Federal Court  Cour fédérale

Date: 20240522

Docket: T-1510-21

Citation: 2024 FC 741

Ottawa, Ontario, May 22, 2024

PRESENT: Mr. Justice Sébastien Grammond

BETWEEN:

VERN ACOOSE

Applicant

and

SAKIMAY FIRST NATIONS ALSO KNOWN AS ZAGIME ANISHINABEK FIRST NATION, ONEFEATHER MOBILE TECHNOLOGIES LTD., LYNN ACOOSE, PAULA ACOOSE, DANA ACOOSE, RACHEL SANGWAIS, AMBER SANGWAIS, CYNTHIA SANGWAIS, RANDALL SPARVIER AND KITTY WHITEHAT

Respondents

JUDGMENT AND REASONS

I. Overview

[1] Vern Acoose was a candidate in the last election for the chief and council of Zagimē Anishinabēk. He challenges the result of the election. He argues that the result of the election was affected by several irregularities. More generally, he states that the manner in which the election was conducted made it more difficult for off-reserve members to vote.

[2] The Court dismisses Vern Acoose's application and declines to set the election aside. Most of the issues he raised do not constitute a breach of the *First Nations Elections Act*. Zagimē's failure to provide the email addresses of off-reserve members to the Electoral Officer constituted a breach, but there is no evidence that it affected the election results. One candidate, Cameron Bernard-Peepeetch, was nominated a few days before he became a member of Zagimē. While this constitutes a breach, it was quickly cured and is not sufficiently serious to warrant setting aside the election.

[3] Many of the irregularities alleged by Vern Acoose find their origin in the fact that Zagimē uses two different membership systems for different purposes. The first is a membership list drawn according to Zagimē's membership code and the second is a registry list prepared by Indigenous Services Canada. Only persons on the membership list are entitled to vote. Such a system is unusual, but it is not unlawful. The evidence, however, shows that it creates confusion. Zagimē may consider whether it wants to change this system. If the system is retained, Zagimē may wish to take proactive measures to ensure that persons on the registry list understand that they can apply to become members.

II. Background

[4] Zagimē Anishinabēk is a First Nation located in southeastern Saskatchewan. It conducts its elections according to the *First Nations Elections Act*, SC 2014, c 5 [the Act]. The 2021 election, which is the subject of this application, is the second one that Zagimē has held under the Act.

A. *Membership in Zagimē Anishinabēk*

[5] The peculiar manner in which Zagimē manages its membership is the backdrop to most of the issues raised in this application. Zagimē uses two lists, a "registry list" and a "membership list." Before going any further, it is necessary to clarify the reason for the existence of these two different lists.

[6] In 2012, Zagimē adopted a membership code pursuant to section 10 of the *Indian Act*, RSC 1985, c I-5. To simplify somewhat, to be entitled to membership in Zagimē, a person must hold Indian status and have at least one parent who is a member of Zagimē. A status Indian who marries a Zagimē member is also entitled to membership. These entitlements, however, do not automatically translate into membership. A person who is entitled must make an application, "in the form prescribed by Council," to Zagimē's membership clerk. Upon verifying that the person is entitled, the clerk shall enter the person's name on the membership list. This is a simple process that does not involve any discretionary power.

[7] Indigenous Services Canada [ISC] is in charge of maintaining the Indian Registry pursuant to the *Indian Act*. When someone's name is added to the Registry, ISC also determines which First Nation that person is most closely associated with. When that First Nation has enacted a membership code, ISC informs the newly registered person that Indian status does not automatically confer membership in the First Nation and that the person should contact the First Nation to become a member. ISC provides Zagimē with a list of status Indians whom it considers "associated" with it. The parties have called this the "registry list."

[8] There are many individuals whom ISC considers to be associated with Zagimē, and whose names are on the registry list, who have not applied to become members. Nevertheless, Zagimē extends most of the benefits it affords its members to persons who are only on the registry list. The rationale for this policy appears to be that all persons on the registry list could automatically become members by simply filling out a form. However, only members are allowed to vote in elections for the chief and council. Persons whose names are only on the registry list cannot. There are approximately 850 Zagimē members of voting age. However, there are approximately 450 persons of voting age who are on the registry list but who are not Zagimē members.

B. *The 2021 Election*

[9] The last election for Zagimē's chief and council took place on September 4, 2021. Zagimē hired One Feather Technologies Ltd [One Feather] to assist in the organization of the election. Drew Shaw, an employee of One Feather, was the Electoral Officer.

