

Federal Court



Cour fédérale

**Date: 20230126**

**Docket: T-1135-21**

**Citation: 2023 FC 124**

**Ottawa, Ontario, January 26, 2023**

**PRESENT: Madam Justice McDonald**

**BETWEEN:**

**KATHY MASUSKAPOE**

**Applicant**

**and**

**AHTAHKAKOOP CREE NATION,  
LARRY AHENAKEW,  
BEN AHENAKEW, LANNY SCOTT AHENAKEW,  
RUSSELL AHENAKEW, DEAN GENEREAUX,  
JAMES ISBISTER, PAT ISBISTER, DAVID MASUSKAPOE,  
CHAD PEEKEEKOOT, RODNEY SASKAMOOSE,  
STANLEY SASKAMOOSE, EVAN WILLIAMS,  
CINDY WILLIAMS-JOHNSTONE,  
BURKE RATTE**

**Respondents**

**JUDGMENT AND REASONS**

[1] This Application challenges the June 18, 2021 election [Election] results for a Councillor position at Ahtahkakoop Cree Nation [ACN] pursuant to section 31 of the *First Nations*

*Elections Act*, SC 2014, c 5 [*FNEA*]. The Applicant, Kathy Masuskapoe, claims issues with the mail-in ballots impacted the Election results.

[2] The Applicant was an unsuccessful candidate for Chief in the Election, but the issue she raises in this Application is the election of a Councillor. The Election results for the Chief are not contested.

[3] The Respondents are ACN, the elected ACN Chief and Councillors [collectively, the ACN Respondents], and the Chief Electoral Officer [CEO], Burke Ratte.

[4] For the reasons that follow, this Application is dismissed, as the evidence does not conclusively establish any breach of the *FNEA* or any breach that would have materially impacted the results of the Election based upon the magic number test from *Opitz v Wrzesnewskyj*, 2012 SCC 55 [*Opitz*].

## I. Background

[5] ACN is located in north-central Saskatchewan and as of April 2021, had over 2,600 eligible voters. An election was called for June 18, 2021. ACN elections are governed by the *FNEA*, which allows off-reserve voters to vote by mail-in ballot.

[6] In oral submissions, legal counsel for the Applicant confirmed the mail-in ballot procedures are the focus of this Application. Specifically on this issue, the Applicant alleges a number of ACN electors who requested mail-in ballots either did not receive them, or did not

receive them in a timely enough manner to allow them to cast their vote in the Election. Counsel for the Applicant also confirmed in oral submissions that in accordance with recent jurisprudence of this Court, the argument relating to the ACN's failure to provide electors' email addresses was no longer being pursued. However, I have briefly addressed this argument in these Reasons.

[7] The CEO, the Respondent Ratte, obtained the ACN electoral lists from Indigenous Services Canada. According to the ACN electoral lists, there were 2,641 eligible electors registered to vote. The electoral lists provided the last known mailing address for each of the registered voters, but did not include email addresses. Nomination packages, which included the Request for Mail-in Ballot form, were sent by mail to each eligible elector for whom the CEO had a current mailing address (2428 electors) on April 19, 2021. Forty-six packages were returned as undeliverable. A further 41 packages were sent after the initial mail out, as additional mailing addresses were received by the CEO.

[8] The evidence of Respondent Ratte was that 107 requests for mail-in ballots were received and accepted. Twelve requests were rejected for non-compliance with the *FNEA* or *First Nations Elections Regulations, SOR/2015-86 [Regulations]*. Sixty mail-in ballots were successfully returned. Three ballots were rejected for non-compliance with the *FNEA* or *Regulations*.

[9] In addition to the mail-in ballots, in-person voting took place on four occasions, and advanced polls were held in Prince Albert, Saskatoon, and North Battleford. The main polling station was on the ACN reserve on June 18, 2021.

[10] The Election for the twelfth seat on ACN Council was decided by four votes.

Dean Genereaux was declared the winner with 198 votes. The next two candidates finished with 194 votes each.

## II. Issues

[11] The following issues are determinative of this Application:

- A. Applicable law.
- B. Has the applicant established consequential contraventions with mail-in ballots?
- C. Was there a failure to send the nomination packages by email?

