Federal Court Cour fédérale

Date: 20220425

Docket: T-749-21

Citation: 2022 FC 492

Ottawa, Ontario, April 25, 2022

PRESENT: The Honourable Mr. Justice Favel

BETWEEN:

NORMA JOHNSTONE

Applicant

and

**MISTAWASIS NEHIYAWAK,
DARYL WATSON, COLBY DANIELS,
ROBIN DANIELS, STEVEN JOHNSTON,
LESLIE PECHAWIS, AND
DEREK SANDERSON**

Respondents

JUDGMENT AND REASONS

I. Nature of the Matter

[1] Norma Johnstone [Ms. Johnstone] brings an application pursuant to section 31 of the *First Nations Elections Act*, SC 2014, c 5 [*FNEA*] contesting the April 7, 2021 Mistawasis Nêhiyawak [Mistawasis] election for Chief and Councillors [Election]. Mistawasis is a signatory

to Treaty Six and is an Indian Band within the meaning of the *Indian Act*, RSC 1985, c I-5 [*Indian Act*]. The individual Respondents are the successful candidates in the Election. Ms. Johnstone is a member of Mistawasis who unsuccessfully sought re-election to Council in the Election.

[2] Ms. Johnstone seeks: (1) an Order declaring that the Election contravened the *FNEA* or the *First Nations Election Regulations*, SOR/2015-86 [*FNER*] and that these contraventions likely affected the result of the Election; and (2) an Order setting aside the Election, directing that a new election take place with a different electoral officer [EO].

[3] I find that there were two breaches of the *FNER* but that neither of those breaches likely affected the results of the Election within the meaning of section 31 of the *FNEA*. Therefore, Ms. Johnstone's application is dismissed.

II. Background

A. *The Statutory Regime and Events Leading Up to the Election*

[4] The *FNEA* and *FNER* [Statutory Regime] only apply to First Nations that have opted into the Statutory Regime. The Election, which took place during the COVID-19 pandemic, was the first Mistawasis election held pursuant to the Statutory Regime.

[5] On January 26, 2021, Mistawasis Chief and Council appointed the EO and set the election date and the nomination date. On January 27, 2021, the EO appointed five individuals as deputy electoral officers [DEOs] to help him conduct and supervise the Election.

[6] The Statutory Regime allows off-reserve electors to vote by mail-in ballot. Subsection 4(1) of the *FNER* states that a First Nation must provide the EO with a list setting out "the last known postal address and email address of each elector who does not reside on the reserve" at least 65 days before the election day. Subsection 15(1) of the FNER states that members must submit a written request for a mail-in ballot package to the EO and provide "proof of identity."

[7] On February 5, 2021, the EO mailed off-reserve electors a Notice of Nomination Meeting that included the Nomination Package as well as a Request for Mail-In Ballot Form [Form]. To receive a mail-in ballot package, the EO told off-reserve electors to send their completed Form and proof of identity to him by mail, fax, or email. The EO only sent mail-in ballot packages by regular mail. He did not send any mail-in ballot packages by email. Some of the mail-in ballot packages were "returned to sender." The EO states that he sent 107 mail-in ballot packages, but only received 56 mail-in ballot packages on or before the date of the Election. After the EO received a mail-in ballot package, he kept them in a locked briefcase that was in his possession at all times prior to the Election.

[8] When electors requested mail-in ballots, the EO took the position that the only acceptable "proof of identity" was photo identification. If the Form did not include photo identification, the

EO tried to notify the member to correct the deficiency. The EO received five Forms that did not include photo identification. Two of those electors voted in person while the other three did not.

[9] Ms. Johnstone's son, Perry Pechawis [Mr. P. Pechawis], was one of the three electors that did not provide photo identification and did not vote. At the time of the Election, Mr. P. Pechawis was one of six Mistawasis members incarcerated at the Prince Albert Penitentiary. Early on in the election process, Ms. Johnstone asked the EO how to facilitate voting for these members given that they do not have access to photo identification. The EO did not take any steps to ensure that these members could vote by mail-in ballot. Ms. Johnstone provided the EO with a certified letter from the Mistawasis Membership Clerk confirming Mr. P. Pechawis' name, registry number, date of birth, and gender. The EO declined to accept this as proof of identity because it "was not government photo identification." Ms. Johnstone states that none of the incarcerated Mistawasis members were able to exercise their right to vote. I note, however, that there is no evidence that any of the other incarcerated members requested a mail-in ballot.

[10] Subsection 16(1) of the *FNER* provides that an elector must request a mail-in ballot package within 30 days prior to the date of the election. However, subsection 16(2) of the *FNER* permits an elector to request a mail-in ballot six or more days before the date of the election. On March 10, 2021, an elector named Margaret Struck [Ms. Struck] emailed the EO for a mail-in ballot package. Ms. Struck's email went to the EO's junk mail folder and the EO did not discover it until March 29, 2021. Pursuant to subsection 16(2), the EO sent a mail-in ballot package by ExpressPost the day her email was discovered. Ms. Struck did not receive her mail-in

ballot package on time and was not able to vote. She also states that she made an earlier request but that request is not in the record.

[11] There were two advance polls in Saskatoon and Prince Albert, but no one takes issue with how voting was carried out at those polls.

B. *Election Results and Recounts*

[12] The EO's report indicates that there were 2094 eligible voters, 820 of which voted for Council. The successful candidate for Chief won by over 50 votes. Each successful candidate for Councillor won by a margin of at least 20 votes, except for the last seat on Council. This application concerns the last seat on Council.

[13] Three DEOs manually counted the ballots on the night of the Election after the polls closed. Ms. Johnstone states that unlike previous elections, the EO did not hold up each ballot and read out the votes. Other than this, Ms. Johnstone takes no issue with the counting process, save for the result of the Election. The initial results for the last Councillor seat were:

Initial Results	
Leslie Pechawis	171
William Badger	171
Norma Johnstone	169

[14] The DEOs recounted the votes for Leslie Pechawis and William Badger using the same process [First Recount]. Ms. Johnstone's votes were not recounted. The results were:

First Recount	
Leslie Pechawis	172
William Badger	170

[15] Leslie Pechawis was declared the winner for the last seat on Council. The next morning, Ms. Johnstone asked the EO for a recount and he advised her that she was not entitled to one. Eventually, the EO agreed to a recount on April 11, 2021 at the EO's home. However, prior to this taking place, on April 10, 2021, the EO signed and certified the Election results and sent them to Indigenous and Northern Affairs Canada [INAC]. He confirmed that Leslie Pechawis had 172 votes and William Badger had 170 votes.

