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Federal Court of Appeal File No. _____

Federal Court File No. T-904-23

FEDERAL COURT OF APPEAL

B E T W E E N:

SHAUNA BUFFALOCALF

**Appellant
(Respondent on Application)**

and

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

**Respondents
(Applicants on Application)**

NOTICE OF APPEAL

TO THE RESPONDENTS:

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the appellant. The relief claimed by the appellant appears below.

THIS APPEAL will be heard by the Court at a time and place to be fixed by the Judicial Administrator. Unless the Court directs otherwise, the place of hearing will be as requested by the appellant. The appellant requests that this appeal be heard virtually.

IF YOU WISH TO OPPOSE THIS APPEAL, to receive notice of any step in the appeal or to be served with any documents in the appeal, you or a solicitor acting for you must prepare a notice of appearance in Form 341A prescribed by the *Federal Courts Rules* and serve it on the appellant's solicitor, or, if the appellant is self-represented, on the appellant, **WITHIN 10 DAYS** after being served with this notice of appeal.

IF YOU INTEND TO SEEK A DIFFERENT DISPOSITION of the order appealed from, you must serve and file a notice of cross-appeal in Form 341B prescribed by the *Federal Courts Rules* instead of serving and filing a notice of appearance.

Copies of the *Federal Courts Rules*, information concerning the local offices of the Court and other necessary information may be obtained on request to the Administrator of this Court at Ottawa (telephone 613-992-4238) or at any local office.

IF YOU FAIL TO OPPOSE THIS APPEAL, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU.

July ____, 2023
(Registry Officer)\

Issued by: _____

Address of local office:

The Court House
2425 Victoria Avenue
Regina, Saskatchewan S4P 4W6

TO: **Phillips & Co.**
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Wesley Daniel

AND TO: **Alena Louison**
Respondent on Application (Non-Party on Appeal)

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APPEAL

THE APPELLANT APPEALS to the Federal Court of Appeal, from the Judgment of the Honourable Justice Grammond (the “**Application Judge**”), dated June 26, 2023, bearing Court File No. T-904-23, with Judgment and Reasons at 2023 FC 897 (the “**Judgment**”), by which the April 26th Declaration dissolving the Nekaneet Government was rendered invalid.

THE APPELLANT ASKS this Honourable Court to:

1. Set aside the Judgment of the Federal Court, dated June 26, 2023;
2. Issue a Declaration upholding the validity of the Declaration of the Nekaneet First Nation Citizens delivered on April 26, 2023 pursuant to Article 8.07 of the *Nekaneet Constitution* (the “**April 26th Declaration**”);
3. Issue Orders:
 - i. Confirming that Chief and Council of Nekaneet First Nation are dissolved;
 - ii. Confirming that Alena Louison is Chief Electoral Officer, permitted to conduct her electoral duties pursuant to the April 26th Declaration;
 - iii. Setting a Nomination Meeting three (3) days from the date of the Order or as the Chief Electoral Officer shall establish;
 - iv. Setting a General Election twenty-eight (28) days from the Nomination Meeting;
 - v. Granting the Appellant (Respondent on Application) her costs as against the Respondents (Applicants on Application) in this Court and in the first instance.
4. Grant such further and other relief as counsel may advise, and as to this Honourable Court may seem just.

THE GROUNDS OF APPEAL are as follows:

1. This appeal arises out of an Application to the Federal Court, bearing Court File No. T-904-23, commenced by the Respondents (Applicants on Application) (the “**judicial review Application**”).
2. The judicial review Application of the Respondents (Applicants on Application) sought, *inter alia*, an Order setting aside a Nekaneet First Nation citizens’ ‘Declaration’ delivered to the Government of Nekaneet First Nation on April 26, 2023, pursuant to, *inter alia*, Article 8.07 of the *Nekaneet Constitution* (the “**April 26th Declaration**”), dissolving the Government on account of their failure by that point in time to appoint members to the Nekaneet Appeal Body as required by the *Nekaneet Constitution*.

