Date: 20090210

Docket: T-999-08

Citation: 2009 FC 134

Toronto, Ontario, February 10, 2009

PRESENT: The Honourable Mr. Justice Russell

BETWEEN:

CHIEF PAHTAYKEN, BRANDY BUFFALO CALF, ELVIE STONECHILD and CHRISTINE MOSQUITO

Applicants

and

LARRY OAKES, JORDIE FOURHORNS, RUSSELL BUFFALO CALF, LINDA OAKES and GLEN OAKES

Respondents

REASONS FOR JUDGMENT AND JUDGMENT

THE APPLICATION

[1] The Applicants are seeking judicial review of administrative action pursuant to section 18.1 of the *Federal Courts Act*, R.S.C. 1985, c.F-7 and a writ of *quo warranto* pursuant to section 18(1) of the *Federal Courts Act*, R.S.C. 1985, c.F-7 concerning the right of the Respondents to hold office as a band council of Nekaneet, with Larry Oakes, as Chief, and Jordie Fourhorns, Russell Buffalo Calf, Linda Oakes and Glen Oakes as Councillors.

[2] This application concerns two separate elections which took place on March 28, 2008, notionally creating two separate Nekaneet band councils elected pursuant to two different band customs. The purpose of the application is to determine which band custom governs band council elections at Nekaneet and which of the two band councils legitimately holds office.

[3] The election of the Applicants occurred in an election based upon a band custom passed at a referendum vote (Referendum Vote) of the eligible voters of Nekaneet held on February 25, 2008. The Referendum Vote approved the *Nekaneet Constitution* and *Nekaneet Governance Act*, which together formed the Referendum Band Custom. The Referendum Band Custom was intended to replace any previous band customs of Nekaneet and can only be amended, repealed or replaced by a subsequent referendum.

[4] The election of the Respondents was not based on the Referendum Band Custom but was based on a band custom (Second Band Custom) passed at a meeting of members of Nekaneet by a show of hands on or about March 14, 2008.

[5] The Department of Indian Affairs and Northern Development (INAC) has refused to acknowledge either the Applicants or the Respondents as the official Nekaneet band council. INAC regards the dispute as an internal matter and has suggested mediation or an application to this Court to resolve the impasse. Mediation was rejected as an option since mediation cannot change Nekaneet band custom law. The deadlock has caused significant problems at Nekaneet and needs to be addressed as quickly as possible.

[6] Specifically, the Applicants are seeking:

1. A declaration that the custom for band elections at Nekaneet is made up of the *Nekaneet Constitution* and the *Nekaneet Governance Act* as passed by the Referendum Vote of the eligible voters of Nekaneet held on February 25, 2008;
2. A declaration that the Applicants elected as the Chief and Councillors of Nekaneet under the *Nekaneet Constitution* and the *Nekaneet Governance Act* in the Nekaneet election of March 28, 2008 are the Chief and Councillors of Nekaneet;
3. A writ of *quo warranto* to the effect that the Respondents have no right to hold office as Chief or Councillors, as the case may be, of Nekaneet;
4. In the event of a decision or order made by the Respondents, more than thirty days before the date of this application, an order for an extension of time to permit the within application pursuant to section 18.1(2) of the *Federal Courts Act*, R.S.C. 1985, c.F-7;
5. An order that the Respondents, jointly and severally, pay the legal costs of the Applicants;
6. Such further and other relief as this Court deems fit.

BACKGROUND

[7] Nekaneet is an indian band under the *Indian Act* and conducts its elections for chief and council under the band custom method.

[8] The election of the Applicants as the band council of Nekaneet was based on a band custom passed at the Referendum Vote of the eligible voters of Nekaneet residing both on and off reserve and held on February 25, 2008. The Referendum Vote approved the *Nekaneet Constitution* and the *Nekaneet Governance Act* which together formed the Referendum Band Custom which was intended to replace any previous band customs of Nekaneet. The Referendum Band Custom further required that it could only be amended or repealed by a subsequent referendum held in accordance with the *Nekaneet Constitution.*

[9] The election of the Respondents as the band council of Nekaneet was based on the Second Band Custom passed by a show of hands at a Nekaneet band meeting called for such purpose and held on March 14, 2008.

[10] The Referendum Vote was conducted under the charge of Mr. Walter Wenaas as Referendum Officer, who was independent of Nekaneet.

[11] Nekaneet has approximately 418 band members, of which 267 were eligible voters at the material time. Of the 267 Nekaneet eligible voters, 136 ballots were cast under the Referendum Vote. Of the 136 ballots cast, 113 voted in favour of the *Nekaneet Constitution* and 21 against, and 114 also voted in favour of the *Nekaneet Governance Act*, and 21 voted against.

[12] Prior to the Referendum Vote, all previous band customs of Nekaneet were passed by way of show of hands at a meeting of members called for such purpose.

[13] The passing of the Referendum Band Custom was intended to create a new approach to government at Nekaneet whereby legislation of Nekaneet would be passed by way of Referendum (Article 9.05 of the *Nekaneet Constitution*). It also identified ten core laws of Nekaneet to ensure standards for good government and accountability (Article 9.07 of the *Nekaneet Constitution*). Further, it also confirmed the Rule of Law for Nekaneet.

[14] Article 11.02 of the *Nekaneet Constitution* provides that Nekaneet lands and resources are held for the communal benefit of all citizens of Nekaneet.

[15] Section 5.02 of the *Nekaneet Governance Act* requires that a candidate running for office not be indebted to Nekaneet if such debt is outstanding for more than 90 days prior to the relevant nomination meeting.

[16] The *Nekaneet Governance Act* also contains formal election rules (sections 1-11) and governance provisions setting out standards of good government, conflict of interest rules, and accountability and transparency rules (sections 12-18).

[17] The *Nekaneet Constitution* brings into being an independent Nekaneet appeal body. The *Nekaneet Governance Act*, under section 19, sets out the rules for applications to the appeal body.

[18] The Respondents, who opposed the Referendum Band Custom initiative, instituted a counter measure to pass a different band custom for Nekaneet. This was the Second Band Custom.

[19] The Second Band Custom was passed, not by referendum in accordance with the February 25, 2008 Referendum Band Custom, but by way of a show of hands at a meeting of members called for such purpose on March 14, 2008.

[20] It is not known how many band members were in attendance or otherwise participated in the meeting that created the Second Band Custom.

[21] A General Election was called under section 3.04 of the *Nekaneet Governance Act*. The Nomination Day was February 29, 2008 and the Voting Day was March 28, 2008.

[22] Mr. Gordon Alger, of Meadow Lake, Saskatchewan, was appointed the Chief Electoral Officer to conduct the Nekaneet General Election of 2008 under the *Nekaneet Governance Act*.

