Federal Court of Appeal | Cour d'appel fédérale

Date: 20240812

Dockets: A-193-23
A-276-23

Citation: 2024 FCA 127

CORAM: **DE MONTIGNY C.J.**
LEBLANC J.A.
WALKER J.A.

Docket: A-193-23

BETWEEN:

SHAUNA BUFFALOCALF

Appellant

and

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

Respondents

Docket: A-276-23

AND BETWEEN:

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

Appellants
(Respondents by cross-appeal)

and

SHAUNA BUFFALOCALF

Respondent
(Appellant by cross-appeal)

Heard by online video conference hosted by the Registry on June 19, 2024.

Judgment delivered at Ottawa, Ontario, on August 12, 2024.

REASONS FOR JUDGMENT BY:	DE MONTIGNY C.J.
CONCURRED IN BY:	LEBLANC J.A. WALKER J.A.

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REASONS FOR JUDGMENT

DE MONTIGNY C.J.

[1] Following an election for the Chief and Council of Nekaneet First Nation conducted on March 29, 2023, Shauna Buffalocalf (or the appellant), who was unsuccessful in her bid for re-election as Councillor, sought to appeal the election of the new Chief Carolyn Wahobin on the basis that she was not eligible to be a candidate under Nekaneet law due to an alleged outstanding debt to the First Nation. In addition to the election of the Chief, the applicants Roberta Francis and Christine Mosquito, and the respondent, Wesley Daniels, were elected councillors of the Nekaneet Government.

[2] Pursuant to the *Nekaneet Constitution* and *Nekaneet Governance Act*, the Nekaneet Appeal Body (Appeal Body or NAB) would normally deal with such an appeal. However, the terms of appointment of all three members of that body had expired. Ms. Buffalocalf insisted that the empty seats be filled "immediately". Soon thereafter, Ms. Buffalocalf pursued another avenue. Relying on section 8.07 of the *Nekaneet Constitution*, on April 26, 2023, she delivered to Councillors Francis and Mosquito a Declaration that had the effect of removing the Nekaneet Government from office and calling a general election (the Declaration). Two days later, the

Chief and Council appointed the three members of the Nekaneet Appeal Body, and filed an application for judicial review and a motion for interim relief before the Federal Court.

[3] The Federal Court (*per* Grammond J.) granted the interim relief (*Nekaneet First Nation v. Louison*, 2023 FC 709) and eventually concluded that the Declaration was unreasonable because it misinterpreted the *Nekaneet Constitution*: *Nekaneet First Nation v. Louison*, 2023 FC 897. It is of that decision that we are now seized on appeal. In file A-193-23, Ms. Buffalocalf appeals the merits of the Federal Court decision, whereas in file A-276-23, the Nekaneet First Nation and named appellants, as well as Ms. Buffalocalf as cross-appellant, challenge the cost award which was the subject of a separate decision of the Federal Court.

[4] On the merits, Ms. Buffalocalf raised a number of issues pertaining to the reasonableness review conducted by the application judge, including the interpretation of the *Nekaneet Constitution*, and especially of the timeframe within which the Nekaneet Appeal Body members must be appointed following the expiration of their predecessors' term of office. I am of the view, however, that we need not, and cannot, deal with these issues because neither the Federal Court nor this Court have jurisdiction on the substratum of the dispute between the parties.

I. BACKGROUND FACTS AND DECISION BELOW

[5] As previously mentioned, the respondents, Chief Wahobin and Councillors Francis and Mosquito were elected to the Government of Nekaneet First Nation on March 29, 2023. The appellant, Ms. Buffalocalf, was a Councillor between 2017 and 2023, but was defeated in her bid for re-election.

[6] Pursuant to sections 5.04, 19.01 and 19.10 of the *Nekaneet Governance Act*, any unsuccessful candidate has the right to appeal the election of a candidate within 30 days of the election, on the basis that such elected candidate did not satisfy the qualifications to be a candidate under this Act. The application must be launched and filed with the Nekaneet Appeal Body, whose composition and powers are governed by section 8 of the *Nekaneet Constitution*. It is intended at all times to consist of a minimum of three members, with staggered terms. It appears from the record that there was no Appeal Body in place between 2017 and March 3, 2020, when three members were appointed at the same time. The terms of appointment of the three members expired on March 2, 2023.

