

Federal Court



Cour fédérale

**Date: 20230626**

**Docket: T-904-23**

**Citation: 2023 FC 897**

**Ottawa, Ontario, June 26, 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**

**JUDGMENT AND REASONS**

[1] The applicants, who were recently elected to the Government of Nekaneet First Nation, apply for judicial review of a declaration purporting to remove them and to call a new general election. I am granting this application because it was unreasonable to conclude that the conditions for making such a declaration were met. One cannot escape the conclusion that the

Government had 60 days to make appointments to the Nekaneet Appeal Body. This delay had not expired when the declaration was made.

I. Background

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

[3] Article 8 of the Nekaneet Constitution creates the Nekaneet Appeal Body. The following provisions of article 8 are especially relevant to the present dispute:

**8.01** A Nekaneet Appeal Body is established made up of three (3) persons who are qualified to serve with staggered terms of no less than three (3) years and no greater than five (5) years, and the Nekaneet Government shall forthwith appoint the Nekaneet Appeal Body, fill vacancies in a timely manner as they occur and respect the Nekaneet Appeal [Body] as a fundamental constitutional requirement to insure compliance and enforcement of the laws of Nekaneet.

**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.

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

**8.06** There is no power to remove a Nekaneet Appeal Body member prior to the expiration of the term of office of such member except as may be provided for in the laws of Nekaneet.

**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 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 Nekaneeet.

[4] The term of appointment of the former members of the Nekaneeet Appeal Body expired on March 2, 2023. While an election was scheduled for March 29, 2023, the then members of the Nekaneeet 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 Nekaneeet 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 Nekaneeet Government realized that the vacancies in the Nekaneeet Appeal Body needed to be filled. According to their interpretation of the Nekaneeet 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 Nekaneet 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 Nekaneet Appeal Body was a breach of the Nekaneet Constitution, that the Nekaneet 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 Nekaneet 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. 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] On May 23, 2023, I granted an interlocutory injunction extending the interim relief until a decision is made on the present application for judicial review: *Nekaneeet First Nation v Louison*, 2023 FC 709.

## II. Analysis

[12] To explain why I am allowing the application, I must first determine what the standard of review is. I will then explain why I find that it was unreasonable to conclude that the conditions for making a declaration pursuant to section 8.07 of the Nekaneeet Constitution were met.

### A. *Standard of Review*

[13] The parties disagree as to the applicable standard of review. The roots of this disagreement lie deeper: the parties do not even agree as to what the decision under review is. It is therefore necessary to clarify this first.

[14] According to the notice of application, the applicants seek judicial review of the April 26 Declaration and, more precisely, an order that the Declaration is of no force or effect. At the hearing, however, the applicants argued that the relevant decisions were made by the Nekaneeet

Government on April 4, 2023. On that date, the Government decided that the Nekaneet Constitution gave it until May 2, 2023 to fill vacancies in the Nekaneet Appeal Body. It also decided on a process for soliciting applications, with a view to making the appointments on April 28, 2023. The applicants argue that these decisions were reasonable.

[15] The respondents, in contrast, contend that the only decision under review is the April 26 Declaration and that there is no reason to depart from the presumption, established by the Supreme Court of Canada in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65, [2019] 4 SCR 653 [*Vavilov*], that reasonableness is the standard of review.

[16] I agree with the respondents that there is only one decision that is the subject of this application for judicial review and that it is the Declaration. This decision is the explicit target of the notice of application. The applicants cannot describe aspects of their own conduct as “decisions,” the reasonableness of which should be assessed prior to that of the Declaration, in a pre-emptive fashion.

[17] Moreover, I agree with the respondents that the Declaration should be reviewed on a standard of reasonableness.

[18] To support their contention that the Declaration should be reviewed on a correctness standard, the applicants point to its collective nature. This would make it impossible to know the reasons for the decision, and these reasons may in fact vary from one individual to another. However, the Supreme Court of Canada held that the collective nature of a decision does not

displace reasonableness as the standard of review: *Law Society of British Columbia v Trinity Western University*, 2018 SCC 32 at paragraphs 51–56, [2018] 2 SCR 293.

[19] The applicants also relied on *Ojibway Nation of Saugeen v Derose*, 2022 FC 531. That case, however, dealt with two applications for judicial review in which two groups challenged each other’s assertion that it formed the legitimate council. Here, there is only one application and no risk of incompatible decisions.

[20] To be reasonable, a decision must, among other things, be “justified in relation to the facts and law that constrain the decision maker”: *Vavilov*, at paragraph 85. The statutory scheme that the decision-maker is tasked with applying is the most important of these constraints: *Vavilov*, at paragraph 108. In this case, the statutory framework is the Nekaneet Constitution. Where an interpretive difficulty arises, the decision-maker is expected to have regard to the modern principle of statutory interpretation, and “the merits of an administrative decision maker’s interpretation of a statutory provision must be consistent with the text, context and purpose of the provision”: *Vavilov*, at paragraph 120. This is no less true of Indigenous laws that take a written form: *Boucher v Fitzpatrick*, 2012 FCA 212 at paragraph 25; *Porter v Boucher-Chicago*, 2021 FCA 102 at paragraph 37.

#### B. *Reasonableness of the Declaration*

[21] The determinative issue in this case is whether the authors of the Declaration reasonably concluded that the conditions set forth by section 8.07 of the Nekaneet Constitution were met on April 26, 2023 and, in particular, that the 60-day delay set forth in section 8.05 was inapplicable.