[23] The nomination meeting of February 29, 2008 proceeded and Ms. Alice Pahtayken, one of the Applicants, was elected by acclamation as chief. Four persons were also nominated for the three council positions.

[24] One of the four nominated for a councillor position was Mr. Steven Richard Buffalo Calf. He withdrew on March 10, 2008 as a candidate, causing the remaining three candidates for council to be elected by acclamation. They were the three other Applicants.

[25] No appeal under the *Nekaneet Governance Act* has been filed on the election of March 28, 2008 conducted under the Referendum Band Custom.

[26] However, a second election occurred for chief and council of Nekaneet on the same voting day of March 28, 2008. This election was based on the Second Band Custom and resulted in the election of the Respondents.

[27] INAC has refused to acknowledge either the Applicants or the Respondents as the official Nekaneet chief and band council and regards the dispute as an internal matter.

[28] A timely resolution of the dispute is necessary because the refusal of INAC to acknowledge the Applicants' band council elected under the Referendum Band Custom or the Respondents' band council elected under the Second Band Custom means that non-INAC programs at Nekaneet cannot be managed.

[29] Both the Applicants and the Respondents acknowledge that the impasse must be resolved as quickly as possible and they both ask the Court to decide who is the rightful chief and band council of Nekaneet.

ISSUES RAISED

[30] The Applicants have identified the following issues for the Court to decide:

1. Is this application appropriate having regard to the preconditions in the *Federal Court Act* and *Federal Courts Rules* and the existence of Federal Court Action No. T-481-08 commenced by Statement of Claim. This brings up several specific issues:
   a. Is the within application under section 18(1) of the *Federal Courts Rules* appropriate?
   b. Is a decision of the Respondents, as a tribunal, required as a pre-condition for the within judicial review application?
   c. Does the action commenced by Statement of Claim in Federal Court Action T-481-08 constitute a bar to the within judicial review proceedings?

2. Which of the Referendum Band Custom passed by the Referendum Vote of February 25, 2008 and the Second Band Custom passed on March 14, 2008 by way of a show of hands at a meeting of the Nekaneet membership is valid? This seems to involve the following specific issues:
   a. If the Referendum Band Custom was validly passed, does it invalidate the Second Band Custom because the Second Band Custom did not come about in accordance with the process contained in the *Nekateet Constitution*?
   b. Must a referendum vote for a band custom be initiated by a resolution of the incumbent band council and was Nekaneet limited to band customs passed by a show of hands at a meeting called for such purpose?
   c. Did the Referendum Band Custom satisfy the test of being generally acceptable to the members of the Nekaneet First Nation on which there was a broad consensus?

d. Did any of the acknowledged irregularities in the conduct of the Referendum Vote invalidate that vote?

ANALYSIS

Appropriateness of Application

[31] In *Salt River First Nation 195 (Council) v. Salt River First Nation* 2003 FCA 385, the Federal Court of Appeal set out what should happen in cases such as the present where, strictly speaking, a decision of a band council is not being challenged but where the application seeks to challenge the right of a public office holder to hold office:

> **18** Pursuant to paragraph 18(1)(*a*) of the *Federal Court Act*, the Federal Court has jurisdiction to issue a writ of quo warranto or to grant declaratory relief. I see no reason why declaratory relief which, in substance, is in the nature of quo warranto, cannot be granted. That procedure appears to have been approved in *Lake Babine Indian Band et al. v. Williams et al.* (1996), 194 N.R. 44 (F.C.A.). Robertson J.A. states at paragraphs 3 and 4:
>
> > 3. It is to be noted at the outset that the appellants do not dispute the jurisdiction of the court to address the issues herein. The respondents seek declaratory and injunctive relief, which in these circumstances essentially amounts to a request for a writ of quo warranto. Quo warranto allows a challenge of an individual's right to hold a particular office...
> >
> > 4. There is no doubt therefore that there is jurisdiction per se, an Indian Band Council being a "federal board, commission or other tribunal" within the meaning of ss. 2 and 18 of the Act....Accordingly, this Court has jurisdiction to address the issue but it can do so only in the context

> of a s. 18 application not in the context of an action initiated by way of statement of claim.
>
> **19.** In the present case, the matter proceeded by way of application and the objection in *Lake Babine* to the procedure by way of statement of claim is not relevant.
>
> **20.** While normally judicial review is conducted with respect to a decision of a federal board, commission or tribunal, there will be occasions where relief may be granted in the absence of a decision. An application for a writ of prohibition is an obvious example. Quo warranto or a declaration in the nature of quo warranto where the challenge is to the right of a public office holder to hold office directly is another. That is what has occurred here. For these reasons, the second ground of appeal must be rejected.

[32] In light of this guidance from the Federal Court of Appeal, I regard the application before me as legitimately engaging the Court's jurisdiction under the *Federal Courts Act* and the *Federal Courts Rules*.

[33] Nor do I see Federal Court Action No. T-481-08 as a bar to the present application. The basic relief sought in that action differs from the relief sought here and both sides agree that a timely resolution to the issues raised in this application is imperative.

[34] Both sides in this dispute also agree that the impasse between them needs to be resolved as quickly as possible in order to avoid negative consequences for the Nekaneet First Nation as a whole and they have asked the Court to render a decision under this application.

The Second Band Custom

[35] The application for *quo warranto*, or a declaration in the nature of *quo warranto*, which the Applicants seek is aimed at the Second Band Custom under which the Respondents were purportedly elected on March 14, 2008. However, whether or not the Respondents were properly elected involves a consideration of Nekaneet customs for band council elections and whether those customs have been replaced by the Referendum Band custom under the *Nekaneet Constitution* and the *Nekaneet Governance Act*.

[36] The election of the Respondents as the chief and band council was based upon a band custom passed by a show of hands at a band meeting called for that purpose and held on March 14, 2008. This means that the Respondents may have no right to hold office as the Nekaneet band council either because:

a. Their election was not in accordance with Nekaneet custom as such custom existed prior to the passing of the *Nekaneet Constitution* and the *Nekaneet Governance Act*; or
b. Their election did not take place in accordance with the *Nekaneet Constitution* and the *Nekaneet Governance Act* if those instruments have superseded any prior custom regarding the election of chief and band council.

[37] The Applicants have, however, conceded that should the election of the Applicants in accordance with the Referendum Band Custom under the *Nekaneet Constitution* and the *Nekaneet*

Governance Act not be valid, then the election of the Respondents under the Second Band Custom should be regarded as valid, even though it could have been challenged on other grounds.