[10] In early July 2021, pursuant to section 4 of the *First Nations Elections Regulations*, SOR/2015-86 [the Regulations], Zagimē provided One Feather with a list of its electors, including their last known residential address. This list did not contain email addresses. Moreover, this list included only the names of Zagimē members; it did not include persons whose names appeared only on the registry list. This is because only members are electors, according to the definition in section 2 of the Act. As a result, persons who were on the registry list but who were not Zagimē members did not receive the election package described in section 5 of the Regulations and may or may not have become aware of the election.

[11] During the summer of 2021, a number of persons whose names were only on the registry list realized that they were not Zagimē members and could not vote in the election. They then applied to become members. The precise circumstances in which they did so varies from individual to individual and will be discussed in more detail later in these reasons. Zagimē's general manager and membership clerk, Ken Acoose, added the names of approximately 30 persons to the membership list. He informed the Electoral Officer of these additions, so the names of these persons could be added to the voters' list. Ken Acoose is the brother of the incumbent chief, Lynn Acoose.

[12] The nomination meeting was held on July 30, 2021. Cameron Bernard-Peepeetch was among the 28 persons nominated for the position of councillor. His name was on the registry list, but he was not a Zagimē member on the day of the nomination meeting. He later communicated with the membership clerk to become a member. His name was added to the membership list and

the voters' list in early August 2021. It appears, however, that he never filled out the application form.

[13] An advance poll was held on August 28, 2021 in Regina. The membership clerk was present near the polling station. Persons who sought to vote but whose names were not on the voters' list were directed to him. On that day, eight more persons applied for membership and were admitted.

[14] On election day, the polling station was located in the community. It appears that no one who sought to vote needed to apply for membership first. It also appears that One Feather used a paper voters' list that was in reality the registry list. On cross-examination, the Electoral Officer was not able to provide clear explanations regarding the various lists in his possession.

[15] Lynn Acoose won the election for chief with 165 votes. Vern Acoose, the applicant in the present matter, lost with 140 votes. Cameron Bernard-Peepeetch was not elected as a councillor, but obtained 69 votes. Candidates who were elected to the position of councillor obtained between 81 and 110 votes.

C. *The Present Appeal*

[16] Vern Acoose brought the present appeal of the election results. The grounds mentioned in his notice of application pertained mainly to the compilation of the voters' list, the sending of election notices and the process for obtaining mail-in ballots. More generally, he alleged that the

manner in which the election was conducted made it inherently more difficult for off-reserve members to have their names added to the voters' list and to obtain mail-in ballots.

[17] As a result of evidence obtained in the course of the present proceeding, the applicant added new grounds to challenge the election results. In particular, he argues that the membership clerk added the names of at least 27 individuals to the membership list without first obtaining a signed application form from each of them. Thus, he submits that these individuals did not validly become Zagimē members and that their votes were unlawful. One of these individuals was Cameron Bernard-Peepeetch, who, according to the applicant, could not validly be nominated.

III. Analysis

[18] I am dismissing the application. In all but two of the situations complained of, there was no breach of the Act or Regulations. While Zagimē's failure to provide its members' email addresses to the Electoral Officer breached section 4 of the Regulations, the impact of this breach on the result of the election remains speculative. Allowing Cameron Bernard-Peepeetch's nomination before he became a Zagimē member breached section 9 of the Act, but in the exercise of my discretion, I decline to set aside the election on this ground.

[19] Before providing my reasons for these conclusions, I need to say a few words regarding certain procedural and evidentiary issues. Over the course of the proceeding, the applicant has significantly broadened the grounds on which he contests the result of the election. The respondents challenge his ability to do so without amending the notice of application. Given the

manner in which I am deciding the case, it is not necessary to decide whether such an amendment would have been needed.

[20] The applicant filed the affidavit of Jacqueline Acoose-Agecoutay. A number of statements in her affidavit constitute hearsay. Rule 81 of the *Federal Courts Rules*, SOR/98-106, prohibit hearsay in affidavits filed in support of applications. Accordingly, I will disregard such statements. The applicant also objects to the supplementary affidavit of the Electoral Officer, because the latter was not available for cross-examination. I will simply keep the lack of cross-examination in mind when assessing the weight I will give to that affidavit.

[21] I can now turn to the merits of the matter. I will first explain the framework for analyzing the contestation of an election under the Act. I will then review the grounds alleged by the applicant, in an order somewhat different from the order in which the applicant presented them.

A. *Analytical Framework*

[22] The contestation of an election is governed by sections 31 and 35 of the Act:

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.

35 (1) After hearing the application, the court may, if the ground referred to in section 31 is established, set aside the contested election.	**35 (1)** Au terme de l'audition, le tribunal peut, si le motif visé à l'article 31 est établi, invalider l'élection contestée.

