Federal Court of Appeal | Cour d'appel fédérale

Date: 20100623

Docket: A-130-09

Citation: 2010 FCA 169

CORAM: **EVANS J.A.**
PELLETIER J.A.
STRATAS J.A.

BETWEEN:

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

Appellants

and

ALICE PAHTAYKEN, IN HER CAPACITY AS CHIEF, BRANDY BUFFALO CALF, IN HER CAPACITY AS COUNCILLOR, ELVIE STONECHILD, IN HER CAPACITY AS COUNCILLOR, AND CHRISTINE MOSQUITO, IN HER CAPACITY AS COUNCILLOR

Respondents

Heard at Calgary, Alberta, on June 17, 2010.

Judgment delivered at Ottawa, Ontario, on June 23, 2010.

REASONS FOR JUDGMENT BY: PELLETIER J.A.

CONCURRED IN BY: EVANS J.A.
STRATAS J.A.

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REASONS FOR JUDGMENT

PELLETIER J.A.

[1] This is an appeal from the decision of Mr. Justice Russell (the Judge) of the Federal Court reported as *Nekaneet First Nation v. Oakes*, 2009 FC 134, [2009] F.C.J. No. 183, in which the Federal Court was asked to declare which of two slates of chief and councillors, elected in two separate elections, was lawfully elected. The dispute arose because a group of band members initiated a process leading to a referendum on the adoption of the *Nekaneet Constitution* and

Nekaneet Governance Act. Following an independently supervised secret ballot, the referendum passed. The respondents were elected chief and councillors pursuant to the election procedure set out in the *Nekaneet Constitution* and *Nekaneet Governance Act.*

[2] Another group of band members opposed the referendum initiative and expressed their opposition by boycotting the process as well as the referendum itself. They organized a band council election in accordance with the pre-existing band custom, at which time the appellants (applicants in the Federal Court) were elected as Chief and band councillors.

[3] The Judge decided that the election of the respondents was lawful and that they lawfully occupied the offices of chief and councillors.

[4] Numerous affidavits were filed both in support of and in opposition to the appellants' application for judicial review. There were numerous issues of fact as well as issues of credibility. In careful, detailed reasons, the Judge made findings of fact and credibility which he justified by reference to the material before him. Given the nature of the application before him, the Judge was the primary fact-finder. In those circumstances, the standard of review for findings of fact, and factual inferences, is that set out at paragraph 25 in *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235: palpable and overriding error. I have not been persuaded that the Judge made any such error.

[5] The legal test which the Judge was to apply to the facts was that of “broad consensus” as set out in the jurisprudence: *Bigstone v. Big Eagle* [1992] F.C.J. No. 16, [1993] 1 C.N.L.R. 25 (F.C.T.D.), *McLeod Lake Indian Band v. Chingee*, [1998] F.C.J. No. 1185, [1999] 1 C.N.L.R. 106 (F.C.T.D.). That test was articulated by Stayer J. in *Bigstone*, cited above, as follows:

> 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?

[6] The Judge concluded that where 136 of 276 eligible voters participated in the referendum, and of those, 113 voted in favour of adoption of the proposed *Nekaneet Constitution* and *Nekaneet Governance Act*, there was sufficient evidence of a broad consensus in favour of those measures, and by extension, of the election of the chief and councillors elected pursuant to the new constitution. The Judge was mindful that this participation rate occurred in the face of an organized boycott of the referendum by those opposed to the adoption of the *Nekaneet Constitution* and *Nekaneet Governance Act.* He discounted the petition signed by 113 band members who participated in the subsequent band election on the ground that he did not have sufficient credible evidence as to its circumstances to accord it much weight.

[7] Like the Judge, I cannot help but note that this community is deeply divided, a regrettable situation. Nonetheless, his task was to determine if there existed a broad consensus in favour of a change in band governance. It is true that the process which was undertaken by the respondents was

not sanctioned by the existing council. But it is also true that the process was undertaken by a significant number of band members; it was undertaken publicly and with notice to all band members. It offered band members the opportunity to participate in the work of the Governance Committee, either in person or by providing responses to questionnaires circulated to band members. The proposed changes were put before band members at two public meetings, one on the reserve and the other in Regina. The proposed changes are broadly in line with current notions of open and transparent democratic practices. Finally, the *Nekaneet Constitution* and *Nekaneet Governance Act* were adopted in a vote by secret ballot under independent supervision. It is apparent that both the process and the result of the vote satisfied the Judge that, notwithstanding the boycott, there existed a broad consensus in favour of the change in governance and the subsequent election of the respondents.

[8] The parties agreed that the Judge applied the correct legal test, that of "broad consensus". The application of that test to the facts is a question of mixed fact and law for which the standard of review, once again, is that of palpable and overriding error: see *Housen v. Nikolaisen*, previously cited, at paragraph 36.

[9] I have not been persuaded that the Judge committed a palpable and overriding error in concluding, as he did, that there was a broad consensus in favour of the adoption of *Nekaneet Constitution* and *Nekaneet Governance Act* and, by extension, the election of the respondents as the chief and councillors of the Nekaneet First Nation.

[10] I would therefore dismiss the appeal with costs.

"J.D. Denis Pelletier"

J.A.

“I agree.
John M. Evans J.A.”

“I agree.
David Stratas J.A.”

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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STYLE OF CAUSE:	LARRY OAKES et al. and ALICE PAHTAYKEN et al.
PLACE OF HEARING:	CALGARY, ALBERTA
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REASONS FOR JUDGMENT BY:	PELLETIER J.A.
CONCURRED IN BY:	EVANS J.A. STRATAS J.A.
DATED:	JUNE 23, 2010

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