[7] Ms. Buffalocalf therefore made inquiries as to whether an Appeal Body was appointed, and if not, demanded that the Chief and Council make appointments by April 21, 2023, failing which she would solicit signatures for a Declaration that would call a new election on June 2, 2023. Because it is crucial for the understanding of this appeal, I reproduce in full section 8.07 of the *Nekaneet Constitution* upon which Ms. Buffalocalf relies:

> **8.07** In the event that 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 ad the naming of 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.

[8] Since the Government had not made Appeal Body appointments by April 21, 2023, Ms. Buffalocalf collected 148 signatures (about 38% of eligible voters) and delivered the Declaration on April 26, 2023, to Councillors Francis and Mosquito (Chief Wahobin was outside of the country for a Tribal Council meeting). Shortly thereafter, on April 28, 2023, the Chief and Council filled the three vacancies on the Appeal Body and commenced an application for judicial review of the Declaration in the Federal Court.

[9] The crux of the dispute with respect to the reasonableness of the Declaration is the timeline within which the appointments to the Appeal Board ought to be made. The arguments of the parties to this dispute revolve around the language of the various paragraphs of section 8. Ms. Buffalocalf relies on section 8.1, pursuant to which the Nekaneet Government shall "forthwith" appoint the Nekaneet Appeal Body and fill vacancies "in a timely manner" as they occur. The Chief and Council, on the other hand, are rather of the view that the deadline for filling vacancies does not expire until at least 60 days after the vacancies arose.

[10] In the Federal Court, Justice Grammond sided with the Chief and Council and concluded that the expressions "forthwith" and "timely manner" found in section 8.01, when read in context, must be interpreted to mean within 60 days. For that proposition, the application judge relied on sections 8.04 (initial appointments "shall be made no later than sixty (60) days from the

date of the Nekaneet 2008 election") and 8.05 (vacancy resulting from termination, death or resignation of a member "shall be filled by the Government within sixty (60) days of such event"). While acknowledging that these two sections are not applicable to the case at bar, Justice Grammond opined that an interpretation of the phrase "timely manner" that would lead to different results depending on the type of vacancy would be curious. As he stated, "[m]uch 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" (at para. 25 of his reasons). Accordingly, the Federal Court came to the conclusion that the Declaration is invalid as it was unreasonable to ignore the 60-day time limit for making appointments.

[11] In separate reasons, Justice Grammond awarded costs in the amount of $5,000 to the respondents. In doing so, he dismissed the respondents' request for elevated costs, as well as both parties' requests that their costs be paid by the First Nation.

II. ISSUES

[12] As mentioned earlier, Ms. Buffalocalf raised a number of issues with respect to the Federal Court's decision on the merits. First and foremost, she disagrees with the interpretation given to section 8.01 by the Federal Court. In her view, there are two forms of appointments, with different timelines. Initial appointments in 2008 were to be made within 60 days, whereas subsequent appointments are to be made "forthwith". Vacancies differ from appointments in that they arise in the middle of a term of appointment, whereas appointments occur at the beginning of a term. Even if the appointment of new members after the expiration of the predecessors'

terms of appointment constitutes the filling of a vacancy for the purposes of s. 8.01, which she denies, the timeline for replacement would be "in a timely manner", and not "within sixty (60) days", because appointments arising on the expiration of a predecessor's term do not fall within the ambit of "termination, death or resignation of a member", as envisaged in section 8.05. "Termination" as used in that section connotes removal by the Government; besides, the drafters would have added "expiration of the term of office" to section 8.05 if they wanted the 60-day timeline to apply to that situation, since they were clearly aware of that scenario as shown in section 8.06.

[13] Ms. Buffalocalf also claims that the application judge erred in applying, in effect, a correctness standard under the guise of a reasonableness review. In the same vein, she argues that Justice Grammond failed to consider principles of deference to indigenous decision-makers, thereby ignoring not only common law principles but also Parliament's enactment of the *United Nations Declaration on the Rights of Indigenous Peoples Act*, S.C. 2021, c. 14.

[14] For the reasons that I will develop below in my analysis, I shall not evaluate these arguments. The only issues that need be addressed are the following:

1) Does this Court (and the Federal Court) have jurisdiction to review the Declaration and to deal with the application brought by the respondents in file A-193-23?

2) Was the application for judicial review in file A-193-23 premature?

3) Did the Federal Court commit any legal or palpable and overriding error in awarding costs?

