

Federal Court



Cour fédérale

**Date: 20210319**

**Docket: T-986-20**

**Citation: 2021 FC 219**

**Fredericton, New Brunswick, March 19, 2021**

**PRESENT: Madam Justice McDonald**

**BETWEEN:**

**PAMELA HALCROW AND  
DEBRA CHALIFOUX-COUTURIER**

**Applicants**

**and**

**KAPAWE'NO FIRST NATION,  
LYDIA CUNNINGHAM, CHRISTOPHER HALCROW,  
AND PRISCILLA SUTHERLAND**

**Respondents**

**JUDGMENT AND REASONS**

**Introduction**

[1] This is an application for judicial review of the July 29, 2020 decision of the Kapawe'no First Nation (KFN) Election Appeal Committee. On July 11, 2020, the KFN held an election for two Councillor positions. The Applicants, Pamela Halcrow and Debra Chalifoux-Couturier, were declared elected as Councillors, having received the most votes.

[2] The Respondents, Christopher Halcrow, Lydia Cunningham, and Priscilla Sutherland who were unsuccessful or declared ineligible to run in the election, launched appeals following the election. The Election Appeal Committee granted their appeals and ordered a new election.

[3] For the reasons that follow, I am allowing this judicial review on procedural fairness grounds.

### **Background**

[4] The KFN is a Cree First Nation, party to Treaty 8, located near Grouard, Alberta. The KFN has a population of 402 of whom 281 are eligible to vote.

[5] The *Kapawe'no First Nation Custom Election Code and Regulations* (Election Code) govern the KFN elections. The Election Code is founded upon both tribal custom law and the clan system. The KFN Council is made up of one Chief and two Councillors with a quorum being two members, one of whom must be the Chief. The Chief and Councillor positions are lifetime positions. The KFN has three family clans from whom members are eligible to run for elected office: the Halcrow Clan, the Chalifoux Clan, and, the Freeman Clan.

[6] Following the death of the KFN Chief in January 2020, Sydney Halcrow became Chief. Prior to becoming Chief, Sydney Halcrow served as a councillor representing the Halcrow Clan. In 2019, the Councillor representing the Chalifoux Clan resigned. These events resulted in two

councillor positions becoming vacant: one from the Chalifoux Clan and one from the Halcrow Clan.

[7] On March 7, 2020, Chief Halcrow called an election for April 25, 2020, to fill the two vacant councillor positions. However, on March 20, 2020, a state of emergency was declared at the KFN in response to the COVID-19 pandemic. As a result, the election was postponed until July 11, 2020.

[8] In light of the pandemic, the KFN undertook various health and safety measures in compliance with federal and provincial health guidelines including the use of electronic voting options and safety protocols at polling stations for the purposes of the July 11 election.

[9] Pursuant to the provisions of the Election Code, the KFN appointed an independent Electoral Officer. For this election, lawyer Nicole Hajash, who is not a member of the KFN, acted as the Electoral Officer.

[10] On June 27, 2020, the Electoral Officer chaired a nomination meeting and the following members were nominated from the eligible Clans:

- Halcrow Clan - Christopher Halcrow, Pamela Halcrow and Lydia Cunningham;
- Chalifoux Clan - Debra Chalifoux-Couturier, Colin Chalifoux, David Chalifoux, Monica Chalifoux and Priscilla Sutherland.

[11] The Electoral Officer disqualified Priscilla Sutherland and Monica Chalifoux as the Electoral Officer decided that they did not meet the requirement of section 17(a) of the Election Code that states that to be eligible for nomination, a member must have been “continuously resident on reserve for at least twelve (12) months prior to the date of nomination.”

