

August 11, 2020

Mr. Kevin Buffalo  
Maskwacis, AB

-and-

Loretta Pete-Lambert  
Suite 140 – 203 Packham Avenue  
Saskatoon, SK S7N 4K5

RE: Samson Cree Nation Election Appeal Board  
*Kevin Buffalo v. Shay Yellowbird*  
Reasons for Decision

---

Pursuant to Part 20 of the Samson Cree Nation Election Law, the Appeal Board has decided the above-referenced matter.

Please see attached our reasons for decision.

Sincerely,



---

Geraldine Hill, Chairperson  
Samson Cree Nation Election Appeal Board

---

Decision Date: August 10, 2020

Appeal Board: Geraldine Hill (Chairperson), Ron Lameman (Appeal Board Member), Marvin Yellowhorn (Appeal Board Member)

Hearing Date: August 8 & 10, 2020

---

On August 3, 2020, Mr. Kevin Buffalo (the "Appellant") filed an appeal in relation to election to the position of councillor of Mr. Shay Yellowbird (the "Respondent"). The allegations against the Respondent relate to certain contraventions of the Samson Cree Nation Election Law (the "Election Law") including engaging in corrupt practice as defined in the Election Law and continuing to act in his capacity as an employee for Samson Cree Nation after seeking nomination on July 21, 2020 up until the night before the election for council which was held on July 28, 2020.

#### PROCEDURAL BACKGROUND

The Samson Cree Nation Appeal Board (the "Appeal Board") scheduled an in-person hearing at the Samson Cree Nation Council Chambers on August 8, 2020 to hear oral submissions of the Appellant. In addition, the Manager for Samson Income Support, Ms. Lauri Dennehy, appeared as a witness before the Appeal Board on the same day to answer questions in relation to the appeal materials and evidence provided by the Appellant.

Once the Appellant and Ms. Dennehy provided their evidence, the Appeal Board determined that it was then necessary to hear submissions from the Respondent and scheduled a continuation of the appeal hearing on August 10, 2020. The Respondent was provided a notice of appeal on August 9, 2020 which was accompanied by the letter of appeal and the relevant documents being relied upon by the Appellant.

On August 10, 2020, the Respondent was present along with a lawyer, Mr. Lee Francoeur, who stated he was present "to support" the Respondent and did not indicate he represented the Respondent. He nonetheless made submissions on behalf of the Respondent. In addition, the Appeal Board also heard from the Respondent's direct supervisor, Mr. Trevor Swampy, who is the Senior Manager of the NEA Education and Youth Development. Finally, Ms. Dorothy Simon, who was appointed as the Election Technician in this election, provided some information to the Appeal Board in relation to information provided to candidates.

#### FACTS

The Election Law (as amended in 2013) was further amended in May of 2020 in order to address the current COVID-19 pandemic by taking into account various measures to be implemented and followed in relation to the elections for chief and council that would take place in July 2020. The COVID-19 measures contemplated the inclusion of virtual voting, nominations meetings, campaign practices regarding social media instead of in-person rallies, safety precautions for voting and nominations, security, the use of personal protective equipment, and the sanitation of the voting location.

The nomination process for the council election took place on July 21, 2020 and the eligible voters of Samson Cree Nation cast their ballots for the positions of councillor on July 28, 2020. The period in between July 21-28 will hereinafter be referred to as the "campaign period".

The Appellant ran unsuccessfully in the in the election for council held on July 28, 2020. The Respondent obtained the fourth highest number of votes in the election for councillor. At the time of nomination, the Respondent was the Senior Advisor of the Pre-Employment Support Program (the "PESP").

#### Submissions of the Appellant

In both his oral and written submissions, the Appellant indicated that he was contacted by way of a phone call from Ms. Dennehy, indicating that there were perceived irregularities in relation to the monetary issuances through the PESP for which the Respondent was responsible. In addition, Ms. Dennehy indicated that the Respondent was carrying out his duties during the campaign period, which is prohibited under the Election Law.

The Appellant submitted that, because the Election Law provides that only candidates can appeal the results of the election, Ms. Dennehy reported the alleged irregularities, as she identified them, to the Appellant to bring the appeal forward. The Board considered it necessary to hear from Ms. Dennehy in relation to her knowledge of the incidents giving rise to this appeal rather than relying on hearsay statements.

Ms. Dennehy provided an explanation of the structure of the Income Support Program in relation to the PESP. The PESP had migrated from being under the Income Support Program to the Education department. Prior to 2019, the PESP was under the Income Support Program. Both programs utilize the same database, called "360". This database can be accessed remotely from anywhere that has an internet connection and has three (3) layers of security to access it.