III. ANALYSIS

1) *The jurisdiction of the Federal Courts over First Nations disputes and electoral matters*

[15] As statutory courts established pursuant to section 101 of the *Constitution Act, 1867* (UK), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, Appendix II (the Constitution Act), it is well established that the Federal Court and this Court only have the jurisdiction that is conferred upon them by statute; moreover, that statutory jurisdiction must relate to the application of a law of Canada within the meaning of section 101 of the Constitution Act: see, *inter alia*, *ITO Int'l Terminal Operators v. Miida Electronics*, [1986] 1 S.C.R. 752; *Canada (Attorney General) v. TeleZone Inc.*, 2010 SCC 62; *Windsor (City) v. Canadian Transit Co.*, 2016 SCC 54 (*Windsor*). Sections 18 and 28 of the *Federal Courts Act*, R.S.C. 1985, c. F-7 (the FCA) further impose a statutory limitation on the Federal Courts' exclusive jurisdiction to hear applications for judicial review: the review being sought must relate to decisions of a "federal board, commission or other tribunal", as this phrase is defined in subsection 2(1) of the FCA. According to that definition, it means "any body, person or persons having, exercising or purporting to exercise jurisdiction or powers conferred by or under an Act of Parliament."

[16] In their initial submissions before this Court, both parties seem to take for granted that the Federal Court and this Court have the jurisdiction to deal with the application for judicial review brought by the respondents. The appellant, in particular, argues that the signatories of the Declaration were empowered to make the collective decision to sign and deliver the Declaration per section 8.07 of the *Nekaneet Constitution*, and are therefore a "federal board, commission or other tribunal" in the exercise of this authority. As for the respondents, they appear to be of the

same view. While they do not squarely address the jurisdictional issue in their initial memorandum, they emphasized at paragraph 31 of their Notice of Application that a "federal board, commission or other tribunal" includes any body or persons "purporting" to exercise jurisdiction or powers conferred by or under an Act of Parliament, and as such, that the Declaration was made by such a body of persons. They also relied on the fact that the Chief Electoral Officer that the Declaration purports to appoint for the purpose of a general election is a "federal board, commission or other tribunal" in her own right.

[17] Since neither party (nor the Federal Court, for that matter) satisfactorily addressed the jurisdictional issue, this Court issued a direction on May 9, 2024, requesting supplemental submissions on two points: (1) whether the factual scenario underlying this judicial review comes within federal jurisdiction, insofar as it involves an exercise of power by a "federal board, commission or other tribunal"; and (2) whether this case involves a "decision" or "matter" that can form the basis of a judicial review application for the purpose of subsections 18.1(1) and (3) of the FCA. The parties duly obliged and filed written submissions on these two issues, which I will now address.

[18] There are three main routes to ground the Federal Courts' jurisdiction over First Nations electoral matters: (a) the Band Council acting as a federal body; (b) the supervisory jurisdiction over First Nation's elections; and (c) the writ of *quo warranto*.

[19] Band Councils established under the *Indian Act*, R.S.C. 1985, c. I-5, are a "federal board, commission or other tribunal" whose decisions are subject to judicial review when they exercise

their powers over band members under a federal statute: *Sebastian v. Saugeen First Nation No. 29 (Council of)*, 2003 FCA 28 at para. 51; *Sioui v. Huron-Wendat Nation Council*, 2023 FC 1731 at para. 30. Pursuant to the definition of "council of the band" found in subsection 2(1) of the *Indian Act*, a band council is not necessarily selected as a result of an election under the specific procedure set out in an Act of Parliament such as subsection 74(1) of the *Indian Act* or in the *First Nations Elections Act*, S.C. 2014, c. 5. It can also be chosen according to the unwritten custom of the Band or by their own Election Codes, as is the case here: *Ratt v. Matchewan*, 2010 FC 160 at paras. 104-106 (*Ratt*).

[20] When selected through custom, the powers exercised by First Nations in relation to the selection of their leaders are incorporated by reference in the *Indian Act*; as such, they are conferred by an Act of Parliament, and fall within the ambit of "federal board, commission or other tribunal": *Canatonquin v. Gabriel*, [1980] 2 F.C. 729 (FCA), 1980 CanLII 4125; *Ermineskin First Nation v. Minde*, 2008 FCA 52 at para. 33 (*Minde*); *Bellegarde v. Carry the Kettle First Nation*, 2024 FC 699 at paras. 50-52 (*Bellegarde*).