[12] The election was held on the KFN on July 11, 2020, and the Report prepared by the Electoral Officer records the following voting results:

RESULTS FOR THE OFFICE OF COUNCILLOR – HALCROW CLAN	
	TOTAL
TOTAL BALLOTS CAST	95
	TOTAL
TOTAL BALLOTS REJECTED	0
	TOTAL
CUNNINGHAM, LYDIA	34
HALCROW, CHRISTOPHER	25
HALCROW, PAMELA	36

RESULTS FOR THE OFFICE OF COUNCILLOR – CHALIFOUX CLAN	
	TOTAL
TOTAL BALLOTS CAST	77
	TOTAL
TOTAL BALLOTS REJECTED	0
	TOTAL
CHALIFOUX, COLIN	7
CHALIFOUX, DAVID	11
CHALIFOUX, LORRAINE	22
COUTURIER, DEBRA D	37

[13] The Electoral Officer Report confirms that Pamela Halcrow received the most votes for the Councillor position for the Halcrow Clan and that Debra Chalifoux-Couturier received the most votes for the Councillor position for the Chalifoux Clan.

[14] On July 13, 2020, Pamela Halcrow and Debra Chalifoux-Couturier, each received a letter from the Chief advising them that they had been successful in their election to the Council.

[15] On July 20, 2020, the Respondents Lydia Cunningham and Priscilla Sutherland, each filed a notice of appeal of the election. On July 21, 2020, Christopher Halcrow also filed a notice of appeal.

[16] In her appeal, Lydia Cunningham argued that Priscilla Sutherland and Monica Sutherland's names were removed from the list of candidates without any reasons being provided. Ms. Cunningham also took issue with the nomination meeting not being held within the required 14-day period. Finally, Ms. Cunningham challenged the use of online voting.

[17] Priscilla Sutherland's appeal took issue with the Elector Officer removing her from the list of candidates. Ms. Sutherland states that she met the residency requirement as she lived on the KFN as a child.

[18] In his appeal, Mr. Halcrow argued that the Election Code does not allow for online voting, that the nomination meeting was not held within 14 days of the election, and that the membership list was not provided prior to the nominations.

### **Appeal Committee**

[19] On July 24, 2020, Chief Halcrow appointed three elders to act as the Appeal Committee. Pursuant to section 47 of the Election Code, Chief Halcrow appointed one elder from each clan of the KFN. The Appeal Committee consisted of Anita Cunningham, Mary Callihoo and Katherine A. Chalifoux.

[20] On July 27, 2020, the Electoral Officer, Ms. Hajash, posted the Notice of Appeal on the KFN website listing the grounds of appeal from section 45 of the Election Code as follows:

- a) An error was made in the interpretation or application of the regulations that materially and directly affecting the conduct and outcome of the election or run off election;
- b) A candidate did not meet the eligibility requirements set for Sections 17 and 18;
- c) A candidate was guilty of promoting or aiding corrupt election practices including, but not limited to bribery, threats and intimidation of candidates, electors, the electoral officer or polling clerk;
- d) A person voted who was not eligible to vote; or
- e) Any other circumstance or event materially or directly affecting the conduct and outcome of the election or run off election.

[21] The Notice of Appeal states that "only members scheduled to participate may attend" the Appeal Committee Meeting on July 29, 2020. Finally, the Notice also advises that the Appeal Committee "shall decide on the appeals within three (3) days of the Appeal Committee Meeting."

[22] On July 29, 2020, the Appeal Committee held a meeting and heard from each of the Respondents, Christopher Halcrow, Lydia Cunningham, and Priscilla Sutherland.

[23] The Electoral Officer provided the Committee with her opinion on the appeals. On the issue of residency, the Electoral Officer explained that she reviewed the eligibility of all candidates and determined that Priscilla Sutherland and Monica Chalifoux did not meet the residency requirement as they could not establish that they ever resided on reserve.

[24] With respect to the objection to online voting, the Electoral Officer noted that the KFN had used online voting in the past without any objections raised. The Electoral Officer stated that online voting was a reasonable alternative to in-person voting because of the COVID-19 pandemic. The Electoral Officer also noted that the Election Code does not prohibit online voting.

[25] On the timing of the final nomination list, the Electoral Officer explained that due to the pandemic, the final list was posted on July 7, 2020.

[26] Following hearing from the Respondents, the Appeal Committee informed the Electoral Officer that the appeals were being granted.

