Federal Court  Cour fédérale

Date: 20220629

Docket: T-1714-21

Citation: 2022 FC 970

Ottawa, Ontario, June 29, 2022

PRESENT: The Honourable Madam Justice Strickland

BETWEEN:

SIDNEY CHAMBAUD, GORDON PASTION, GERRY PASTION, CHRISTOPHER YAKINNEAH, JOSEPH (BERNARD) BEAULIEU, RAYMOND HOOKA-NOOZ, THOMAS AHKIMNACHIE, RALLY PASTION, ROBERT TSONCHOKE ON THEIR OWN BEHALF AND ON BEHALF OF THE MEMBERS OF THE DENE THA' FIRST NATION

Applicants

and

DENE THA' BAND COUNCIL, CHIEF JAMES AHNASSAY, COUNCILLOR CHARLIE CHAMBAUD, COUNCILLOR ANDREW BEAULIEU, COUNCILLOR GABBRIEL DIDZENA, COUNCILLOR SHANE PROVIDENCE, COUNCILLOR STEPHEN DIDZENA, COUNCILLOR ANDREA GODIN, COUNCILLOR JEFF CHONKOLAY, COUNCILLOR FABIAN CHONKOLAY AND THE ATTORNEY GENERAL OF CANADA

Respondents

JUDGMENT AND REASONS

[1] This is the judicial review of a decision made by the Dene Tha' Band Council [Council], extending the term of office of Chief and Council in response to the COVID-19 pandemic and related legislation. Specifically, the *First Nations Election Cancellation and Postponement Regulations (Prevention of Diseases)* SOR/2020-84 [Regulations] and s 267 of the *Budget Implementation Act*, 2021, no. 1, SC 2021 c 23 [BIA].

Background

[2] The Applicants in this matter are members of the Dene Tha' First Nation [DTFN]. The Respondents are the DTFN Chief and Council [collectively referred to in these reasons as "Chief and Council" or the Respondents] as well as the Attorney General of Canada [AG].

[3] The DTFN chooses its band council according to band custom (*Indian Act* RSC 1985 c I-5 s 2(1), part (d) of the definition of "council of the band") and, in 1993, adopted the *Dene Tha' First Nation Election Regulations 1993* [DTFN Election Regulations]. The DTFN Election Regulations require that general elections take place at least every four years, but an election may be called at any time by a majority vote of Council.

[4] The DTFN held its last election for Chief on October 17, 2017, and for Council on October 30, 2017. Pursuant to the DTFN Election Regulations, the next elections would have been held on or before October 17, 2021 and October 30, 2021, respectively. On April 8, 2020, the Governor in Council enacted the Regulations. The preamble to the Regulations states that the Governor in Council was of the opinion that there was an outbreak of a communicable disease, COVID-19, and that its introduction or spread posed an imminent and severe risk to public

health. Further, that some First Nations had begun or were about to begin the process of electing the chief and councillors, some First Nations had cancelled or postponed elections to avoid the introduction or spread of COVID-19 and, some First Nations did or would not have a council in place at the end of the tenure of the current chief and council. Therefore, to ensure continuance of governance of First Nations during the outbreak and spread of COVID-19, the Regulations were enacted, pursuant to s 73 and 76(1) of the *Indian Act* and s 41 of the *First Nations Elections Act*, SC 2014, c 5.

[5] The Regulations dealt with elections held under the *Indian Act*, the *First Nations Elections Act* and elections held according to custom. As the DTFN are a custom election band, s 4(1) of the Regulations would apply to it:

> 4(1) The council of a First Nation whose chief and councillors are chosen according to the custom of the First Nation may extend the term of office of the chief and councillors if it is necessary to prevent, mitigate or control the spread of diseases on its reserve, even if the custom does not provide for such a situation.

[6] Section 8 of the Regulations states that those regulations are repealed on October 8, 2021 (the Regulations were initially to be repealed on April 8, 2021, the anniversary of their coming into force, but this was extended to October, 8 2021 by way of s 5 of the *Regulations Amending the First Nations Election Cancellation and Postponement Regulations (Prevention of Disease)* SOR/2021-78) [the Amending Regulations].