[16] On April 11, 2021, Ms. Johnstone, her husband, another person on behalf of Ms. Johnstone, and one DEO attended the EO's house. The EO counted the ballots while Ms. Johnstone observed and the other three individuals kept tally. Three recounts took place this day [Second Recount, Third Recount, and Fourth Recount]. The Respondents state that during the Second Recount, Ms. Johnstone continuously interrupted the EO and asked questions. The EO only counted the votes for Ms. Johnstone. The results were:

Second Recount	
Norma Johnstone	171

Third Recount	
Norma Johnstone	169

Fourth Recount	
Norma Johnstone	169

[17] The parties have not asked the Court to determine whether the Second Recount, Third Recount, or Fourth Recount are official recounts within the meaning of the Statutory Regime. Nevertheless, the parties have referred to these recounts in their submissions.

[18] Ms. Johnstone, lacking faith in the inconsistent recounts, filed this appeal on May 6, 2021. On September 23, 2021, based on an agreement of the parties, an independent accounting firm conducted another recount [Fifth Recount]. However, during the Fifth Recount, there were two fewer ballots accounted for. On election day, the total number of ballots counted for the Councillor positions was 820 (802 valid ballots and 18 rejected ballots). In comparison, when the Fifth Recount took place there were 818 ballots (796 valid ballots and 22 rejected ballots). The accounting firm rejected an additional four ballots pursuant to paragraph 21(4)(b) of the *FNER*. The firm rejected the ballots because "more than the allowed 5 marks were contained in each of the ballots even if the intent of the elector had been able to be interpreted." The results of the Fifth Recount were:

Fifth Recount	
Leslie Pechawis	171
William Badger	170
Norma Johnstone	167

III. The Evidence

[19] Ms. Johnstone submitted her own affidavit and the affidavits of Ms. Struck, Lana Johnstone-Ledoux [Ms. Johnstone-Ledoux], Anita Johnstone [Ms. A. Johnstone], and Sheila Matheson [Ms. Matheson]. Ms. Matheson had initially submitted an affidavit stating she did not receive a mail-in ballot and was unable to vote in the Election but she clarified in a

supplemental affidavit that she did vote in person. The Respondents only cross-examined Ms. Johnstone.

[20] The Respondents submitted the affidavits of the EO and Rosalind Alger, a DEO. Ms. Johnstone only cross-examined the EO.

IV. Preliminary Issue

A. *Respondents' Position*

[21] The Respondents submit that the following portions of the affidavits filed by Ms. Johnstone should be struck or afforded no weight because they include hearsay evidence, contrary to Rule 81(1) of the *Federal Courts Rules*, SOR/98-106 [*Rules*]:

- Paragraphs 3 and 4 of Ms. Johnstone-Ledoux's affidavit;
- Paragraph 2 of Ms. A Johnstone's affidavit; and
- Paragraphs 5, 6, 8, 11, 13, and 28 of Ms. Johnstone's affidavit.

[22] Alternatively, the Respondents submit that pursuant to Rule 81(2), the Court ought to draw an adverse inference from Ms. Johnstone's failure to tender the best evidence (evidence from the individuals with direct knowledge of the facts). The Respondents point out that Ms. Johnstone has not provided affidavits from Mr. P. Pechawis, Cree Duquette (named in Ms. Johnstone's affidavit), and Joshua Johnstone (named in Ms. A. Johnstone's affidavit), nor has she explained why this evidence has not been tendered.

B. *Applicant's Position*

[23] At the hearing, counsel for Ms. Johnstone acknowledged that some of the affidavits contain hearsay. Counsel stated that the hearsay evidence provides background information and conceded that it is entitled to less weight. However, Counsel maintained that the evidence pertaining to Ms. Struck and Mr. P. Pechawis is admissible because the Respondents tested this evidence during the EO's cross-examination.

C. *Analysis*

[24] I find that portions of the above-noted paragraphs include facts not confined to the direct personal knowledge of the affiants, contrary to Rule 81(1) of the *Rules*. However, Rule 81(1) does not necessarily exclude hearsay evidence. It states that on an application, all affidavits shall be confined to the facts within the deponent's personal knowledge. If evidence within an affidavit is deemed necessary and reliable, it may still be admitted despite Rule 81(1) (*Éthier v Canada (RCMP Commissioner)*, [1993] 2 FC 659, [1993] FCJ No 183 (FCA)).

[25] Hearsay evidence is an out-of-court statement offered to prove the truth of its contents (*R v O'Brien*, [1978] 1 SCR 591 at 593, 76 DLR (3d) 513). The central reason for the presumptive exclusion of hearsay statements is the general inability to test their reliability. Hearsay is presumptively inadmissible unless it falls into a traditional exception or is admissible under the principled approach (*R v Khelawon*, 2006 SCC 57 at paras 2-3). Paragraphs that contain "hearsay evidence, argument, and irrelevant or inflammatory comments" should be given no weight in an application under section 30 of the *FNEA* (*Good v Canada (AG)*, 2018 FC 1199 at paras 60, 63,

223, 226 [*Good*]). I will not give weight to any of the following portions of the affidavits contained in Ms. Johnstone's Record.

[26] Paragraphs 3-4 of Ms. Johnstone-Ledoux's affidavit repeats what others told her. Namely, that "Mistawasis members requested mail-in ballots and did not receive them" and that electors "were sending emails to the address listed on the announcement forms (firstnationsgov@hotmail.com)." These portions of the paragraphs are hearsay.

[27] Paragraph 2 of Ms. A. Johnstone's affidavit states that various members were waiting on their ballots, received their ballots after the Election, or did not receive their ballots at all. The deponent does not identify which members these statements relate to but states that she has heard "numerous stories like this by Mistawasis members." She also states that a member named Joshua Johnstone received his ballot on May 2, 2021, well after the Election. This is similarly hearsay evidence.

[28] Paragraphs 5-6 of Ms. Johnstone's affidavit are hearsay. They discuss problems related to mail-in ballots that "a number of members" told her about. The first sentence of paragraph 8 is also hearsay. It states, "[m]y son wanted to vote and wanted to assist in facilitating the ability of the other Incarcerated Electors to vote." Paragraphs 11 and 13 contain statements to the effect that Ms. Johnstone was told that incarcerated members never received their ballots. Finally, the beginning of paragraph 28 summarizes some of the issues with the Election including that "off reserve voters did not receive mail-in ballots [and] incarcerated voters were not permitted to vote." I find that all of these aspects of Ms. Johnstone's affidavit are hearsay.

[29] Hearsay evidence is admissible if it is both necessary and reliable (*R v Bradshaw*, 2017 SCC 35 at para 23). Ms. Johnstone has not provided direct evidence from the individuals named in the affidavits that allege contraventions of the Statutory Regime, such as Mr. P. Pechawis, Cree Duquette, Joshua Johnstone, and other unnamed members of Mistawasis. Furthermore, Ms. Johnstone has not explained why she failed to provide direct evidence from these parties. Accordingly, this evidence cannot be considered necessary or reliable and is inadmissible (*Potts v Alexis Nakota Sioux Nation*, 2019 FC 1121 at para 28).

