

FEDERAL COURT OF APPEAL

BETWEEN:

FEDERAL COURT OF APPEAL COUR D'APPEL FÉDÉRALE	
FILED	JUL 13 2022
JENNIFER SORVISTO	
EDMONTON, AB	1

KEHEWIN CREE NATION

Appellant

- and -

VERNON WATCHMAKER

Respondent

NOTICE OF APPEAL

TO THE RESPONDENT:

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the appellant. The relief claimed by the appellant appears on the following page.

THIS APPEAL will be heard by the Court at a time and place to be fixed by the Judicial Administrator. Unless the Court directs otherwise, the place of hearing will be as requested by the appellant. The appellant requests that this appeal be heard at Edmonton.

IF YOU WISH TO OPPOSE THIS APPEAL, to receive notice of any step in the appeal or to be served with any documents in the appeal, you or a solicitor acting for you must prepare a notice of appearance in Form 341 prescribed by the *Federal Courts Rules* and serve it on the appellant's solicitor, or where the appellant is self-represented, on the appellant, WITHIN 10 DAYS of being served with this notice of appeal.

IF YOU INTEND TO SEEK A DIFFERENT DISPOSITION of the order appealed from, you must serve and file a notice of cross-appeal in Form 341 prescribed by the *Federal Courts Rules* instead of serving and filing a notice of appearance.

Copies of the *Federal Courts Rules*, information concerning the local offices of the Court and other necessary information may be obtained on request to the Administrator of this Court at Ottawa (telephone 613-992-4238) or at any local office.

IF YOU FAIL TO OPPOSE THIS APPEAL, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE, WITHOUT FURTHER NOTICE TO YOU.

July 13, 2022

**ORIGINAL SIGNED BY
JENNIFER SORVISTO
A SIGNÉ L'ORIGINAL**

Issued by: _____

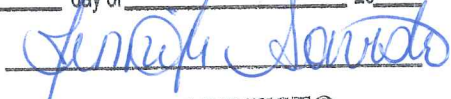
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Attention: Avnish Nanda

I HEREBY CERTIFY that the above document is a true copy of
the original issued out of / filed in the Court on the _____

day of JUL 13 2022 A.D. 2020

Dated this _____ day of JUL 13 2022



**JENNIFER SORVISTO
REGISTRY OFFICER
AGENT DU GREFFE**

APPEAL

THE APPELLANT APPEALS to the Federal Court of Appeal from the Federal Court's Order of the Honourable Justice Brown, dated June 16, 2022 in Court File T-1633-21, by which the Court granted the Respondent's application for judicial review, directed the Electoral Officer to appoint a new Election Appeal Committee, and awarded costs of \$4,000 (the "**Decision**"). The Kehewin Cree Nation ("**KCN**") appeals this Decision.

THE APPELLANT ASKS that the Federal Court of Appeal:

- (a) Set aside the Federal Court's Decision and dismiss the Respondent's application for judicial review;
- (b) Stay the Decision until such time as this appeal can be disposed of;
- (c) Award costs of this appeal and of the proceeding before the Federal Court;
- (d) Issue any other order that this Honourable Court considers fair and appropriate.

THE GROUNDS OF APPEAL are as follows:

Introduction:

1. The question in the underlying judicial review application was whether the Respondent had properly filed his election appeal in accordance with the Kehewin Cree Nation's Election Law – the customary election code of the KCN. The Electoral Officer determined that the appeal was filed late and was submitted to the wrong parties, being the Election Appeal Committee. The Respondent disagreed and sought judicial review on this issue. Unfortunately, the Federal Court Justice did not address this issue and instead determined that the matter was a question of procedural fairness, finding that the failure to forward the appeal materials to the appeal committee was a breach of procedural fairness. The Court ordered that a new appeal tribunal be appointed and that the Respondent be given the opportunity to submit the materials directly to the appeal body. The Court did not determine the threshold question as to whether the appeal was filed in time and whether the appeal was otherwise not filed as required by the Election Law.

Background:

2. The KCN is a First Nation located on Treaty 6 territory in Alberta. The Respondent was the incumbent Chief. He sought re-election and was unsuccessful, having lost by 74 votes. The

election results were announced at 1:40 pm on September 29, 2021. He sought to appeal the election by submitting a Notice of Appeal to the deputy Electoral Officer at 1:49 pm on October 6, 2021.

3. The KCN Election Law requires that appeals be submitted within 7 days of the final voting results. The Election Law states: “An appeal submitted to the Election Appeals Committee must ... be made within seven (7) days after the final voting results.” The Election Law further provides that the appeal jurisdiction is triggered “Upon receipt on an election appeal...”

4. When the Notice of Appeal provided to the Deputy Electoral Officer, she advised the Respondent that he needed to submit it to the Appeals Committee. The Electoral Officer subsequently contacted the Respondent and advised him that his appeal was also late, having been filed more than 7 days after the 1:40 pm announcement of the election results.

Judicial Review and Decision of the Court:

5. The Respondent challenged the decision in the Federal Court. The application for judicial review was filed on October 27, 2021 and provided that it was challenging: “the decision of the Electoral Officer and ultimately the Election Appeal Committee, of October 6, 2021 ... wherein the Electoral Officer ... made the unilateral decision to deny the Applicant the right to appeal in the Kehewin Cree Nation election of September 27, 2021...” The Respondent sought *certiorari* in respect of this decision, sought *quo warranto* setting aside the election results, and *mandamus* directing a new election to be held.