[27] After the Appeal Committee rendered their decision, the Electoral Officer advised the KFN Chief of her concerns with the appeal process. The Electoral Officer stated that she was concerned that the Appeal Committee had reached a decision before hearing the issues. The Electoral Officer was also concerned that a member of the Appeal Committee had a personal interest in the makeup of the Council.

## Appeal Committee Decision

[28] The full decision of the Appeal Committee is as follows:

In the matter of the appeal of Lydia Cunningham, Christopher Halcrow and Priscilla Sutherland of the Kapawe'no First Nation election held July 11, 2020 in Grouard Alberta for the Councillor positions for the Halcrow Clan and Chalifoux Clan.

The Appeal Committee comprised of Anita Cunningham, Mary Callihoo and Katherine A. Chalifoux, who were appointed by Chief Sydney Halcrow and took an oath to decide the appeal in accordance with the *Kapawe'no First Nation Custom Election Code and Regulations*.

After hearing from the appellants, the decision of the Appeal Committee is as follows:

1. That the appeals are upheld; and
2. That a new Election be called and held in accordance with the *Kapawe'no First Nation Custom Election Code and Regulations*.

The Appeal Committee makes this decision freely and unanimously on July 29, 2020.

[29] The Applicants filed this judicial review application of the Appeal Committee decision on August 26, 2020. Their Motion for an interim injunction was denied on November 20, 2020 (*Halcrow v Kapawe'no First Nation* 2020 FC 1069).

[30] The Respondent KFN filed submissions on this judicial review but did not take a position on issues raised in the application.



## Issues

[31] Based upon the submissions of the parties, I would characterize the issues for determination as follows:

- A. Was the Appeal Committee process fair to the Applicants?
- B. Is the Appeal Committee decision reasonable?
- C. Remedy and Costs.

## Standard of Review

[32] The issue of the fairness of the Appeal Committee process is considered on the correctness review standard (*Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 43; *Mission Institution v Khela*, 2014 SCC 24 at para 79; *Heiltsuk Horizon Maritime Services Ltd v Atlantic Towing Limited*, 2021 FCA 26 at para 107).

[33] The Court must assess if the procedure adopted by the Appeal Committee was fair in the circumstances (*Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at paras 34 to 56).

[34] To assess the reasonableness of the Appeal Committee decision the Court is concerned with whether the decision "bears the hallmarks of reasonableness - justification, transparency and intelligibility - and whether it is justified in relation to the relevant factual and legal constraints

that bear on the decision" (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] at para 99).

### **Preliminary Issue**

[35] The Applicants and the Respondent KFN object to the Court considering the Affidavit of Anita Cunningham, who was a member of the Appeal Committee. They argue that it is improper for a member of the Appeal Committee to file an Affidavit on a judicial review of the decision of the Appeal Committee. The Applicants also argue that the Court should not consider paragraph 73 of the Affidavit of the Respondent Lydia Cunningham as it refers to the Anita Cunningham Affidavit.

[36] The Respondent KFN also objects to the letter attached as Exhibit 22 to the Affidavit of Lydia Cunningham. This letter, dated August 11, 2020, is from the law firm of Parlee McLaws and is addressed to the attention of Chief Halcrow of the KFN. The KFN objects to the inclusion of this letter on the grounds that it is privileged solicitor-client communication. They state that the fact that letter was posted on a secure part of the KFN website does not constitute waiver of privilege. Ms. Cunningham in her Affidavit identifies the letter as "legal opinion", but claims that privilege was waived when the letter was posted on the KFN website.

[37] With respect to these objections, as a starting point it is useful to reiterate the general rule that on judicial review the Court only considers the evidence that was before the decision-maker (*Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency*,

2012 FCA 22 at para 19; see also *Bernard v Canada (Revenue Agency)*, 2015 FCA 263 at paras 13-18; *Delios v Canada (Attorney General)*, 2015 FCA 117 at para 42, *Stemijon Investments Ltd v Canada (Attorney General)*, 2011 FCA 299 at para 41).