[7] Prior to the repeal of the Regulations, they were challenged in *Bertrand v Acho Dene Koe First Nation*, 2021 FC 287 [*Bertrand*]. In *Bertrand*, Justice Grammond found that the matter before him was moot because an election had been called. However, he chose to exercise his

discretion and hear the matter on the merits, ultimately concluding that s 4 of the Regulations was *ultra vires* its legislative enabling provision, s 73(1)(f) of the *Indian Act*. Justice Grammond suspended his April 1, 2021 declaration of invalidity for 60 days from the date of his judgement.

[8] The AG filed a Notice of Appeal of that decision on April 9, 2021, but discontinued that appeal on July 21, 2021.

[9] On June 29, 2021, the BIA received royal assent. The AG submits that s 267 of the BIA remedied the *vires* issue identified in *Bertrand* as it provides a direct grant of constitutional authority from Parliament to the Regulations, enabling the Regulations and, deeming them to have been validly made as of April 8, 2020. That is, s 267 of the BIA is declaratory legislation (see: *Regie des rentes du Quebec v Canada Bread Company Ltd*, 2013 SCC 46 at para 26-29).

[10] Section 267 of the BIA deems the Regulations and Amending Regulations to be valid, stating:

> 267 The First Nations Election Cancellation and Postponement Regulations (Prevention of Diseases), made on April 7, 2020 and registered as SOR/2020-84, and the Regulations Amending the First Nations Election Cancellation and Postponement Regulations (Prevention of Diseases), made on April 8, 2021 and registered as SOR/2021-78, are deemed to have been validly made and everything done under, and all consequences flowing from, those Regulations since April 8, 2020 are deemed effective as if those Regulations were so made.

[11] On or about October 7, 2021 the DTFN Chief and Council passed Band Council Resolution [BCR] 2021-2022-027, which extended the term of office of Council. The decision to do so is the subject of this judicial review [Decision].

[12] On October 8, 2021, the Regulations were repealed by their own terms.

Decision under review

> The BCR states that the Council of the Dene Tha' First Nation: Do hereby resolve
>
> WHEREAS the Dene Tha First Nation (DTFN) has existed since time immemorial.
>
> WHEREAS the DTFN has governed themselves since time immemorial, including since 'contact'.
>
> WHEREAS Canada, Alberta and DTFN have been hit with the COVID-19 pandemic, and as a First Nation, DTFN has had extreme cases of COVID-19 and DTFN remains low in relation to the number of people who have been vaccinated.
>
> WHEREAS Indigenous Services Canada (formerly known as INAC or Indian and Norther [*sic*] Affairs Canada), has in order to address public health risks associated with voting, developed the First Nation Election Cancelation and Postponement Regulations (Prevention of Disease), which allows Indian Act bands, and First Nations who elect their Chief and Councils, and the Indian Act or the new First nations Elections Act, to postpone their elections for two (2), six-month periods.
>
> WHEREAS the DTFN Election Code is silent on the extension of 4-year election terms and does not contemplate pandemics or catastrophes.
>
> WHEREAS the DTFN and Alberta is currently enduring the '4th wave' of the COVID-19 pandemic.
>
> WHEREAS Indigenous Service Canada have indicated that they would honour and recognize DTFN's extension of the current term of office up to one year including the extension of funding

> agreements and continuing to recognize current elected leadership until the next election is held
>
> NOW THEREFORE BE IT RESOLVED
>
> 1. The DTFN will extend the current term from October 2021 to June 2022 (up to one year is allowed) or up to until at least 80% of the populations is double vaccinated. Currently 41% have had their 2nd shot.

Relief sought

[13] In their Notice of Application the Applicants identify the Decision as the decision under review and state that they seek the following relief:

a) An Order of *certiorari* or Declaration quashing and setting aside the Decision and remitting the Decision for re-determination in accordance with the direction of this Court;

b) An Order in the nature of *mandamus* compelling the Chief and Council to comply forthwith with their obligations to call an Election under the *Dene Tha' First Nation Election Regulations, 1993*;

c) A Declaration that

   i. The Decision was made without jurisdiction, unreasonable, unfair and/or otherwise unlawful;

   ii. The Decision was inconsistent with and/or violated the Applicants' right to vote under section 3 of the *Charter of Rights and Freedoms* for their First Nation's Chief and Council;

   iii. The Attorney General of Canada exceeded their authority by legislating in relation to the Dene Tha' customary elections which are not subject to the *Indian Act* or any grant of jurisdiction;

