Federal Court  Cour fédérale

Date: 20160531

Docket: T-1875-15

Citation: 2016 FC 597

Ottawa, Ontario, May 31, 2016

PRESENT: The Honourable Madam Justice Strickland

BETWEEN:

GORDON GADWA

Applicant

and

KEHEWIN FIRST NATION, TINA DION, AND BRENDA JOLY

Respondents

JUDGMENT AND REASONS

[1] This is an application for judicial review of the October 12, 2015 decision of Loreen Suhr, made in her role as the elections officer ("Elections Officer") for the Kehewin Cree Nation ("KCN"), concerning an appeal from the September 29, 2015 election for Chief of the KCN. The application is brought pursuant to ss 18(1) and 18.1 of the *Federal Courts Act*, RSC 1985, c F-7 ("Federal Courts Act").

Background

[2] Elections of Council and Chief of the KCN are governed by the Kehewin Cree Nation Custom Election Act ("KCN Custom Election Act" or "Act"). An election was required by the settlement of an application for judicial review arising from a prior election held in March 2014 (T-973-14). Accordingly, by way of a KCN band council resolution dated May 29, 2015, Loreen Suhr was appointed Elections Officer. On June 9, 2015 she provided notice of a nomination meeting. The notice indicated that nominations for seven Council positions would take place on July 13, 2015, that the election would occur on September 1, 2015 and that an election for the position of Chief would be held following the Council election. The Council election proceeded on September 1, 2015 and seven new Councillors were elected. Four of the newly elected Councillors submitted notices of their intention to run for the position of Chief. The election for Chief was held on September 29, 2015, following which the Elections Officer declared Gordon Gadwa the successful candidate. He received 141 votes, Brenda Joly received 138 votes, Willie John received 127 votes and Jason Mountain received 92 votes.

[3] On October 5, 2015, counsel for Tina Dion, a Respondent in this application, filed a notice of appeal, pursuant to Section XIV, Article 1 of the KCN Custom Election Act. The appeal alleged that Gordon Gadwa had engaged in vote buying, a corrupt election practice. In support of her appeal the appellant provided an affidavit sworn by Elmer Gary Paul which alleged that on September 22, 2015, Gordon Gadwa had paid him $20 for his vote and that on September 29, 2015, Elmer Gary Paul's nephew, Byron Paul, had told him that Gordon Gadwa was paying others $40 for their votes. She also cited jurisprudence in support of her submissions

(*Sideleau v Davidson (Controverted election for the Electoral District of Stanstead)*, [1942] SCR 306 [*Sideleau*]; *Wilson v Norway House Cree Nation Election Appeal Committee*, 2008 FC 1173 at paras 18, 22, 25-28 and 30 [*Norway House*]; *Opitz v Wrzenshewskyj*, 2012 SCC 55 at para 76 [*Opitz*]; and *Yukon (Chief Electoral Officer) v Nelson*, 2014 YKSC 26 at para 15 [*Nelson*]).

[4] The following day, then-counsel for Gordon Gadwa responded in writing to the notice of appeal stating, amongst other things, that Canadian case law was not applicable and, because "corrupt practices" is not defined in the KCN Custom Election Act, the appeal was not valid. In an affidavit dated October 6, 2015 Gordon Gadwa admitted to giving Elmer Gary Paul $20, but stated that it was at Elmer Gary Paul's request and was unrelated to the election, specifically, he claimed it was part of an entry fee to a hand games event. Further, that he did "declare his intention to run for Chief" to Elmer Gary Paul at that time. The affidavit of Gordon Gadwa also stated that Elmer Gary Paul's allegations regarding statements made by Byron Paul were inadmissible hearsay and that he had never paid for any votes. Rather, that Byron Paul had requested gas money to take KCN members to voting stations and that Gordon Gadwa had given him money for this purpose.

[5] Gordon Gadwa's then-counsel provided further written submissions on October 7, 2015 elaborating on the arguments presented in the October 6, 2015 response. Specifically, that because KCN had a custom election act, Canadian case law did not apply; that the hearsay evidence of Elmer Gary Paul was not admissible; and, because the KCN Custom Election Act contained no appeal process, the documents submitted by the appellant did not prove any breach of the Act. The appellant's counsel replied on the same date, submitting that Canadian case law

applied as the *Constitution Act, 1867* applies to all elections in Canada and imports the principles of federalism, democracy and the rule of law; that direct evidence is not required to establish corrupt election practices (*Norway House*; *Sideleau*); and, because the integrity of the election had been undermined it must be set aside (*Nelson*).

Decision Under Review

[6] On October 12, 2015 the Elections Officer issued a decision in the appeal. She began by providing an introduction which included a statement she had made to candidates, on two occasions, that:

> You are expected to run a clean campaign. Bribery, influencing, coercion or intimidation of the voters or the electoral staff will not be tolerated. If I receive an Affidavit alleging any improper conduct by any candidate, I will take the necessary action.

[7] She then set out the appeal provisions of the KCN Custom Election Act and summarized the submissions of the appellant, the claims made by Elmer Gary Paul in his affidavit as well as those made by Gordon Gadwa in his responding affidavit. The Elections Officer also described unsolicited evidence received from Byron Paul, being that in a telephone call he stated that he had asked Gordon Gadwa for $20 for gas money to go to St. Paul for an appointment. Gordon Gadwa had not mentioned that the gas money was to take other voters to the poll to vote.

[8] The Elections Officer also set out the submissions of counsel for the appellant and for Gordon Gadwa and the remedies that they each sought.

[9] In her analysis, the Elections Officer noted that Section XIV of the KCN Custom Election Act, appeals, provides that an election officer "may do what is reasonably necessary to answer the appeal" and that, although the Act does not use the words "corrupt practice", Sections VIII and X contemplate removal of a Chief or Councillor for "malfeasance, neglect of duty or misconduct". Further, she noted that the Act is not an isolated or insulated document and is subject to the application of the laws of Canada as they relate to the electoral process.

[10] The Elections Officer found that Gordon Gadwa had admitted to paying money to Elmer Gary Paul and Byron Paul in his affidavit. She found Gordon Gadwa's explanation for the payment to Elmer Gary Paul not to be credible. The Elections Officer questioned why Gordon Gadwa would declare, at the time of his payment to Elmer Gary Paul, his intention to run for Chief when the election was only three days later. All candidates for Chief had declared their intention to run on September 1, 2015, and the list of candidates had also been posted. The members of KCN were well aware of who those candidates were.