[38] The exceptions to this general rule include circumstances where additional evidence is necessary to highlight or summarize background information; or evidence is necessary to explain the absence of evidence on a certain subject matter; or where such evidence is necessary to explain an improper purpose or fraud (*Bernard* at paras 19-25).

[39] The Affidavit of Anita Cunningham, a member of the Appeal Committee, is particularly concerning. A decision-maker cannot attempt to justify the decision, after-the-fact, when the justification for the decision cannot be ascertained by reference to the information on record (*Stemijon* at paras 41-42). The statements contained in the Affidavit of Anita Cunningham are an attempt to justify and explain the reasons for the Appeal Committee decision and to respond to the apprehension of bias allegation. Therefore, Anita Cunningham's Affidavit will not be considered on this judicial review. For the same reasons, paragraph 73 of the Affidavit of Lydia Cunningham is hereby struck.

[40] Finally, the letter of August 11, 2020, attached to the Affidavit of Lydia Cunningham (Exhibit 22) is from KFN's law firm and addressed to the Chief of the KFN. The letter clearly contains legal opinion and legal advice and the KFN says there was never an intention to waive solicitor-client privilege. As such, this letter is solicitor-client communication and Ms. Cunningham cannot waive the privilege (*British Columbia (Attorney General) v Lee*, 2017

BCCA 219 at paras 52-60). In any event, I note that the letter post-dates the election and post-dates the decision of the Appeal Committee. Therefore, the letter is irrelevant to the issues raised on this judicial review.

## Analysis

### A. *Was the Appeal Committee Process Fair to the Applicants?*

[41] The Applicants argue that the Appeal Committee reached its decision in a manner that was procedurally unfair to them on a number of grounds including:

- Lack of personal notice to them as required by section 46 of the Election Code.
- Failure to provide the Applicants an opportunity to address the Appeal Committee.
- A reasonable apprehension of bias because of a statement made by a member of the Appeal Committee.
- Lack of reasons for the decision reached.

[42] In assessing if a process was fair, the question is whether a right-minded person, applying themselves to the question and obtaining the required information, would think it is more likely than not that the decision-maker did not decide fairly (*Baker v Canada (Minister of Citizenship and Immigration)*, 1999 SCC 699 at para 46).

[43] The *Baker* factors were reaffirmed in *Vavilov* as follows at para 77:

Where a particular administrative decision-making context gives rise to a duty of procedural fairness, the specific procedural requirements that the duty imposes are determined with reference

to all of the circumstances: *Baker*, at para. 21. In *Baker*, this Court set out a non-exhaustive list of factors that inform the content of the duty of procedural fairness in a particular case, one aspect of which is whether written reasons are required. Those factors include: (1) the nature of the decision being made and the process followed in making it; (2) the nature of the statutory scheme; (3) the importance of the decision to the individual or individuals affected; (4) the legitimate expectations of the person challenging the decision; and (5) the choices of procedure made by the administrative decision maker itself: [citations omitted].

[44] The *Baker* factors have been applied in the context of a First Nation election dispute in *Morin v Enoch Cree First Nation*, 2020 FC 696 at para 21; *Lecoq v Peter Ballantyne Cree Nation*, 2020 FC 1144 at para 27; and *Blois v Onion Lake Cree Nation*, 2020 FC 953 at paras 72-73.

#### Notice to the Applicants

[45] The Election Code states under the heading of Notice of Appeal at section 46 in part:

The Electoral Officer will promptly notify all Candidates for the office affected by the Notice of Appeal.

[46] The Applicants, as the successful candidates in the July 11 election, were the “candidates” within the meaning of section 46 who should have been "promptly" notified of the Notice of Appeal. The Applicants state that they did not receive personal notice of the appeals from the Electoral Officer.

[47] The Respondents do not dispute that the Applicants, as candidates, did not receive personal notification. However, the Respondents argue that the posting of the Notice of Appeal on the KFN website was "notice" within the meaning of section 46 of the Election Code.

[48] The Notice of Appeal was posted on the KFN website on July 27, 2020. The grounds of appeal listed in the Notice of Appeal are a restatement of the grounds of appeal listed in section 45 of the Election Code. The Notice of Appeal did not specify what aspects of the election the Respondents were challenging. Similarly, the Notice did not identify the issues that would be considered by the Appeal Committee in its meeting scheduled for two days later, on July 29, 2020.