V. Issues

[30] In my view, after hearing the parties' submissions, the issues are best characterized as:

1. What is the appropriate test to determine whether a contravention "likely affected the result" of the Election;
2. What is the "magic number";
3. Was there a contravention of the Statutory Regime on any of the following grounds that "likely affected the result" of the Election:
    i. Failure to send mail-in ballot packages by email;
    ii. Failure to send a mail-in ballot to Ms. Struck in a timely manner;
    iii. Incorrect application of ID requirements;
    iv. Failure to accommodate quarantined electors;
    v. Breaches to recount procedure; or
    vi. Missing/misplaced ballots.
4. If so, should this Court exercise its discretion to set aside the Election?

VI. Parties' Positions

A. *What is the appropriate test to determine whether a contravention "likely affected the result of the Election"?*

[31] For the Court to set the Election aside, Ms. Johnstone must satisfy the two-part test outlined in section 31 of the *FNEA*:

> 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.

[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).

(1) Step 1: establishing that there has been a contravention of the Statutory Regime

[34] The parties agree that the first aspect of the two-part test is a lower threshold than that in the *Canada Elections Act*, SC 2000, c 9 [*CEA*]. As stated by the Saskatchewan Court of Queen's Bench, "[a]n applicant under the FNEA need not prove anything akin to fraud, corruption or illegality, but only a contravention of the FNEA, even an unintentional or inadvertent contravention, without the necessity of proving fraud, corruption or illegality" (*Paquachan v Louison*, 2017 SKQB 239 at para 18 [*Paquachan*]). Furthermore, "[i]t is not necessary to show that the contravention was deliberate or motivated by malice, in any way. It may occur through negligence or inadvertence" (*O'Soup* at para 27). The Respondents also note that this aspect of the test "looks at whether there has been 'non-compliance related to an electoral safeguard'" within the Statutory Regime (*O'Soup* at para 104).

(2) Step 2: establishing that a contravention likely affected the election results

[35] The parties disagree about the applicable principles governing this aspect of the two-part test. Ms. Johnstone submits that the "magic number test" articulated by the Supreme Court of Canada in *Opitz* applies. As explained by Justice Rothstein, "[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* at para 73).

[36] The Respondents submit that the magic number test is the incorrect test. They state that the magic number test relies on the highly improbable assumption that all rejected votes were cast for the unsuccessful candidate. In *McNabb*, the Court explicitly left open the possibility for a

more realistic method for assessing contested elections (at paras 47-48). Likewise, in *Paquachan*, the Court questioned the flawed assumption inherent in the magic number test. The Court emphasized that "[i]n a multi-ballot candidate situation, unlike a federal riding election, setting aside a First Nation's election for several council positions based on the magic number test has dire consequences for those elected with a clear plurality of ballots" (*Paquachan* at para 26).

[37] Instead, the Respondents submit that this Court should follow the approach taken by the New Brunswick Court of Queen's Bench in *Ogden v Lowe*, 2019 NBQB 184 [*Ogden*]. At paragraphs 149-153 of *Ogden*, the Court rejects the magic number test. Instead, the Court applies the "substantial effect test", which asks whether the number of rejected votes would be "…of such a nature as that they may reasonably be said to produce a substantial effect upon the election" (at para 150).

[38] The Respondents also cite *Bird v Paul First Nation*, 2020 FC 475 [*Bird*] where Justice McVeigh stated the following at paragraph 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*… 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).
>
> [Emphasis in original.]

B. *What is the "magic number"?*

(1) Applicant's Position

[39] The magic number is one, representing the margin between Leslie Pechawis and William Badger. One vote is also the margin between the number of votes for Ms. Johnstone in the Second Recount (171 votes) and the number of votes for the winner, Leslie Pechawis, in the First Recount (172 votes). Given that the magic number is only one vote, any of the breaches set out below satisfy section 31 of the *FNEA* and a new election is required.

(2) Respondents' Position

[40] Ms. Johnstone likely lost by three votes. In the Fifth Recount, the independent accounting firm should not have rejected three of the four rejected ballots. Paragraph 21(4)(b) of the *FNER* does not require a ballot to be rejected if an elector makes five or more marks on a ballot. The provision only requires the elector to mark the ballot with a mark that clearly indicates their choice. The three ballots in question clearly indicated the elector's choice with an 'X' or a cheque mark. Had the independent accounting firm not rejected these three ballots, the Fifth Recount would have confirmed the results of the First, Third, and Fourth Recount:

Leslie Pechawis	172
William Badger	170
Norma Johnstone	169

[41] This indicates that the most consistent result is that Leslie Pechawis won by two votes and Ms. Johnstone lost by three votes.

C. *Was there a contravention of the Statutory Regime on any of the following grounds that "likely affected the result" of the Election?*

(1) Failure to send mail-in ballot packages by email

(a) *Applicant's Position*

[42] Mistawasis and the EO contravened sections 4(1) and 5(1)(b) of the *FNER*. Subsection 4(1) states "[a]t 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." This obligates Mistawasis to provide the EO with off-reserve electors' email addresses and mailing addresses. Mistawasis did not give the EO electors' email addresses and the EO did not request them.

[43] Paragraph 5(1)(b) states: "[a]t least 25 days before the day on which a nomination meeting is to be held, the electoral officer must… 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)." Given that Mistawasis failed to provide the EO with email addresses, mail-in ballot packages were only sent by regular mail, in contravention of paragraph 5(1)(b).

[44] Had email been used, various problems with post mail may have been avoided including: mail-out ballot packages never reaching electors (being returned to sender); mail-out ballot packages arriving too late despite being sent in a timely manner; and ballots being received after the Election. The *FNER* likely requires EOs to use email due to these problems with post mail. It

is difficult to know how many electors would have received their packages if the EO also sent them an email. However, given the number of difficulties electors had with post mail and contacting the EO, it is likely that more electors would have voted if the EO had used email. Thus, these contraventions likely affected the outcome of the Election.

[45] At the hearing, counsel for Ms. Johnstone acknowledged that there was no evidence from any elector relating to this contravention. Nevertheless, counsel submitted that this Court should draw an inference that the EO did not email electors.

(b) *Respondents' Position*

[46] Ms. Johnstone's argument about email is a new ground of appeal that was not included in her of Notice of Application. Rule 301(e) of the *Rules* states that a Notice of Application must include a complete and concise statement of the grounds intended to be argued. This is true even if the Respondents has not been prejudiced (*Tl'azt'en Nation v Sam*, 2013 FC 226 at para 6 [*Tl'azt'en*]). While this Court can exercise its discretion under Rule 301(e) and choose whether to hear new grounds of appeal, it may only do so in limited circumstances. Those circumstances include: where the ground of appeal arises after filing the Notice of Application; where the new issue has some merit, are related to those set out in the notice, and are supported by the evidentiary record; where the respondent would not be prejudiced; and no undue delay would result (*Tl'azt'en* at para 7). None of these circumstances arise in the present matter.