[11] As to Gordon Gadwa's explanation for the payment of gas money to Byron Paul, which was to bring KCN members to vote, this was contradicted by Byron Paul's unsolicited communication of October 9, 2015 when he stated that he asked for the money to go to St. Paul for an appointment and categorically denied asking for gas money to take members to vote. However, the Elections Officer concluded that as Gordon Gadwa admitted to paying money to both Byron and Elmer Gary Paul, it was unnecessary for her determination of the merits of the appeal to deal with the inconsistencies between Elmer Gary Paul's affidavit and Byron Paul's unsolicited evidence.

[12] The Elections Officer found that:

> On the balance of probabilities, I find that the evidence supports the inference and reasonable conclusion that the moneys paid were related to the election for Chief and were intended to influence or bribe the voters to cast a vote for Gordon Gadwa.

[13] Given this, and her prior instructions to the candidates that bribery or influencing of voters would not be tolerated, the Elections Officer found that Gordon Gadwa did engage in a corrupt election practice and that his actions vitiated his election.

[14] On the issue of a proper remedy, she noted that counsel for Gordon Gadwa had proposed that the proper remedy would be to have a new vote for Chief. However, the Elections Officer found that it was neither reasonable nor necessary for the KCN to have to spend several thousands of dollars to have another election for Chief due to the corrupt election practice of a candidate. Further, she found that the corrupt election practices engaged in by Gordon Gadwa so undermined the integrity of the democratic election process for the KCN that whether or not the actual number of voters affected was minimal should not be a consideration.

[15] She stated that she was mindful of the extremely serious nature of the matter and was of the view that the appropriate remedy should reflect both the destructive nature of the corrupt elections practice engaged in and assure the members of the KCN that such behaviour is not acceptable. Therefore, she found the reasonably necessary remedy was that: the election of Gordon Gadwa as chief of the KCN be voided and Gordon Gadwa be removed both as Chief and as Councillor; the candidate with the next highest number of votes, Brenda Joly, be declared as

elected as Chief of the KCN; and, the candidate for Councillor with the next highest number of votes, Eric Gadwa, be declared as a Councillor of the KCN.

Issues

[16] The Applicant submitted two issues for the Court's consideration which I have reframed as follows:

1. Did the Elections Officer breach procedural fairness?
2. Was the Elections Officer's decision reasonable?

Standard of Review

[17] The parties submit and I agree that the interpretation and application of the KCN Custom Election Act by the Elections Officer is reviewable on the standard of reasonableness (*Orr v Peerless Trout First Nation*, 2015 FC 1053 at para 44 [*Orr*]; *Campre v Fort McKay First Nation*, 2015 FC 1258 at para 32 [*Fort McKay*]; *D'Or v St Germain*, 2014 FCA 28 at paras 5-6; see also *Lower Nicola Indian Band v York*, 2013 FCA 26 at para 6 [*York*]; *Tsetta v Band Council of the Yellowknives Dene First Nation*, 2014 FC 396 at para 22 [*Tsetta*]).

[18] Reasonableness is concerned with the existence of justification, transparency and intelligibility, and whether the decision falls within a range of possible, acceptable outcomes (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47 [*Dunsmuir*]; *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 59 [*Khosa*]).

[19] It is well established that the standard of correctness applies to questions of procedural fairness (*Khosa* at para 43; *York* at para 6; *Tsetta* at para 24; *Ermineskin Cree Nation v Minde*, 2008 FCA 52 at para 32; *Mission Institution v Khela*, 2014 SCC 24 at para 79; *Testawich v Duncan's First Nation*, 2014 FC 1052 at para 15). The parties, when appearing before me, accepted the Applicant's position that the reasonableness standard applied to all of the issues raised, including those of procedural fairness. In support of the deferential standard, the KCN suggested that the terms of the KCN Custom Election Act, as a consolidation of KCN custom election law approved by the KCN band, are owed great deference. And, in any event, the outcome would be unchanged regardless of the applicable standard of review.

[20] I am not aware of any jurisprudence that would support the parties' position that the reasonableness standard applies to matters of procedural fairness in cases of custom election acts or codes. Nor is it open to parties to elect or agree to an alternate standard of review. Rather, the Supreme Court of Canada in *Dunsmuir* created a framework through which courts are to determine the appropriate level of deference in overseeing the actions and decisions of administrative bodies. Further, where existing jurisprudence has satisfactorily determined the standard of review to be accorded to a particular category or question, then that standard can be adopted by a reviewing court (*Dunsmuir* at paras 57 and 62). As stated above, the jurisprudence points to review of issues of procedural fairness on the correctness standard. Regardless, I do agree, given my reasons below, that nothing turns on this issue and I would come to the same conclusion on either standard of review.

The KCN Custom Election Act

[21] The following provisions of the KCN Custom Election Act are most relevant to the present case:

> **PREAMBLE – SECTION I**
>
> The Chief and Councillors elected under the provisions of this Custom Election Act shall be given the sole authority to govern Kehewin Cree Nation No. 123. The Chief and Councillors so elected shall be responsible for the peace, order and good government of Kehewin Cree Nation; shall protect the interests of their membership socially, economically, culturally, educationally and spiritually; shall promote peace and cooperative relationships with other First Nations Governments; and shall maintain relations with the settler Government in accordance with the provisions of Treaty Six of 1987.
>
> **NOMINATION PROCESS – SECTION IV**
>
> 1) Chief and Council shall appoint and Elections Officer, set a date and place for the nomination of Councillors and advise the Reelections Officer of the date and place so set.
>
> **ELECTIONS – SECTION V**
>
> 1) An election shall be held to elect the Councillors.
>
> 2) Within seven (7) calendar days of the election of the Councillors there shall be an election for Chief only from the elected Councillors who wish to run for chief.
>
> **VACANCIES – SECTION VIII**
>
> 1) If a Chief or Councillor dies, resigns, is convicted of an indictable offence, moves off the reserve, fails to attend three (3) consecutive regular Council meetings without reasonable grounds, or is removed by being found guilty of a malfeasance, neglect of duty or misconduct, a vacancy occurs.
>
> 2) In the event that the Chief position becomes vacant, the Council shall select a Councillor as interim Chief until an election can be held.

BY-ELECTIONS – SECTION IX

1) Subject to paragraph three (3), in the event of a vacancy a by-election will be set by Chief and Council.

2) The by-election shall follow the same procedure as the election procedure contained in the Act.

[…]

CHIEF AND COUNCIL – SECTION X

1) The Chief and Councillors shall be elected for a three (3) year term of office.

2) The Kehewin Cree Nation No. 123 Chief and Council shall have six (6) Councillors and one (1) Chief.

3) A Chief or Councillor who is convicted of an indictable offense under the Criminal Code of Canada is not eligible to remain on Council.

4) If any Chief or Councillor during their term of office is accused of malfeasance neglect of duty or misconduct reflecting of a Councillor of Kehewin Cree Nation No. 123 then the member(s) alleging shall in writing convey their concern(s) to Council who shall address the concern(s) alleged and report back to the member(s) making the allegation.