[21] Where the powers exercised by Band Councils are delegated to other decision-making bodies, agents or persons, they will still come within the purview of section 18.1 of the FCA. For instance, a Housing Authority acting as an agent of the First Nation to evict someone is reviewable under section 18.1. An Elections Board reviewing election appeals and complaints is also considered a "federal board, commission or other tribunal", provided its powers derive from legislation effected under the *Indian Act*. Similarly, an Elders Council's decision to determine an elected official's office "vacated" comes within section 18 of the FCA because it was statutorily

empowered under a Band Constitution: see *Cyr v. Batchewana First Nation of Ojibways*, 2022 FCA 90 at para. 44; *Opaskwayak Cree Nation v.* Cook, 2023 FC 505 at para. 30; *Minde* at para. 33*; Bellegarde* at para. 29 and case law herein cited.

[22] There is also a second line of jurisprudence to the effect that Federal Courts have supervisory jurisdiction over Band elections when executed according to Band customs. This extends to decisions made by election appeal bodies: see *Minde*; *Francis v. Mohawk Council of Kanasetake*, [2003] 4 F.C. 1133 at paras. 11-18; *Ballantyne v. Nasikapow*, (2001) 197 F.T.R. 184 at paras. 5-6; *Ratt* at paras. 96-100. This type of jurisdiction has even been extended to decisions that are "intimately related to the electoral process", including an Election Officer removing a candidate from the ballot, a Council's failure to take further steps after the body designated to resolve the dispute declined to act, and the disputed officeholder refusing to resign: see *Thomas v. One Arrow First Nation*, 2019 FC 1663 at paras. 13-14.

[23] Also connected to the Courts' supervisory jurisdiction over Band elections is the power to review disputes when there is no decision from a "federal board, commission or other tribunal", but where the prerogative writ of *quo warranto* is sought. This is the third ground of federal courts' jurisdiction over First Nations electoral matters. *Quo warranto* is a challenge to the right of a public office holder to hold office, and can include challenging the authority that one claims to act with: see *Ojibway Nation of Saugeen v. Derose*, 2022 FC 531 at para. 26; *Marie v. Wanderingspirit*, 2003 FCA 385 at para. 20 (*Wanderingspirit*); *Key First Nation v. Lavallee*, 2021 FCA 123 at para. 59; *Lake Babine Indian Band et al. v. Williams et al.*, (1996) 194 N.R. 44 (F.C.A.) at paras. 3-4; *Standingready v. Ocean Man First Nation*, 2021 FC 434 at

para. 13. The alleged illegality must pertain to the person's eligibility to hold office, or to the electoral process itself. It is unavailable for alleged illegalities that are unrelated to a person's eligibility, and is not a tool to express political grievances. It cannot be used to assert that office holders have made unwise decisions or misused powers entrusted to them.

[24] This case does not sit comfortably within any of the three routes whereby the Federal Courts can claim jurisdiction.

[25] In their supplemental submissions filed in response to the direction of this Court dated May 9, 2024, both the appellant and the respondents rely heavily on Justice Grammond's reasoning in his order granting interim relief. Interestingly, the appellant had argued before the Federal Court that it did not have jurisdiction to hear the respondent's application for judicial review and could not, as a result, grant interim relief in the form of an emergency injunction. Justice Grammond dismissed that argument in his order granting interim relief:

> [15] Ms. Buffalocalf raises an objection to the Court's jurisdiction. She says that contrary to what took place in *Bellegarde*, the applicants are not challenging a decision made by a federal board, commission or other tribunal,", but rather a decision made by the Nekaneet voters, In my view, this does not make any difference, There is no doubt that this Court may review decisions made by a First Nation's voters, where they purport to exercise a power granted by the First Nation's election laws: see, for example, *Marie v Wanderingspirit*, 2003 FCA 385; *Oakes v Pahtayken*, 2010 FCA 169; *Narte v Gladstone*, 2021 FC 433.