   iv. Section 267 of the *Budget Implementation Act*, 2021, c. 23. does not retroactively or otherwise validate section 4 of the *First Nations Election Cancellation and Postponement Regulations (Prevention of Diseases)*, SOR/2020-84 ("Federal Regulations")

   v. Alternatively, if it does validate section 4 of the Federal Regulations, Section 267 of the *Budget Implementation Act* is invalid because it is;

i. Inconsistent with the United Nations Declaration on the Rights of Indigenous Peoples Act, SC 2021, c 14, ("UNDRIP Act") including but not limited to, Articles 19 and 46 of Schedule 2;

ii. Infringes the rule of law principle outlined in section 96 *The Constitution Act*, 1867, 30 & 31 Viet, c 3, and/or purporting to eliminate the constitutional guarantee to judicial review; and/or

iii. Infringes the Dene Tha' members collective right to self-government protected under section 35 of the *Constitution Act*, 1982, Schedule B to the Canada Act 1982 (UK), 1982, c 11, and which infringement cannot be justified;

d) An Order of *quo warranto* removing the Dene Tha' Chief and Council from their elected offices effective October 31, 2021;

e) Interim Order restraining the Respondents from conducting business on behalf of the First Nation and/or providing for expedited timelines so that the relief claimed is capable of being effective;

f) An Order of:

i. advance costs from the Dene Tha' First Nation and/or the Attorney General of Canada;

ii. alternatively, costs from the Respondents on a solicitor-client basis and/or party and party costs in any event of the cause;

g) Such further and other relief that this Court deems just.

[14] The Applicants have also filed a Notice of Constitutional Question. Therein they state that they intend to question the constitutional validity of s 267 of BIA, in particular:

> 1. The Applicants seek a declaration pursuant to section 52(1) of the *Constitution Act*, 1982, that section 267 infringes on the Applicants' rights protected under section 3 of the *Canadian Charter of Rights and Freedoms* (the "*Charter*"), the infringement is not saved by section 1 of the Charter, and section 267 is therefore of no force or effect.
>
> 2. The Applicants seek a declaration pursuant to section 52(1) of the *Constitution Act, 1982*, that section 267 unjustifiably infringes on the Applicants' section 35 of the *Constitution Act, 1982*, including the section 24 right to self-government and right to

choose the method of leader selection, and section 267 is therefore of no force or effect.

3. The Applicants seek a declaration pursuant to section 52(1) of the *Constitution Act, 1982*, that section 267 infringes the Applicants' right of access to justice by deeming decisions valid and thereby infringes on the rule of law principle protected under section 96 of the *Constitution Act, 1867*, and section 267 is therefore of no force or effect.

Issues

[15] In my view, having reviewed the submissions of the parties, there are three preliminary matters that must be addressed. These are as follows:

i. Are settlement discussions properly before the Court?

ii. Do the Applicants have representative capacity?

iii. Is this matter moot and, if so, should the Court exercise its discretion and determinate it on the merits?

[16] The issues on the merits can be framed as follows:

i. Was the Decision authorized by custom, or by the Regulations and the BIA?

ii. Was the Decision reasonable?

iii. Was the Decision made in breach of a duty of procedural fairness?

iv. If the Decision was authorized by the Regulations and the BIA, and it was reasonable and procedurally fair, is s 267 unconstitutional?

Preliminary Issues

i. Settlement discussions

[17] The DTFN Council objects to the Applicants' references to settlement discussions in their memorandum of fact and law and the affidavit of Sidney Chambaud, sworn on December 21, 2021, which also attaches as an exhibit "with prejudice" related correspondence from counsel for the Applicants to counsel for DTFN Chief and Council.

[18] Pursuant to Rule 422 of the Federal Courts Rules, SOR/98-106, no communications respecting an offer to settle or offer to contribute shall be made to the Court, other than in the circumstances set out, until all questions of liability and the relief to be granted, other than costs, have been determined. Also relevant is the common law protection of settlement privilege (see *Thibodeau v Halifax International Airport Authority*, 2018 FC 223 at paras 24-26, 33-35; *Union Carbide Canada Inc. v Bombardier Inc.*, 2014 SCC 35 at paras 31, 34). I agree with the Chief and Council that references to any settlement offer should not have formed a part of the Applicant's submissions on the merits and I will disregard that aspect of the submissions.