[23] These provisions were considered by the Saskatchewan Court of Appeal and the Federal Court of Appeal in *McNabb v Cyr*, 2017 SKCA 27 [*McNabb*]; *Whitford v Chakita*, 2023 FCA 17 [*Whitford*]; *Wuttunee v Whitford*, 2023 FCA 18. A useful summary of the principles governing the application of these provisions may be found in *Flett v Pine Creek First Nation*, 2022 FC 805 at paragraph 17 [*Flett*]. The decision of the Supreme Court of Canada in *Opitz v Wrzesnewskyj*, 2012 SCC 55, [2012] 3 SCR 76 [*Opitz*], which dealt with the *Canada Elections Act*, SC 2000, c 9, is also relevant. These decisions confirm that the application of sections 31 and 35 of the Act obeys a three-step framework.

[24] At the first step, the applicant must establish, on a balance of probabilities, a contravention of the Act or Regulations. This is explicitly required by section 31. At this stage, there is a presumption of regularity: *McNabb*, at paragraphs 25–27. In other words, absent proof to the contrary, it is presumed that an election took place in conformity with the Act and Regulations.

[25] At the second stage, the applicant must show that the contravention is "likely to have affected the result" of the election. Again, this requirement flows from the explicit language of section 31. Where the number of votes affected by an irregularity can be ascertained, the "magic

number" test is often used. If the number of tainted votes is greater than the margin of victory, then the outcome of the election is likely to be affected.

[26] Third, even if the conditions in section 31 are met, the Court retains the discretion not to annul an election: *Whitford*, at paragraph 57; *Flett*, at paragraph 17. This flows from the use of the word "may" ("*peut*") in section 35. At this stage, the Court must keep in mind that electoral law is meant to give effect to the right to vote, while protecting the integrity of the election: *Opitz*, at paragraph 38. Overturning an election disenfranchises all voters and casts a doubt over the integrity of the process: *Opitz*, at paragraph 48. Courts should not apply electoral law in a way that increases the potential for litigation and external intervention in a First Nation's affairs: *Whitford*, at paragraphs 60, 62. The Court is also entitled to consider the degree of seriousness of the breach of the Act: *Whitford*, at paragraphs 76–81.

[27] One must presume that when Parliament adopted the Act, it was mindful of *Corbiere v Canada (Minister of Indian and Northern Affairs)*, [1999] 2 SCR 203, in which the Supreme Court of Canada struck down a provision of the *Indian Act* that denied the right to vote to members of First Nations who resided outside their Nation's reserve. Thus, whenever possible, the Act should be interpreted and applied in a manner that facilitates the participation of off-reserve members in the electoral process. Nevertheless, Parliament also sought to achieve other objectives, in particular to clarify certain aspects of the electoral process to reduce the potential for fraud or misuse of the system. To this end, several components of the Act are modelled on the *Canada Elections Act*. The off-reserve vote is facilitated first and foremost by implementing the carefully crafted scheme of the Act.

B. *Exclusion of Persons on the Registry List*

[28] The applicant's most basic challenge to the election relates to Zagimē's concurrent use of the membership list and the registry list. The existence of two lists may create confusion as to an individual's status. Persons who were told by ISC that they are associated with Zagimē and who have received services from Zagimē would naturally think they are members. However, if they did not formally apply for membership, they are not in fact Zagimē members. Because they are not members, they are not entitled to vote and they will not receive notice of the election. This situation is especially likely to affect persons who do not reside in the community. If they do not receive notice and do not become aware of the election through other means, they may lose any practical opportunity to apply for membership, to become entitled to vote and to vote by mail.

[29] The applicant provided the affidavits of Cheryl Johnson, Cindy Johnson, Mackenzie Crosby and Taylor Crosby to illustrate this confusion. These four individuals were not on the membership list. However, they were on the registry list. They believed they were Zagimē members because they received various benefits from Zagimē over the years. They expressed surprise when they learned that they were not on the voters' list. In particular, when Cheryl Johnson contacted the membership clerk and was told that she had to apply for membership, she found this offensive and refused to complete the required form, as she firmly believed she was already a member.

[30] The applicant argues that this situation has the effect of "disenfranchising" persons on the registry list. I am unable to agree. Where an election is held under the Act, only persons who are

actually members of a First Nation are entitled to vote, to be a candidate and to receive notice of the election. The fact that a person would be entitled to membership is of no import if that person has not actually obtained membership. In section 2 of the Act, an elector is defined as "a person who is registered on a Band List," not a person who would be entitled to be registered. In turn, sections 2, 8 and 10 of the *Indian Act* make it clear that individuals can only be added to a Band List in compliance with the provision of a First Nation's membership code. In Zagimē's case, the code provides that a person must apply and that the membership clerk must verify if the person meets the conditions for non-discretionary admission.

