

Federal Court



Cour fédérale

Date: 20230523

Docket: T-904-23

Citation: 2023 FC 709

Ottawa, Ontario, May 23, 2023

PRESENT: Mr. Justice Sébastien Grammond

BETWEEN:

**NEKANEET FIRST NATION, CHIEF
CAROLYN WAHOBIN, COUNCILLOR
ROBERTA FRANCIS, AND COUNCILLOR
CHRISTINE MOSQUITO**

Applicants

and

**ALENA LOUISON, COUNCILLOR
WESLEY DANIEL, AND SHAUNA
BUFFALOCALF**

Respondents

ORDER AND REASONS

[1] The applicants, who were recently elected to the Government of Nekaneet First Nation, seek an interlocutory injunction suspending the effects of a declaration purporting to remove them and to call a new general election. For the reasons that follow, the test for granting an interlocutory injunction is met. I am therefore granting the injunction.

I. Background

[2] The fundamental law of Nekaneeet First Nation [Nekaneeet] is the Nekaneeet Constitution, adopted by referendum in 2008.

[3] Article 8 of the Nekaneeet Constitution creates the Nekaneeet Appeal Body, comprised of three lawyers serving terms of three to five years. The members of the Nekaneeet Appeal Body are to be appointed by resolution of the Nekaneeet Government setting out the term of office. The following provisions of article 8 are especially relevant to the present dispute:

8.05 In the event of the termination, death or resignation of a member of the Nekaneeet Appeal Body such vacancy shall be filled by the Government within sixty (60) days of such event.

8.07 In the event the Nekaneeet Government should fail to appoint or fill vacancies in the Nekaneeet Appeal Body in accordance with this *Nekaneeet Constitution* or the laws of Nekaneeet, resulting in there being no Nekaneeet Appeal Body, then the Nekaneeet Government shall cease to hold office the day and date that a declaration is signed by a minimum of 35% of the eligible voters of Nekaneeet stating:

(a) The Nekaneeet Government has violated this *Nekaneeet Constitution* or a law of Nekaneeet by causing no members to be appointed to the Nekaneeet Appeal Body and the Nekaneeet Government is therefore removed from office;

(b) A General Election is called;

(c) The date of the General Election, the date of the nomination meeting and the naming the Chief Electoral Officer and the Deputy Electoral Officer for the General Election;

In such event, the then Nekaneeet Government shall cease to hold office effective on the date such declaration, or a copy thereof is delivered to the then Chief or to at least two of the then Councillors, and the General Election shall proceed under the charge of the Chief Electoral Officer who shall have the full power

to run the General Election and the fees and expenses associated with such General Election shall be a debt due and payable by Nekaneet.

[4] The term of appointment of the former members of the Nekaneet Appeal Body expired on March 2, 2023. While an election was scheduled for March 29, 2023, the then members of the Nekaneet Government did not take any steps to fill the vacancies.

[5] On March 29, 2023, the applicants Carolyn Wahobin, Roberta Francis and Christine Mosquito and the respondent Wesley Daniel were elected chief and councillors of the Nekaneet Government. The respondent Shauna Buffalocalf, who previously sat on the Government, sought re-election, but was defeated.

[6] Upon taking office, the newly elected members of the Nekaneet Government realized that the vacancies in the Nekaneet Appeal Body needed to be filled. According to their interpretation of the Nekaneet Constitution, this had to be done within 60 days of the vacancy, that is, before May 2, 2023. Thus, the Nekaneet Government advertised the positions on the Law Society of Saskatchewan's website and laid out a process leading to appointments being made on April 28, 2023.

[7] Meanwhile, Ms. Buffalocalf advised the Government of her intention of appealing the election of Chief Wahobin and inquired as to the identity of the Nekaneet Appeal Body members. After discussions between counsels failed to resolve the issue to her satisfaction, Ms. Buffalocalf began soliciting signatures for a declaration pursuant to section 8.07 of the Nekaneet Constitution.

[8] On April 26, 2023, a declaration signed by 148 Nekaneeet members (about 38% of eligible voters) was delivered to Councillors Francis and Mosquito [the Declaration]. It stated that the failure to appoint members of the Nekaneeet Appeal Body was a breach of the Nekaneeet Constitution, that the Nekaneeet Government was removed from office and that a general election was called for June 2, 2023. The respondent Alena Louison was appointed Chief Electoral Officer.

[9] On April 28, 2023, the applicants began an application for judicial review of the Declaration and sought interlocutory and interim relief to enjoin the holding of a nomination meeting and election. On the same day, the Government appointed the three members of the Nekaneeet Appeal Body.

