

Federal Court



Cour fédérale

Date: 20101209

Docket: T-1762-09

Citation: 2010 FC 1266

Ottawa, Ontario, December 9, 2010

PRESENT: The Honourable Mr. Justice Barnes

BETWEEN:

SONYA OAKES AND JOE DANIELS

Applicants

and

**CHIEF ALICE PAHTAYKEN,
BRANDY BUFFALO CALF,
ELVIE STONECHILD,
CHRISTINE MOSQUITO,
DENNIS CALLIHOO, ELEANORE SUNCHILD
AND DARREN WINEGARDEN**

Respondents

REASONS FOR JUDGMENT AND JUDGMENT

[1] The parties to this application are all members of the Nekaneet First Nation (Nekaneet) situated near Maple Creek, Saskatchewan.

[2] The Respondents, Chief Alice Pahtayken, Brandy Buffalo Calf, Elvie Stonechild, and Christine Mosquito are the elected leaders of Nekaneet. The Respondents, Dennis Callihoo,

Eleanore Sunchild and Darren Winegarden are appointees to the Nekaneet Appeal Body established under the Nekaneet Constitution. The Nekaneet Appeal Body is charged with the responsibility for resolving conflicts or violations relating to the laws of Nekaneet.

[3] The Applicants, Sonya Oakes and Joe Daniels, seek declaratory and other prerogative relief with a view to compelling the Respondents to proceed with a band election in accordance with the terms of the Nekaneet Constitution.

[4] The underlying history of this governance dispute is described in detail in the reasons of my colleague, Justice James Russell in *Pahtayken et al. v. Oakes et al.*, 2009 FC 134 and that history need not be repeated here. It is sufficient for present purposes to observe that Nekaneet continues to be a divided community with two factions vying for control of the Band Council.

[5] The Applicants argue that the Nekaneet Constitution requires a band election in the event of a failure by the Chief and Council to appoint the three members of the Nekaneet Appeal Body within 60 days of a band election, provided that 35% of the eligible voters of Nekaneet sign a declaration to that effect. The Applicants contend that the necessary conditions for an election have been established, but the Chief and Council have failed in their constitutional duty to convene one.

[6] The Chief and Band Councillors maintain that the prerequisites for proceeding with a band election have not been met and that they are lawfully entitled to serve out their electoral mandates until the next band election in March, 2011.

I. Background

[7] Following a band election on March 28, 2008 Alice Pahtayken was elected as Chief and Brandy Buffalo Calf, Elvie Stonechild, and Christine Mosquito were elected as Councillors of Nekaneet with terms of office running until March, 2011. It was the 2008 election that was at the centre of the previous application to this Court which was resolved by Justice Russell in favour of the incumbent Chief and Councillors. Needless to say, this earlier litigation was substantially disruptive to the business of Nekaneet. Nevertheless, the Chief and Council began the process of appointing three members to the Nekaneet Appeal Body and on May 26, 2008 three Band Council Resolutions were passed appointing Dennis Callihoo, Darren Winegarden and Eleanor Sunchild as members of the Appeal Body.

[8] According to the Affidavit of Alice Pahtayken, each of the above appointees had provided her with their verbal acceptances before May 26, 2008 but it was not until some time in June that their formal written acknowledgements were requested.

[9] The record indicates that all three of the appointees to the Appeal Body did sign and return their acceptances. Mr. Callihoo responded promptly but Ms. Sunchild and Mr. Winegarden took several months to do so.

[10] According to the affidavit of Joe Daniels, on April 24, 2009 he delivered a declaration to the Band Council signed by 107 members of Nekaneet calling for a new election. The declaration cited Article 8 of the Nekaneet Constitution, and stated that the “Nekaneet Government has violated the

Nekaneet Constitution or a law of Nekaneet by causing no members to be appointed to the Nekaneet Appeal Body and the Nekaneet Government is therefore removed from office”.

[11] When the Band Council refused to accede to this demand for an election the Applicants brought this application to compel that outcome.

II. Issues

[12] Whether, on the facts presented, the Nekaneet Constitution requires the holding of a band election?

[13] Having regard to the pending band election in March, 2011 should the Court exercise its discretion in favour of the Applicants?

III. Analysis

[14] Neither party addressed the issue of the Court’s jurisdiction to deal with this matter but I accept that it falls within the scope of s. 18 of the *Federal Courts Act*, R.S., 1985, c. F-7: see *Sparvier v. Cowessess Indian Band*, [1993] 3 F.C. 142, 63 F.T.R. 242.

[15] This application turns on the interpretation of provisions of the Nekaneet Constitution, issues which are subject to review on the standard of correctness.

[16] The principal constitutional provisions that apply to this case are Articles 8.03, 8.04 and 8.07 which respectively state:

8.03 A member of the Nekaneet Appeal Body is appointed by written resolution of the then current Nekaneet Government setting out the term and the manner of compensation and such appointment shall become effective on the day and date that the Nekaneet Appeal Body member accepts such appointment in writing.

8.04 The appointment of the initial Nekaneet Appeal Body shall be made no later than sixty (60) days from the date of the Nekaneet 2008 Election.

[...]

8.07 In the event the Nekaneet Government should fail to appoint or fill vacancies in the Nekaneet Appeal Body in accordance with this Nekaneet Constitution or the laws of Nekaneet, resulting in there being no Nekaneet Appeal Body, then the Nekaneet 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 Nekaneet stating:

- (a) The Nekaneet Government has violated this Nekaneet Constitution or a law of Nekaneet by causing no members to be appointed to the Nekaneet Appeal Body and the Nekaneet 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 Nekaneet 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.