[26] In my view, the above-quoted paragraph and the arguments submitted by the parties before us conflate the various jurisdictions of the Federal Courts with respect to Band elections, and also blurs the line between what is properly an electoral matter and an issue of governance. Indeed, one should keep in mind that section 8 of the *Nekaneet Constitution* cannot be

characterized as an election law, but a provision establishing the Nekaneet Appeal Body and the rules for the appointment of its members, and setting out its jurisdiction. In the event that the NAB is not properly constituted, section 8.07 creates an automatic, democratic mechanism whereby this violation of the *Nekaneet Constitution* can be remedied. Of course, the process put in place involves a vote, the removal of the Nekaneet Government and the election of a new government, but section 8.07 cannot be assimilated to an election law in the same way as the cases cited by Justice Grammond in the above-quoted paragraph. A short analysis of these cases will demonstrate that point.

[27] *Wanderingspirit* concerned a Band meeting held to vote-out certain elected councillors, and simultaneously vote-in new councillors to replace them. There was no notice to the Band members before the meeting that this election would take place. The voted-out group sought judicial review of the vote to remove them, and the election of new councillors. The trial division granted the application and found both votes were of no effect.

[28] On appeal, the appellants argued that the "will of the people" must be respected to choose elected representatives. This Court agreed with this proposition, but with the *caveat* that the "will of the people" must respect the Band's election custom and due process. The meeting vote was not in accordance with the First Nation's election customs, nor did it respect the principles of natural justice because no notice was provided.

[29] It is interesting to note that this Court accepted that there was no "decision". However, such a decision was not necessary in the circumstances, because what was challenged was the

authority of the voted-in councillors to exercise authority in place of the voted-out group. The Court therefore relied on its *quo warranto* jurisdiction: "[a]lthough their application was for a declaration and not expressly for a writ of quo warranto, the substance of what they were seeking was a declaration equivalent to the prerogative writ of quo warranto" (at para. 17). As such, the Court had jurisdiction per paragraph 18(1)(*a*) of the FCA. As outlined above, this Court stressed that *quo warranto* is an exception to the normal rule that judicial review must be conducted on a decision of a federal board, commission or other tribunal (at para. 20).

[30] On the basis of this short summary, it is easy to understand the important distinctions between the case at bar and *Wanderingspirit*. The application for judicial review of the Declaration made by the newly-elected Council and Chief is not a challenge to the right of a public office holder to hold office, and therefore cannot be assimilated to a *quo warranto*. It is true that the person named as Chief Electoral Officer is mentioned in the Notice of Application, but nothing turned on that nomination and neither the appellant nor the respondents make much of that nomination or genuinely analyze her position.

[31] The appellant's own conduct bears out this interpretation of the application for judicial review that was before the Federal Court. On April 17, 2023, she brought an application before the NAB for various reliefs, including a declaration that the respondent Carolyn Wahobin be disqualified from being a candidate for the office of Chief, thereby challenging her election. She seemed to understand that the only route to challenge the Chief's election was through an application before the NAB. Because there was no properly constituted NAB within the 30-day period to challenge the election, Ms. Buffalocalf resorted to the constitutional mechanism of a

Declaration. What is worth stressing, however, is that a declaration operates automatically once it is signed by a minimum of 35% of the eligible voters. It is not based on a challenge to the right of a public officer to hold office. Rather, it is premised on the notion that the members of the Nekaneet Government were eligible to hold office, but violated the *Nekaneet Constitution* by not appointing or filling the vacancies in the NAB. Challenging a declaration, therefore, cannot properly be equated with a *quo warranto*.

[32] Some of the submissions made by the Chief and Council as appellants in the costs appeal also reinforce my analysis on the merits. They acknowledge that the purpose of a section 8.07 Declaration is to function in the unique event where there is no Nekaneet Appeal Body. Contrary to their submissions on the merits appeal, they also assert that there is only one decision on appeal, that being the Declaration. Finally, and importantly for the question of jurisdiction, they submit that the election appeal and the Declaration were independent of each other.

[33] Regrettably, the application judge glossed over that fundamental difference between what has come to pass in this case and the essential characteristics of the writ of *quo warranto*. It is no doubt true that the Declaration was set in motion shortly after an election was held, and had the effect in practice of overturning the results of that election. The fact remains, however, that the Declaration was not a direct challenge to the election and was one-step removed from it. As much as one may wish to read an application for its underlying substance, the Federal Courts should be careful not to overstep their jurisdiction.