[10] On May 1, 2023, after holding a case management conference, I granted interim relief, I enjoined the holding of a nomination meeting and new election and I set a schedule for the steps leading to the hearing of this motion for an interlocutory injunction. On the same day, Ms. Buffalocalf filed her appeal of Chief Wahobin's election, but asked the Nekaneeet Appeal Body to hold the matter in abeyance pending the resolution of the present proceeding.

[11] These reasons pertain to the applicants' motion for an interlocutory injunction. Among the respondents, only Ms. Buffalocalf appeared and opposed the motion.

II. Analysis

[12] An interlocutory injunction may be granted where the applicant shows that the matter raises a serious issue to be tried, that the injunction is necessary to avoid irreparable harm and that the balance of convenience favours the granting of the injunction. In *Bellegarde v Carry the Kettle First Nation*, 2023 FC 129 [*Bellegarde*], I recently discussed how these criteria apply in the context of First Nations governance disputes. For the sake of brevity, I will not repeat what I said in that decision and I will refer to it as needed.

A. *Serious Issue*

[13] The first step of the test for granting an interlocutory injunction is a preliminary review of the merits of the case. In most cases, the applicant need only convince the judge that the case raises a serious issue. A serious issue is a low threshold. It is not necessary to show that the applicant is likely to succeed.

[14] As the injunction sought by the applicants is prohibitive and not mandatory, the applicants do not need to meet a more stringent test: *Bellegarde*, at paragraph 23.

[15] Ms. Buffalocalf raises an objection to the Court's jurisdiction. She says that contrary to what took place in *Bellegarde*, the applicants are not challenging a decision made by a "federal board, commission or other tribunal," but rather a decision made by the Nekaneet voters. In my view, this does not make any difference. There is no doubt that this Court may review decisions made by a First Nation's voters, where they purport to exercise a power granted by the First

Nation's election laws: see, for example, *Marie v Wanderingspirit*, 2003 FCA 385; *Oakes v Pahtayken*, 2010 FCA 169; *Narte v Gladstone*, 2021 FC 433.

[16] This brings us to the crux of the matter. I find that the applicants have raised a serious issue regarding the validity of the Declaration. As this issue will be fully analyzed when the application is heard on the merits, I will say as little as possible to explain why I find that there is a serious issue.

[17] The applicants argue that articles 8.05 and 8.07 of the Nekaneet Constitution must be interpreted together. Therefore, a declaration made pursuant to article 8.07 cannot be valid before the expiry of the 60-day period afforded to the Government by article 8.05 to replace the members of the Nekaneet Appeal Body when their positions become vacant.

[18] Ms. Buffalocalf, in contrast, contends that article 8.07 must be read independently of article 8.05 and becomes applicable on the day the positions become vacant. She also argues that the applicants' interpretation amounts to a rewriting of the Nekaneet Constitution or to requiring Court approval for a declaration to take effect.

[19] In my view, the interpretation of article 8.07 raises a serious issue. While I acknowledge Ms. Buffalocalf may put forward submissions that are more fulsome in support of her interpretation when the application is heard on its merits, the applicants' interpretation is tenable and would potentially render the Declaration unreasonable because it was made before the expiry of the 60-day period.

[20] Ms. Buffalocalf's submissions do not negate the serious issue. If the applicants prevail on the merits, this would result from an interpretation of the Nekaneet Constitution as it exists, instead of an amendment to it. Likewise, the fact that a declaration may be subject to judicial review does not mean that it needs Court approval. A declaration would be valid without the intervention of the Court if it meets all the requirements of the Nekaneet Constitution.

[21] I wish to add that the applicants' allegations regarding the potential bribery of signatories to the Declaration played no role in the issuance of the interim injunction and the present interlocutory injunction. While I recognize that obtaining evidence of bribery may be challenging, the applicants did not rely on this issue for the purposes of this motion and there is very little evidence in the record at this stage. I need not comment further on this issue at this juncture.

B. *Irreparable Harm*

[22] In the absence of an interlocutory injunction, a new election will be held shortly to replace the applicants. If the applicants later prevail on the merits, this new election will be nullified and they will be reinstated in their position. If this happens, this would cast a significant cloud on the legitimacy of the applicants' position, even if the results of the March 2023 election still hold.

[23] Such a situation has been considered to give rise to irreparable harm in several decisions of this Court: *Buffalo v Bruno*, 2006 FC 1220; *Yahey v Ewaskow*, 2020 FC 732; *Linklater v*

Thunderchild First Nation, 2020 FC 899; *Whitstone v Onion Lake Cree Nation*, 2021 FC 1228; *Bird v Peter Ballantyne Cree Nation*, 2022 FC 994.