[38] This being the case, I think that the easiest way to approach these issues is to decide whether the *Nekaneet Constitution* and the *Nekaneet Governance Act* now govern Nekaneet chief and band council elections and, if they do, whether the Respondents rightly occupy their offices in accordance with the relevant provisions. If they do not then, provided the *Nekaneet Constitution* and the *Nekaneet Governance Act* can be considered as valid and as governing the election of chief and band councils within the Nekaneet First Nation, the Applicants will be the rightful chief and band council because there is no evidence or allegation before me that they were not elected in accordance with the Referendum Band Custom under the *Nekaneet Constitution* and *Nekaneet Governance Act.*

[39] I agree with the Applicants that there is no requirement under the *Indian Act* or any other legislation that has been brought to the Court's attention that requires a referendum band custom process to be initiated or passed in a specified way. The issue is whether the *Nekaneet Constitution* and *Nekaneet Governance Act* have been adopted by, and are acceptable to, a broad consensus of the Nekaneet First Nation, as "broad consensus" is defined by the governing jurisprudence. If it has been so adopted and accepted then the Nekaneet people have decided that it will govern future chief and band council elections, and elections that do not comply with the relevant provisions will not be valid.

[40] Further, the absolute number of voters who participated in the Referendum Vote was significant, being 136 of a possible 267 eligible voters, and 83% of the majority of the eligible voters who participated in the Referendum Vote voted in favour of the *Nekaneet Constitution* and the *Nekaneet Governance Act*, even though the Respondents and their families and friends boycotted the whole process.

[41] No evidence has been led by the Respondents to suggest that participation by 136 eligible voters was low. In fact it exceeded one half of all of the eligible voters of Nekaneet in a situation where the Respondents, together with their supporters, refused to participate.

[42] In *Lac des Mille Lacs First Nation v. Chapman*, [1998] 4 C.N.L.R. 57 (F.C.T.D.), a "Custom Leadership Selection Code" was adopted by referendum under which the respondents in that case were acclaimed as band councilors. The applicants in *Lac des Mille Lacs* argued that the Selection Code's practices were not generally acceptable to band members and that there was no broad consensus that favoured them. Justice Cullen disagreed. Making reference to the pattern of general non-participation among band members, he held that the participation of 86 voting members out of a population of 300 band members (of which the location of only 130 was known), with a large majority of the 86 in favour of the Selection Code, was a sufficiently broad consensus to constitute the Selection Code as a band custom.

The Evidence

[43] There is some conflict in the evidence before me in this application. This is inevitable given the different approaches to governance that each side represents. The Applicants see themselves as bringing a new, more transparent and more accountable approach to governance of the Nekaneet First Nation. The Respondents, on the other hand, see themselves as the embodiment of traditional custom and practice that does not need the new approach found in the *Nekaneet Constitution* and the *Nekaneet Governance Act*. In fact, the Respondents regard these instruments as being totally at odds with traditional custom and practice and as detrimental to the identity of the Nekaneet First Nation.

[44] Notwithstanding the different views of appropriate governance found in the evidence, and notwithstanding the conflicts in the evidence, after reviewing the record as a whole I believe the following general patterns are clear:

a. Although the Respondents seek to preserve the status quo at Nekaneet and claim to embody traditional custom and practice, they have, by and large, been unwilling to allow governance issues to be decided by the Nekaneet people themselves. They have simply resisted, and attempted to thwart, the new initiatives put forward by the Applicants. In the end, the rules of governance at Nekaneet should be decided by the First Nation and it is the will of the Nekaneet people as a whole that matters. The evidence suggests to me that the Respondents have been more concerned to preserve the status quo – and, in particular, the way the chief and band councils are elected and function – than with ascertaining what is the general consensus of the Nekaneet

First Nation on appropriate rules of governance. Whatever irregularities arose in the referendum procedure and the general approach of the Applicants, it is at least apparent that their purpose has been to ascertain the will of the Nekaneet people. The new constitution and rules of governance bring no apparent personal advantage to the Applicants, while the Respondents, in their efforts to thwart consensus seeking, are tainted by a strong suggestion of self-interest regarding the control of communal lands and band resources. I think that a party or a group that thwarts attempts to ascertain the general consensus, and simply relies upon traditional custom and practice to justify its own position in a situation where governance has become dysfunctional, invites suspicion;

b. The Respondents have been clearly aware that community consensus is the true legitimizing factor because, in one very telling way, they have attempted to give themselves that legitimacy. At the second election organized by the Respondents under the Second Band Custom a petition was signed by 113 persons which had the following written above the signatures:

> I believe and trust in the Nekaneet Election Procedure of March 28, 2008. Nekaneet Elections have chosen their spokes persons [Band Council members] under the Band Custom process since elections were used on Nekaneet.

The petition is attached to the affidavit of Mr. Dale Mosquito and the only explanation he offers for it is as follows:

> At the time of the conduct of the custom election at Nekaneet, band members were also given the opportunity to sign a petition confirming their

> commitment to our band custom process. This document was signed by 113 band members. One of the Applicants, Christine Mosquito, and a person who had worked on the Governance Committee, Doreen Oakes, signed this petition. A copy of the petition is attached hereto and marked as Exhibit "G" to this my affidavit.

There is no evidence that it has been Nekaneet custom to have members sign such petitions at election time, and such a petition can only be understood in the context of this dispute. There would be no need to have people sign such a petition unless the Respondents wanted to use it to dispute the legitimacy of the Referendum Vote and the earlier election which took place under the Referendum Band Custom. The petition is the Respondents' attempt to demonstrate community support for the status quo which they profess to embody. It is their answer to the Applicants' Referendum Vote.

The strange thing about this is that the criticisms that the Respondents level against the Applicants' Referendum Vote to try and demonstrate that it did not yield a consensus of the Nekaneet First Nation in favour of the new regime are, in fact, true of the petition. There is no evidence to reassure the Court that this petition has any value or legitimacy as an expression of the understanding or the will of the people who signed it. What was the procedure for signing it? What was the information and educative process that preceded it? What were the safegrounds surrounding the signing? Who authorized it? Who organized it? What means did they use to secure the signatures or to ensure that the signators voted freely in accordance with their

consciences? We know most of these things about the Referendum Vote. We know none of them about the petition.

The Respondents take a strong position in this application that the Nekaneet First Nation did not understand what was at stake under the Referendum Vote. They say the Nekaneet people were not properly informed and that the Referendum Vote was unsafe because of mistakes in the process. They appear to feel no obligation to reassure and demonstrate to the Court that the petition has the legitimacy that they say the Referendum Vote lacks. But without those reassurances, there is little weight that the Court can attach to the petition as an expression of the will of the Nekaneet First Nation.