5) If the member(s) are not satisfied with response by Chief and Council then the member(s) may appeal to an Elders Advisory Committee.

6) If the decision of the Elders Advisory Committee is not acceptable to the alleging member(s), then a special band meeting will be held that will include seventy per cent (70%) of the voting membership of Kehewin Cree Nation No. 123 and a motion shall be passed containing a final decision of the allegations.

7) In order for a motion to pass at the special band meeting it must have a sixty per cent (60%) majority vote of those in attendance.

8) The voting at the special band meeting will be by secret ballot and Chief and Council may determine or appoint an individual(s) to count the secret ballots.

> 9) If the allegations are proven, the Chief or Councillor will be removed by Council.
>
> **ELDERS – SECTION XIII**
>
> 1) Elders can be asked by Chief and Councillors to assist them in issues and decisions which may arise as a result of this Act.
>
> **APPEALS – SECTION XIV**
>
> 1) Any appeals under this Act must be made in writing to the Elections Officer within thirty (30) calendar days of the election for Chief.
>
> 2) The Elections Officer receiving the appeal may do whatever is reasonably necessary to answer the appeal and must provide a response within seven (7) calendar days from the receipt of the appeal.
>
> 3) The decision of the Elections Officer shall be binding and final.

Preliminary Issues

i. *Parties to the application for judicial review*

[22] By way of a Notice of Change of Solicitor filed on February 1, 2016 Ms. Miranda Moore became solicitor of record in this matter for Gordon Gadwa, William Dion, Arnold Paul and Margaret Gadwa. All of those persons remained as named Applicants in the Amended Notice of Application filed on April 6, 2016. However, the title of the written representations is Memorandum of Fact and Law of the Applicant, Gordon Gadwa and those submissions speak only of him as the Applicant and make no reference to the other named Applicants.

[23] Because their role or interest in the application was not apparent, counsel for the named Applicants was asked by the Court for clarification at the hearing of this matter. She advised that

she had received a retainer and instructions only from Gordon Gadwa. Counsel for the Respondent, Brenda Joly, advised that the other named Applicants were involved solely with another appeal that was ultimately not included in this application. Given this, the Court asked that Ms. Moore consult with the other named Applicants and, if appropriate, immediately take the procedural steps necessary to remove them from the style of cause. On May 26, 2016, Ms. Moore filed Notices of Discontinuance on behalf of William Dion, Margaret Gadwa and Arnold Paul.

ii. *April 6, 2016 affidavit of Gordon Gadwa*

[24] Justice McVeigh, the case management judge in this specially managed case, issued a direction on April 5, 2016 concerning, amongst other things, the submission of an affidavit of Gordon Gadwa in support of the application for judicial review. In that regard, the direction states:

> 3. This Judicial Review can proceed without an affidavit from the Applicant as the CTR is before the court as directed December 30, 2015. But as the Original Notice of Application alleges procedural unfairness, I will allow the Applicants to file an affidavit in their Application Record with restrictions. To allow this affidavit at this very late date is highly irregular and I am doing it to negate any allegations of prejudice that the Applicant may raise if they were not afforded this exceptional remedy at this stage in the proceedings… if the Applicant does file an affidavit, the affidavit will be limited to only address the procedural unfairness if it is alleged in the amended Notice of Application. The Affidavit will be limited to personal knowledge and will not contain opinion or argument as set out in Rule 81 of the Federal Courts Rules.

[25] The Amended Notice of Application alleges that the Elections Officer denied the Applicants procedural fairness by:

(i) failing to require an oral hearing.

(ii) failing to refer any appeal to another body, other than herself.

(iii) failing to direct cross-examinations on Affidavits on serious allegations.

(iv) receiving and allowing 'unsolicited', 'unsworn', 'unidentified', phone calls as evidence in the absence of the appellant [*sic*] Gordon Gadwa or his legal counsel.

(v) failing to adhere to the principles of natural justice by allowing 'phone calls' from 'unsolicited', 'unidentified', 'unsworn' from 'unknown' sources to influence her decision.

(vi) relaxing the rules of evidence so low as to deny any justice, including natural justice to prevail.

[26] The Respondents, Tina Dion and Brenda Joly ("Joly Respondents"), submit that the April 6, 2016 affidavit of Gordon Gadwa consists of opinion and legal argument throughout, is inconsistent with the material filed by him in response to the appeal and should be struck pursuant to Rule 81 of the *Federal Courts Rules*, SOR/98-106 ("Federal Courts Rules") as non-compliant with the Court's direction (*AB Hassle v Canada (Minister of National Health and Welfare)*, (2000) 190 FTR 264 (FCTD)).

[27] The KCN submits that, in addition to containing opinion and legal argument, the April 6, 2016 affidavit makes reference to matters either not contained in other affidavit evidence and/or matters not otherwise properly before the Court. Further, that this Court must not consider evidence that was not before the Elections Officer, nor could the Elections Officer be expected to base a decision on issues that were not presented to her.

[28] I note that Rule 81 of the Federal Courts Rules requires that affidavits in support of applications be confined to facts within the deponent's personal knowledge that are relevant to the dispute, without gloss or explanation (*Canada (Attorney General) v Quadrini*, 2010 FCA 47; *Duyvenbode v Canada (Attorney General)*, 2009 FCA 120). The April 6, 2016 affidavit of Gordon Gadwa states that it deposes to matters of which the deponent has personal knowledge "as well as matters based on information and belief whereas I believe those matters to be true". However, the latter category of information is contrary to both Rule 81 and the Court's direction. The affidavit also makes arguments regarding the content of procedural fairness in this circumstance and the interpretation and application of the KCN Custom Election Act. Further, it purports to support Gordon Gadwa's allegations of procedural unfairness based on his personal experience and knowledge as a former Chief and Councillor of the KCN.

[29] More specifically, paragraph three of the affidavit asserts that KCN members who pursue an election appeal always complete the notice of appeal themselves. However, in this case, counsel for Tina Dion completed the notice of appeal on her client's behalf which was supported by the third party affidavit of Elmer Gary Paul. To the extent that Gordon Gadwa's affidavit asserts that the Elections Officer was required to, but did not, address whether the required process for commencing an appeal was followed, I accept that it raises an issue of procedural fairness. However, this allegation is not contained in the Amended Notice of Application and, therefore, amounts to argument and is contrary to Rule 81 and the Court's direction.

[30] Paragraph four of the affidavit asserts, in essence, that the Elections Officer breached procedural fairness by failing to provide an opportunity to cross-examine Elmer Gary Paul on his

affidavit or to cross-examine Byron Paul. It is permissible to that extent. However, in paragraph five Gordon Gadwa asserts that, based on his personal experience and knowledge, further steps should have been taken to scrutinize the allegations contained in the Elmer Gary Paul affidavit. In my view, paragraph five is an argument regarding the content of procedural fairness owed.