[49] The purpose of "notice" is to allow those who might be impacted to be informed and to assess if further action is necessary. Here, the Notice of Appeal simply recites the Election Code generic grounds of appeal. Such notice is insufficient to serve as a warning to the Applicants that the election results were at risk of being overturned. In fact, without specific notice of the issues raised in the appeals, and whether the issues related to the election process or the election results, the Applicants were not properly informed of the issues that would be considered by the Appeal Committee.

[50] Even if I were to accept the Respondents argument that posting the appeal notice on the KFN website constituted "notice" to the Applicants, I fail to see how the notice as posted could have provided the Applicants with sufficient information or warning that the election results

were in jeopardy. Furthermore, there were no allegations of wrong-doing or inappropriate conduct on the part of either of the Applicants.

[51] In my view, considering the substantive rights at issue for the Applicants, the lack of notice to the Applicants constitutes a lack of procedural fairness. Accordingly, I conclude that the Applicants, as the declared successful candidates for the offices affected by the Notice of Appeals, were not "promptly notified" as required by section 46 of the Election Code.

Failure to Afford the Applicants an Opportunity to Address the Appeal Committee

[52] The notice posted on the KFN website states that only those "scheduled to participate" could attend the Appeal Committee meeting on July 29. In this regard, section 50 of the Election Code states:

The appellant, the individual in respect of which the appeal is brought and other interested parties or their representatives, may present oral or written submissions to the Committee at the meeting.

[53] However, the Applicants were not "scheduled to participate", were not invited to participate, and were not afforded the opportunity to participate or provide input to the Appeal Committee.

[54] The Appeal Committee rendered its decision within hours of convening its meeting. In fact, the Electoral Officer reports that the Appeal Committee meeting started at 9:15 a.m. and a decision was reached by 12:30 p.m.

[55] The decision reached by the Appeal Committee suggests that it fully accepted the appeals advanced by the individual Respondents. There is no evidence that the Committee considered any other evidence or arguments other than those offered by the Respondents. The Certified Tribunal Record indicates that the only information before the Appeal Committee, regarding the merits of the appeals, were the letters from the individual Respondents. Although the Appeal Committee did have input from the Electoral Officer, she was not acting as the Applicants' representative.

[56] As noted by Justice Strickland in *Morin* at para 34:

Significantly, notice and an opportunity to make representations have been characterized as the most basic requirements of the duty of fairness (*Orr v Fort McKay First Nation*, 2011 FC37 at para 12 (“*Orr*”); *Gadwa* at paras 48-53). Further, the Federal Court of Appeal has stated that, “No matter how much deference is accorded administrative tribunals in the exercise of their discretion to make procedural choices, the ultimate question remains whether the applicant knew the case to meet and had a full and fair chance to respond” (*Canadian Pacific* at para 56).

[57] The Applicants, having been elected, had the highest personal interest of any member of the KFN, in any reconsideration of the election results by the Appeal Committee. This fact alone elevates, and by a significant degree, the procedural fairness owed to them. The Applicants had the right to have adequate notice of the case against their successful elections, and they should have been provided with sufficient opportunity to make representations before a decision adverse to their interests was made.

[58] Fairness required that the Applicants be provided an opportunity to address the Appeal Committee before it rendered a decision. In *Baker* at para 25, the Court notes that the more



important the decision and the greater the impact of the decision, the higher the procedural fairness protections that should be afforded (see also *Ledoux v Gambler First Nation*, 2019 FC 1465 at para 25). The fact that Councillor positions are held for life, further increases the fairness owed to the Applicants.

[59] The submission of the Respondents that the Applicants waived their rights by failing to appear before the Appeal Committee is without merit. The Applicants were not given an opportunity to appear before the Appeal Committee.