## III. Analysis

### A. *Applicable Law*

[12] The relevant sections of the *FNEA* and *Regulations* are included in the Appendix.

[13] Section 31 of the *FNEA* requires the applicant to establish: (1) a contravention of a provision of the *FNEA* or the *Regulations* occurred; and (2) the contravention is likely to have affected the election results. This test was recently affirmed in *Johnstone v Mistawasis Nèhiyawak First Nation*, 2022 FC 492 [*Johnstone*] (at para 32).

[14] The first part of the test, being a contravention of the *FNEA* or *Regulations*, is a lower threshold than in the *Canada Elections Act*, SC 2000, c 9, and there is no need to demonstrate fraud, malice, corruption, or illegality, only that a contravention occurred (*Johnstone* at para 34).

[15] On the second prong of the test, the parties agree the ‘magic number’ test applies. The Supreme Court articulated the ‘magic number’ test in *Opitz* as follows: “[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” (at para 73). The ‘magic number’ test was recently affirmed by this Court in *Johnstone* at paragraph 83 and *Whitford v Red Pheasant First Nation*, 2022 FC 436 at paragraph 10 [*Whitford*].

[16] The parties agree the ‘magic number’ in this Application is four.

[17] Finally, as confirmed in *Whitford*, the Applicant has the burden of establishing, on a balance of probabilities, that a contravention of the *FNEA* or *Regulations* has occurred that is likely to have affected the election results (at para 75).

B. *Has the Applicant Established Consequential Contraventions with Mail-In Ballots?*

[18] The Applicant alleges the mail-in ballots were not mailed “as soon as feasible after receipt of the request” as required by subsection 16(2) of the *Regulations* which states:

If an elector makes a written request for a mail-in ballot six or more days before the day on which the election is to be held, the electoral officer must	Si l’électeur soumet une demande écrite de bulletin de vote postal six jours ou plus avant la date de l’élection, le président d’élection lui envoie
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mail, or deliver at an agreed time and place, a mail-in ballot package to the elector as soon as feasible after receipt of the request.

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

[19] Given that the Election was scheduled for June 18, 2021, the deadline to request a mail-in ballot was June 12, 2021 (six days prior). There is no definition for “as soon as feasible” in the *Regulations*. The Applicant submits “as soon as feasible” must be interpreted in a manner that best facilitates the voting rights of ACN members.

[20] The Applicant alleges several mail-in ballot packages were not provided as soon as feasible and she claims this delay impacted the following voters: Laurie Lewis, Logan Waughtal, Sharon Waughtal, Darlene Masuskapoe, and Glen Ahenakew.

[21] The Applicant filed Affidavits from four members of ACN on the mail-in ballots issue.

[22] Laurie Lewis states in her Affidavit sworn August 16, 2021, that she requested a mail-in ballot on June 9, 2021, but never received a ballot.

[23] In his Affidavit sworn August 16, 2021, Logan Waughtal states he received a mail-in ballot on June 17, 2021, and mailed the ballot back the same day.

[24] In the Affidavit of Sharon Waughtal (Masuskapoe), sworn August 16, 2021, Sharon Waughtal states she requested a mail-in ballot on May 14, 2021, but there was some

confusion regarding her address and proof of identity. She states she received a ballot on June 17, 2021, and mailed it back the same day.

[25] Glen Ahenakew states in his Affidavit sworn August 24, 2021, that he requested a mail-in ballot sometime in June. He attests he received the ballot and sent it back, but no dates were provided.

[26] In response to these allegations, the Respondent Ratte provided the following evidence via his Affidavit sworn January 14, 2022, and by undertakings arising from the cross-examination on his Affidavit:

- a) Laurie Lewis – He confirms a completed request for a mail-in ballot was received on June 12, 2021, and a mail-in package was sent to Ms. Lewis on or about June 12, 2021. No mail-in ballot was received back from Ms. Lewis.
- b) Logan Waughtal – He confirms a completed request for a mail-in ballot was received on June 2, 2021, and a mail-in package was sent on or about June 8, 2021.
- c) Sharon Waughtal – He confirms a completed request for a mail-in ballot was received on June 2, 2021, and a mail-in package was sent on or about June 8, 2021.
- d) Darlene Masuskapoe – He confirms a completed request for a mail-in ballot was received on June 2, 2021, and a mail-in package was sent on or about June 8, 2021.