[31] This Court had to deal with a similar situation in *McCallum v Canoe Lake Cree First Nation*, 2022 FC 969 [*McCallum*]. That First Nation had a membership code that mirrored the provisions of the *Indian Act* as they existed in 1987. It wished to amend its code to make membership more inclusive, but the ratification vote failed. It then began to employ a registry list prepared by ISC. Day-to-day services were provided to persons whose names were on that list. However, my colleague Justice Cecily Y. Strickland held that only persons whose names were on the list maintained in accordance with the membership code were entitled to vote: *McCallum*, at paragraphs 77, 94.

[32] The applicant argues that Zagimē's and One Feather's conduct amounts to an obstruction of the conduct of an election, contrary to section 27 of the Act. I disagree. Section 27 reads as follows:

27 A person must not, in a manner that this Act does not otherwise prohibit,	**27** Nul ne peut, d'une manière qui n'est pas autrement interdite par la présente loi,

intentionally obstruct the conduct of an election.	entraver intentionnellement la tenue d'élections.

[33] There is no evidence that Zagimē's concurrent use of a membership list and a registry list was intended to affect or obstruct the electoral process or to bring about the confusion described above. The wording of section 27 requires proof of intention. Justice Strickland rejected a similar argument in *McCallum*. At paragraph 88, she noted that, without more, the omission of someone's name on the voters' list does not amount to obstruction. Disputes regarding eligibility to vote do not give rise to a breach of section 27. While section 27 was raised in *Lorentz v Suhr*, 2022 FC 1138, the Court did not decide the issue. The applicant's submission regarding section 27 is entirely devoid of merit. In the end, while Zagimē's manner of dealing with membership issues may appear curious, it is not unlawful.

[34] While the applicant did not show that the respondents breached section 27, the following observations may provide useful guidance to the parties. It is fairly apparent from the record that Zagimē's use of two lists for different purposes has caused confusion. The evidence shows that certain persons genuinely believed they were Zagimē members and thus entitled to vote because they had received services or funding in the past. When providing services or funding to such persons, Zagimē did not advise them that they were not members and did not invite them to apply for membership. Moreover, the lack of rigour in the use of language that is apparent throughout the record (e.g., voting and non-voting members, "registry list members", "you are a band member of Zagimē, but you are not on the voting band members list") does not help dissipate the confusion.

[35] Zagimē might want to consider whether it wishes to change a membership system based, in practice, on the use of two different lists. The rationale Zagimē put forward for this system, to ensure that individuals consent to becoming members, is not entirely convincing. One is at a loss to understand why someone like Mackenzie Crosby, who receives services from Zagimē, would not consent to becoming a Zagimē member. To change the situation, Zagimē could simply require persons on the registry list to apply for membership before receiving services.

[36] If Zagimē wishes to retain the current system, it should take proactive measures to alert persons on the registry list to the fact that they are not members and not entitled to vote and that they can correct this situation by simply applying. One manner of doing this would be to include a notice to this effect in the election package sent to members. Members who receive the package could then alert relatives to the issue. Likewise, a notice could be permanently posted on Zagimē's website or social media accounts. Alternatively, Zagimē could send a notice to persons on the registry list whose postal or email addresses are known to it, or it could remind them that they can apply for membership when they receive services. At the hearing, the respondents suggested that implementing such measures in the context of an election could give rise to an appearance of partiality. I fail to see how alerting potential members to the need to make an application would be improper.

C. *Failure to Provide Email Addresses*

[37] Another ground for challenging the election is Zagimē's failure to provide the Electoral Officer with the email addresses of its off-reserve members. In this regard, section 4 of the Regulations provides as follows:

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.	**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.

[38] The purpose of this provision is to ensure that, to the extent possible, off-reserve members are given a fair opportunity to participate in the electoral process. To this end, section 4 of the Regulations requires the First Nation to provide information that will enable the electoral officer to send the election package required by section 5 to the largest possible number of persons. By requiring both postal and email addresses, Parliament aims to ensure that as many members as possible are made aware of the election and given the possibility to vote. There is no dispute that, with two exceptions, Zagimē did not provide its off-reserve members' email addresses and that notices of the election were sent by regular mail only.

