “[i]f an elector makes a written request for a mail-in ballot six or more days before the day on which the election is to be held, the electoral officer must mail, or deliver at an agreed time and place, a mail-in ballot package to the elector as soon as feasible after receipt of the request.” In my view, subsection 16(2) is unequivocal in that the only person who may facilitate the delivery of an urgent mail-in ballot is an EO. Ultimately, the legislature would not have used the words “electoral officer” if the legislature thought it permissible for any other person to carry out the responsibilities under subsection 16(2).

[103] In my view, the use of the term “personally” indicates that the delivery must occur in-person rather than by other means, such as mail. This interpretation is supported by various provisions cited by Respondent Charlie, which differentiate between delivering a notice “personally or by sending it by mail, fax or e-mail” (*First Nations Assessment Inspection Regulations*, SOR/2007-242, s 7(1); *First Nations Tax Commission Review Procedures Regulations*, SOR/2007-239, s 4(1)).

[104] Subsection 17(1) of the *FNEA* sets out the comprehensive method by which an elector votes by mail-in ballot. The permissive language “may” is used because an elector may vote by

mail-in ballot, in person on the day of the election, or in person at advanced polls. Paragraph 17(1)(f) clearly contemplates the return of a completed mail-in ballot from the elector to the EO or deputy EO. Accordingly, subsection 17(2) only permits an elector to enlist the help of "another person" when returning their completed mail-in ballot. For the reasons already discussed above, I do not agree with the Respondent Charlie that this interpretation defies the purpose of the FNEA Regime. On the contrary, ensuring that an EO controls the issuance of mail-in ballots increases the integrity of the election process and limits the "loose distribution of mail-in ballots."

[105] Respondent Suhr analogizes the Delivery and Collection Arrangement to the situation in *Good*, where this Court found that "walking in" ballots did not, in and of itself, amount to a breach of the FNEA Regime (at para 195). The foregoing analysis is consistent with this Court's finding in *Good*. In *Good*, the ballots being "walked-in" were sent to electors by the EO after electors completed a Mail-in Ballot Request Form (at paras 168-170). *Good* is also distinguishable from the present case because in *Good*, the applicant alleged that "walking in" ballots was an issue of fraud rather than a violation of paragraph 14(b) and subsection 16(2) (at para 168).

[106] For these reasons, I find that the delivery component of the Delivery and Collection Arrangement violated paragraph 14(b) of the *FNEA* and subsection 16(2) of the *FNER*. I do not find that section 17 of the *FNER* can be interpreted as permitting these contraventions. Accordingly, I agree with the Applicant that the votes of Norman Gerow, Bob Garcia, and Juanita Symington are invalid. The difference of three votes is likely to have affected the

outcome of the By-election because the difference between Respondent Charlie and the runner-up was only one vote.

(7) Intentional Obstruction of the By-election

[107] Having found that paragraph 14(b) and subsection 16(2) of the *FNER* were violated, it is unnecessary to analyze whether the Respondents intentionally obstructed the By-election under section 27 of the *FNEA*.

B. *Should the Court exercise its discretion to set aside the By-election?*

[108] Subsection 35(1) of the *FNEA* states:

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

[109] The discretion of this Court comes from the use of the permissive word "may" (*McNabb SKCA* at para 45; *Paquachan* at para 25). However, the Court's discretion is limited under the magic number test because "the application of the magic number test is purely arithmetic and admits of only one correct answer. Based on the evidence and the math, the winner either is or is not in doubt" (*McNabb SKCA* at para 48). Likewise, in *Opitz*, the majority of the Supreme Court said, "[i]f a court is satisfied that, because of the rejection of certain votes, the winner is in doubt, it would be unreasonable for the court not to annul the election" (at para 23). In this case, the winner is in doubt because there were three unlawful votes.

[110] I agree with the Respondents that courts should solemnly overturn First Nation elections. I acknowledge that, in comparison to past elections, the By-election had a low voter turn out. I also acknowledge that a third election for Chief may further erode public confidence in the finality and legitimacy of Burns Lake politics. With that said, the record before the Court indicates that many members of Burns Lake (including Respondent Charlie) felt that the By-election was fundamentally flawed. Others, including Ms. Lorentz and former Chief Gerow, asked ISC to extend the election by two weeks. In my opinion, there is a risk of diminishing public confidence in the electoral process if this Court declines to set the By-election aside.

[111] As a community with many off-reserve voters, Burns Lake faces unique challenges associated with mail-in ballots. To promote confidence in its electoral process, it is incumbent on Band leadership to work with the EO to verify that members' contact information is up to date; for electors to promptly request mail-in ballots; and ensure that timelines, in accordance with the FNEA Regime, are sufficient to address all election matters.

VII. Conclusion

[112] For all of these reasons, I am allowing the application, setting aside the results of the By-election, and ordering that a new election take place.

[113] The Applicant seeks an Order for costs in any event of the cause at Tariff B pursuant to Rule 400 of the *Federal Court Rules*, SOR/98-106. Alternatively, if the Respondents are drawing from Burns Lake funds, the Applicant seeks full indemnification for his costs.

[114] Respondent Charlie seeks costs payable in accordance with Tariff B. Respondent Suhr seeks the opportunity to make submissions on costs after the reasons for this decision are issued.

[115] I agree with Respondent Suhr that it is preferable to allow the parties to make further submissions, taking the outcome of the application into account (*Bertrand v Acho Dene Koe First Nation*, 2021 FC 287 at para 104).

JUDGMENT in T-821-21

THIS COURT'S JUDGMENT is that:

1. The application contesting the Burns Lake By-election is allowed.
2. Pursuant to subsection 35(1) of the *FNEA*, the Court orders that a new election take place in accordance with the provisions of the FNEA Regime.
3. The parties will file their costs submissions within 30 days of this Order.

"Paul Favel"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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