[31] Paragraph six of the affidavit states that the Elections Officer "usurped both her authority and role, and further violated customary law of KCN" as embodied within the KCN Custom Election Act. As can be discerned from the subsequent paragraphs seven to eleven, in essence, the procedural issue raised is that the Act does not provide the Elections Officer with authority to remove an elected Chief or Councillor or to appoint a successor. However, those paragraphs are primarily comprised of legal argument based on Gordon Gadwa's interpretation of the KCN Custom Election Act and what he asserts to be the misinterpretation or misapplication of the Act by the Elections Officer, not facts within Gordon Gadwa's personal knowledge that support the allegation of procedural unfairness. Therefore, they are contrary to Rule 81 and the Court's direction.

[32] Finally, paragraph eleven of the affidavit states that an "Elders Advisory Committee is an option if a member is not satisfied with the decision of Council, which the electoral officer did not pursue, based on the customs and practices of Kehewin Cree Nation with respect to elections". As the decision at issue was that of the Elections Officer, not of the band Council, this paragraph is not relevant.

[33] I would also note that the affidavit adds little to the information found in the certified tribunal record ("CTR") or as submitted by way of the Applicant's written memorandum of fact and law.

[34] Given the foregoing, I afford no weight to paragraphs 5 and 7-11 of Gordon Gadwa's affidavit. I give the remaining paragraphs little weight, as stated above, they add little to the evidentiary record.

iii. *Content of the CTR*

[35] Although not raised by the parties, I would note that the CTR contains information produced subsequent to the Elections Officer's October 12, 2015 decision which is under review in this application. In particular, the CTR contains materials relevant to two subsequent appeals. Although the Applicants were afforded the opportunity during case management to amend their Notice of Application and to bring a motion under Rule 302 to have more than one decision considered in this application, no motion was made. Therefore, I have not considered the information contained in the CTR that post-dates the October 12, 2015 decision. It is trite law that, as a general rule in an application for judicial review, the evidentiary record before the Court is restricted to the evidentiary record that was before the decision-maker (*Assn of Universities and Colleges of Canada v Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22 at para 19; *Fort McKay* at para 21; *Schwartz Hospitality Group v Canada (Attorney General)*, 2001 FCT 557 at para 8).

Issue 1: Did the Elections Officer breach procedural fairness?

Applicant's Position

[36] The Applicant submits that the content of procedural fairness depends on the specific context of each case (*Knight v Indian Head School Division No 19*, [1990] 1 SCR 653 at p 682 [*Knight*]). This case involved a final administrative decision having significant impact on rights, privileges and interests, thus procedural fairness was required (*Foster v Canada (Attorney General)*, 2015 FC 1065 at paras 28 and 30). The Applicant submits that a higher level of procedural fairness is owed because of the substantial rights at stake and the finality of the decision and that he was denied procedural fairness by the actions or omissions of the Elections Officer as listed above.

[37] While the KCN Custom Election Act does not specify what is required to file an appeal, the Applicant submits that procedural fairness and KCN custom required that the notice of appeal be completed by the person making the allegations and invoking the appeal.

[38] The Applicant submits that the Elections Officer should have recognized that allegations of corrupt election practices were a common occurrence around KCN election appeals. Further, because the Elections Officer acknowledged that she received a number of telephone calls alleging that candidates had engaged in vote buying or had attempted to influence voters, she should have imposed a stricter evidentiary approach. The Applicant submits that an oral hearing with cross-examinations was necessary to scrutinize these competing allegations and credibility,

particularly as unsolicited evidence from Byron Paul called into question the affidavit evidence of Elmer Gary Paul.

[39] On the failure to refer the appeal to another body, the Applicant submits that a decision-maker should not also be the decision-maker on appeal of a related matter so as to preserve the integrity of the appeal process and to avoid a reasonable apprehension of bias. By deciding to remove Gordon Gadwa as Chief and Councillor, a vacancy was created pursuant to Section VIII of the Act and the Elections Officer's failure to refer the appeal making the removal decision was in violation of Section VIII.

[40] Finally, the Applicant submits that the Elections Officer breached procedural fairness by her overall relaxing of the rules of evidence.

The Joly Respondents' Position

[41] The Joly Respondents agree that the duty of procedural fairness is context-dependent (*Knight*) but note that the content of procedural fairness will vary depending on the circumstances of the case and that clear statutory provisions may establish that procedural fairness is limited (*Dunsmuir* at para 79; *Canada (Attorney General) v Mavi*, 2011 SCC 30 at paras 38-39 [*Mavi*]).

[42] In this case, the KCN Custom Election Act is clear and restricts to seven days the time within which a decision on an appeal must be made. Therefore, the Elections Officer had no ability to extend this timeline. Further, the Act specifies that appeals must be made in writing

and must be answered by the Elections Officer, leaving no basis on which the Elections Officer could have referred the appeal to another decision-maker. There is no bias in this provision as the Elections Officer had not made any related decision prior to the appeal, nor would she have been aware of the issues at the time of the election.

[43] On the lack of an oral hearing and cross-examination, the Joly Respondents submit that despite three written responses to the appeal by the Applicant's counsel, no issue was raised nor was a request made for oral testimony or cross-examination. An appeal cannot compel cross-examination without a request. The Joly Respondents submit that procedural fairness was satisfied in this case.

The KCN's Position

[44] The KCN largely adopts the submissions of the Joly Respondents on the issues of procedural fairness. It also submits that there is no bias as the Elections Officer is not deciding an appeal of her own decision. The Elections Officer's decision was final, there was no other appellate board to which an appeal of her decision could be sent.

[45] As to the claimed right of cross-examination, the KCN Custom Election Act does not require this nor did the Applicant request the opportunity to cross-examine. And, although the Elections Officer had the power to do whatever was reasonably necessary to answer the appeal, the Act also set a mandatory seven day response time. On that basis, and given the factual circumstances, no procedural unfairness arises.

Analysis

[46] Decisions that are administrative in nature and affect "the rights, privileges or interests of an individual" will trigger the application of the duty of fairness (*Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at p 836 [*Baker*], referencing *Cardinal v Director of Kent Institution*, [1985] 2 SCR 643 at p 653; *Mavi* at para 38). In this matter, the parties do not dispute that the Applicant was owed a duty of procedural fairness, the question is as to the content of that duty.