[24] I find that irreparable harm will occur if the interlocutory injunction is not granted.

C. *Balance of Convenience*

[25] At this third stage of the test, I must compare the harm to each party if the injunction is granted or denied, as the case may be. I may also consider the interests of the First Nation as a whole.

[26] Both sides have relied on the democratic principle. Ms. Buffalocalf argues that the Declaration is imbued with democratic legitimacy, which the Court should not easily set aside. In contrast, the applicants point out that the will of the Nekaneet voters is reflected in the results of the March 29, 2023 election.

[27] In this case, the democratic principle favours the applicants. Article 8.07 does not provide a vehicle for the expression of the will of the majority. Rather, it provides protection to a sizeable minority that would be deprived of an effective remedy if there is no functioning appeal body. While the issuance of a declaration is an important mechanism provided by the Nekaneet Constitution, it is not an expression of the will of the majority and does not have greater democratic legitimacy than the election that took place less than two months ago. Therefore, the democratic principle favours the suspension of the Declaration until the Court rules on its

validity and that the chief and councillors elected on March 29, 2023 remain in office in the meantime.

[28] Moreover, the members of the Nekaneet Appeal Body have now been appointed and Ms. Buffalocalf filed an appeal of Chief Wahobin's election. Nothing prevents the Appeal Body from hearing this appeal as expeditiously as possible. This would give Ms. Buffalocalf what she was initially seeking, namely, a review of Chief Wahobin's eligibility for office. It would also allow the decision-making body created by the Nekaneet Constitution to decide what appears to be the real issue between the parties.

[29] I would also note that the vacancies on the Nekaneet Appeal Board arose when the former Government was in office. Ms. Buffalocalf was then a member of the Government. It would have been in the power of the then Government to remedy the situation that Ms. Buffalocalf is now complaining about. While this situation may not directly affect the validity of the Declaration, it is a factor that weighs against her in the balance of convenience.

[30] Under this heading, each party also provided evidence of what it considers objectionable governance practices of the opposing party. This, however, is entirely irrelevant to this proceeding: *Gadwa v Joly*, 2018 FC 568 at paragraphs 30–33; *Ojibway Nation of Saugeen v Derose*, 2022 FC 531 at paragraph 29. This Court's role is to ensure compliance with the processes set forth by the Nekaneet Constitution for the selection of the chief and councillors. It is not to decide who would be the best chief and councillors. That is the role of the Nekaneet

voters, and I am not one of them. Therefore, I do not consider the various accusations that each party has levelled at the other in the balance of convenience.

[31] In the end, the balance of convenience favours the granting of an interlocutory injunction.

III. Disposition

[32] For these reasons, I will issue an interlocutory injunction preventing the holding of a nomination meeting and election pending a final judgment on the underlying application.

[33] The parties made submissions regarding costs at the hearing, but it became clear that the issue of costs would be best addressed by the judge hearing the merits of the application. The issue of costs will thus be deferred.

ORDER in file T-904-23

THIS COURT ORDERS that:

1. Until the Court decides the underlying application for judicial review, the Chief and Council of Nekaneet First Nation shall continue to include Chief Carolyn Wahobin, Councillor Roberta Francis, Councillor Christine Mosquito and Councillor Wesley Daniel.
2. Until the Court decides the underlying application for judicial review, the respondent Alena Louison and any other person who may purport to be an electoral officer of Nekaneet First Nation shall not conduct a nomination meeting or an election.
3. Nothing in this order prevents the Nekaneet Appeal Body to hear appeals in relation to the March 29, 2023 election and to issue relief accordingly.
4. The issue of costs is reserved for the judge who will hear the underlying application.
5. This matter will continue as a specially managed proceeding and is referred to the Chief Justice for the appointment of a case management judge.

"Sébastien Grammond"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-904-23

STYLE OF CAUSE: NEKANEET FIRST NATION, CHIEF CAROLYN WAHOBIN, COUNCILLOR ROBERTA FRANCIS, AND COUNCILLOR CHRISTINE MOSQUITO v ALENA LOUISON, COUNCILLOR WESLEY DANIEL, AND SHAUNA BUFFALOCALF

PLACE OF HEARING: BY VIDEOCONFERENCE

DATE OF HEARING: MAY 19, 2023

ORDER AND REASONS: GRAMMOND J.

DATED: MAY 23, 2023

APPEARANCES:

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