- e) Glen Ahenakew – He confirms a completed request for a mail-in ballot was received on June 12, 2021 and a mail-in package was sent on or about June 13, 2021. No mail-in ballot was received back from Mr. Ahenakew.

[27] The Respondent Ratte submits mail-in ballots were sent to Logan Waughtal, Sharon Waughtal, and Darlene Masuskapoe 10 days prior to the Election. The request for mail-in ballots for Laurie Lewis and Glen Ahenakew were received on the last possible day to request a mail-in ballot, and were sent either the same day or the next day. The Respondent Ratte also confirmed that no mail-in ballots were received after the close of polls on June 18, 2021.

[28] In response to the allegations, the ACN Respondents submit as follows:

- a) Laurie Lewis – The ballot was sent to Ms. Lewis’ last known address. Although Ms. Lewis claims an email was sent to the CEO with her updated mailing address, she did not provide a copy of this email as an Exhibit to her Affidavit as evidence. The ACN Respondents submit that without evidence of this email, no finding of fact can be made that a breach of the *FNEA* occurred in relation to Ms. Lewis.
- b) Logan Waughtal – Mr. Waughtal requested, received, and returned a mail-in ballot. Therefore there is no evidence of a breach of the *FNEA* in this Affidavit.
- c) Sharon Waughtal – Once the issues surrounding identification were resolved, Ms. Waughtal was sent a mail-in ballot the same day. There is no evidence of a breach of the *FNEA* in this Affidavit.



- d) Glen Ahenakew – There is little detail about Mr. Ahenakew’s mail-in ballot request, but the ACN Respondents submit that emailing the mail-in ballot is not an acceptable manner for casting a vote under the *FNEA*.

[29] Overall, the ACN Respondents argue the Affidavit evidence relied upon by the Applicant fails to establish a contravention of the *FNEA*. In any event, the ACN Respondents argue the ‘magic number test’ has not been met, even if Laurie Lewis and Glen Ahenakew were not able to vote as a result of contraventions of the *FNEA*.

[30] The ACN Respondents argue the Applicant’s evidence is speculative, largely based on hearsay evidence, and should not be given any weight. They highlight the Applicant’s own Affidavit, sworn August 20, 2021, where she makes allegations that unnamed ACN members were not able to vote in the Election. However, on cross-examination she was unable to provide specifics for these allegations, such as the identities of these electors or how she came to learn of their alleged inability to vote.

[31] Furthermore, on cross-examination, the Applicant admitted she was not personally aware of anyone who requested a mail-in ballot and did not receive one. She was also not able to provide the names of any ACN electors who believed their vote was not counted in the Election.

[32] I agree with the Respondents that the Applicant’s own evidence on the mail-in ballots is largely speculative and, accordingly, is not being given any weight in support of the allegations made regarding mail-in ballots.

[33] There is evidence that each of the five challenged mail-in ballots were sent by the CEO to the voter. Mail-in ballots were sent to Logan Waughtal, Sharon Waughtal, and Darlene Masuskapoe 10 days prior to the Election, and mail-in ballots were sent to Laurie Lewis and Glen Ahenakew within a day of receipt of the request. This evidence establishes the requests were responded to in a reasonable timeframe and “as soon as feasible”.

[34] Further, the CEO’s evidence is there were no mail-in ballots received after the close of polls on June 18, 2021. This leads to the inevitable conclusion—there were no mail-in ballots sent by ACN voters that were not counted. It therefore cannot be said that mail-in electors were denied the right to vote as a result of when their mail-in ballot packages were received.

[35] The obligations of a CEO under subsection 16(2) were recently considered in *Lorentz v Suhr*, 2022 FC 1138 [*Lorentz*] where Justice Favel held, at paragraphs 84 and 85:

... 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.

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. [Emphasis in original]

[36] In my view, *Lorentz* is a full answer to the Applicant's allegations. There is no evidence the mail-in ballots were not sent as soon as feasibly possible, as required by the *Regulations*. Likewise, there is no evidence the 'magic number' test of four can be met in these circumstances such that any contravention of the *Regulations* would have affected the Election results.