Further, she explained that, during the COVID-19 shutdown of the community, the Income Support Program and PESP worked remotely as the offices were closed. Laptops were provided on a sign-out basis. Ms. Dennehy stated that the Respondent had one of the laptops during the campaign period.

Ms. Dennehy indicated that the Respondent has access to the Income Support database used by all Samson Income Support staff. She also stated that the Respondent has the authority to approve and provide monetary issuances to clients of the PESP, who are also clients of the Income Support Program.

The Appellant alleges, and is supported by the evidence of Ms. Dennehy, that the Respondent accessed files during the campaign period, including the early morning hours of the day of the election for council. This includes creating case notes of at least four (4) Income Assistance/ PESP clients and authorizing monetary issuances to them on the day of the election.

There was also information provided by the Appellant, Ms. Dennehy and the Respondent, in relation to ten (10) gas cards that were purchased for the purpose of a training program for PESP clients. It is unclear if a program was running or scheduled to run, or what occurred in relation to those items or for what purpose they were to serve. There is conflicting testimony on this; however, the Appeal Board considered that this information would not influence the outcome of this appeal.

Ms. Dennehy provided testimony that her colleague, Clay Bruno, ran for a seat on council. She advises that this individual alerted other individuals in the Income Support Program group that he could not act in his capacity and his clients were then assisted by other case workers.

#### *Submissions of the Respondent*

The Respondent made submissions on his own behalf, as well as brief submissions were made by his legal counsel. The Respondent was asked if he had reviewed the Election Law in advance of his nomination. He indicated that he was familiar with the document but was on a tight timeframe to submit his materials for candidacy.

The Respondent provided testimony that he did, in fact work, on the night before the election which included the evening of July 27, 2020 and the early hours of July 28, 2020. He stated that he had to authorize the monetary issuances of benefits to the clients so that they would receive their supports for the month of August. He vehemently denies engaging in corrupt practice.

Upon being asked why he continued to carry out his duties despite the Election Law prohibiting candidates from doing so, he stated that he was declared an “essential worker” and that there was no one to delegate his files to carry out the necessary duties for the clients to receive their supports. The PESP operates with 1.5 staff.

Further, the Respondent stated that he was not paid for the work he performed during the period between nominations and the council election. His direct supervisor, Mr. Swampy also provided a letter confirming that he was not paid during this time. Payroll documents relating to that period were provided by the Respondent to support his statement as well.

Mr. Trevor Swampy was asked to appear before the Appeal Board and answer questions regarding his letter of support and the PESP in relation to the Respondent’s continued work with the PESP after the nominations had taken place. He informed the Appeal Board that, if the Respondent was to take a leave of absence, then his assistant would be able to carry out his duties during the campaign period. However, he stated that no conversation took place between him and the Respondent regarding his taking leave during the campaign period. He also noted that it is not standard practice for a supervisor to ensure that an employee who is running in the election develops a plan for their leave of absence during that time.

Mr. Swampy also stated that, in the past, he had run for a seat on council in a previous election. When he did so, he did not carry out any duties in relation to his work during the campaign period.

#### *Other Submissions*

The appointed Election Technician, Ms. Dorothy Simon, provided information in relation to the process that followed nominations which was helpful to the Appeal Board. She stated that the Nation’s general counsel was designated to provide all candidates with an information package for which their names were marked down to confirm they received it. The list showed that the Respondent received the candidate information package.

#### ISSUES

The issues as we have determined are as follows:

1. Did the Respondent engage in vote-buying by way of misusing Samson Cree Nation funds, thereby engaging in corrupt practice as defined under the Election Law?
2. Did the Respondent contravene section 4.1 of the Election Law?
3. What is the appropriate remedy?

#### LAW

In relation to the allegations contained in this appeal, the following sections are relevant. Section 3.5 of the Election Law reads as follows:

3.5 The campaign period for all candidates shall commence upon nomination and cease twenty-four hours before the day of the election.

Section 3.9 of the Election Law reads as follows:

3.9 Candidates are prohibited from engaging in corrupt practice.

Section 4.1 of the Election Law reads as follows:

4.1 In order to facilitate their full participation in all elections, any employee who is nominated as a candidate for office in an election, and accepts that nomination, will be given a leave of absence without pay pending the final determination of that election.

The following provisions of the Election Law give guidance on the remedies available in this case.

20.7 The Election Appeal Board may:

- a) declare that a complaint is an invalid complaint and dismiss the appeal;
- b) declare that the complaint is a valid complaint but dismiss the appeal because the violation of the Samson Cree Nation Election Law was not one which would have affected the result of the election; or
- c) declare the complaint to be a valid complaint and order that a new election be held within seven (7) days of the date of the Board's determination.