6. The Court granted the application for judicial review and ordered that the Appellant can submit his appeal directly to the Election Appeals Committee, once a new Committee was appointed. In so finding, the Court framed the decision as the “Electoral Officer’s decision in this case not to refer the Applicant’s appeal to the Election Appeals Committee” (para 25). The Court also described it as the “decision of the Electoral Officer to withhold the appeal from the Election Appeals Committee” (para 45). The Court found that the issues raised were questions of procedural fairness and were reviewable on the correctness standard.

7. The Appellant submits that the Court’s findings were made in error. The key conclusion of the Court was that:

“[40] I am unable to find any support in the Elections Act for the proposition the Electoral Officer has any role to play or discretion to exercise in whether or not the Applicant’s appeal should be sent to the Election Appeals Committee. In declining to do so, in my view the Electoral Officer inappropriately assumed an authority he did not have and which in fact the Elections Act gives exclusively to the Election Appeals Committee.”

8. This is clearly a finding related to the Electoral Officer's interpretation of the Election Act and is an issue as to whether the Electoral Officer had the authority to make this decision. This is not a question of procedural fairness, it is a question of authority/jurisdiction, which turns on the interpretation of the Election Act. Accordingly, the Court's finding that "This is entirely a procedural matter" is incorrect – this was a question of statutory interpretation and the Court misconstrued the nature of the issue and reviewed the matter on the incorrect standard of review.
9. The Court went on to conclude that the procedural fairness rights of the Respondent were breached by the decision of the Electoral Officer, for seemingly failing to forward the appeal to the Election Appeals Committee. However, the Electoral Officer was not under any duty to forward the Respondent's documents to the Appeal Committee. On the contrary, the Respondent was required to submit the documents directly to the Committee himself. The Electoral Officer cannot be in breach of a duty that is not owed.
10. The Court ultimately never made a determination as to whether the appeal was submitted in compliance with the Election Law. The Court granted the judicial review on the basis that procedural fairness was breached, on the purported basis that the Electoral Officer failed to forward the appeal to the Appeal Committee. The Court determined that the Electoral Officer "interposed" himself between the Respondent and the Appeal Committee. The Appellant submits that this determination cannot be supported on the evidence and applicable legal principles.
11. The Court also found that the Respondent could not challenge the issues related to the appointment of the Electoral Officer or the appointment of the Appeal Committee, because he had failed to challenge these appointment decisions when he was clearly aware of them (in the case of the Electoral Officer, he was one of the parties that made this appointment). Notwithstanding this finding, the Court ordered that a new appeal committee be appointed. This is effectively a collateral attack on the appointment decision, even though the Court concluded that this decision could not be challenged in the within application for judicial review. Accordingly, the Appellant respectfully submits that the reasoning is internally inconsistent.
12. The Court also failed to properly consider the Appellant's submissions regarding the discretionary nature of remedies on judicial review. The Respondent had previously breached Court orders related to governance matters at the KCN and the Court previously found him in contempt, imposed a fine, and ordered him to pay a substantial costs award. The Appellant submitted that this should be considered when determining whether the Respondent should be entitled to the relief he seeks. The Court found that these were not relevant (para 10). The Appellant submits that this is an error. While the Court may determine that on balance it should still exercise its discretion in the Respondent's favour, these issues are clearly relevant to the exercise of discretion. The Appellant submits that the Court failed to exercise its discretion in accordance with the proper principles, including considering the Respondent's previous breaches of court orders when evaluating whether the Court's discretion should be exercised in the Respondent's favour.

13. Overall, the Court's decision fails to address the key issue raised in the application for judicial review – whether the election appeal was filed on time and in compliance with the Election Law. It is still not clear from the Court's decision whether the new appeal committee is required to accept the appeal for filing, or whether it must make a determination as to whether the appeal was properly filed.

Basis for Appeal to this Court:

14. The Appellant respectfully submits that, in addition to the issues set out above, the appeal should be granted on the following bases:

- a The Court erred in finding that this was an issue of procedural fairness. The Appellant submits that this was an issue of substantive review, in that the Court was reviewing the Electoral Officer's determination as to his authority/jurisdiction.
- b As a consequence of the preceding issue, the Court proceeded to review the matter on a correctness standard. This was a further error.
- c The Court erred in finding that the Electoral Officer was under an obligation to forward the election appeal to the Appeal Committee. The Electoral Officer was under no such duty and cannot be found in breach of a duty that is not owed.
- d The Court misconstrued the evidence by finding that the Electoral Officer "interposed himself between the Applicant and the Election Appeals Committee". On the contrary, the Respondent was the one that submitted his appeal to the wrong party and the Electoral Officer was not under any obligation (statutory or otherwise) to forward this appeal to the Election Appeals Committee.
- e The Court failed to actually address the issue decided by the Electoral Officer – whether the appeal was filed in time. It is not clear whether the new appeal committee is required to accept the appeal for filing, or whether it must make a determination as to whether the appeal was properly filed.
- f The Court erred in failing to consider the discretionary nature of judicial review remedies and whether the Respondent's previous contempt of court orders should have been considered in determining whether to grant him the relief he sought.
- g The Court erred in effectively reviewing the appointment decision related to the Election Appeal Committee members, which was not in issue in the application for judicial review and which decision is presumed to be valid unless and until it is set aside by the Court. This was a collateral attack and a violation of Rule 302 of the

Federal Courts Rules.

h The Court made palpable and overriding errors of fact when interpreting the evidence and making factual findings.

i Such further and other grounds as counsel may advise and this Court may permit.

Date: July 13, 2022

A handwritten signature in black ink, appearing to read "D Callihoo", written in a cursive style.

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