C. *Was There a Failure to Send the Nomination Packages by Email?*

[37] The Applicant submits ACN breached subsection 4(1) of the *Regulations* when they failed to provide the CEO with the email addresses for all electors and the Respondent Ratte further breached subsection 5(1) of the *Regulations* when he did not send the nomination packages by email.

[38] The Applicant submits subsection 4(1) of the *Regulations* required ACN to provide the CEO with "the last known postal address and email address of each elector who does not reside on the reserve" [emphasis added]. The Applicant further submits that subsection 5(1) required the CEO, at least 25 days before the Election, to "send by mail and email a notice of the nomination meeting, a voter declaration form and a form on which the elector may request a mail-in ballot to the addresses provided under subsection 4(1)" [emphasis added]. The Applicant alleges that had the nomination packages been sent by email, there would have been far fewer packages returned by mail as undeliverable.

[39] The Respondents submit the *Regulations* require the last known mailing and email addresses of voters. The Respondents submit there is no evidence ACN knew the email addresses of electors and purposefully withheld them. The Applicant has not provided any

evidence that ACN has a list of last known email addresses for the registered voters.

Additionally, there is no evidence from any electors who did not receive a package in the mail but have a current email address with ACN.

[40] In his Affidavit, the Respondent Ratte states the information he received from ACN did not include a list of email addresses. The Ratte Affidavit further states the CEO sent nomination packages to the mail addresses provided to him under subsection 4(1) of the *Regulations*.

[41] This issue was addressed in *Johnstone*, where the mail-in ballot procedure was alleged to have been breached in the same manner as in this Application. Justice Favel held:

[95] Under section 4 of the *FNER*, the First Nation is responsible for giving the EO electors' "last known" mailing and email addresses. In this case, Mistawasis failed to give the EO any email addresses. If a First Nation fails to provide emails, there is nothing more for an EO to do. Once Mistawasis provided the information it had, the EO was under no obligation to request additional information related to the off-reserve electorate. I agree with the Respondents that there is no evidence in the record that Mistawasis had electors' email addresses. I find that there is no *prima facie* contravention on this ground. Therefore, I need not consider whether the results of the Election were likely affected.

[42] In the circumstances, the Applicant has not established a breach of the *Regulations* in failing to provide the email addresses for the electorate. There is no evidence ACN was in possession of voter email addresses. The *Regulations* require provision of the last known contact information, and for voters to be provided the nomination packages at their last known address.

IV. Conclusion

[43] This Application is dismissed. The evidence does not support any of the allegations of contravention of the *FNEA* or *Regulations*. The five requests for mail-in ballots relied upon by the Applicant to argue that the ballots were not sent “as soon as feasible after receipt of the request” are simply not supported by the evidence. The evidence is that the requests were dealt with within a reasonable timeframe. In any event, there is insufficient evidence to meet the ‘magic number test’.

[44] Finally, the allegation of a failure to provide the nomination packages by email is without merit, as there is no evidence ACN had email addresses for eligible electors.

**JUDGMENT in T-1135-21**

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

1. This Application for judicial review is dismissed; and
2. The Respondents are entitled to their costs.

"Ann Marie McDonald"

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Judge

V. Appendix*First Nations Elections Act, SC 2014, c 5*

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

31 Tout électeur d'une première nation participante peut, par requête, contester devant le tribunal compétent l'élection du chef ou d'un conseiller de cette première nation pour le motif qu'une contravention à l'une des dispositions de la présente loi ou des règlements a vraisemblablement influé sur le résultat de l'élection.

*First Nations Elections Regulations, SOR/2015-86*

4 (1) At least 65 days before the day on which an election is to be held, the First Nation must provide the electoral officer with a list setting out the last known postal address and email address of each elector who does not reside on the reserve.

...

5 (1) At least 25 days before the day on which a nomination meeting is to be held, the electoral officer must  
 (a) post a notice of the nomination meeting and a list of the names of electors in one conspicuous place on the reserve; and  
 (b) send by mail and email a notice of the nomination meeting, a voter declaration form and a form on which the elector may request a mail-in ballot to the addresses

4 (1) Au moins soixante-cinq jours avant l'élection, la première nation fournit au président d'élection les dernières adresses postale et électronique connues de chacun des électeurs qui ne résident pas dans la réserve.