[47] The content of the duty of procedural fairness "…is flexible and variable, and depends on an appreciation of the context of the particular statute and the rights affected" (*Baker* at 837). There the Supreme Court of Canada provided a non-exhaustive list of factors to be considered when determining the content of the duty owed in any particular circumstance:

a. the nature of the decision being made and the process followed in making it;

b. the nature of the statutory scheme and terms of the statute under which the body operates;

c. the importance of the decision to the individual(s) affected;

d. the legitimate expectation of the person challenging the decision; and

e. the choices of procedure made by the agency itself.

[48] The *Baker* factors were applied in *Polson v Long Point First Nation Committee*, 2007 FC 983 at paras 41-47 [*Polson*], which was concerned with a custom election code and an application for judicial review of an election committee decision to deny the applicant's request

for an appeal. The Court found that the decision of the election committee was regulatory in nature as it had to decide whether or not the allegations of a corrupt election practice were legitimate. Further, that the appeal process was intended to reflect the customary election practices of the band which were adopted after a consultation process in the community. The process to be followed to contest an election was to submit written allegations to the electoral president and the election committee then had to decide on the legitimacy of the appeal. The Court found that the applicant was not directly affected by the decision of the election committee to reject his appeal. Nor had the applicant established that he had legitimate expectations, on the basis of custom, that the appeal would go before the general assembly. And, finally, the process expressly chosen by the community was written submissions at the preliminary level before the election committee, therefore, the applicant was not entitled to an oral hearing at that stage.

[49] The Court concluded, upon consideration of these factors, that the applicant was entitled to a basic level of procedural fairness before the election committee, such as the right to an unbiased tribunal, the right to notice and an opportunity to make representations which was afforded by the provision of an opportunity to make written submissions.

[50] Similarly, in *Bruno v Samson Indian Band,* 2006 FCA 249 at paras 21-22 [*Samson*], the Federal Court of Appeal applied the *Baker* factors in the context of an appeal from an election held pursuant to a custom election code. The Court determined that basic procedural safeguards were required and that the appeal board had failed to provide an opportunity for the respondent in the appeal to make submissions. The Court also noted that the opportunity to respond did not

require an oral hearing, however, by failing to allow any response, the board made its decision on an incomplete factual record.

[51] In this matter, the decision of the Elections Officer was administrative in nature. The KCN Custom Election Act set out the process, which required that appeals be made in writing to the Elections Officer within thirty days of the election for Chief. The Act further provided that the Elections Officer receiving the appeal "may do whatever is reasonably necessary to answer the appeal" and must provide a response within seven days of receiving the appeal. Because the Act is the codification of KCN band custom, the mandatory requirement that appeals be made in writing and be responded to within the very short period of seven days reflects the process chosen by the KCN. Within those requirements, the Elections Officer was able to choose her own process in answering the appeal. However, the Elections Officer had no discretion to extend the seven day response period which constrained the possibility of conducting a full oral hearing with cross-examinations. Indeed, the type of decision that she was required to make, an appeal of an election for Chief, supports the need for an efficient and expeditious decision.

[52] Further, considering the function of the Elections Officer and the nature of the decision and the process, it cannot be said that it resembles judicial decision-making for which the duty of fairness would require a higher level of procedural protections. Conversely, the Elections Officer's decision was undoubtedly important to Gordon Gadwa and it was final, the only appeal of the Elections Officer's decision is by way of judicial review. However, there was no evidence that Gordon Gadwa had any legitimate expectation that a certain result would be reached.

[53] Thus, considering these factors on balance, I cannot conclude, as the Applicant urges, that he was owed an exceptionally high level of procedural fairness in this case. Rather, he was entitled to notice, an opportunity to make submissions and a full and fair consideration of those submissions.

[54] Here the Elections Officer gave the Applicant notice of the appeal and provided him with a copy of the appeal submissions. The Applicant, through his counsel, made three written responses and provided his own affidavit in support of his position. As will be discussed further below, at no time did the Applicant request an oral hearing or that he be permitted to cross-examine Elmer Gary Paul on his affidavit. In any event, procedural fairness does not always demand that an oral hearing be conducted (*Baker* at p 843).

[55] For example, in *Bacon v Appeal Board of the Betsiamites Band Council*, 2009 FC 1060 [*Bacon*] the applicant appealed a band council election alleging corrupt practices. The electoral officer forwarded a copy of the appeal request to the respondents. The appeal board found that the facts alleged in the applicant's affidavit were not adequate to challenge the validity of the election and dismissed the appeal. On judicial review, the applicant claimed that she had been denied procedural fairness as she was entitled to, but had not had, an oral hearing at the preliminary assessment stage of her complaint. The Court referred to *Polson* and concluded that the applicant was able to present her position through written submissions and that she was not entitled to an oral hearing to supplement or add to her written arguments. Further, it was up to her to provide detailed reasons to support her request for a hearing.

[56] It is also important to recall, as was noted in *Bacon*, that there are many differences amongst customary electoral codes of band councils (at para 52). I would note, for example, that unlike the KCN Custom Election Act, some codes contain specific references to a hearing in the case of election appeals (*Orr* at para 93). Because of this, each procedural fairness analysis of a custom election act or code is highly context-specific.

[57] In my view, in the context of the KCN Custom Election Act and circumstances of this matter, the lack of an oral hearing did not breach the duty of procedural fairness.

[58] As a final point on the issue of an oral hearing, I would note that, in essence, the Respondents raise the issue of waiver. As the Court noted in *Muskego v Norway House Cree Nation*, 2011 FC 732 at para 42:

> 42 It is a well-established principle that a party must raise an issue of procedural fairness at the first opportunity. The failure to do so will amount to an implied waiver: see, for example, the decision of this Court in *Kamara v. Canada (Minister of Citizenship & Immigration)*, 2007 FC 448 (F.C.):
>
> > [26] ...The jurisprudence of the Court is clear; such issues dealing with procedural fairness must be raised at the earliest opportunity. Here, no complaint was ever made. Her failure to object at the hearing amounts to an implied waiver of any perceived breach of procedural fairness or natural justice that may have occurred. See *Restrepo Benitez et al v MCI*, 2006 FC 461 (CanLII), 2006 FC 461 at paras 220-221, 232 & 236, and *Shimokawa v MCI*, 2006 FC 445 (CanLII), 2006 FC 445 at paras 31-32 citing *Geza v MCI*, 2006 FCA 124 (CanLII), 2006 FCA 124 at para. 66.
>
> The same rule is confirmed in *Uppal v. Canada (Minister of Citizenship & Immigration)*, 2006 FC 338 (F.C.), at paras 51 and 52.

[59] Therefore, and in any event, the Applicant's failure to raise with the Elections Officer his concerns as to the need for an oral hearing and cross-examination amounts to an implied waiver of any procedural rights. He cannot now complain of procedural unfairness before this Court.