[39] Relying on *Johnstone v Mistawasis Nêhiyawak First Nation*, 2022 FC 492 at paragraph 95 [*Johnstone*], and *Masuskapoe v Ahtahkakoop Cree Nation*, 2023 FC 124 at paragraphs 37–42 [*Masuskapoe*], the respondents say that there is no evidence that Zagimē possesses its off-reserve members' email addresses and that it therefore did not breach section 4 of the Regulations.

[40] In this case, contrary to *Johnstone* and *Masuskapoe*, there is evidence that Zagimē possesses at least some of its off-reserve members' email addresses. Mackenzie Crosby's affidavit contains her application for post-secondary student sponsorship. This form states that providing an email address is mandatory. Thus, I can infer that Zagimē possesses the email

addresses of all members whose post-secondary studies it sponsors. Pursuant to section 4 of the Regulations, it had to provide these addresses to the Electoral Officer. In my view, the failure to do so is not excused by the fact that each of Zagimē's departments maintains a separate database of members. When section 4 refers to "the last known postal address and email address", it means known to Zagimē, not known to a specific department. A First Nation's internal organization does not limit the scope of the duty under section 4.

[41] Thus, Zagimē's failure to provide email addresses to the Electoral Officer was a breach of section 4 of the Regulations. However, the evidence does not allow me to conclude that this breach had an impact on the outcome of the election. I do not know how many email addresses Zagimē has in its possession. Where a member received the election package by regular mail, the failure to send the same notice by email most probably had no impact. Those who provided affidavits in support of the application did not receive the election package but learned of the election through other means. Nothing can be inferred from the different participation rates of on-reserve and off-reserve members. It would be purely speculative to attribute the lower participation rate of off-reserve members to the lack of notice by email. Therefore, the failure to provide email addresses does not allow me to overturn the election.

D. *Allowing Non-Members to Vote*

[42] During the course of this proceeding, the applicant discovered that a number of persons whose names were added to the membership list in the summer of 2021 did not sign an application form, as required by the membership code. In answers to undertakings given on cross-examination, the membership clerk revealed that eight of the persons he admitted to

membership during the election period never sent him an application form. Based on a comparison between various lists, the applicant now argues that at least 27 persons were admitted to membership without providing the membership clerk with the required form and voted in the election. Thus, membership would have been invalidly granted to these 27 persons, who therefore would not have been entitled to vote.

[43] I reject this submission. As I explained in *Pittman v Ashcroft First Nation*, 2022 FC 1380 at paragraph 103, save in exceptional circumstances, the contestation of an election is not the appropriate forum to question a voter's entitlement to membership in a First Nation. This is especially true where, as here, the person whose entitlement to membership is challenged is not a party to the proceeding.

[44] The structure of the Regulations buttresses this conclusion. Subsection 3(3) establishes a summary process for the revision of the voters' list, in particular where an elector's name was omitted from the list. Subsection 3(4) then states:

(4) For the purposes of subsection (3),	**(4)** Pour l'application du paragraphe (3) :
(a) a person may demonstrate that an elector's name has been omitted from, or incorrectly set out in, the voters list by presenting to the electoral officer written evidence from the Registrar or from the First Nation that the elector is in the Band List and will be at least 18 years of age on the day of the election; . . .	**a)** il est établi que le nom d'un électeur a été omis de la liste des électeurs ou que son inscription est inexacte sur présentation au président d'élection d'une preuve écrite émanant du registraire ou de la première nation que le nom de l'électeur est inscrit sur la liste de bande et qu'il est âgé d'au moins dix-huit ans le jour de l'élection; […]

[45] Thus, the Regulations provide that written evidence from the First Nation constitutes a conclusive demonstration (in French, "*il est établi*") that a person is a member of the First Nation and, therefore, entitled to vote. The Electoral Officer does not need to make further inquiries as to a person's entitlement to membership. In fact, in most cases the Electoral Officer cannot be expected to be familiar with the First Nation's membership code.

[46] In the present case, the emails sent by Zagimē's membership clerk to the Electoral Officer constituted "written evidence . . . from the First Nation that the elector is in the Band List." Therefore, the names of the 27 persons whose entitlement to membership is questioned by the applicant were added to the voters' list in conformity with section 3 of the Regulations. Because their names were on the voters' list, allowing them to vote did not breach the Act or Regulations.

[47] The applicant argues that the Electoral Officer in this case was required to make further inquiries because Zagimē's membership clerk, Ken Acoose, was the chief's brother and therefore in a conflict of interests. I disagree. Ken Acoose was the membership clerk, not the Electoral Officer. While his presence at the polling station to process membership applications was somewhat unusual, there is no evidence that he favoured certain candidates in the election. In particular, there is no evidence that he denied membership to someone who was entitled or that he refused to register someone for the sole reason that the person did not sign an application form. The applicant's allegation that the membership clerk showed "selective flexibility" is not borne out by the evidence. Nothing suggests that the summary process for adding names to the voters' list, set out in section 3 of the Regulations, could not be followed in the present case.