[47] Alternatively, there is no evidence that subsections 4(1) or 5(1)(b) of the *FNER* were breached. The EO did not receive emails from Mistawasis. Subsection 4(1) only requires that a

First Nation provide an EO with the “last known” postal and email addresses of off-reserve electors. The First Nation’s knowledge of said emails is a prerequisite to any alleged obligation. There is no evidence to suggest that Mistawasis possessed the electors’ email addresses or that electors’ provided their emails to the First Nation.

[48] Subsection 5(1)(b) requires that the EO send Forms to the addresses provided in subsection 4(1). These provisions must be read together. Since there is no evidence that Mistawasis possessed members’ email addresses, the EO did not breach paragraph 5(1)(b).

[49] Finally, even if there was a violation of subsections 4(1) and 5(1)(b), Ms. Johnstone has not submitted any evidence to establish that those violations affected the results of the Election. Absent any persuasive evidence, this ground of appeal is merely speculation.

(2) Failure to send a mail-in ballot to Ms. Struck in a timely manner

(a) *Applicant’s Position*

[50] Subsection 16(1) of the *FNER* states, “[n]o 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…”. The Election was held on April 7, 2021. Ms. Struck states that she submitted her request on March 3, 2021, 34 days before the Election. Upon not receiving her package, she inquired with the EO and he told her to submit her request again. She did so on March 10, 2021.

[51] Although the March 3, 2021 email request is not in the record, subsection 16(2) still applies. It states that "[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 feasibly possible after receipt of the request." Ms. Struck states that her request submitted on March 10, 2021 went to the EO's junk mail folder. The EO then had Ms. Struck send the request to the DEO's email. The EO did not send Ms. Struck her mail-in ballot package until March 29, 2021. This is not "as soon as feasibly possible." Ms. Struck was not able to vote in time. In these circumstances, both subsections 16(1) and 16(2) were contravened. Ms. Struck's vote alone is enough to affect the results of the Election.

(b) *Respondents' Position*

[52] Exhibit 1 to the affidavit of Margaret Struck clearly establishes that Ms. Struck sent her mail-in ballot request on March 10, 2021 (28 days before the Election), not on March 3, 2021. As such, subsection 16(2) of the *FNER* applies to this ground of appeal, not section 16(1).

[53] The fact that Ms. Struck's March 10, 2021 email went to the EO's junk mail is an example of the type of imperfection that is inevitable in the context of an election (*Opitz* at para 46). The EO only discovered Ms. Struck's email on March 29, 2021. Therefore, since sections 15 and 16(1) require that requests for mail-in ballot packages be written, it was not feasible for the EO to send Ms. Struck a package any earlier. The EO did not contravene subsection 16(2) because as soon as he learned of the email in his junk folder, he sent Ms. Struck a mail-in ballot package.

[54] Alternatively, if there is a breach of subsection 16(2), it is not likely to have affected the results of the Election. Given that Leslie Pechawis' margin of victory over William Badger was two votes, even if Ms. Struck did vote for William Badger, Leslie Pechawis still would have won the last seat by one vote.

(3) Incorrect Application of ID requirements

(a) *Applicant's Position*

[55] Section 15 of the *FNER* states that an elector seeking a mail-in ballot package must provide a written request that includes their "proof of identity." The Statutory Regime does not indicate specific requirements for proving identity. Yet, even though ballots were being mailed-in and there was no opportunity to visually confirm the elector, the EO required photo identification for Mr. P. Pechawis and others. Accordingly, the EO contravened subsection 16(1) of the *FNER*, which states that he "must" send a mail-in ballot package to an elector who makes a written request pursuant to section 15.

[56] The EO's requirement for photo identification disenfranchised Mr. P. Pechawis, five additional electors incarcerated at Prince Albert Penitentiary, and possibly others who do not have access to photo identification for various reasons. Stringent voter identification requirements can result in the suppression of marginalized groups' right to vote (S*auvé v Canada (Chief Electoral Officer),* 2002 SCC 68 at para 60). Indeed, Mr. P. Pechawis does not have photo identification and prisoners cannot carry photo identification with them. Ms. Johnstone also

pointed to the Alberta elections process where prisoners may use letters of attestation to prove their identity.

[57] Principles of statutory interpretation also support the position that requiring photo identification under section 15 of the *FNER* is too high a standard. A band member's right to vote in a band election is a "fundamental right" (*Corbiere v Canada (Minister of Indian and Northern Affairs)*, [1999] 2 SCR 203 at para 90, 173 DLR (4th) 1 [*Corbiere*]). Provisions such as section 15 "should be construed in a manner consistent with its object of providing all eligible votes with an opportunity to exercise their basic democratic right – the right to vote" (*Boucher v Fitzpatrick*, 2012 FCA 212 at para 27). Parliament declined to specify "the manner for identifying electors of a participating First Nation" in the *FNER*, though the *FNEA* gave the Governor in Council this authority (*FNEA*, s 41). Accordingly, the EO cannot unilaterally impose a requirement for photo identification. Furthermore, unlike the *CEA*, Parliament made the choice not to require government issued photo identification under the Statutory Regime. As such, Parliament must be taken to have intended that a different standard apply (*Nova Tube Inc/Nova Steel Inc v Conares Metal Supply Ltd*, 2019 FCA 52 at para 40).

[58] Finally, courts have held that the Statutory Regime does not impose a positive obligation on the EO to insist on photo identification in the context of in-person voting (*Paquachan* at para 46). The requirements for proof of identity in the context of mail-in voting should be read in light of this holding.

[59] At the very least, the EO should have accepted the certified letter from the Membership Clerk confirming Mr. P. Pechawis' identity. The fact that Mr. P. Pechawis did not vote is enough to affect the outcome of the Election.

(b) *Respondents' Position*

[60] The only issue related to this ground of appeal is whether the EO breached the *FNER* by concluding that the letter submitted by Mr. P. Pechawis did not constitute proof of identity. The Statutory Regime is silent on what type of identification constitutes proof of identity and the case law is not instructive. In the circumstances, the Statutory Regime gives the EO the inherent discretion to determine what qualifies as proof of identity. The EO's decision to apply the same standard set out in the *CEA* (see subsection 143(2)) was reasonable and more appropriate than applying some arbitrary standard.

[61] Applying this standard, the letter submitted by Mr. P. Pechawis does not constitute proof of identity. The letter was only created to establish that Mr. P. Pechawis is a member of Mistawasis. The letter does not establish that he was the individual requesting a mail-in ballot from the EO.