What is more, the very existence of such a petition undermines some of the basic tenets of the Respondents' position. They say that the governance issues that led to the Referendum Vote were little understood at Nekaneet. Yet they present the Court with a countervailing petition that can only have a significance and a meaning in the context of the governance debate. If these people do not understand what is at stake, why would they be signing a petition so obviously intended to counter the Referendum Vote and the first election? The Court cannot accept that the people who signed the petition understood its significance and what was at stake while the people who participated in the Referendum Vote were not sufficiently informed to know what they were doing. The petition is strong evidence of the Applicants'

position that the governance issues at stake in the Referendum Vote were widely known and debated in the Nekaneet community;

c. The governance debate at Nekaneet is between those who wish to preserve a status quo that has led to significant problems for the community as a whole. The Respondents insist that all band council initiatives require a consensus of council members. The problem with this is that it can only work where no self-interest enters into the picture. Any band council business that threatens the personal, family or friendship interests of a councillor can be thwarted by absenteeism and/or veto. The evidence reveals ongoing dysfunction at the band council level in recent years that has led to warnings from Nekaneet's auditors and INAC. Tradition and custom have been summoned by the Respondents' group to justify a traditional consensual approach, but it is obvious from the evidence that self-interest has sullied custom and that if a new approach to governance is not found, those who control communal assets may continue to prosper at the expense of the Nekaneet First Nation as a whole. There is a great deal of personal bitterness in the evidence and the somewhat extreme measures used by the Respondents to boycott, thwart and nullify the referendum process, rather than seek the consensus of the Nekaneet community as a whole, suggest that some individuals at least have much to lose from the new governance regime. There is evidence of nepotism on the Applicants' side too, but the Applicants are not seeking to extend the opportunities for personal and family

gain. The new constitution will pinch them just as much as the Respondents and will make both groups much more accountable to the Nekaneet membership;

d. I have carefully reviewed the affidavits provided by both sides. While there is considerable contradiction on some key points, it is clear that the affidavits of Ms. Pahtayken, Ms. Millar and Mr. Buffalo Calf for the Applicants are, for the most, fact-based and present evidence within their personal knowledge. Their affidavits are also supported by solid documentation that addresses the key issues in this dispute. The affidavits of Mr. Wenaas and Mr. Alger for the Applicants come from experienced and impartial observers and participants and are strongly supportive of the Applicants' position. The affidavits from the Respondents speak well and convincingly of tradition and custom at Nekaneet, and of the special history of the Nekaneet people. But they are much less convincing when it comes to the key issues in this application. Apart from defending personal positions, they are very thin on acceptable evidence concerning the referendum process, and the knowledge of the community as to what was at stake. There is considerable resort to hearsay, vagueness and personal opinion on key points. As an example, when I examine the affidavit of Mr. Dale Mosquito, for Respondents, it is evident that Mr. Mosquito does speak to some matters of personal experience, but much of what he says is generalized opinion or argument, often on points that are not relevant to the central issue of concern in this application. In addition, when he does get down to the principal issues, Mr. Mosquito reveals a lack of objectivity. He is willing to opine to

things of which he has no personal knowledge in order to discredit the Applicants and bolster the Respondents case:

> 40. Members of the Governance Committee travelled to various locations both in Canada and the United States to meet with some band members on an individual basis. I am advised by Santana and Belinda Stanley, by two of my sisters-in-law, that they were approached to vote by Harry Buffalo Calf and Cheryl Stanley. One of the two did cast a ballot when she agreed to vote in favour of what the Governance Committee was proposing. When the second individual indicated she was not in favour, these individuals would not take her ballot. I am advised however that the persons picking up the ballots did not discuss specifics of what members were being asked to vote on. This does not appear to be an isolated occurrence. I have been advised by other band members that members of the so-called Governance Committee or those working with them, visited members in several locations.
>
> 41. I have spoken to one member of the Nekaneet First Nation who indicated to me that he voted in favour but did not understand what he was voting for.

[45] I do not wish to suggest that Mr. Mosquito's evidence is all like this but, on this important and relevant issue, what he says is of little assistance to the Court. For example, the Court needs to know:

a. When and how he was advised by his sisters-in-law, and what is the context that gives what they told him some credibility?

b. Why can't he remember which of his sisters-in-law agreed to vote in favour?

c. Why is this presented as hearsay and why have the sisters-in-law not provided direct evidence on point?

d. Who advised him that the persons picking up the ballots did not discuss the specifics of what members were being asked to vote on? Why don't we have an affidavit from this person and how can Mr. Mosquito generalize on this point the way he does?

e. How does Mr. Mosquito know this is not an isolated occurrence?

f. Who are the other band members who have told him that Members of the Governance Committee, or those working with them, visited members in several locations? Why does Mr. Mosquito not name these other band members? And what, precisely, does Mr. Mosquito say transpired on these other occasions, and how does he know, and how many occasions is he talking about?

g. Why doesn't Mr. Mosquito name the band member he spoke to in paragraph 41 and why has that band member not provided an affidavit?

[46] This is not persuasive evidence on the key issue of the legitimacy of the Referendum Vote. Most of it is hearsay about people who are not even named. The purpose of such evidence is clear. Mr. Mosquito wants to create the impression that people were pressured into casting a favourable vote at the referendum, that the Governance Committee personally interfered to ensure that negative votes were excluded, and that people who did vote in favour did not know what they were doing. But it is all hearsay and innuendo. What is more, the suggestions contained in this evidence are obviously not consistent with facts that are clearly established. For example, not everyone who participated in the Referendum Vote voted in favour of the new regime. The "yes" vote of 113 was 83% of the 136 votes cast. The number of eligible voters was approximately 267. The Respondents

organized a petition of 113 votes which they say comes from people who want to continue with the traditional custom of voting. No evidence is provided as to how many of these people voted in the referendum, but the Respondents and their group have been very careful to boycott the whole referendum process in order to deny it legitimacy, so that it is reasonable to suppose that a good number of the petition signers did not participate in the Referendum Vote. All in all, it seems that a significant proportion of eligible voters at Nekaneet have, in one way or another, if the Respondents' own evidence is accepted, participated in recording their views on the governance debate, even though there is no evidence that gives the petition figure a legitimacy as a free vote.

[47] I do not want to suggest that all of the Respondents' evidence is problematic in this way, but other affidavits do have similar problems on key points.

[48] As regards conflicts in the evidence, I think the Court has to take into account the fact that the Applicants have tried their best to put the governance issues before the Nekaneet First Nation so that the whole community can express itself. There were negative votes in the referendum. That suggests an informed community that knew what it was doing and made a free choice. It is telling that the Respondents petition is presented as though there was no dissent, and that raises doubts about how informed and free the petition process was. Either that or it suggests a block of people who have a vested interest in ensuring that the status quo continues at Nekaneet.

[49] It also has to be kept in mind that the process adopted by the Applicants and the new regime endorsed by the Referendum Vote gives rise to no obvious conflicts of interest on the part of the

Applicants. Transparency and accountability in governance are something that will apply to the Applicants as much as to the Respondents. But the Respondents want to retain a status quo that, on the evidence, greatly troubles a great many people at Nekaneet who believe it promotes unfairness, nepotism and the pursuit of self-interest over communal well-being. The evidence suggests that the Respondents have a personal interest in the status quo, and this has to affect the way the Court views their evidence and their interpretation of events that lead to the Referendum Vote.