20.8 In the event that a new election is ordered, the election shall be held in accordance with the Samson Cree Nation Election Law described herein, subject however, to such further requirements, conditions, or directions as may be imposed by the Board in order to avoid a repetition of the violation complained of.

In addition, the following definition is important:

"Election" means an official and organized event at which candidates are chosen by vote to fill the position of Chief or Councillor."

In Schedule B of the Election Law, the following is relevant in relation to process:

6.4 Review of Appeal

...

d) In making its determination, the Board may consider any evidence it deems relevant, including all correspondence and documentation submitted by the Electoral Officer and the Appellant.

#### ANALYSIS AND DECISION

Issue #1: Was the Respondent engaging in corrupt practice as defined in the Election Law?

There is not enough evidence before the Appeal Board to prove that there was corrupt practice on the part of the Respondent. The Appeal Board did not hear any direct submissions by the Appellant in relation to vote-buying, and no witnesses were produced to give direct testimony on the issue. The appeal alleging a contravention of section 3.9 is an invalid complaint and is hereby dismissed.

Issue #2: Did the Respondent contravene section 4.1 of the Election Law?

The Respondent was carrying out his duties as Senior Advisor of the PESP up to the early morning of July 28, 2020, which is evidenced by his own testimony on the matter. He also indicated that he was “familiar” with the Election Law. Further the candidates were provided with a copy of the Election Law in their candidate information packages which was provided to him. It is the responsibility of individual candidates to familiarize themselves with the document.

The Appeal Board heard submissions from the Respondent’s legal counsel. He urged the Appeal Board, when interpreting the Election Law in this appeal, to consider the practicalities of the Respondent’s actions in light of the COVID-19 pandemic. Without the Respondent’s actions, Mr. Francoeur on behalf of the Respondent, submits that vulnerable clients would not be provided with the monetary supports that they need.

While, compelling, we note that the Nation did take pains to address issues that would arise in the Election Law as a result of carrying out an election during the COVID-19 pandemic. In doing so, the Nation considered the nomination and voting processes, campaign practices moving online and the provision of virtual voting and passed an amendment addressing those issues. We must look to the intent of the drafters of the Election Law. If they intended to suspend section 4.1 from the Election Law for certain employees (e.g. essential workers) they would have done so in the amendments that were passed. Thus, we are left with what the Election Law expressly provides.

Section 4.1 provides that a candidate must take an unpaid leave of absence in order to participate in an election. While the Respondent was not paid for the work performed, he still carried out his duties as an employee of the Samson Cree Nation. It cannot be said he took a leave of absence if he continued in his role as Senior Advisor of the PESP.

The Appeal Board has determined that the actions of the Respondent during the campaign period are a clear breach of section 4.1 of the Election Law.

Issue #3: What is the appropriate remedy?

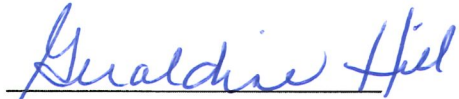
The Appeal Board finds that the breach rendered the Respondent an ineligible candidate to run for a council position in election. The Appeal Board further finds that the Respondent’s position is now vacant on council as a result of the breach.

In considering the appropriate remedy, the Appeal Board contemplated that there would be a redistribution of the votes as a result of this decision, which would have a broad effect on the candidates who were not successful. The Election Law provides a fair amount of discretion for the Appeal Board to consider in relation to remedies. Further, the Election Law does not contain many capitalized terms throughout the document that are also defined. By-election is not a defined term and the term "election" does not exclude by-elections. Therefore, the Appeal Board deems it appropriate, in considering the cost and safety measures of re-calling a full election for all council seats, to order a by-election for the now vacant position of councillor. Eligible voters will have the opportunity to cast their vote for the remaining eligible candidates who sought election for council.

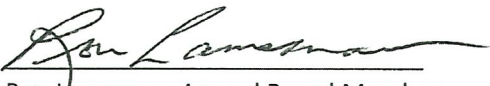
Further, the Appeal Board, in their discretion can impose certain conditions, requirements or directions in order to avoid a repetition of the violation complained of. Therefore, in addition to ordering a by-election for one council seat that is now vacant, the Appeal Board also imposes the condition that the Respondent is prohibited from running in said by-election. He is, however, welcome to run again in the next scheduled election for chief or council.

Held: The Appeal Board finds that this appeal is a valid complaint, orders a new election for the Respondent's now vacant seat within seven (7) days of the release of this decision, and that the Respondent is prohibited from running in that election.

Dated this 11<sup>th</sup> day of August 2020.



Geraldine Hill, Chairperson



Ron Lameman, Appeal Board Member



Marvin Yellowhorn, Appeal Board Member