[60] As to the form of the appeal, in his April 6, 2016 affidavit Gordon Gadwa states that KCN members who pursue an appeal always complete the notice of appeal themselves, based on their own allegations and that this did not occur in the subject appeal. He alleges that the Elections Officer breached procedural fairness by failing to address this in her decision. I would first note that nothing in the KCN Custom Elections Act requires that a person seeking to appeal an election complete the appeal notice themselves, rather than by counsel, or that it must be supported by their own affidavit. The Act merely requires that the appeal be made in writing to the Elections Officer and be made within thirty days of the election for Chief. In this matter the submitted appeal was in writing and, in her decision, Elections Officer noted October 5, 2015 as the date that the appeal was received.

[61] I would also note that unless the appellant herself had been approached by Gordon Gadwa offering to buy her vote, she was not in a position to file an affidavit containing personal knowledge of corrupt election practice. The supporting affidavit that she did file, that of Elmer Gary Paul, did contain such direct personal evidence. Further, I fail to see how having counsel complete the application or supporting it with an affidavit containing personal knowledge of the allegations that are the basis for the requested appeal can amount to procedural unfairness. This is particularly so as this Court has recognized that it may not be possible to provide direct evidence of vote buying (*Hudson v Canada (Minister of Indian Affairs and*

Northern Development), 2007 FC 203 at para 85; *Norway House* at paras 20-23; *Dedam v Canada (Attorney General),* 2012 FC 1073 at paras 72-74 [*Dedam*]).

[62] The Applicant also asserts that, based on his personal experience and knowledge, where cross allegations exist in election appeals, further steps to scrutinize the allegations contained in affidavits are normally taken. As noted above, this is not a requirement of the Act, nor does the Applicant provide any factual examples of this. Further, such an assertion does not amount to proof of custom. As I recently stated in *Beardy v Beardy*, 2016 FC 383 at para 97 [*Beardy*], a positive determination of whether actions are consistent with band custom requires evidence demonstrating that the action was "firmly established, generalized and followed consistently and conscientiously by a majority of the community, thus evidencing a broad consensus" (*Francis v Mohawk Council of Kanesatake,* 2003 FCT 115 at paras 21-30*; Prince v Sucker Creek First Nation,* 2008 FC 1268 at para 28*; Metansinine v Animbiigoo Zaagi'igan Anishinaabek First Nation,* 2011 FC 17 at para 28*; Joseph v Yekooche First Nation,* 2012 FC 1153 at paras 36-39). Finally, I note that there is also no evidence that this assertion was placed before the Elections Officer.

[63] The Applicant also submits that the Elections Officer should have referred the appeal to another body after she decided to remove Gordon Gadwa as Chief and Councillor. However, it is entirely unclear from the Applicant's submissions to which body the Elections Officer should have referred the appeal or on what basis. The KCN Custom Election Act states that election appeals will be determined by the Elections Officer and that the decision of the Elections Officer

shall be binding and final. There is no provision for appeal to another body and, therefore, no breach of procedural fairness arises.

[64] To the extent that the Applicant is suggesting that when the Elections Officer decided to remove Gordon Gadwa as Chief and Councillor a vacancy arose which, pursuant to Section VII of the KCN Custom Election Act, should have been addressed by Council through the selection of a Councillor as interim Chief, this has no relevance to an election appeal to another body.

[65] And, although the Applicant also submits that referral would be necessary to preserve the integrity of the appeal process and to avoid any reasonable apprehension of bias, it is unclear how the integrity of the process is at risk or what the basis for such apprehension might be. The Elections Officer is not sitting in appeal of her own decision. And the fact that the appellant proposed a remedy that was ultimately elected by the Elections Officer does not establish bias. The Applicant has provided no substantive reason why an "informed person, viewing the matter realistically and practically" would conclude that the Elections Officer more likely than not would not decide the case fairly (*Yukon Francophone School Board, Education Area #23 v Yukon (Attorney General)*, 2015 SCC 25 at paras 20-21).

[66] The Applicant also submits that his procedural rights were breached through the Elections Officer's overall use of "relaxed rules of evidence". No specifics are provided in support of this assertion other than, "The Appellant simply did not make out his case with respect to his allegation, due to the high level of procedural fairness that was owed to him". The appellant, however, was Tina Dion, so it unclear what the Applicant intended to argue.

[67] As I have found above, this matter does not attract a high level of procedural fairness. Therefore, a breach of procedural fairness does not arise because the rules of evidence that may apply to a judicial matter were not adopted by the Elections Officer, she should be granted significant latitude to choose her own procedures, within the constraints imposed by the Act and principles of procedural fairness (*Samson* at para 22).

[68] Further, to the extent that the Applicant is suggesting that his procedural rights were breached through the Elections Officer's use of relaxed rules of evidence in accepting unsolicited evidence and unsworn evidence from Byron Paul, in my view, this argument also has no merit. The Elections Officer referred to the unsolicited evidence in her decision and the fact that it contradicted Gordon Gadwa's affidavit. However, she determined that addressing the inconsistency was not necessary in reaching a decision on the appeal:

> As Gordon Gadwa admitted to paying money to Gary Paul and Byron Paul, I do not find it necessary for the determination of the merits of this appeal to deal with the inconsistencies between the Affidavit of Gary Paul and the unsolicited evidence of Byron Paul.

[69] In my view, the Elections Officer based her decision on the affidavit evidence of Gordon Gadwa and of Elmer Gary Paul, and not on the unsolicited evidence from Byron Paul. Indeed, she also noted in her decision that during the conduct of the elections for both for Councillors and Chief she received a number of telephone calls concerning candidates allegedly buying votes or attempting to influence voters and advised the callers that she would take action if they were prepared to sign an affidavit. None of those callers were prepared to do so and so the Elections Officer did not rely on their allegations.

[70] In this matter the Applicant was provided with notice of the appeal, he was afforded a meaningful opportunity to put forward his position and evidence in support of that position. Put otherwise, he was aware of the allegations and was able to respond to them. And, based on the reasons of the Elections Officer, his position was fully and fairly considered. In my view, given this and in the context and circumstances described above, there was no breach of the duty of procedural fairness in this case.

Issue 2: Was the Elections Officer's decision reasonable?

Applicant's Position

[71] The Applicant submits that the Elections Officer's decision was unreasonable because it resulted in suffering and confusion to the KCN members and caused harm to the community.

[72] Further, that he was removed from his elected position as Chief based only on the bare assertion that he had allegedly purchased a vote for $20. He had never before been accused of or found to have engaged in corrupt election practices, despite his long service as both Chief and Councillor. It was unreasonable not to consider his past political contributions and status and to balance this against the vote buying allegation. It was also unreasonable to conclude that he would sacrifice his career and reputation for such a bizarre amount of money. The Applicant asserts that he was in fact assisting fellow band members in exercising their ability to vote, which is a common custom and practice in the KCN. For these reasons, including the denial of procedural fairness and the public interest of the KCN, the Applicant submits that the Elections

Officer's decision to remove him as Chief was unreasonable. Further, that the Elections Officer overstepped her authority under the Act in making the final decision.