[50] There is no way that the Court can identify, parse and discuss every problem in the evidence and get this decision out in a timely way. Suffice it to say, that I have reviewed the full record and find the Applicants' evidence much more factual, relevant and substantiated than that of the Respondents on the key points at issue. What is more, there is a taint of self-interest and conflict in the Respondents' evidence that cannot be left out of account. The Respondents are obviously wedded to the status quo and have vehemently resisted having governance issues decided by the Nekaneet First Nation as a whole. The Applicants, on the other hand, obviously wish to assume power, but they want to do so under a new system of governance that brings no obvious personal benefit to them and that is an attempt to introduce accountability and transparency to Nekaneet so that dysfunction, self-interest and nepotism can become a thing of the past. Their methodology and process may not have been perfect, but they have been willing to draw the mistakes they made to the Court's attention and, notwithstanding, I believe they have established that a new custom now exists at Nekaneet that is embodied in the *Nekaneet Constitution* and the *Nekaneet Governance Act*.

[51] The key point for the Court is whether, notwithstanding the mistakes, formal disagreements, and evidentiary conflicts, it can be safely concluded that the Nekaneet First Nation has expressed a sufficiently broad consensus in favour of the new governance regime and the rules for the election of chief and band councils set forth in that regime. On the evidence before me, I believe that consensus has been established.

The Central Issue

[52] With these general comments in mind, the central issue for the Court is whether evidence shows that a sufficient consensus at Nekaneet has brought into being the new regime embodied in the *Nekaneet Constitution* and the *Nekaneet Governance Act* so that chief and band council elections must take place in accordance with the Referendum Band Custom unless and until it is amended.

[53] Nekaneet has approximately 418 band members, of which 267 were eligible voters at the time of the referendum. One of the problems with a group of people of this size is that loyalties will inevitably divide along family and friendship lines. This makes a clear and overwhelming consensus well nigh possible. As can be seen in the present case, there is a marked polarization between those who want to preserve the status quo and those who want a new approach to governance.

[54] The jurisprudence on what will constitute a sufficient consensus is somewhat sparse, but I think the relevant principles upon which to resolve the present impasse are clear. In *Bigstone v. Big*

Eagle (1992), [1993] 1 C.N.L.R. 25 (F.C.T.D.) at p. 24, Justice Strayer had the following to say of general import:

> Unless otherwise defined in respect of a particular band, "custom" must include practices for the choice of a council which are generally acceptable to members of the band, upon which there is a broad consensus … . The real question as to the validity of the new constitution then seems to be one of political, not legal, legitimacy: is the constitution based on a majority consensus of those who, on the existing evidence, appear to be members of the Band?

[55] Justice Strayer's decision in *Bigstone* appears to assume that there is no legal requirement that the majority consensus be ascertained in any particular way. The Court must look for political, rather than legal legitimacy.

[56] This position is confirmed by Justice Reed in *McLeod Lake Indian Band v. Chingee* (1998), [1999] 1 C.N.L.R. 106 (F.C.T.D.) at paragraph 17 where she refers to what is "fairly established in the jurisprudence," and this is that "the custom of the band is the practices for selecting the council of the band that are generally acceptable to members of the band, upon which there is a broad consensus."

[57] More recently, in *Kanesatake v. Mohawk of Kanesatake (Council)*, [2003] 3 C.N.L.R. 86 (F.C.T.D.) Justice Martineau was called upon to resolve a dispute between competing factions. He confirmed that the *Indian Act* does not set out guidelines as to how a band custom is to be identified and his approach is consistent with the words of Justice Strayer in *Bigstone* and Justice Reed in *McLeod Lake*. He points out that practices related to the choice of council must be generally acceptable to members of the band on a broad consensus. Significantly, Justice Martineau

concluded that such practices may be established either through repetitive acts over time, or through a single act such as the adoption of an electoral code. He says at paragraph 37 that "whether a particular band resolution, decision or an adopted electoral code reflects the custom of the band can be framed as follows: is the resolution, decision or code based on a majority consensus of all those who, on the existing evidence, appear to be members of the band, regardless of residence?"

[58] Applying these principles to the present case, I think the Court must decide whether the Referendum Band Custom passed at the Referendum Vote of eligible Nekaneet voters residing both on and off reserve and held on February 25, 2008 approving the *Nekaneet Constitution* and the *Nekaneet Governance Act* (which together form the Referendum Band Custom), and which replaced any previous band customs at Nekaneet for chief and band council elections, had the support of a sufficiently broad consensus of both resident and non-resident band members. Put simply, the Court needs to decide whether the new regime for electing councils is generally acceptable to the Nekaneet First Nation based upon the evidence before me in this application.

[59] The evidence before me establishes that a majority of Nekaneet band members participated in the Referendum Vote and a substantial and clear majority voted in favour of the *Nekaneet Constitution* and the *Nekaneet Governance Act*.

[60] The hard facts are that, out of a total of approximately 267 eligible voters, 136 participated in the Referendum Vote and, of these, 113 (83%) voted in favour of the new rules.

[61] Given the fact that the Respondents and their supporters refused to participate in the referendum process and the Referendum Vote because that would have meant consenting to something they wished to thwart, this seems to me to be a remarkably high turn out and a clear endorsement of the new regime as a custom of the Nekaneet First Nation.

[62] I note that, in *Lac des Mille Lacs First Nation*, Justice Cullen held that the participation of 86 voting members out of a population of 300 band members, with a large majority of the 86 in favour of a Custom Leadership Selection Code, was a sufficiently broad consensus to render the code a band custom.

[63] Instead of putting their position to the whole community, the Respondents held their own election in accordance with traditional custom and, more importantly, organized the petition of 113 signatures as a way of undermining the consensus reflected in the Referendum Vote.

[64] The problem for the Court is that the Respondents have provided no evidence that would allow the Court to gauge the significance or the legitimacy of the petition as an indicator of band consensus on the issues before the Court. They simply attempt to undermine the legitimacy of the Referendum Vote and place the petition before the Court as a means of doing this. Based upon the record as a whole, the Court must remain highly sceptical of this tactic.