E. *Allowing a Non-Member to be Nominated*

[48] It is common ground that Cameron Bernard-Peepeetch was not on the membership list nor on the voters' list on July 30, 2021, when he was nominated for the position of councillor. Hence, he was not an elector at that time. The respondents concede that his nomination breached section 9 of the Act, which reads as follows:

9 (1) Only an elector of a participating First Nation is eligible to be nominated as a candidate for the position of chief or councillor of that First Nation.	**9 (1)** Seul l'électeur d'une première nation participante peut être présenté comme candidat au poste de chef ou à un poste de conseiller de cette première nation.

[49] The respondents argue, however, that this breach was cured when he was admitted to membership on August 6, 2021, before any votes were cast in the advance poll. Therefore, they ask the Court to exercise its discretion not to annul the result of the election on this ground.

[50] This breach of the Act likely satisfies the magic number test set out above. I do not need to reach any firm conclusion in this regard, because I agree to exercise my discretion not to overturn the result of the election, for two reasons.

[51] First, the breach was minor and it was cured before the election. Of course, eligibility is a prerequisite to both voting and being nominated. Allowing an ineligible candidate to run is usually a serious matter. In this case, however, Zagimē operated with two lists, the registry list and the membership list, and essentially allowed for an automatic transfer from the first to the second upon making an application to this effect. It is not in dispute that Cameron Bernard-

Peepeetch was automatically entitled to membership upon applying. There is no doubt that he would have been added to the membership list before the nomination meeting had he applied. In this context, the fact that he only became a member shortly after being nominated is a minor irregularity that does not warrant the overturning of the entire election.

[52] Second, the lapse of time is a factor that militates against overturning the election. In saying this, I am not ascribing responsibility for this delay to one party or the other. Nevertheless, the election was held almost three years ago. Should I overturn it, a new election would take place barely a year before the date of the next general election. It would take a very serious irregularity to overturn the results of an election in these circumstances.

[53] The respondents have also argued that this issue was not mentioned in the notice of application. Given the manner in which I am deciding the issue, I do not need to decide whether the applicant is barred from raising it at this stage in the proceeding. I will simply say that it arose as a result of facts that the respondents disclosed in the course of the proceedings and that addressing it does not prejudice the respondents, as the relevant facts are not in dispute.

F. *Other Issues*

[54] The applicant alleges a number of other breaches of the Act and Regulations. I find that he has not made out his allegations and that the persons concerned in these situations were not disenfranchised. In a number of cases, the applicant’s allegations are based on inferences drawn from a comparison of various pieces of information in the record, in the absence of direct evidence from the persons concerned. This is insufficient to displace the presumption of

regularity. In other cases, the allegations are based on a misapprehension of the requirements flowing from the Act and Regulations.

(1) Failure to Provide Addresses to the Electoral Officer

[55] The applicant argues that Zagimē failed to provide nine members' postal addresses to the Electoral Officer, even though it had these addresses in its possession. The applicant's submission appears to be based on a comparison between a membership list dated June 30, 2021, and the list of addresses that was forwarded to the Electoral Officer on July 5, 2021. While the postal addresses of these nine individuals are indicated opposite their names in the first list, no address is shown for them in the second list.

[56] The applicant infers that Zagimē had the addresses of these nine members and that it failed to provide the Electoral Officer with their "last known postal address," contrary to section 4 of the Regulations. As a result, these members did not receive formal notice of the election by mail. However, I do not have any evidence regarding the reason why these addresses were deleted. It may be that Zagimē knew that these addresses were no longer valid. Given that the applicant has the burden of proof, I am not satisfied that a mere comparison of lists establishes a breach of the Regulations. Nor did the Electoral Officer have any duty to challenge the omission of these nine persons' addresses from the list. In fact, in his affidavit, the Electoral Officer states that there were no mailing addresses for 36 individuals out of a voters' list that contained approximately 850 names. I fail to see anything unusual in such a situation and the Act and Regulations do not impose any duty on the Electoral Officer to make further inquiries in such circumstances.

[57] In any event, there is no evidence that this situation had any impact on the result of the election. There is no evidence from the nine persons concerned. The applicant states that two of these nine persons voted. If anything, this shows that the failure to receive formal notice did not prevent members from voting. I do not know whether the other seven became aware of the election by other means. I can only speculate as to why they did not vote, and speculation is not a basis to overturn an election. Moreover, this issue affects only nine persons in a community where approximately 850 persons were entitled to vote.