[62] There is no evidence that the other five incarcerated members of Mistawasis were disenfranchised due to the photo identification rule. In fact, there is no evidence that any other incarcerated individuals sought to vote or provided identification that the EO rejected. Any evidence tendered by Ms. Johnstone in this regard is hearsay.

(4) Failure to accommodate quarantined electors

(a) *Applicant's Position*

[63] Some electors that were planning to vote in person were unable to do some because they had to quarantine. Subsection 16(2) of the *FNER* states that electors must request a mail-in ballot six or more days in advance of an election. At least one elector planning to vote in person had to quarantine within six days before the Election. The EO refused to provide this elector with a mail-in ballot.

[64] While the Statutory Regime does not contemplate pandemic measures, subsections 17(2) and 21(7) of the *FNER* both provide that another person may assist an elector if the elector is unable to vote in the manner provided for in the *FNER*. These provisions must be read to permit a quarantined elector to have a ballot brought to them. The EO failed to do so, resulting in a breach of subsections 17(2) and 21(7) and the disenfranchisement of at least one voter. One vote alone is enough to have affected the results of the Election.

(b) *Respondents' Position*

[65] Subsections 17(2) and 21(7) are inapplicable in the context of quarantined electors and do not impose the obligation alleged by Ms. Johnstone. Ms. Johnstone invites this Court to engage in "impermissible judicial redrafting" (*Beattie v National Frontier Insurance Co* (2003), 233 DLR (4th) 329, 68 OR (3d) 60 at para 16 [*Beattie*]). Canadian courts may only fill gaps in legislative schemes where a flaw can be characterized as a minor drafting error (*R v Vinepal*,

2015 BCCA 349 at paras 17-19; *Stone v Woodstock (Town)*, [2006] NBJ No 277 (NBCA), 302 NBR (2d) 165). The absence of a provision requiring the EO to bring a quarantined elector a ballot is not a minor drafting error.

[66] In *Paquachan*, Justice Layh found that the Statutory Regime does not place a positive obligation on the EO to check electors' identification. As a result, he held that there was no contravention and that the election should not be put aside on the basis of an alleged implied provision of the *FNEA* (at para 47). Likewise, Ms. Johnstone's argument must fail because there is no provision to contravene.

(5) Breaches to recount procedure

(a) *Applicant's Position*

[67] Subsection 24(2) of the *FNER* requires an automatic recount for all the candidates when an election is decided by fewer than five votes. Subsection 24(3) states that a "recount must commence within 24 hours after the announcement by the electoral officer that a recount is necessary."

[68] The First Recount did not recount Ms. Johnstone's votes, contrary to subsection 24(2) of the *FNER*.

[69] The EO also contravened the *FNER* by certifying the election results with INAC a day before conducting the Second and Third Recount on April 11, 2021. Accordingly, the Second

and Third Recounts had no possibility of changing the certified results. Thus, the EO never conducted a proper recount as required by subsections 24(2) and 24(3) of the *FNER*.

[70] The Fifth Recount had two fewer ballots than the other recounts, so it is inconclusive. Over the course of all the recounts, the votes have been within the following ranges:

Leslie Pechawis	171-172
William Badger	170-171
Norma Johnstone	167-171
Total Ballots	818-820

[71] Given the contraventions to subsections 24(2) and 24(3), the parties have been denied certainty as to who actually won the election. As such, a new election is necessary.

(b) *Respondents' Position*

[72] The Respondents concede that the EO contravened subsection 24(2) of the *FNER*. However, the Respondents submit that the contravention is not likely to have affected the results of the Election and it does not result in uncertainty. The EO recounted Ms. Johnstone's votes were three times. The Fifth Recount, which was independent, provided certainty for all parties and would have confirmed the results of the First, Third, and Fourth Recount had the firm counted three of the ballots it incorrectly rejected.

[73] The fact that the independent Fifth Recount affirmed the results should provide further certainty that Leslie Pechawis won the last seat on council by two votes and Ms. Johnstone lost

by three votes. There is no persuasive evidence that the contravention related to recount procedures likely affected the results of the Election.

(6) Missing/misplaced ballots

(a) *Applicant's Position*

[74] The *FNER* requires that ballot boxes must be sealed; the EO and others present must place their initials on the seal; the EO must ensure the safekeeping of the sealed ballot box; and after a recount, the EO must put the ballots in sealed envelopes to ensure their safekeeping (ss 24(4)(a)-(d), 25(1)). The EO must not have followed these provisions since two ballots were unaccounted for during the Fifth Recount, which could have easily changed the outcome of the Election. The Saskatchewan Court of Appeal upheld the finding that "unaccounted for" ballots were a contravention of the *FNER* that likely affected the results of the election (*McNabb* at paras 42-43)**.**

(b) *Respondents' Position*

[75] There was a discrepancy between the total number of ballots on the EO's report and the total number of ballots listed on the report of the independent accounting firm. However, this does not mean that there were two missing ballots that were not counted. The results of the Fifth Recount would have been the same as the EO's recounts if the firm had not rejected three ballots. This suggests that, rather than there being two missing ballots, the discrepancy is more likely due to the EO recording the total number of ballots incorrectly. This error is another example of an imperfection that ought to be expected in an election.

[76] The presumption of regularity holds that courts should "begin from the position that the election…comported with all requisite legal requirements" (*O'Soup* at para 33). This Court must presume that the EO did comply with the safekeeping provisions of the *FNER*. Ms. Johnstone has not provided evidence to suggest otherwise. On the contrary, the independent accounting firm's report indicates that the ballot box was sealed. This case is distinguishable from *McNabb* because there was actual evidence of improper handling in that case. Here, there is no such evidence.

[77] Alternatively, if two ballots did go missing, those ballots likely would not have affected the results of the Election. The results of the independent Fifth Recount were the same as the recounts conducted by the EO. If two ballots were missing and the results of the Fifth Recount were not affected, those ballots are not likely to have affected the results of the Election.

(7) Should this Court exercise its discretion to set aside the Election?

(a) *Applicant's Position*

[78] The magic number in this case is 1 vote. Any of the contraventions discussed above satisfy this threshold. The outcome of the Election would have been different if Ms. Struck, Mr. P. Pechawis, the other incarcerated members of Mistawasis, the quarantined electors, or the electors whose ballots went missing were entitled to have their votes count. As such, this Court should exercise its discretion to set aside the Election.

[79] Ms. Johnstone has appealed the election for both Chief and Council. However, if this Court finds that the Chief's margin of victory (51 votes) is large enough that the contraventions discussed above do not affect the results of the Chief's race, the Chief's race should not be set aside. The remedy in this case cannot be a by-election for the last seat on Council. The entire election for Council must be set aside (*Yukon (Chief Electoral Officer) v Nelson*, 2014 YKSC 26 at paras 17-18).