[65] Had the Respondents been truly concerned with ascertaining the general will of the Nekaneet First Nation on the matters in dispute, they would have placed the issues squarely before

the Nekaneet people and either participated in the referendum or found some other way to allow the Nekaneet First Nation to decide these issues for itself. Rather than allow the community to express its will in a fair and transparent way, the Respondents have attempted to thwart the referendum process in order to preserve a status quo that, the evidence suggests, is more conducive to their personal interests. Bearing in mind this general pattern, the Court cannot accept the petition as an indication of how all of the people signing it would have voted in a free and transparent process. It is obvious that the Respondents have family and supporters who will always vote with them. But I do not think the Respondents can have it both ways. They cannot snipe at, and complain of, defects in the referendum process, and then bring forward a petition that was organized and obtained in a way that is not transparent on the evidence. The Respondents cannot boycott and thwart a referendum process aimed at ascertaining the general will at Nekaneet and then offer a petition that has no fair and due process attached to it to support their own legitimacy in the community.

[66] In my view then, the Referendum Vote satisfies, on its face, the jurisprudence for establishing a broad consensus at Nekaneet for the new governance regime and an abandonment of the old ways. The next question is whether the Referendum Vote was the result of a fair and open election in which the voters knew what they were doing when they adopted the new governance regime as custom at Nekaneet.

Criticisms of Respondents

[67] The Respondents say that the Referendum Vote was defective and that the people who voted did not understand the significance of the changes they were voting to bring about.

[68] Once again, however, the Respondents' own actions and evidence would seem to belie the assertion that the changes were not sufficiently understood to make the Referendum Vote meaningful. Obviously, the Respondents and their followers knew precisely what was at stake and what the changes would mean. They knew this so well (and they had legal advice) that they were aware they had to boycott and thwart the referendum process to stand a chance of preserving the status quo. They knew it so well that they organized a petition that they say supports the old ways of electing the chief and band councils. So it is pretty hard for the Court to accept as a general proposition that the Respondents and their followers knew what was at stake and, in effect, petitioned against it, but that those Nekaneet people who participated in the Referendum Vote did not. What is more, I believe that other evidence adduced does not support the Respondents' position on this issue. The Applicants' evidence on this issue suggests that, although members of the community may not have understood all of the detail in the documentation that was distributed and which eventually became the *Nekaneet Constitution* and the *Nekaneet Governance Act*, they were certainly aware that they had a choice to make between a dysfunctional status quo that allowed too much scope for self-interest, and a new governance regime that would bring much more transparency and accountability to Nekaneet in a way that would benefit the community as a whole.

[69] Justice Rouleau alluded to the necessity of some degree of information being provided prior to a vote on band custom at paragraph 47 of *Salt River First nation 195 (Council) v. Salt River First Nation 195*, [2003] 3 C.N.L.R. 332 (F.C.T.D.), where he stated at paragraph 45 that "[c]ontrary to the respondent's position, the customary electoral practices of the SRFN cannot be changed on an *ad hoc* basis at a meeting where there has been no notice given that a proposal to change electoral custom is to be discussed." The test is whether the band custom has been changed by the broad consensus of the band which, as Justice Rouleau put it in *Salt River*, "requires a manifestation of the will of the band members to be bound by a new set of rules."

[70] In addition to the voting results, the process associated with the development and approval of the Referendum Band Custom is relevant to the issue of whether there was a "broad consensus" and, in that regard, the following should be noted, even though the Respondents take issue with some of these facts:

a. The referendum process commenced on February 23, 2007 and ended with the Referendum Vote on February 25, 2008;
b. Approximately 60 band members who were in attendance at the band meeting of February 23, 2007 initiated the governance committee initiative;
c. Thirty-four written responses from members were provided naming prospective persons to sit on the governance committees;
d. The Nekaneet Governance Committee held five meetings;
e. Two questionnaires with 46 responses from the membership on the *Nekaneet Constitution* and 46 responses on the *Nekaneet Governance Act* (initially called the

Nekaneet Election Act), reveal that the contents of the majority of responses are aligned with the core ingredients of the *Nekaneet Constitution* of the *Nekaneet Governance Act* relating to the accountability and transparency;

f. Two consultation meetings were held with the membership, one held in Regina, Saskatchewan and the other held on Nekaneet Reserve, where the members were given an opportunity to provide verbal input;

g. The draft *Nekaneet Constitution* and the draft *Nekaneet Governance Act* were circulated prior to the Referendum Vote;

h. An Information Document regarding the subject of the vote was circulated prior to the Referendum Vote;

i. An Information Meeting was held on February 4, 2008 giving the Nekaneet Membership an opportunity to discuss the matters of concern regarding the *Nekaneet Constitution* and the *Nekaneet Governance Act*;

j. The *Nekaneet Constitution* and the *Nekaneet Governance Act* and the associated Referendum Vote were widely discussed and hotly debated within the Nekaneet Community;

k. The use of an independent and impartial Referendum Officer;

l. Band members residing off reserve participated in the vote through a mail-in process;

m. 136 of 267 eligible voters participated in the Referendum Vote, and 83% of those who voted were in favour of the Referendum Band Custom.

[71] A helpful account of what amounts to being sufficiently informed is found in *McLeod Lake Indian Band v. Chingee* (1998), [1999] 1 C.N.L.R. 106 (F.C.T.D.). There, the terms of the McLeod Lake Indian Band's band custom were purportedly adopted at a general meeting of the band convened with notice. An election was subsequently held in accordance with those terms. The defendants argued that the election was invalid because the terms adopted at the meeting did not actually reflect band custom. In considering this argument, Justice Reed made the following observations at paragraphs 18 and 19:

> **18** The question that remains is whether "broad general consensus" equates to a "majority decision of the Band members attending a general meeting of the Band convened with notice". In my view, it may do so, or it may not, depending upon a number of factors. If for example, the general meeting was held in a location or at a time when it was difficult for a number of members to attend, and there was no provision for proxy voting, it may not meet the broad consensus test. If the notice was not adequate in not providing sufficient detail of what was proposed, or was not given sufficiently in advance of the meeting to allow people a realistic opportunity to attend then it would not be.
>
> **19** There are also situations in which those who do not vote may be signaling a willingness to abide by the majority decision of those who do. I am of the view that approval by a majority of the adult members of the Band is probably a safe indication of a broad consensus (the age of majority being a matter for the band to determine). Whether a majority decision by the Band members attending a general meeting demonstrates a broad consensus depends on the circumstances of that meeting.

Madam Justice Reed's statement, which has been quoted in a number of subsequent judgments, confirms that whether information provided is sufficient will depend on the circumstances. If the information documents sent to the membership of Nekaneet provided "sufficient detail of what was proposed," and the information meetings were held at a relatively convenient time and place, with

reasonable notice having been given, then it can likely be said that the membership was sufficiently informed.

[72] As the Applicants point out, other cases are less explicit about the level of information required for a vote as to band custom. In *Bigstone*, for example, copies of the proposed constitution and other information had been sent to the band members, a meeting was held with some discussion as to the constitution, and individual interviews with the band members were conducted. Although Justice Strayer did not specifically consider the sufficiency of this information in his analysis, he did ultimately decide that there was no basis for the Court to intervene with respect to the band custom that had been adopted.