(2) Failure to Facilitate Voting by New Members

[58] The applicant alleges that eleven members were "disenfranchised by obstruction, delay or lack of notice." If I understand correctly, these persons were not on the membership list but manifested their willingness to vote to Zagimē officials during the election period. The membership clerk added their names to the membership list. However, they did not receive the election package by mail, as they were not members when these packages were sent. As a result, they did not immediately realize that they had to request a mail-in ballot from the Electoral Officer if they intended to vote by mail.

[59] The applicant puts forward the cases of Cheryl and Cindy Johnson, who provided affidavits in support of the application, to illustrate this situation. Both of them became aware of the election and realized they were not on the voters' list. They communicated with Zagimē to correct what they considered an omission. Even though they did not fill out a membership application form, the membership clerk added them to the membership list and notified the Electoral Officer of such on August 6, 2021. However, they were not informed that they were

granted membership nor given instructions for requesting a mail-in ballot. They state that they would have voted had they received a mail-in ballot.

[60] The applicant argues that Zagimē's failure to confirm to these persons that their names had been added to the membership list and to provide them with information as to how to request a mail-in ballot resulted in a breach of the Act and Regulations. I agree that it would have been best practice for the membership clerk to confirm to these persons that their names were added to the membership list and to inform them that they needed to communicate with the Electoral Officer if they intended to vote by mail. The Act and Regulations, however, do not require the Electoral Officer to send an election package to persons who are added to the voters' list during the election period. Zagimē has no separate duty in this regard.

[61] Moreover, under the Act and Regulations, mail-in ballots are not automatically sent to all off-reserve voters. This may have caused some confusion, as Zagimē's past practice, when its elections were governed by the *Indian Act*, was apparently different. Section 15 of the Regulations, however, makes it abundantly clear that an elector who wishes to vote by mail must make a written request to receive a mail-in ballot. In their affidavits, Cheryl and Cindy Johnson do not state that anyone at Zagimē undertook to send them a mail-in ballot, nor that they made a request for a mail-in ballot to the Electoral Officer.

[62] Cheryl Johnson also provided excerpts of a conversation with Chief Lynn Acoose and other persons on social media. Chief Acoose told Cheryl Johnson that she was "a member on the registry list," but that she had to complete a form to be put on the membership list. Cheryl

Johnson then asked whether Chief Acoose was referring to the form that the membership clerk had sent to her. Chief Acoose was evidently unaware that Cheryl Johnson had already communicated with the membership clerk, who had added her to the membership list. Chief Acoose also told another person that the cut-off date to request a mail-in ballot was the day before, which was accurate. I fail to see anything in this conversation on social media that is untoward or that breaches the Act or Regulations.

[63] There is little evidence regarding the other persons in this group. Most of them were granted membership in August 2021 and their names were provided to the Electoral Officer and are found on the final electronic list provided by the Electoral Officer. We know from One Feather's records that only two of them, Edward Pelletier and Tara Acoose, requested a mail-in ballot; their situation will be discussed later in these reasons. Of these eleven individuals, only Cindy and Cheryl Johnson have provided affidavit evidence.

[64] In sum, there is no evidence of a breach of the Act or Regulations with respect to this group of members.

(3) Denial of the Right to Vote

[65] In her affidavit, Jacqueline Acoose-Agecoutay states that she attended the advance poll in Regina with family members and that her nephew, Riley Acoose-Sayer, was not allowed to vote. Riley Acoose-Sayer did not provide an affidavit. There is no evidence of why he was not allowed to vote. There is a Riley Scott Acoose on the membership list but the version of that list containing the names of each member's parents suggests that this is not Jacqueline Acoose-

Agecoutay's nephew. Riley Acoose-Sayer does not appear on any list in the record. In my view, the evidence is insufficient to prove that Riley Acoose-Sayer was denied the opportunity to vote in spite of being entitled.

[66] The applicant's memorandum of fact and law also suggests that the vote of Bailey Brown, Jacqueline Acoose-Agecoutay's daughter, was "not counted." There is no basis for this statement in Jacqueline Acoose-Agecoutay's affidavit, and Bailey Brown did not provide evidence.