[34] This conceptual confusion is further illustrated by *Pahtayken v. Oakes*, 2009 FC 134 (*Pahtayken*] and *Narte v. Gladstone,* 2021 FC 433 (*Narte*). The first of these two cases involved Nekaneet First Nation's adoption of two different slates of Chiefs and Councillors. A determination of who was legally in charge was therefore required. The applicants had led a referendum to pass both the *Nekaneet Constitution* and the *Nekaneet Governance Act*, and were then elected pursuant to the election procedures set out in these two governing documents. The respondents, however, boycotted the referendum and were elected pursuant to the pre-existing Band custom. The Federal Court ruled that the applicants were legally elected, as the referendum to adopt the governing documents represented a "sufficient" consensus: *Pahtayken* at para. 66. Our Court confirmed that decision of the Federal Court: *Oakes v. Pahtayken*, 2010 FCA 169. While this Court did not touch on jurisdiction, it is interesting to note that the applicants had sought a writ of *quo warranto* pursuant to subsection 18(1) of the FCA at the trial level. Again, this is not the situation we are dealing with.

[35] Finally, in *Narte*, the applicants sought to remove council members from a First Nation's Council because they failed to disclose financial information and provide drug-testing results. They applied to the Court for an order to remove the councillors and call a new election. Once again, as noted by Justice Grammond in that case, the applicants were seeking a declaration and a writ of *quo warranto* "effectively removing" the councillors from the Band council. This is not the remedy that was sought by the respondents in our case before the Federal Court.

[36] In summary, I am of the view that neither this Court nor the Federal Court can claim jurisdiction over this case pursuant to subsection 18(1) of the FCA on the basis of it being an

application for *quo warranto*. Perhaps at the invitation of the respondents (then applicants), who clearly sought to ground their application in the *quo warranto* jurisdiction of the Court, Justice Grammond took for granted that this is a case concerning the validity of an election. While he was no doubt entitled to read the material before him for its true substance, he nevertheless stated that the only decision on review was the Declaration. As mentioned earlier, that Declaration is a constitutional mechanism to remedy a constitutional violation. That constitutional violation – not appointing NAB members – is not directly tied to the validity of an election, even if it occurred in an election context. Indeed, the respondents explicitly acknowledge that the purpose of section 8.07 is "not to recall, remove, or reverse the result of an election" (at para. 74 of their factum).

[37] In light of the foregoing, I fail to see how this Court (and the Federal Court) can have jurisdiction over the application brought forward by the respondents. In the exercise of their supervisory jurisdiction pursuant to section 18.1 of the FCA, the Federal Courts' jurisdiction only encompasses decisions or actions of federal boards, commissions or other tribunals. In a similar context, this Court endorsed the Federal Court's ruling that a Band council vote did not qualify as a "decision" for the purposes of section 18.1 of the FCA: *Wanderingspirit* at para. 17. If this is true of a vote taken at a Band Council meeting (although irregularly held), it must equally be true for a petition signed by a minimum of 35% of the eligible voters.

[38] Even if the Declaration could arguably be considered as a "decision" in the sense that it affects legal rights and causes prejudicial effects, assimilating a grass-roots petition to dissolve the Government for non-election reasons to a federal body would be an impermissible stretch. Indeed, neither Justice Grammond nor the parties substantiated this claim with any precedent.

While the case law has extended the notion of "federal board, commission or other tribunal" to all sorts of decision-making bodies exercising delegated authority from Band Councils, I am unaware of any decision where a specified threshold of the eligible electors (let alone petitioners) have been granted that status. The fact that the Declaration (and the anticipated new election) flows from custom law incorporated into federal statute law is not sufficient. To be subject to judicial review before the Federal Court or the Federal Court of Appeal, there must still be a "decision" made by a "federal board, commission or tribunal."

[39] For all of the foregoing reasons, I am therefore of the view that the Federal Court erred in concluding that it had jurisdiction to judicially review the Declaration dissolving the Nekaneet Government.