[73] The Applicants in the present case also acknowledge that there were irregularities in the conduct of the Referendum Vote:

a. The ballots were not initialled prior to the Mail-in Voting Packages being sent out. The mail-in ballots all had accompanying completed declarations of identity and both the completed and signed declaration and the ballot were placed in a sealed envelope as provided in the Mail-in voting Package, and such sealed envelope was either sent by mail or delivered to the Referendum Officer. On opening each sealed envelope the Referendum Officer confirmed the identification of the voter as contained in the signed declaration, then proceeded to initial the ballot and put the ballot in the ballot-box. No evidence has been led to show that such irregularity would have materially affected the result;

b. The Referendum Officer permitted Nekaneet band members to attend and pick up the sealed envelopes containing the completed and signed declarations and ballots as an equally acceptable process to mailing the ballots to the Referendum Officer. The band members who picked up the ballots included members of the Nekaneet Governance Committee. The Referendum Officer had the authority, under the voting rules, to make his own rules as to matters of procedure in administering the Referendum Vote. No evidence has been led that such procedure constituted an irregularity that would have materially affected the results. Further, no evidence has been led that a voter was denied the right to vote either in person or by placing their mail-in ballot in the mail in the usual course.

[74] There are a number of other minor items that have been raised, such as sending two mail-in packages to the same voter and listing a mentally disabled person as a voter, which person did not vote. But no evidence has been led to establish that such irregularity materially affected the results.

[75] In order to undermine the referendum process and the Referendum Vote the Respondents raise numerous points. I have reviewed each of them in turn against the evidence presented. While it is true that mistakes were made and that differences of opinion and conflicts of evidence exist, there is nothing that, taken either singly or cumulatively, convinces me that the hard facts of the Referendum Vote do not reflect a broad consensus of what the Nekaneet First Nation truly wants, and that, in my view, is the central issue. I believe that the process leading to the Referendum Vote, if not perfect, was sufficiently informative for the Nekaneet First Nation to know what was at stake

and what they were voting for. And I also believe that the voting process itself, notwithstanding the mistakes that were made, allowed a consensus to emerge, even in the face of the obstructive, and sometimes hostile, tactics of the Respondents, which shows that the Nekaneet First Nation favour the transparency and accountability embodied in the *Nekaneet Constitution* and the *Nekaneet Governance Act* over the dysfunctional and partisan situation that many members think exists at Nekaneet and that favours some individuals and groups over others. It looks to me as though the Nekaneet people have spoken and that a broad consensus does not favour the Respondents' position on these governance issues.

[76] As the Applicants point out, it is not always necessary to strictly construe the provisions of an election code, and non-compliance does not necessarily invalidate the election process. (Brian A. Crane, Robert Mainville and Martin W. Mason, *First Nations Governance Law* (Markham, Ont.: LexisNexis Butterworths, 2006) at 200). Therefore, if the Nekaneet Governance Committee terms of reference, for example, were not strictly followed, that does not necessarily invalidate the Referendum Vote.

[77] A vote will generally not be rendered invalid as a result of irregularities unless such irregularities would have materially affected the results. A succinct statement of this principle may be found at paragraph 20 of *Ta'an Kwächʼän Council (Re)*, [2006] Y.J. No. 139, 2006 YKSC 62:

> **20** The general common law principle is that the will of the people as expressed in an election will not be set aside unless the irregularity or non-compliance with election law or practice is such that the outcome would have been materially affected. Obviously any irregularity affects the election process in some way. Unless it

> materially affects the validity of the election results, courts will not set aside the decision of the voters.

[78] The Applicants have referred the Court to *Camsell v. Rabesca*, [1987] N.W.T.R. 186 (S.C.), which has received subsequent positive judicial consideration, as an example of a case in which a vote was upheld despite significant irregularities in the voting process because there was no evidence that the irregularities materially affected the result. The petitioners in that case sought to have a liquor plebiscite, in which the majority of the community had voted in favour of prohibition, declared void. Irregularities in the voting process included the late opening of a polling station, the manner in which the election lists were compiled (namely, the addition and deletion of names from a municipal election list by the returning officer assisted by an individual familiar with the community members), the failure to provide interpreters at the polling stations in accordance with the plebiscite regulations, a lack of clarity as to the residence requirement for participation in the vote, the failure to meet the requirement of holding an advance poll, discrepancies between the number of ballots cast and the number recorded, the failure of the returning officer to take an oath, and the failure to initial the ballots in accordance with the applicable legislation.

[79] The plebiscite regulations in *Camsell* provided that the provisions of the *Municipal Act* applied to the vote, "with such modifications as the circumstances require[d]" (paragraph 6). Justice Marshall noted that two of the irregularities resulted from the Returning Officer applying such modifications due to the limited time available in preparing for the vote. He then reviewed the applicable authorities, noting that elections "should not be too easily overturned," and noting that

irregularities will virtually always occur in an election in one form or another (paragraph 52). He then summarized the law in this way at paragraph 55:

> So the rule then, on a review of these authorities and subject to statutory modification, could be stated, in my view as follows: That the vote should be vitiated, only if it is shown that there were such irregularities that, on a balance of probabilities, the result of the election might have been different. And, secondly, that the vote could not be said to have been a vote, that is, that it was not conducted generally in accordance with electoral practice under existing statutes.

Justice Marshall held that the election in *Camsell* was conducted generally in accordance with the principles for conducting such an election. He also held that the petitioners had failed to establish, on a balance of probabilities, that because of the irregularities which occurred, there might have been a different result. His reasoning with respect to the non-initialling of ballots, particularly relevant in the present circumstances, was as follows, at paragraph 27:

> The petitioners tendered evidence that none of the ballots were initialled, as required by s. 51(j) of the *Municipal Act*, and, therefore, they contend that under a strict interpretation of that Act, again none of the ballots should count. The purpose of the process is to ensure that the ballots are legitimate. The requirement, in my view, is directive, not mandatory. There is considerable authority for this interpretation [Footnote: See *Blackburn v. Moss* (1986), 12 O.A.C. 387 (Div. Ct.), and *Morgan v. Simpson*, [1974] 3 All E.R. 722 at 725 (C.A.)]. Again, in this regard, there was no evidence that the practice had led to any impropriety in the casting or recording of the vote, which might otherwise have changed the vote.

Justice Marshall added at paragraph 63 that "…[w]ith regard to the failure to initial the ballots, there is not a shred of evidence that this affected the result in any way."

Justice Marshall concluded that, as there was no evidence that the irregularities affected the result of the vote, the petition should be dismissed and the election upheld.