...

5 (1) Au moins vingt-cinq jours avant l'assemblée de mise en candidature, le président d'élection :  
 a) affiche, à un endroit bien en vue dans la réserve, un avis de la tenue de l'assemblée et une liste des électeurs;  
 b) envoie par la poste et par courrier électronique, aux adresses fournies au titre du paragraphe 4(1), un avis de la tenue de l'assemblée de mise en candidature, le formulaire de déclaration d'identité et le formulaire de demande de bulletin de vote postal.

provided under subsection 4(1).

...

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.

16 (1) No later than 30 days before the day on which the election is to be held, the electoral officer must mail to every elector who has made a written request a mail-in ballot package consisting of

- (a) a ballot, initialed on the back by the electoral officer or deputy electoral officer;
- (b) an outer return envelope that is pre-addressed to the electoral officer and, if the elector's address is in Canada, is postage-paid;
- (c) an inner envelope marked "Ballot" for insertion of the completed ballot;
- (d) a voter declaration form;
- (e) instructions regarding voting by mail-in ballot;
- (f) the notice set out in section 14;
- (g) a statement that the elector may vote in person at a polling station on the day of the election, or at an advance polling station if applicable, in lieu of voting by mail-in ballot, if
  - (i) they return the unused mail-in ballot to the electoral officer or deputy electoral officer, or
  - (ii) they provide the electoral officer or deputy electoral officer with a sworn affidavit

...

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.

16 (1) Au plus tard le trentième jour avant l'élection, le président d'élection envoie par la poste à l'électeur qui en a fait la demande écrite une trousse comprenant les éléments suivants :

- a) un bulletin de vote portant au verso les initiales du président d'élection ou du président d'élection adjoint;
- b) une enveloppe-réponse adressée au président d'élection et, si l'adresse de l'électeur se trouve au Canada, affranchie;
- c) une enveloppe intérieure portant la mention « bulletin de vote » dans laquelle doit être inséré le bulletin de vote rempli;
- d) un formulaire de déclaration d'identité;
- e) les instructions relatives au vote par bulletin de vote postal;
- f) l'avis visé à l'article 14;
- g) une mention indiquant que l'électeur peut, au lieu de voter par bulletin de vote postal, voter en personne à un bureau de vote le jour de l'élection ou à un bureau de vote par anticipation, le cas échéant, dans les cas suivants :
  - (i) il retourne son bulletin de vote postal inutilisé au



stating that they have lost their mail-in ballot; and (h) a list of the names of any candidates who were elected by acclamation.

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

...

17 (3) A mail-in ballot is void if the mail-in ballot package is not received by the electoral officer or deputy electoral officer before the time at which the polls close.

président d'élection ou au président d'élection adjoint, (ii) il fournit au président d'élection ou au président d'élection adjoint une déclaration sous serment indiquant qu'il a perdu son bulletin de vote postal; h) le cas échéant, une liste mentionnant le nom des candidats élus par acclamation.

(2) Si l'électeur soumet une demande écrite de bulletin de vote postal six jours ou plus avant la date de l'élection, le président d'élection lui envoie la trousse par la poste ou la lui remet à l'heure et au lieu convenus, et ce, dans les plus brefs délais après la réception de la demande.

...

17 (3) Le bulletin de vote postal est nul si le président d'élection ou le président d'élection adjoint n'a pas reçu la trousse avant la fermeture du scrutin.

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

**DOCKET:** T-1135-21

**STYLE OF CAUSE:** MASUSKAPOE v AHTAHKAKOOP CREE NATION,  
LARRY AHENAKEW, BEN AHENAKEW, LANNY  
SCOTT AHENAKEW, RUSSELL AHENAKEW, DEAN  
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**PLACE OF HEARING:** HELD BY VIDEOCONFERENCE

**DATE OF HEARING:** DECEMBER 6, 2022

**JUDGMENT AND REASONS:** MCDONALD J.

**DATED:** JANUARY 26, 2023

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