2) *The administrative process has not been exhausted*

[40] Even if, for the sake of the argument, I was prepared to accept that the Federal Court did have jurisdiction to entertain the application, there is another compelling reason why it should have declined to do so. It is well established that judicial review is a discretionary remedy. When the administrative process has put in place remedial recourses, these should normally be exhausted before courts can step in. This is a cardinal rule of Canadian administrative law, and nowhere has it been more eloquently spelled out than in *Canada (Border Services Agency) v. C.B. Powell Limited*, 2010 FCA 61 (*C.B. Powell*), where this Court stated (at para. 31):

> Administrative law judgments and textbooks describe this rule in many ways: the doctrine of exhaustion, the doctrine of adequate alternative remedies, the doctrine against fragmentation or bifurcation of administrative proceedings, the rule against interlocutory judicial reviews and the objection against premature judicial reviews. All of these express the same concept: absent exceptional circumstances,

> parties cannot proceed to the court system until the administrative process has run its course. This means that, absent exceptional circumstances, those who are dissatisfied with some matter arising in the ongoing administrative process must pursue all effective remedies that are available within that process; only when the administrative process has finished or when the administrative process affords no effective remedy can they proceed to court. Put another way, absent exceptional circumstances, courts should not interfere with ongoing administrative processes until after they are completed, or until the available, effective remedies are exhausted.

[41] See also the cases cited at paragraph 30 of *C.B. Powell*, as well as: *Strickland v. Canada (Attorney General)*, 2015 SCC 37 at paras. 40, 42; *Halifax (Regional Municipality) v. Nova Scotia (Human Rights Commission)*, 2012 SCC 10 at paras. 35-37 (*Halifax*); *Dugré v. Canada (Attorney General)*, 2021 FCA 8 at para. 37; *Viaguard Accu-Metrics Laboratory v. Standards Council of Canada*, 2023 FCA 63 at paras. 4-5.

[42] As noted in the case law, there are practical and theoretical reasons for judicial restraint. One of the rationales for this rule is that a premature intervention by a reviewing court could deprive it of a full record, and of an administrative decision-maker's factual and evidentiary findings. Such findings are often suffused with expertise, policy judgments and regulatory experience: *C.B. Powell*, at para. 32. Indeed, early judicial intervention may lead to the imposition by a court of what amounts to the "correct" interpretation of a legal question that an administrative tribunal could have reasonably interpreted differently: *Halifax*, at para. 36. Such caution is all the more critical in an aboriginal context, and especially when dealing with governance and electoral disputes, where courts are at a disadvantage compared to decision-makers steeped in or familiar with the culture and traditions of the Band within which a dispute arose.

[43] In the case at bar, section 8.08 of the *Nekaneet Constitution* makes it very clear that the NAB was to have exclusive jurisdiction over all matters governed by a law adopted by the Nekaneet. That section reads as follows:

> 8.08 The Nekaneet Appeal Body has the jurisdiction to hear and resolve any conflict or dispute relating to an issue governed by a law of Nekaneet or address violations of a law of Nekaneet based on remedies and processes that are fair, just and equitable and in accordance with the laws of Nekaneet.

[44] The appellant contends that there was no alternative administrative remedy and that the NAB cannot have authority to review a Declaration, since the very *raison d'être* of such Declaration is to dissolve Government where there is no NAB in place. This is precisely what happened here.

[45] With all due respect, this argument does not hold water. First of all, and parenthetically, I note that the appellant is not seeking before this Court an order confirming that the current Chief and Council is dissolved as of the date of the Declaration, but only as of the date of the judgment in this appeal. She accepts that the validity of the Declaration was suspended pending the determination of the merits as a result of the injunctions issued by the Federal Court, which were not appealed. This is made even clearer by counsel for the appellant, who stated in an email to NAB members on August 9, 2023, that his client is not challenging the validity of their appointments before this Court.

[46] Even if one were to accept that the appointment of NAB members by the Chief and Council on April 28, 2023, was arguably controversial, the proper venue to challenge the legality of those appointments was before the NAB itself. This is indeed precisely what Ms. Buffalocalf

did. She brought an application to the NAB pursuant to the *Nekaneet Constitution* and the *Nekaneet Governance Act* for various forms of relief, including a declaration that the respondent Carolyn Wahobin is disqualified from being a candidate for office of Chief and declaring Alvin Francis is the elected Chief.

[47] The NAB released a preliminary decision dealing with some jurisdictional issues on July 25, 2023, and a decision to hold the application in abeyance on August 8, 2023. Although that decision is not part of the record, we were told at the hearing that the NAB had to deal with the legality of their own appointment before addressing the substance of the application. This is exactly as it should be. If the appellant did not agree with that decision, she could have made an application for judicial review before the Federal Court. This would have been the proper procedure to follow, respectful of the administrative process established in the *Nekaneet Constitution*. For the respondents to short-circuit that process by bringing an application for judicial review of the Declaration before the Federal Court was no substitute for the NAB's exclusive authority to determine constitutional violations and assess the eligibility of the newly elected Chief.