The Joly Respondents' Position

[73] The Joly Respondents submit that certain conduct will permit an inference that corrupt practices have occurred, shifting the onus onto the allegedly corrupt party to respond (*Sideleau*; *Norway House* at paras 18, 25-28; *Nelson* at para 15). Because the Elections Officer's decision is reviewable on the reasonableness standard, it is entitled to deference. The Applicant has failed to show that the decision was unreasonable.

The KCN's Position

[74] The KCN largely adopts the submissions of the Joly Respondents. The KCN also submits, given the broad scope granted to the Elections Officer by Section XIV of the KCN Custom Elections Act, that so long as the Elections Officer followed the Act she could not usurp or exceed her authority. The Elections Officer is the sole arbiter of all election appeals and her decisions are final and binding. And, while the Elections Officer can only do what is "reasonably necessary" to answer the appeal, she is to be afforded a high level of deference in deciding what is reasonably necessary. Similarly, the KCN Custom Election Act itself must be afforded a high level of deference as it is representative of custom codified and rules chosen by the KCN.

[75] As to the authority of the Elections Officer to remove Gordon Gadwa as Chief or Councillor, the KCN submits that, until the appeal period has lapsed and the Elections Officer has rendered a decision, a removal situation does not arise as, until then, those positions are not formally occupied.

[76] Further, while Sections IX and X of the KCN Custom Election Act do provide a role for Elders with respect to the removal of Chief or Councillor, this applies only after the entire election process, including appeals, has been exhausted. Nor does Section XIII have application to an Elections Officer.

[77] Finally, the KCN submits that the Applicant incorrectly interpreted and/or applied the KCN Custom Election Act to the facts of this matter. The Applicant's position applies to sections of the Act regarding vacancies and the removal of the Chief or Councillor after the election process, and the appeal period, has formally and finally concluded. This is not the situation in this matter as the Elections Officer's decision was made within the election appeal process, this is a critical distinction.

Analysis

[78] Appeals are contemplated by Section XIV of the KCN Custom Election Act; however, the Act is silent on what comprises grounds of appeal (unlike, for example, *Twin v Sawridge First Nation*, 2016 FC 358 at para 7; *Meeches v Meeches*, 2013 FC 196 at para 16 where corrupt practices was identified as a ground for appeal). And, as noted by the Elections Officer in her decision, the Act also does not define or refer to "corrupt practices" but it does contemplate

removal of an elected official for malfeasance, neglect or misconduct. The Elections Officer further noted, correctly, that the Act is not an isolated document and is subject to the application of the laws of Canada as they relate to the electoral process. It is well-established that band councils and decision-makers in appeals under a custom election act are federal boards, commissions or tribunals pursuant to s 2 of the Federal Courts Act (*Felix Sr v Sturgeon Lake First Nation*, 2011 FC 1139 at paras 15-16). Their decisions are therefore subject to judicial review by Canadian courts based on Canadian law, jurisprudence and legal principles, including procedural fairness, as discussed above. At the hearing before me, current counsel for the Applicant conceded that Canadian jurisprudence on band elections applies to this matter.

[79] In *Norway House t*he Court summarized what can comprise corrupt practice in the absence of a definition of that term in the subject election law:

> [20] The Elections Procedures Act does not define what constitutes corrupt practice. Moreover, there appears to be little jurisprudence on the point.
>
> [21] In *Hudson v. Canada (Minister of Indian Affairs and Northern Development)* (2007), 2007 FC 203 (CanLII), 309 F.T.R 52, this Court observed, at paragraph 85, that direct evidence of explicit efforts to buy votes is not the only kind of evidence that could lead to a finding of corrupt electoral practice.
>
> [22] In *Sideleau v. Davidson*, 1942 CanLII 50 (SCC), [1942] S.C.R. 306, the Supreme Court of the Canada recognized that certain conduct will permit an inference to be drawn that conduct is intended to corrupt electors.
>
> [23] In my view, no exhaustive definition can be given as to what constitutes corrupt practice in the context of an election. However, at least one core concept of corrupt practice is any attempt to prevent, fetter, or influence the free exercise of a voter's right to choose for whom to vote. What is relevant is the motive or intent behind the impugned conduct. Is the conduct directed to improperly affecting the result of an election?

[80] Thus, the question is whether the evidence reasonably supported the finding that Gordon Gadwa engaged in corrupt practices.

[81] Here the Elections Officer considered but did not accept as credible Gordon Gadwa's explanation that, while he did give $20 to Elmer Gary Paul, this was not in payment for his vote. She reached this conclusion in part based his admission that, at the same time, he also declared his intention to run for Chief, even though that intention had been declared by all of the candidates for Chief some twenty-five days previously, was published and known to the community, and, the election was then only three days away. She also weighed Gordon Gadwa's evidence in this regard against the evidence by provided by Tina Dion in support of her appeal, being the affidavit evidence of Elmer Gary Paul which stated that Gordon Gadwa gave him $20 for his vote.

[82] In my view, the Elections Officer's conclusion that, on a balance of probabilities, the evidence supported an inference and reasonable conclusion that the monies paid were related to the election for Chief and were intended to influence or bribe a voter to cast a vote for Gordon Gadwa was open to her on the evidence. Her decision is also to be afforded considerable deference (*Orr* at para 106; *Dunsmuir* at para 55) and to find differently would, essentially, require the Court to reweigh the evidence, which is not its role on judicial review (*Khosa* at para 59; *Dedam* at para 59; *Chief Gayle Strikes with a Gun v Piikani First Nation*, 2014 FC 908 at para 160). Therefore, her conclusion that Gordon Gadwa did, by his actions, engage in a corrupt election practice which vitiated his election, was also reasonable.

[83] The Applicant's submission that the Elections Officer should have considered his political status or past positions is without merit as this has no relevance to the factual question before her, being whether or not there had been a corrupt election practice in regard to the September 29, 2015 election. Nor do I accept the submission that because the Elections Officer did not address the serious impact her decision had on Gordon Gadwa and the KCN her decision was not reasonable. As discussed above, the impact of the decision was a factor determining the content of procedural fairness owed by the Elections Officer, it was not, however, relevant to the substantive factual question of whether there had been vote buying. Nor was the issue raised by the Applicant before the Elections Officer.