[17] The Applicants argue that the constitutional prerequisites for the holding of a band election have been established; the Respondents say that they have not. At the centre of the controversy is whether there has been a failure by the Band Council to appoint the Appeal Body in violation of the Nekaneet Constitution thereby giving rise to a right of election upon the demand of at least 35% of the eligible voters of Nekaneet.

[18] The evidence establishes that Band Council made a decision within 60 days of the 2008 election to appoint the members of the Nekaneet Appeal Body but the written acceptances of those members were only later received. The Applicants contend that an appointment to the Nekaneet Appeal Body is not made until all of the signed acceptances have been tendered by the appointees and that this must be done within 60 days of a band election. The Respondents say that the required appointments are made at the date of the appointment decision by Band Council in the form of appropriate resolutions.

[19] The interpretation of provisions of this type is informed by their intended purpose and with an eye to the preservation of democratic principles and outcomes: see *Samson Indian Band v. Bruno*, 2006 FCA 249, 352 N.R. 119 at para. 43.

[20] Some constitutional provisions are, of course, fundamental to Band governance and must be strictly observed, sometimes to the point of nullifying band elections or other band decisions. Other provisions are considered to be directory such that their non-observance will not be fatal to the processes to which they pertain. The electoral will of the majority is, after all, not a thing to be readily ignored on the basis of real or perceived technical procedural lapses.

[21] I accept Mr. Stodalka's point that the Nekaneet Constitution places great importance on the work of the Appeal Body. It is in recognition of that importance that Article 8.07 provides a mechanism for compelling an election where the Band Council fails to appoint members to the Appeal Body. It is, however, the failure by Band Council to fulfill its constitutional obligation that is the triggering event under this provision and not the failure of one or more of the appointees to formally acknowledge their appointment. Article 8.03 makes a clear distinction between the making of an appointment to the Appeal Body by the Band Council and the appointment later taking effect upon written acceptance from the appointee. It could not have been the intent of the drafters of the Nekaneet Constitution that the results of a band election could be undermined because a willing appointee to the Appeal Body neglected to sign and return an acceptance within 60 days of the election. In my view, the obvious intent of the drafters of the Nekaneet Constitution was to make Article 8.07 effective where Band Council neglected its constitutional obligation to make these appointments. This interpretation is also consistent with Article 8.01 which stipulates that the "Nekaneet Government shall forthwith appoint the Nekaneet Appeal Body". This language is inconsistent with the Applicants' argument that the subsequent failure by an appointee to confirm the appointment could trigger the drastic relief provided for in Article 8.07. The fact that an appointment is not effective until a written acceptance is received does not mean that, for other purposes, the appointment has not been made.

[22] Even if I am wrong in this interpretation, there is another reason why this application must fail. Article 8.07 is only effective where there has been a failure to appoint "resulting in there being no Nekaneet Appeal Body". It is only where the Nekaneet Appeal Body has not been appointed

that the further prerequisite for presenting a membership declaration arises. It is clear on the evidence that all of the members of the Appeal Body had perfected their appointments before the membership declaration was presented to the Band Council and before any matter had arisen requiring the Appeal Body to act. It is inconceivable to me that Article 8.07 was intended to confer a right of election in circumstances where no actual prejudice arose from the delay in giving effect to the appointments. Because the Appeal Body was properly constituted before the declaration of electors was presented to the Band Council this additional prerequisite to the application of Article 8.07 was not met. Furthermore, even if the failure by two of these appointees to return their signed acceptances on a timely basis was a technical lapse it would not justify the consequences urged upon the Court by the Applicants: see *Sweetgrass First Nation v. Gollan*, 2006 FC 778, 294 F.T.R. 119 at paras. 29-30.

[23] Finally, even if I had accepted all of the Applicants' interpretation arguments, this is not a situation where prerogative relief is warranted. There will be a band election in the ordinary course in March of 2011. There are a number of procedural requirements for convening a band election including a Call for Election and the convening of a nomination meeting. Under Article 6.01 of the Nekaneet Constitution, the holding of a nomination meeting shall not be less than 28 days before the election. Presumably a Court ordered election could not proceed before sometime in February, 2011.

[24] It seems to me that no practical purpose would be served by ordering a new election at this late stage in the normal electoral cycle. Indeed the place for resolving the political differences that have divided the Nekaneet community is more properly at the ballot box than in the courtroom. If

the Applicants have the support of a majority of the members of Nekaneet then they presumably will prevail in the upcoming election. If they do not have that support, it would be a good opportunity for them and their supporters to respect the political will of the community and to let the Nekaneet Band Council get on with its important work in serving their constituents.

[25] In the result, this application is dismissed. The Respondents are entitled to their costs which I fix in the amount of \$2,500.00 inclusive of disbursements. This award of costs is payable jointly and severally by the Applicants.

JUDGMENT

THIS COURT'S JUDGMENT is that this application is dismissed with costs payable jointly and severally by the Applicants to the Respondents in the amount of \$2,500.00.

“ R. L. Barnes ”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-1762-09

STYLE OF CAUSE: Oakes et al
v.
Pahtayken et al.

PLACE OF HEARING: Calgary, AB

DATE OF HEARING: November 30, 2010

REASONS FOR JUDGMENT: BARNES J.

DATED: December 9, 2010

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