3) *The costs appeal and cross-appeal*

[48] In file number A-276-23, both parties appeal the cost order of $5,000 against Ms. Buffalocalf. The Nekaneet First Nation, Chief Carolyn Wahobin, and Councillors Roberta Francis and Christine Mosquito argue in their appeal that the Federal Court made reviewable legal errors, first in deciding that Rule 420 of the *Federal Courts Rules*, SOR 98-106, does not apply to offers to settle that include a costs-only compromise, and second in interpreting section 16.04 of the *Nekaneet Governance Act* which prohibits a Chief or Councillor to use Nekaneet funds to pay for legal fees related to an election challenge. In her cross-appeal, Ms. Shauna Buffalocalf requests that the Order of the Federal Court be set aside, and contends in particular that it was an error to find that she was not acting in the public interest and therefore that she should be allowed to collect her fees from the First Nations regardless of the outcome.

[49] In light of my conclusion on the merits in file A-193-23, there should be no order with respect to costs. This case is somewhat unusual since both parties argued that the Federal Court had jurisdiction to deal with the application brought by the respondents in that file. Having found that such was not the case and that the Federal Court erred in accepting the parties' submissions in this respect, none of the parties have succeeded in this Court. For that reason, each party should bear its own costs.

[50] As for the costs order in the Federal Court, it should be reversed because the case should never have proceeded in the first place. It is true that on appeal, this Court usually refrains from interfering with costs awards in the Federal Court because of their inherent discretionary nature.

In the absence of an error in principle, or short of an award that is plainly wrong, appellate courts will not interfere with cost orders: see, for example, *Indalex Finance, LLC v. United Steelworkers*, 2013 SCC 6 at para. 247; *Tazehkand v. Bank of Canada*, 2023 FCA 208 at para. 92.

[51] The situation is different here, however, because the case should never have proceeded in the Federal Court. In such a case, it may be fitting to reverse a trial court's order when it mistakenly assumes or declines jurisdiction: *Windsor* at para. 72; *Canada (Governor General in Council) v. Mikisew Cree First Nation*, 2016 FCA 311 at para. 64 (aff'd at 2018 SCC 40).

[52] I am, furthermore, comforted, in my opinion, that no cost award should be made in light of the fact that both parties allege financial difficulties. While this factor should obviously not, in and of itself, be determinative, it can be taken into account in a case like this one, where there is no clear winner and where there is no allegation of bad faith.

[53] For all of the foregoing reasons, I would set aside both the judgment of the Federal Court in file A-193-23 and the Order of the Federal Court in file A-276-23, without costs. Both parties should therefore bear their own costs, both in this Court and in the Federal Court.

"Yves de Montigny"
Chief Justice

"I agree.
René LeBlanc J.A."

"I agree.
Elizabeth Walker J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-193-23
STYLE OF CAUSE:	SHAUNA BUFFALOCALF v. NEKANEET FIRST NATION, CHIEF CAROLYN, WAHOBIN, COUNCILLOR ROBERTA FRANCIS,, AND COUNCILLOR CHRISTINE MOSQUITO
AND DOCKET:	A-276-23
STYLE OF CAUSE:	NEKANEET FIRST NATION, CHIEF CAROLYN, WAHOBIN, COUNCILLOR ROBERTA FRANCIS,, AND COUNCILLOR CHRISTINE MOSQUITO v. SHAUNA BUFFALOCALF
PLACE OF HEARING:	BY ONLINE VIDEO CONFERENCE
DATE OF HEARING:	JUNE 19, 2024
REASONS FOR JUDGMENT BY:	DE MONTIGNY C.J.
CONCURRED IN BY:	LEBLANC J.A. WALKER J.A.
DATED:	AUGUST 12, 2024

APPEARANCES:

Jeff Howe Jamie Cockburn	FOR THE APPELLANT/RESPONDENT
Joshua Morrison Michael Marschal	FOR THE RESPONDENTS/APPELLANTS

SOLICITORS OF RECORD:

Howe Legal Professional Corporation Barristers and Solicitors Regina, Saskatchewan	FOR THE APPELLANT
Smith Valeriote Law Firm LLP Guelph, Ontario	
MTL Aikins LLP Barristers and Solicitors Regina, Saskatchewan	FOR THE RESPONDENTS