[60] In this case, the Election Code does not provide any mechanism for an appeal or reconsideration of the Appeal Committee decision. As noted in by Justice Faval in *Lecoq v Peter Ballantyne Cree Nation*, 2020 FC 1144 at para 46, this factor tends toward requiring a higher degree of procedural fairness as the appeal process has a "judicial" component thus requiring some level of formality and testing of evidence. There is no evidence that the Appeal Committee questioned or tested the evidence of the Respondents. Nor is there any evidence that the Appeal Committee considered if it should have heard from the two elected candidates before rendering a decision.

[61] I therefore find that the Appeal Committee breached the duty of procedural fairness owed to the Applicants. Pamela Halcrow and Debra Chalifoux-Courturier, the successful candidates in the July 11, 2020 election, had the right to be heard before the Appeal Committee overturned the election results and ordered a new election.

Reasonable Apprehension of Bias and Failure to Provide Reasons

[62] The Applicants also raise issues of bias and the failure of the Appeal Committee to provide reasons for its decision. As I am allowing this judicial review for the reasons outlined above, it is not necessary to address these issues and I decline to do so.

B. *Is the Appeal Committee Decision Reasonable?*

[63] As I have concluded that the Appeal Committee process undertaken by the KFN was not procedurally fair to the Applicants, any decision arising from that process is also unreasonable.

C. *Remedy and Costs*

[64] I am allowing this judicial review and quashing the decision of the Appeal Committee. The appeals shall be reconsidered by a differently constituted Appeal Committee.

[65] I wish to briefly address the issue of remedy. The Individual Respondents make numerous allegations about the legitimacy of the power and authority exercised by the KFN Chief and they seek a remedy that would limit his power. Those matters are beyond the issues raised by the Applicants in this judicial review, therefore, any such relief is beyond the scope of this judicial review.

[66] The Individual Respondents also seek costs against the Applicants and the KFN because they argue that they have been obliged to defend the Appeal Committee's decision. In my view, this is misguided and they are not entitled to costs.

[67] The Applicants, having been successful on this judicial review, are entitled to an award of costs. In my view, it is appropriate that the KFN be responsible for the Applicants' costs as this case turns on the actions of the Appeal Committee appointed by the KFN. I decline to award costs against the Individual Respondents.

[68] I am awarding the Applicants one set of costs in the all-inclusive sum of Five Thousand Dollars (\$5,000.00) to be paid by the KFN.

**JUDGMENT IN T-986-20**

**THIS COURT'S JUDGMENT is that** the judicial review is granted, the decision of the Appeal Committee dated July 29, 2020, is quashed and the matter is remitted for reconsideration by a differently constituted Appeal Committee. The Applicants shall have costs in the all-inclusive sum of Five Thousand Dollars (\$5,000.00) to be paid by the Kapawe'no First Nation.

“Ann Marie McDonald”

Judge

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

**DOCKET:** T-986-20

**STYLE OF CAUSE:** PAMELA HALCROW ET AL v KAPAWE'NO FIRST NATION ET AL

**PLACE OF HEARING:** HELD BY VIDEOCONFERENCE BETWEEN EDMONTON, ALBERTA AND FREDERICTON, NEW BRUNSWICK

**DATE OF HEARING:** JANUARY 13, 2021

**JUDGMENT AND REASONS:** MCDONALD J.

**DATED:** MARCH 19, 2021

**APPEARANCES:**

Dennis Callihoo	FOR THE APPLICANTS
Evan C. Duffy	FOR THE RESPONDENT (KFN)
David Schulze Marie-Alice D'Aoust	FOR THE RESPONDENTS (CHRISTOPER HALCROW, PRISCILLA SUTHERLAND AND LYDIA CUNNINGHAM)

**SOLICITORS OF RECORD:**

Dennis Callihoo Q.C. Wetaskiwin, Alberta	FOR THE APPLICANTS
Parlee McLaws LLP Edmonton, Alberta	FOR THE RESPONDENT (KFN)
Dionne Schulze Attorneys Montréal, Québec	FOR THE RESPONDENTS (CHRISTOPER HALCROW, PRISCILLA SUTHERLAND AND LYDIA CUNNINGHAM)