[84] Similarly, as to the apparent suggestion that the provision of gas money to permit other members of the KCN the ability to exercise their vote is a common practice and band custom, the Applicant provides no evidence in support of this assertion other than his own submission contained in his October 6, 2015 affidavit which, as addressed above, is not sufficient to establish the existence of a band custom (*Beardy* at para 97). Accordingly, this submission cannot succeed.

Remedy

[85] The Applicant also challenges the reasonableness of the Elections Officer's decision on the appropriate remedy. In this regard she found that:

> With respect to the proposition by counsel for Gordon Gadwa that the proper remedy would be to have a new vote for Chief only, I fail to see how requiring the Kehewin Cree Nation to spend several thousands of dollars to have another election for Chief due to the

> corrupt election practice of a candidate could be considered either reasonable or necessary.
>
> Further, I am not persuaded in light of all of the circumstances of this matter, that I should consider the proposition that the number of votes affected were minimal and there would be no change in the overall result of the election.
>
> I find that the corrupt election practices engaged in by Gordon Gadwa so undermines the integrity of the democratic election process for the Kehewin Cree Nation that whether the actual number of voters affected were minimal or not, should not be a consideration in this matter.
>
> …
>
> I am mindful of the extremely serious nature of this matter and conclude that the appropriate remedy should reflect both the destructive nature of the corrupt election practice engaged in and to assure the members of the Kehewin Cree Nation that such behaviour is not acceptable.

[86] Based on these reasons, the Elections Officer concluded that the reasonably necessary remedy was to void the election of Gordon Gadwa as Chief and that he be removed from both the Chief and Councillor positions; that Brenda Joly, the candidate for Chief with the next highest number of votes, be declared as Chief of the KCN; and, that Eric Gadwa, the candidate for Councillor with the next highest number of votes, be declared as Councillor of the KCN.

[87] In my view, the Elections Officer reasonably concluded that the corrupt election practice engaged in by Gordon Gadwa so undermined the integrity of the democratic election process that the question of whether or not the actual number of voters affected were minimal should not be a consideration.

[88] It must first be stated that a candidate who engages in vote buying is attempting to corrupt the election process. Therefore, regardless of the number of votes that the candidate purchased, or attempted to purchase, and regardless of whether the candidate wins the election by a greater margin than the number of votes that were purchased, this cannot save the candidate and his or her election must still be vitiated. Fraud, corruption and illegal election practices are serious (*Opitz* at para 43).

[89] Secondly, in circumstances of alleged vote buying, it is unlikely that it will be possible to determine with certainty how many votes were actually purchased or if those who accepted payment actually voted in favour of the person who paid them, that is, how the corrupt practice impacted the election results. Here the Elections Officer found that Gordon Gadwa's conduct undermined the election for Chief which alone is sufficient to annul the election. Further, in my view, it is unclear that simply replacing him with a candidate from the same election process would satisfy concerns over corruption, as it is impossible to know how many votes might have gone to the other candidates and to which candidates. This is of particular concern here as there was only an eleven vote difference between the second and third place candidates.

[90] Because of this uncertainty, in my view it was unreasonable to declare Brenda Joly as Chief as a remedy and in answer to the appeal. Regrettably, in these circumstances a new election for the Chief was required. In turn, this means that the declaration of Eric Gadwa as Councillor was also unreasonable.

[91] The Elections Officer not only voided Gordon Gadwa's election to the position of Chief, she also found that it was reasonably necessary that he be removed both as Chief and Councillor. As noted above, an elections officer's authority to deal with appeals is set out in broad terms in Section XIV of the KCN Custom Election Act, she is authorized to do whatever is reasonably necessary "to answer the appeal". In my view, by voiding his election as Chief, this means in effect that Gordon Gadwa never validly held that position of Chief. Thus, once the Elections Officer voided Gordon Gadwa's election to that office in answer to the appeal, she had no need to "remove" him from an office that he had never validly held.

[92] Further, removal of a validly elected Chief or Councillor would not fall within the authority of the Elections Officer as this would not be an action taken in answer to the election appeal and would instead be addressed by Section VII, vacancies. This states that a vacancy occurs if a Chief or Councillor dies, resigns, is convicted of an indictable offence, moves off the reserve, fails to attend three consecutive Council meetings without reasonable grounds or is removed by being found guilty of a malfeasance, neglect of duty or misconduct. In the event that the Chief position becomes vacant, the Council shall select a Councillor as interim Chief until an election can be held.

[93] For these reasons, in my view, the Elections Officer's decision to void Gordon Gadwa's election as Chief was a reasonably necessary remedy and, therefore, was reasonable. While the decision unnecessarily went further and also removed him as Chief, the result is the same in that Gordon Gadwa does not hold the office of Chief.

[94] As to Gordon Gadwa's removal from his position as a Councillor, Section X of the KCN Custom Election Act provides a process for dealing with accusations of misconduct for sitting Councillors. Specifically, if any Chief or Councillor, during their term of office, is accused of malfeasance, neglect of duty or misconduct then the member(s) making the allegations shall convey their concern(s) in writing to Council who shall address the concern(s) and report back to the member(s) making the allegation. If the member(s) is not satisfied with the response by Chief and Council then they may appeal to an Elders Advisory Committee. If that Committee's decision is not accepted by the alleging member(s) then a special band meeting and vote on the allegations will be held. If the allegations are proven, the Chief or Councillor will be removed by Council.

[95] The appeal before the Elections Officer concerned only the election for Chief. And, at the time of the corrupt election practices concerning the election to the Chief's position, Gordon Gadwa was a duly elected Councillor and validly held that office. Therefore, the remedy of his removal from that office was not made in answer to the subject appeal. Further, the Act delegates the authority to respond to complaints about sitting Councillors to the Council and the Elders Advisory Committee and sets out a clear process for exercising that authority. In these circumstances, there was no authority by which the Elections Officer could remove Gordon Gadwa from his Council position. Therefore, it was not open to the Elections Officer to remove Gordon Gadwa from his Council position in answer to an appeal of his election as Chief.

[96] If the Respondents are concerned about Gordon Gadwa maintaining his position as Councillor then their remedy is to bring the concern to the Council in accordance with Section X

of the Act, which they may choose to do in advance of the next election for Chief as, while he holds the position of Councillor, Gordon Gadwa is entitled to run for election as Chief.

JUDGMENT

THIS COURT'S JUDGMENT is that

1. The application for judicial review is granted in part;

2. The Applicant's request for an order in the nature of *certiorari* quashing the October 12, 2015 decision of the Elections Officer to vitiate Gordon Gadwa's election as Chief of Kehewin Cree Nation is dismissed with the exception of the remedy of removing Gordon Gadwa from his position as Councillor in the Kehewin Cree Nation Band Council, which remedy is quashed and set aside;

3. Given the mixed success, each party shall bear its own costs.

"Cecily Y. Strickland"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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