[22] The review must begin with “respectful attention” to the reasons given by the decision-maker: *Vavilov*, at paragraph 84. The difficulty is that the Declaration contains no reasons beyond a conclusory statement that “The Nekaneet Government has violated the Nekaneet Constitution by causing no members to be appointed to the Nekaneet Appeal Body.” Nevertheless, it is possible to “uncover a clear rationale for the decision” (*Vavilov*, at paragraph 137) by looking at a letter from counsel for Ms. Buffalocalf dated April 17, 2023, an email dated April 26, 2023 and the respondents’ submissions.

[23] In a nutshell, the respondents assert that the Nekaneet Government had to appoint Nekaneet Appeal Board members “forthwith” after March 29, 2023 (that is, the date of the election), based on the language of section 8.01 of the Nekaneet Constitution. They deny that section 8.05 is applicable, because the expiry of the former members’ term of appointment does not constitute “termination, death or resignation.” In the alternative, they say that new members had to be appointed “in a timely manner,” another expression found in section 8.01. In either case, it is for the signatories to the Declaration to decide if the Nekaneet Government acted “forthwith” or “in a timely manner.” Thus, they could reasonably find that, according to the language of section 8.07, the Government “fail[ed] to appoint or fill vacancies in the Nekaneet Appeal Body in accordance with [the] Nekaneet Constitution.”

[24] This interpretation is unreasonable because it seeks to read parts of section 8.01 in isolation from the context provided by the other components of article 8. Section 8.01 states that “. . . the Nekaneet Government shall forthwith appoint the Nekaneet Appeal Body, fill vacancies in a timely manner as they occur . . .” without defining “forthwith” or “timely manner.”



Nevertheless, section 8.04 states that the initial appointments “shall be made no latter [*sic*] than sixty (60) days from the date of the Nekaneeet 2008 Election.” Thus, “forthwith” means that the Government has 60 days to make the appointments. Likewise, section 8.05 provides that at least certain kinds of vacancies must be filled no later than 60 days after they occur. Accordingly, “timely manner” means within 60 days. Thus, whether one considers that the applicable standard is “forthwith” or “in a timely manner,” a contextual interpretation of article 8 inevitably leads to the conclusion that both expressions mean 60 days.

[25] The respondents assert that section 8.05 is not applicable to the case at hand because the expiry of a member’s term of appointment does not constitute “termination, death or resignation.” Even if this were correct—and the use of “removal” in section 8.06 instead of “termination” casts some doubt on this—it remains that section 8.01 states that vacancies must be filled in a timely manner. It would be curious, to say the least, if this phrase meant different things depending on the type of vacancy involved. Section 8.01 does not differentiate between vacancies according to their source. Much more precise language would be needed to make it reasonable to conclude that “timely manner” means 60 days with respect to certain vacancies but is left to the appreciation of the authors of a declaration in other cases.

[26] Moreover, the respondents’ interpretation leads to an absurdity. While article 8 sets forth fixed time limits for other types of appointments, the time limit for filling a vacancy arising from the expiry of a member’s term would be undefined and would be, in practical terms, at the discretion of the incumbents’ political opponents. While section 8.07 provides an important

mechanism for ensuring the existence of a functioning Nekaneeet Appeal Board, article 8 evinces an intention to provide a fixed and foreseeable timeframe for making appointments.

[27] I am not convinced that the respondents' interpretation is mandated by the need to have a functioning Nekaneeet Appeal Body within the 30-day time limit for filing an election appeal. Section 8.04 contemplates that the initial appointment may be made outside the 30-day time limit. Moreover, in practical terms a notice of appeal may be served on interested parties and the electoral officer, as Ms. Buffalocalf did, thus preserving her right to appeal until the Nekaneeet Appeal Board members are appointed.

[28] As it was unreasonable to ignore the 60-day time limit for making appointments, the Declaration is invalid, whether this time limit must be calculated from the day the vacancies arise or the day of the election. Therefore, I need not decide the latter issue, beyond observing that the respondents appear to acknowledge that the day of the election is the appropriate starting point.

[29] At the hearing, counsel for Mr. Daniel argued that the Declaration was reasonable because the appointments made in 2020 were not for staggered terms, as required by section 8.01. Nothing in the evidence suggests that this concern motivated the signatories to the Declaration. It is not permissible to buttress a decision by reasons that were not considered by the decision-maker: *Vavilov*, at paragraph 96. In any event, this submission is difficult to square with the language of section 8.07. It is the Government's failure to appoint or fill vacancies that is a condition precedent to the issuance of a declaration, not the previous Government's failure to make appointments for staggered terms.

III. Disposition

[30] For these reasons, the application for judicial review is granted and the Declaration is of no force or effect.

[31] The parties have agreed that the issue of costs will be reserved and decided on the basis of written submissions.

**JUDGMENT in file T-904-23**

**THIS COURT'S JUDGMENT is that:**

1. The application for judicial review is granted.
2. The declaration issued pursuant to section 8.07 of the Nekaneet Constitution on April 26, 2023 is of no force or effect.
3. The applicants will serve and file their submissions regarding costs, not to exceed 10 pages in length, no later than 30 days after the date of this judgment.
4. The respondents will serve and file their submissions regarding costs, not to exceed 10 pages in length, no later than 15 days after the date on which the applicants file their submissions.

"Sébastien Grammond"

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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:** JUNE 20, 2023

**ORDER AND REASONS:** GRAMMOND J.

**DATED:** JUNE 26, 2023

**APPEARANCES:**

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