(4) Late Sending of Mail-in Ballots

[67] The applicant also argues that Tara Kim Acoose and Edward Larry Pelletier were unable to vote because the Electoral Officer failed to send them mail-in ballots early enough. Tara Kim Acoose's name was added to the membership list on August 23, 2021 and a mail-in ballot was sent to her on August 30, 2021. Edward Larry Pelletier's name was added to the membership list on August 12, 2021 and a mail-in ballot was sent to him on August 25, 2021. While the record contains the forms that both of them filled out to request a mail-in ballot, there is no evidence of the date the Electoral Officer received them. These two persons did not provide evidence.

[68] Subsection 16(2) of the Regulations provides:

(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	**(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

mail-in ballot package to the elector as soon as feasible after receipt of the request.	convenus, et ce, dans les plus brefs délais après la réception de la demande.

[69] The evidence does not show that the Electoral Officer failed to send mail-in ballots to Tara Kim Acoose and Edward Larry Pelletier "as soon as feasible after receipt of the[ir] request."

[70] Jacqueline Acoose-Agecoutay also stated in her affidavit that her daughter, Stevie Brown, was unable to attend the advance poll in Regina and that it was too late for her to send her mail-in ballot. The record shows that Jacqueline Acoose-Agecoutay and her other daughter, Bailey Brown, were sent mail-in ballots on August 16, 2021. There is no record of any request by Stevie Brown for a mail-in ballot.

(5) Failure to Add Certain Persons to the Membership List

[71] While the applicant's submissions are not always easy to follow, I understand that he also challenges the fact that Zagimē failed to add certain persons to the membership list, which had the effect of denying them the right to vote.

[72] Cindy Johnson states in her affidavit that her four adult children did not receive election packages. However, her four children are not on the membership list. She states that she phoned the Zagimē office in July 2021 to have this omission corrected. There is no evidence in the record showing that her children's names were ever added to the membership list.

[73] Likewise, Mackenzie and Taylor Crosby's mother wrote to Zagimē to have her daughters' names added to the membership list. Again, there is no evidence showing that their names were added to the membership list.

[74] In both cases, there is no evidence of the reasons why these requests were not acted upon. I note that in both cases, the request was not made by the person concerned, but by a relative, who did not communicate directly with the membership clerk. The membership clerk was not cross-examined in this regard. Given the paucity of evidence, it is very difficult to reach any firm conclusion about what happened.

[75] In any event, as I mentioned earlier, the contestation of an election is not the proper forum to challenge decisions regarding a person's membership in a First Nation. These persons were not Zagimē members, were not entitled to vote and did not request a mail-in ballot. There was no breach of the Act or Regulations.

IV. Disposition

[76] For the foregoing reasons,

(1) I exercise my discretion not to annul the election in spite of the fact that Cameron Bernard-Peepeetch became a Zagimē member only after he was nominated for the position of councillor;

(2) there is no evidence that the breach of the Regulations resulting from Zagimē's failure to provide the email addresses of off-reserve members to the Election Officer had an impact on the result of the election; and

(3) all the other situations impugned by the applicant did not constitute a breach of the Act or Regulations.

[77] Hence, the application will be dismissed.

[78] The parties will be provided with an opportunity to make submissions regarding the costs of this application. They should make submissions with respect to who should pay those costs, and in what amount. The principles governing awards of costs in First Nations governance disputes are summarized in *Whalen v Fort McMurray No 468 First Nation*, 2019 FC 1119.

JUDGMENT in T-1510-21

THIS COURT'S JUDGMENT is that

1. The application is dismissed.

2. The issue of costs is reserved.

3. The parties will serve and file their submissions as to costs, not exceeding ten pages in length, no later than 30 days after the date of this judgment.

"Sébastien Grammond"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1510-21
STYLE OF CAUSE:	VERN ACOOSE v SAKIMAY FIRST NATIONS ALSO KNOWN AS ZAGIME ANISHINABEK FIRST NATION, ONEFEATHER MOBILE TECHNOLOGIES LTD., LYNN ACOOSE, PAULA ACOOSE, DANA ACOOSE, RACHEL SANGWAIS, AMBER SANGWAIS, CYNTHIA SANGWAIS, RANDALL SPARVIER AND KITTY WHITEHAT
PLACE OF HEARING:	REGINA, SASKATCHEWAN
DATE OF HEARING:	APRIL 23, 2024
JUDGMENT AND REASONS:	GRAMMOND J.
DATED:	MAY 22, 2024

APPEARANCES:

Janet L. Hutchison	FOR THE APPLICANT
Jessica Buhler Erica Klassen	FOR THE RESPONDENTS

SOLICITORS OF RECORD:

Hutchison Law Barristers and Solicitors Sherwood Park, Alberta	FOR THE APPLICANT
MLT Aikins Barristers and Solicitors Saskatoon, Saskatchewan	FOR THE RESPONDENTS