(b) *Respondents' Position*

[80] This Court should not exercise its discretion to set aside the Election. Ms. Johnstone has not established that any errors affected the results of the Election. The Fifth Recount affirmed that Leslie Pechawis won the race by two votes.

[81] Alternatively, if there are contraventions that likely affected the results of the Election, this Court should not set the Election aside (See *Opitz* at paras 48-49; *O'Soup* at paras 122-125). Any errors were administrative in nature and allowance should be made for such errors (*Opitz* at para 46). A reviewing court should have "close regard to the nature of the contravention, its importance, and relevance" when deciding to exercise its discretion (*O'Soup* at para 31). A collection of administrative errors cannot "add up" to warrant a new election – a single contravention must have likely affected the results (*Bird* at para 118).

[82] Furthermore, setting the Election aside would disenfranchise voters; result in the removal of Councillors with a clear plurality of votes; increase the potential for future litigation; undermine certainty in democratic outcomes; lead to voter disillusionment; and set a dangerous

precedent for First Nation elections (*Bird* at para 31). If minor administrative errors are enough to set aside a close First Nation election, there will be an increase of appeals by unsuccessful candidates. Further, unsuccessful candidates will see the advantage of raising multiple allegations on appeal that will inevitably reveal some imperfections with the election.

VII. Analysis

A. *What is the appropriate test to determine whether a contravention "likely affected the result of the Election"?*

[83] The magic number test is the appropriate test to determine whether a contravention likely affected the result of the Election. *Opitz* concerned a federal election. In that case the Supreme Court of Canada stated:

> [71] To date, the only approach taken by Canadian courts in assessing contested election applications has been the "magic number" test referred to in *O'Brien* (p. 93). On this test, the election must be annulled if the rejected votes are equal to or outnumber the winner's plurality (*Blanchard*, at p. 320).
>
> [72] The "magic number" test is simple. However, it inherently favours the challenger. It assumes that all of the rejected votes were cast for the successful candidate. In reality, this is highly improbable. However, no alternative test has been developed. No evidence has been presented in this case to support any form of statistical test that would be reliable and that would not compromise the secrecy of the ballot.
>
> [73] Accordingly, for the purposes of this application, we would utilize the magic number test. The election should be annulled when the number of rejected votes is equal to or greater than the successful candidate's margin of victory. However, we do not rule out the possibility that another, more realistic method for assessing contested election applications might be adopted by a court in a future case.
>
> [Emphasis added.]

[84] As the Respondents point out, the Saskatchewan courts in *McNabb* and *Paquachan* have similarly questioned the magic number test in the context of multi-ballot candidate elections under the Statutory Regime. The Respondents have also pointed to *Ogden* for authority that the magic number test should not be applied. In *Ogden* the Court of Queen's Bench of New Brunswick declined to apply the magic number test, noting the following:

> [149] To my knowledge the magic number test has never been applied in New Brunswick. Using such a test would be inconsistent with the "substantial effect" test established by Chief Justice Hazen in *Anderson*. That is:
>
> > "…before the election can be set aside and a new election ordered it must be shown that the irregularities are substantial and not merely informalities, and must be of such a nature as that may reasonably be said to produce a substantial effect upon the election…"
>
> [Emphasis added.]

[85] In comparison, this Court has consistently applied the magic number test when reviewing elections conducted under the Statutory Regime. While *McNabb* and *Paquachan* have both questioned the magic number test, the Respondents, other than submitting *Ogden* on the eve of the hearing of this matter, have not articulated an alternative test. There is an insufficient basis for this Court to determine an alternative to the magic number test based on the parties' submissions.

[86] Moreover, in both *Paquachan* and *McNabb*, the courts ultimately applied or upheld the application of the magic number test (*Paquachan* at para 98; *McNabb* at paras 48, 50, 53).

[87] This Court has recognized that the magic number test is not appropriate in cases dealing with allegations of fraud or corruption. In comparison, this Court has noted its appropriateness where the appeal pertains to "technical procedural irregularities", like in the present case (*Papequash v Brass*, 2018 FC 325 at para 34; *Good* at para 54).

[88] For these reasons, while the magic number test is imperfect and is problematic in the context of multi-candidate ballots, it remains the only statistical test that does not "compromise the secrecy of the ballot" (*Opitz* at para 72).

B. *What is the "magic number"?*

[89] I am of the view that the magic number is most likely two. Ms. Johnstone's votes were recounted four times. The results were:

Second Recount:	
Norma Johnstone	171

Third Recount:	
Norma Johnstone	169

Fourth Recount:	
Norma Johnstone	169

Fifth Recount:	
Leslie Pechawis	171
William Badger	170
Norma Johnstone	167

[90] The independent accounting firm that conducted the Fifth Recount rejected three ballots. The firm rejected three ballots because those ballots had an additional marking on them. However, in my view, it is clear that the additional marking was a correction. In each case, the

intent of the electors was clear. If the firm had counted these ballots, Ms. Johnstone would have secured two more votes and Leslie Pechawis would have received one more vote. In other words, the totals for all the recounts, except the Second Recount, would have been consistent:

First Recount	
Leslie Pechawis	172
William Badger	170

Second Recount:	
Norma Johnstone	171

Third Recount:	
Norma Johnstone	169

Fourth Recount:	
Norma Johnstone	169

Fifth Recount:	
Leslie Pechawis	172
William Badger	170
Norma Johnstone	169

[91] The Respondents state that the Second Recount was flawed because Ms. Johnstone interrupted and asked the EO questions during the recount. During cross-examination, the EO stated that Ms. Johnstone's questions related to why he was counting a certain ballot or not and that her questions would stop the count. He would respond to her question and then begin the count again. In her affidavit, a DEO stated that she thought the EO counted a ballot for Ms. Johnstone twice when this happened. On cross-examination of the EO, counsel for Ms. Johnstone tried to impugn this evidence by pointing out that at paragraph 73 of his affidavit, the EO stated that Ms. Johnstone did not raise any issues regarding spoiled ballots during the April 11 recounts. In my view, the EO is not making inconsistent statements. The *FNER* provides that a "spoiled ballot" is a ballot that an elector has inadvertently made unusable (*FNER*, s 21(9)) whereas a "rejected ballot" is a ballot that is not counted (*FNER*, s 23(a), (e)). On cross-

examination, Ms. Johnstone admitted that she did not observe any spoiled ballots. Rather, she saw ballots that, in her opinion, should have been rejected by the EO.

[92] I find that Ms. Johnstone's interruptions during the Second Recount could reasonably interfere with the integrity of the counting process and explain why she received two additional votes. When the EO and the independent accounting firm conducted uninterrupted recounts, Ms. Johnstone received 169 votes and Leslie Pechawis received 172 votes, two more than William Badger. As such, Ms. Johnstone must demonstrate that there was at least one contravention of the Statutory Regime that resulted in at least two electors being disenfranchised.