[80] As the Applicants point out, this latter point has formed the basis of a number of decisions upholding election votes. This is seen, for example, in *Samson Indian Band v. Cutknife* (2003), [2004] 1 C.N.L.R. 330 (F.C.T.D.). There, the Electoral Supervisor of a councillors' election granted an extension of 24 hours for candidates to deliver the required notarized photographs, and for one of the candidates to submit the required election fees. This formed the basis of an appeal of the election to the Election Appeal Board, which found that the Electoral Supervisor had acted without authority in making the extensions, and ordered a new election. In an application for judicial review, Justice Martineau quashed the Appeal Board's decision. He noted that the Electoral Supervisor has broad general authority to conduct the administration and process of the election, which included the ability to make decisions respecting procedure. He held that granting the extensions was within the Electoral Supervisor's authority, and that doing so was consistent with, and did not defeat, the purpose of the Election Law.

[81] Similar conclusions were reached in *Simon v. Samson Cree Nation* (2001), [2002] 1 C.N.L.R. 343 (F.C.T.D.), where the Electoral Supervisor removed the applicant's name from the list of candidates for council. The applicant argued that the Electoral Supervisor exceeded his jurisdiction in disqualifying her and removing her name from the list of candidates; the Electoral Supervisor submitted that his broad authority over procedure permitted him to do so. Justice Blais rejected the applicant's argument that all provisions in band election laws must be strictly construed, and held that the Electoral Supervisor's position was "the most consistent with the purpose of the Election Law and the intention of its drafters" (paragraph 32). He also referred to the resources that would be wasted if another election had to be held.

[82] Similarly, in the present case, Mr. Walter Wenaas had authority under the voting rules to make rules as to matters of procedure. He was entitled to take the steps that he did in administering the referendum. This argument is particularly strong with respect to measures that he took which could be said to have furthered the electoral process, such as allowing band members to have their completed ballots picked up rather than requiring them to mail the ballots back. This was "consistent with the purpose" of the referendum rules, and should not affect the validity of the vote.

[83] I agree with the Applicants that, in order for a vote to be invalidated, the irregularities would have to be more significant that the ones that in fact occurred in this case. In *Keefe v. Pukanich* (2007), [2008] 4 W.W.R. 112, 2007 NWTSC 90, for example, Justice Vertes would not have set aside an election as a result of numerous irregularities if one of them had not amounted to an abdication of the returning officer's duty, taking the election out of compliance with the statutory requirements.

[84] *Lac des Mille Lacs First Nation v. Hogan* (2000), 198 F.T.R. 48 (T.D.) is another case in which an election was held to be void, but again it involved more serious irregularities than the procedural matters in the case at bar. In concluding that the leadership review and election were of no force and effect, Justice Gibson stated as follows at paragraph 21:

> None of these unique features of the Selection Code was respected in the process leading up to and including the leadership review and election purportedly conducted on the 29th of April, 2000. There was no evidence before me that notice of the events scheduled for the 29th of April was broadly distributed among members of the First Nation. Similarly, there was no evidence whatsoever that those members of the First Nation who would likely be unable to attend a meeting in Thunder Bay would be accommodated by communication

> processes or voting processes that would allow them to effectively take part.

In other words, the election in that case was voided not because of mere procedural irregularities, but because non-compliance with the Selection Code resulted in certain members losing the opportunity to vote. It does not appear to me that any of the steps taken by Mr. Walter Wenaas in the present case would have had the effect of disenfranchising any of the members of Nekaneet; rather, it appears that he was simply attempting to, in the words of Justice Vertes, "facilitate the right to vote."

Conclusions

[85] Generally speaking, this application reveals a personal and ideological struggle at Nekaneet over governance issues. Behind the legalities lie common tensions over such things as custom and accountability, on-reserve and off-reserve interests, traditional spirituality and Christianity, personal interest and community benefit. This kind of summary proceeding cannot address in detail these extremely complex cultural and political flashpoints. In the end they all boil down to the issue of what a consensus of the Nekaneet First Nation wants for itself. A full consensus is impossible over such divisive issues in such a small community. Polarization has led to dysfunctional government, and dysfunctional government has caused problems for the First Nation membership and has begun to deprive the community of the resources it needs to provide services to the people of Nekaneet. It is impossible to please everyone. The only solution is to determine whether there is a sufficient consensus for change.

[86] I do not believe that my conclusions prevent the Respondents from asserting what they regard as traditional interests. The *Nekaneet Constitution* and the *Nekaneet Governance Act* have clear provisions for amendments and change. If the Respondents represent a sufficiently broad traditional faction in the community, they can invoke the amending provisions and attempt to win community support for their way of doing things. But the new constitution does ensure that community support is needed and that governance is a matter for the Nekaneet First Nation as a whole and cannot be controlled by an entrenched interest group from either side of the cultural and political divide.

[87] I render judgment in this case with some reluctance because I am, in effect, pronouncing on the collective will of the Nekaneet First Nation as expressed in a broad consensus vote. That feels presumptuous to me, to say the least. The will of the Nekaneet people, in my view, is a matter for the Nekaneet First Nation. However, counsel for both sides have informed me that the present application is the only viable way of resolving the impasse at Nekaneet over governance in a timely way. I have simply reviewed the materials placed before me and attempted to formulate what I believe those materials reveal concerning what the people of Nekaneet want to happen in terms of governance. I am well aware that Court applications do not reveal everything, particularly summary proceedings such as this judicial review application. Hence, my conclusions will not please everyone at Nekaneet. But taking into account the method of resolution selected in this case, this is the best I can do for the Nekaneet First Nation and I hope that it will bring some respite from the divisiveness that has been hampering the community.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that

1. The band custom of Nekaneet is made up of the *Nekaneet Constitution* and the *Nekaneet Governance Act* as passed by a referendum vote of the eligible voters of Nekaneet held on February 25, 2008;
2. The Applicants elected as the Chief and Councillors of Nekaneet under the *Nekaneet Constitution* and the *Nekaneet Governance Act* in the Nekaneet election of March 28, 2008 are the Chief and Councillors of Nekaneet;
3. A writ of *quo warranto* is granted to the effect that the Respondents have no right to hold office as Chief or Councillors, as the case may be, of Nekaneet;
4. The Applicants shall have their costs of this application, which shall be paid jointly and severally by the Respondents.

"James Russell"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-999-08
STYLE OF CAUSE:	**CHIEF PAHTAYKEN, BRANDY BUFFALO CALF, ELVIE STONECHILD and CHRISTINE MOSQUITO and LARRY OAKES, JORDIE FOURHORNS, RUSSELL BUFFALO CALF, LINDA OAKES and GLEN OAKES**
PLACE OF HEARING:	Calgary, Alberta
DATE OF HEARING:	January 14, 2009
REASONS FOR JUDGMENT:	RUSSELL J.
DATED:	**February 10, 2009**

APPEARANCES:

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