3. The judicial review Application named Alena Louison (the individual named as Chief Electoral Officer in the April 26th Declaration) and Councillor Wesley Daniel as Respondents. While Ms. Louison did not file a Notice of Appearance and did not participate in any way at first instance, Councillor Daniel appeared at the hearing of the judicial review Application and supported the validity of the April 26th Declaration (to which he was a signatory).
4. After granting an interim injunction on May 1, 2023, and an interlocutory injunction on May 24, 2023 (reasons at 2023 FC 709), both preserving Chief and Council of Nekaneet First Nation until the determination on the merits of the judicial review Application, the Federal Court issued its Judgement and Reasons on the underlying judicial review Application on June 26, 2023 (2023 FC 897).
5. In conducting the judicial review, the Application Judge properly determined:
 - i. The administrative action under review in the underlying Application was the decision of the 148 Nekaneet Citizens (comprising 38.34% of eligible voters) (the “**Declaration Decision**”) to sign and deliver the April 26th Declaration; and
 - ii. The Declaration Decision is subject to the reasonableness standard of review.
6. However, the Application Judge misapplied the reasonableness standard as follows:
 - i. The Unreasonableness of the Application Judge’s Selected Interpretation:
 - a. The Application Judge determined that the 148 Nekaneet Citizens who made the Declaration Decision unreasonably interpreted the *Nekaneet Constitution*. Namely, the Application Judge found that the Nekaneet Government had sixty (60) days following the expiration of the former Nekaneet Appeal Body members’ terms of office to appoint replacement members: *i.e.*, replacements did not need to be made until May 2023. Because the sixty (60) day window had not elapsed on April 26, 2023, the Declaration Decision was unreasonable.
 - b. The Application Judge’s conclusion that the Government had sixty (60) days to appoint new Appeal Body members was not a reasonable interpretation of Nekaneet law. Namely, the plain language of the relevant provisions of Nekaneet law, and contextual and purposive factors indicate that: (i) a sixty-day timeline does not apply to Appeal Body appointments following the natural expiration of members’ terms of office; and (ii) the Government was required to appoint new members “forthwith,” or, alternatively, “in a timely manner,” both of which required appointments well before the sixty-day window, and before the delivery of the April 26th Declaration.
 - c. Furthermore, while the interpretive conclusion of the Application Judge

aligned with the interpretive conclusion advanced by the Respondents (Applicants on Application), i.e. that the Government had 60 days to make Appeal Body appointments, the rational chain of analysis leading to the Application Judge's interpretive conclusion in the Judgement was novel, and not advanced by the Respondents (Applicants on Application) nor any other.

ii. The Application Judge's Application of the Correctness Standard when Conducting the Reasonableness Review:

- a. While the Application Judge stated that the Court was applying the reasonableness standard of review, His Honour actually reviewed the Declaration Decision using the correctness standard.
- b. Even if the interpretation of the Application Judge is found to be reasonable (which is not admitted, but denied), the Judgement indicates:
 - i) The Application Judge did not consider the possibility that there can be more than one (1) reasonable interpretation of the relevant enabling provisions; and
 - ii) Instead, the Application Judge set aside the Declaration Decision because the 148 Citizens' interpretation did not align with the one (1) selected interpretation, being the interpretation that the Application Judge deemed to be correct.

iii. The Application Judge's Failure to Consider Principles of Deference and Respect for Self-Determination when Conducting the Reasonableness Review:

- a. The Appellant (Respondent on Application) emphasized principles of deference in her written and oral submissions.
- b. The Application Judge failed to consider, or reference in the Judgement, the common law principle of deference to decision-makers in relation to the interpretation of their home statute.
- c. Further, the Application Judge failed to consider, or reference in the Judgement, the principle of deference to Indigenous decision-makers in the interpretation of their custom, on reserve laws enacted pursuant to their right of self-determination, including self-government. This includes the Application Judge's failure to consider, or reference in the reasons, the arguments that the existing common law principle of deference to Indigenous decision-makers is strengthened on account of:
 - i) The fact that the decision-makers in the case at hand are a subset of the lawmakers who enacted the *Nekaneet Constitution* (including the impugned enabling provisions);

- ii) Principles of democracy, and their application, given the fact that more Nekaneet Citizens supported the Declaration than did vote for any member of the Government in the General Election; and
 - iii) The application of *inter alia* the *United Nations Declaration on the Rights of Indigenous Peoples Act*, S.C. 2021, c. 14, which: (i) requires federal institutions of government to respect Indigenous self-determination, including the right to self-government; and (ii) thus requires the judicial branch of federal government, including the Federal Court, to exercise deference to Indigenous decision-makers in their interpretation of their custom laws enacted pursuant to their right of self-determination.
7. The Appellant (Respondent on Application) has a right of appeal from the Judgment pursuant to, *inter alia*, s. 27(1)(a) of the *Federal Courts Act*, R.S.C., 1985, c. F-7, as amended.
8. The Appellant (Respondent on Application) proposes this appeal be heard virtually, as was the underlying judicial review Application.
9. The Appellant (Respondent on Application) relies on the following legislative instruments:
- i. *Nekaneet Constitution*, and *Governance Act* (Nekaneet);
 - ii. *United Nations Declaration on the Rights of Indigenous Peoples Act*, S.C. 2021, c. 14;
 - iii. *Federal Courts Act*, R.S.C. 1985, c F-7, as amended.

July 25, 2023



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