C. *Was there a contravention of the Statutory Regime on any of the following grounds that "likely affected the result" of the Election?*

(1) Failure to send mail-in ballot packages by email

[93] While Ms. Johnstone's Notice of Application identifies the requirements under sections 4 and 5 of the *FNER*, at no point does it state that the EO failed to send mail-in ballot packages by email. I agree with the Respondents that this ground of appeal is new and does not engage any of the exceptions to Rule 301(e) that were articulated in *Tl'azt'en*.

[94] However, I nevertheless find that the EO clearly articulated that he did not receive any email addresses from Mistawasis during his cross-examination:

> Q: Okay. So I want to, sort of, start from the top and just ask some questions about the mail-outs that you did at the start of the election process. In reference to paragraph 6 of your affidavit, you indicate that INAC gave you the voters list; is that correct?
>
> A: Yes.

> Q: Okay. And then at paragraph 8, you also indicate that the band gave you a voters list with mailing labels; is that correct?
>
> A: They gave us an address list with the labels. Right.
>
> Q: Right. Did they also give you the email addresses of the -- of the voters?
>
> A: No.
>
> Q: Was that a "no"?
>
> A: No. What do I -- they didn't.
>
> Q: They didn't. Okay. And did you ask for email addresses for the officer [phonetic] electors?
>
> A: No.
>
> Q: Okay. And so to be, clear, then, at paragraph 9 of your affidavit, you state that you sent the nomination packages by mail. And to be totally clear, you didn't also send it by email; right?
>
> A: Just by mail.
>
> [Emphasis added.]

[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.

(2) Failure to send a mail-in ballot to Ms. Struck in a timely manner

[96] Ms. Struck's affidavit states that she requested a mail-in ballot package in writing on March 3, 2021. However, Exhibit 1 of that affidavit indicates that she reached out to the EO with her Form and identification on March 10, 2021. Ms. Johnstone suggests that the March 10, 2021 email was a follow up to the March 3, 2021 email. The parties agree that the March 10, 2021 email went to the EO's junk mail and that the EO did not discover it until March 29, 2021.

[97] This Court must decide what date Ms. Struck sent her written request to the EO to determine whether subsection 16(1) or 16(2) of *FNER* applies. Quite simply, the Court only has documentary evidence of the March 10, 2021 email request. Therefore, I find that Ms. Struck's first request was sent on March 10, 2021. As such, subsection 16(2) applies, meaning that the EO could not have contravened subsection 16(1).

[98] I find that Ms. Johnstone has established a contravention under subsection 16(2) of the *FNER*. A contravention under the Statutory Regime can be "unintentional" and occur due to "negligence" or "inadvertence" (*O'Soup* at para 27). In my view, the EO's failure to check his junk mail folder amounts to negligence or, at the very least, inadvertence. Subsection 16(2) of the *FNER* simply requires that an elector make a "written request." The Statutory Regime does not define a "written request" nor does it stipulate how members must communicate that request. The Notice of Nomination and other election documentation includes the EO's mailing address, telephone number, and email address. Therefore, the EO had a responsibility to check all of these modes of communication. In the case of email, he was required to check his junk mail folder. This is particularly true given the fundamental importance of the right to vote.

[99] Additionally, subsection 16(2) states that the EO's obligation to send a mail-in ballot "as soon as feasible" is triggered "after receipt" of an elector's written request. It is informative that provincial electronic commerce legislation states that an email is deemed to be received by an addressee "when it enters an information system designated or used by the addressee for the purpose of receiving information or documents in an electronic form of the type sent and it is capable of being retrieved and processed by the addressee" (*The Electronic Information and Documents Act, 2000,* SS 2000, c E-7.22, s 21(3)(a). See also *Electronic Commerce Act, 2000*, SO 2000, c 17, s 22).

[100] In my view, this legislation lends legitimacy to the position that the EO received Ms. Struck's written request when it arrived in his junk mail folder. The EO has control over his junk mail folder and he his able to check it. Accordingly, his obligation to send Ms. Struck a mail-in ballot "as soon as feasibly possible" was triggered on March 10, 2021 or very shortly thereafter. The EO sent a mail-in ballot package to Ms. Struck using ExpressPost on the same day her request was discovered. Presumably, had the EO checked his junk mail regularly, he could have taken the same steps 19 days earlier. In the circumstances, I do not find that the EO sent Ms. Struck her mail-in ballot package "as soon as feasibly possible."

[101] However, only one voter was disenfranchised due to this contravention. Therefore, I do not find that this contravention likely affected the results of the Election.

(3) Incorrect application of ID requirements

[102] Ms. Johnstone invites this Court to read in an implied term of what constitutes "proof of identity." For the following reasons, I decline to do so.

[103] The Saskatchewan Court of Queen's Bench declined to read in an implied term related to proof of identity in *Paquachan*. In that case, the applicant claimed that the EO had a positive obligation to check identification of in-person voters. The Court found that the Statutory Regime is silent on whether an EO must insist on proof of identity (at para 46). As such, Justice Layh concluded that he was "unprepared to set aside an election result on an alleged implied requirement of the *FNEA*" (at para 47).

[104] As Ms. Johnstone points out, section 41 of the *FNEA* gives the Governor in Council authority to specify "the manner for identifying electors of a participating First Nation" in the *FNER*. Yet, Parliament chose not to exercise this power and did not define what constitutes acceptable "proof of identity." I accept Ms. Johnstone's position that this choice was intentional. However, in my view, this does not mean that Parliament intended that identification requirements be less stringent than the *CEA*. By this logic, Parliament could have intended more stringent requirements apply.

[105] Rather, I agree with the Respondents that it is inappropriate for this Court to define "proof of identity." In her text, *Sullivan and Driedger on the Construction of Statutes, 4th ed (Markham: Butterworths, 2002)*, Professor Sullivan explains why courts do not have jurisdiction to fill legislative gaps:

> While courts are willing to correct drafting errors, they are reluctant to fill gaps in legislation. This reluctance is grounded in two factors. First, unlike mistakes, which are always inadvertent, a gap in legislation may be deliberate. Gaps may result from faulty drafting but equally they may result from factual misconceptions, poor planning or even a considered policy choice. For this reason, gaps are taken to embody the actual intentions of the legislature, which courts are bound to respect. It is up to the legislature rather than the courts to effect any desired change. Second, whether inadvertent or not, gaps result from provisions or schemes that are under-inclusive, and correcting under-inclusiveness would require courts to legislate (at 136).
>
> [Emphasis added.]

[106] Courts must presume that the legislature does not make mistakes. If Parliament wanted specific identification requirements to apply, it would have included the necessary language to make that clear (*Beattie* at para 19). In my opinion, the legislature's silence on this issue is likely a "considered policy choice" to defer to participating First Nations. In *Paquachan*, Justice Layh acknowledged that the EO implemented their own "procedural safeguards" by asking electors for photo identification or asking them for their name, birth date, and treaty number (at para 44). Justice Layh did not interfere with the First Nation's approach.

[107] Deferring to First Nations is consistent with the unique context and purpose of the Statutory Regime, which generally, is to strengthen First Nation's elections. Elections are inherently connected to self-governance and the Statutory Regime was intended to move away from the paternalism of the *Indian Act* (see Regulatory Impact Analysis Statement for the *FNER* in Canada Gazette, Part II, Vol 149, No 15 at 1177-1187; See also December 10, 2013 Hansard Debates, Sitting 34). Therefore, it is reasonable to conclude that Parliament's intent is for First Nations to implement their own procedural safeguards where the Statutory Regime is silent.

[108] Accordingly, I find that a First Nation, through their EO, has discretion to determine what constitutes “proof of identity.” The EO did not contravene subsection 16(1) by requiring photo identification or rejecting the letter submitted by Mr. P. Pechawis. Additionally, there is no evidence that any other incarcerated individuals made a written request for a mail-in ballot. Absent proof of a written request that complies with section 15 of the *FNER*, the Court cannot find that the EO contravened subsection 16(1).

[109] I acknowledge and take very seriously Ms. Johnstone’s argument that stringent voter requirements can result in voter suppression for marginalized groups. This is particularly true in the context of Indigenous communities where, for various reasons, some community members may not have government issued photo identification. First Nations exercising their discretion to implement procedural safeguards where the Statutory Regime is silent must be alert to potential challenges in this regard. Given the fundamental importance of an off-reserve band member’s right to vote (*Corbiere* at para 90), First Nations may find it beneficial to trend towards more inclusive procedural safeguards.

(4) Failure to accommodate quarantined electors

[110] Similar to the last ground of appeal, Ms. Johnstone once again asks this Court to read in an implied term that does not exist in the Statutory Regime. For the reasons already articulated, I would decline to do so.

[111] As discussed above, the fact that the Statutory Regime lacks provisions related to quarantined voters is a gap. Whereas the last ground of appeal concerned a gap related to a

policy choice, this gap is likely a result of "poor planning." Understandably, the legislature was not able to foresee that First Nation elections would be affected by a global pandemic that requires individuals to suddenly quarantine. However, the exclusion of a provision requiring the EO to bring quarantined voters a mail-in ballot is not simply a "mistake" or a "minor drafting error." I agree with the Respondents that subsections 17(2) and 21(7) do not impose this obligation.

(5) Breaches to recount procedure

[112] I agree with the parties that subsections 24(2) and 24(3) of the *FNER* were violated. There was never a proper recount of all three candidates that were within 5 votes that took place within 24 hours, as required by the *FNER*. The EO further contravened subsection 24(2) by prematurely sending the results to INAC before completing a proper recount under the *FNER*.

[113] However, in my view, these contraventions did not likely affect the results of the Election. Ms. Johnstone's votes were recounted four times. I agree with the Respondents that had the independent accounting firm not rejected three of the ballots, the results would have always been consistent.

(6) Missing/misplaced ballots

[114] The overview at paragraphs 75-77 shows that the discrepancy regarding the total number of ballots is most likely the result of a recording error. I can appreciate that electors in an election would want an error-free election so that they can have faith in every aspect of the electoral

process. However, the Statutory Regime acknowledges that mistakes or irregularities may occur. This is why Parliament has added the requirement that such errors or irregularities must have likely affected the election outcome.

[115] I also acknowledge that the Second, Third, Fourth, and Fifth Recounts were unconventional as they fell outside of the Statutory Regime. As stated above, no party sought to invalidate or discredit these additional recounts, so I will briefly provide some commentary on them. The Fifth Recount matches the results of the First Recount, Third Recount, and Fourth Recount. If there were two ballots unaccounted for in the Fifth Recount, the results should have been different from the other recounts but they are not.

[116] Ms. Johnstone has not led any evidence to establish that any of the safekeeping measures in the *FNER* were contravened (ss 24(4)(a)-(d), 25(1)). On the contrary, the evidence suggests that the safekeeping provisions were followed. The accounting firm's report states that immediately prior to the Fifth Recount, the ballot box was sealed. Likewise, the EO's affidavit states that he kept all mail-in ballots he received in a locked suitcase. On election day, witnesses checked that the boxes were empty and then the boxes were sealed. Those witnesses signed a document entitled 'Witness Declaration at the Opening Poll' that confirmed as much. During cross-examination, the EO similarly stated that after the First Recount and the recounts that occurred on April 11, 2021, the ballot boxes were sealed and signed by himself and the DEOs. The presumption of regularity applies to the safekeeping of the ballots. As such, Ms. Johnstone has not established a contravention related to this ground of appeal.

D. *Should this Court exercise its discretion to set aside the Election?*

[117] If there is a breach of the Statutory Regime, this Court has discretion to set aside an election. Sections 31 and 35(1) of the *FNEA* state:

> 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.
>
> […]
>
> 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.]

[118] The discretion of this Court comes from the use of the permissive word "may" (*McNabb* 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* at para 48). In this case, although it was a very close race for the last Councillor position, the winner is not in doubt and there is no discretion for this Court to exercise in relation to setting aside the Election. Ms. Johnstone has established that two contraventions of the Statutory Regime occurred, but has failed to establish that the results of the Election were likely affected.

VIII. Conclusion

[119] Ms. Johnstone's application to contest the results of the Mistawasis Election is dismissed. Only Ms. Johnstone has made fulsome submissions on costs. It is preferable to allow the Respondents 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-749-21

THIS COURT'S JUDGMENT is that:

1. The application to contest the Mistawasis Election pursuant to sections 31-35 of the *FNEA* is dismissed.
2. The parties, including Ms. Johnstone, may submit their submissions on costs as follows:
    a. Ms. Johnstone shall, if she so chooses, submit supplementary submissions by May 16, 2022; and
    b. The Respondents shall file their submissions by June 6, 2022.

"Paul Favel"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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STYLE OF CAUSE:	NORMA JOHNSTONE v MISTAWASIS NEHIYAWAK, DARYL WATSON, COLBY DANIELS, ROBIN DANIELS, STEVEN JOHNSTON, LESLIE PECHAWIS, AND DEREK SANDERSON
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APPEARANCES:

Evan Duffy	FOR THE APPLICANT
Adam Touet	FOR THE RESPONDENTS

SOLICITORS OF RECORD:

Barrister and Solicitor Perlee McLaws LLP Edmonton, Alberta	FOR THE APPLICANT
W Law LLP Saskatoon, Saskatchewan	FOR THE RESPONDENTS