[19] To the extent that the Applicants intended their submission to speak to costs, this would more appropriately have been addressed as such and as a discrete issue after the matter had been determined on the merits (*Voltage Pictures, LLC v Salna*, 2017 FCA 221 at para 18 (leave to appeal refused (August 9, 2018 Doc No. 37914, 2018 CarswellNat 4120 (SCC)).

ii. Representative standing

[20] The Applicants state in their written submissions that they seek representative standing under Rule 114 of the *Federal Courts Rules*, SOR 98/106. This request is based on a petition said to be signed by 307 eligible voters who the Applicants submit represent about 44% of the 693 DTFN members who voted in the last election for Chief in 2017.

[21] I note, however, that while the petition refers to the Decision, it simply calls for an election to be held as soon as possible. It makes no reference to an application for judicial review of the Decision and does not authorize the Applicants to act on behalf of the persons who signed the petition, whether in bringing and pursuing an application for judicial review or otherwise. It is also significant to note that there is no mention of a constitutional challenge of s 267 of the BIA in the petition. While an Aboriginal group can authorize an individual or organization to represent it for the purpose of asserting its section 35 rights, self-appointed individuals will not be permitted to assert collective Aboriginal rights on behalf of an Aboriginal community (*Enge v Canada (Indigenous and Northern Affairs)*, 2017 FC 932 at para 98; see also *Ross River Dena Council v. Canada (Attorney General)*, 2009 YKSC 38 at para. 26, [2009] Y.J. No. 55 citing *Queackar-Komoyue Nation v. British Columbia (Atty. Gen.)*, 2006 BCSC 1517 at para. 35, [2007] 1 C.N.L.R. 286).

[22] In my view, the petition does not meet the requirements of Rule 114 and the Applicants do not represent the DTFN in this litigation.

iii. Mootness

[23] The AG submits that the DTFN Council intends to hold an election in June 2022 in accordance with the Decision. Accordingly, the judicial review will be moot by the time it is heard by the Court as there will no longer be a live controversy between the parties. The AG references *Borowski v Canada*, [1989] 1SCR 342 at para 15,16, 29-42 [*Borowski*], *David Suzuki Foundation v Canada*, 2019 FC 411 at paras 90-98 [*Suzuki*] and *Canadian Union of Public Employees (Air Canada Component) v Air Canada*, 2021 FCA 67 at para 13 [*CUPE*] in support of their position.

[24] Chief and Council also refer to the *Borowski* test for mootness and the criteria to be considered by the Court when determining whether to exercise its discretion to hear a moot matter. They submit that the facts of this matter support that it is moot and that the Court should not exercise its discretion to hear the matter on the merits, distinguishing *Bertrand*. The Applicants did not address the mootness issue in their written submissions but, as will be discussed below, when appearing before me they submitted that the matter should not be dismissed for mootness and, in any event, that the Court should hear the matter on its merits.

Analysis

[25] In *Borowski* the Supreme Court of Canada addressed the doctrine of mootness and its application (at p 353):

> The doctrine of mootness is an aspect of a general policy or practice that a court may decline to decide a case which raises merely a hypothetical or abstract question. The general principle

> applies when the decision of the court will not have the effect of resolving some controversy which affects or may affect the rights of the parties. If the decision of the court will have no practical effect on such rights, the court will decline to decide the case. This essential ingredient must be present not only when the action or proceeding is commenced but at the time when the court is called upon to reach a decision. Accordingly if, subsequent to the initiation of the action or proceeding, events occur which affect the relationship of the parties so that no present live controversy exists which affects the rights of the parties, the case is said to be moot. The general policy or practice is enforced in moot cases unless the court exercises its discretion to depart from its policy or practice….

[26] The Supreme Court identified a two part test:

i. It must first be determined whether the required tangible and concrete dispute has disappeared and the issues have become academic.

ii. If so, it must then be determined if the court should exercise its discretion to hear the case.

(see also *Democracy Watch v Canada (Attorney General)*, 2018 FCA 195 [*Democracy Watch*] at para 10).

[27] Although a case is moot if it fails to meet the "live controversy" test, a court may still exercise its discretion to decide the moot matter on its merits if warranted by the circumstances. This discretion is guided by three factors:

1. the absence or presence of an adversarial context between the parties;

2. whether there is any practical utility in deciding the matter thereby justifying the use of scarce judicial resources; and

3. whether by hearing the matter the court would be intruding into the role of the legislative branch by making law in the abstract, a task reserved for Parliament.

(*Borowski* at pp 358-363; *CUPE* at para 9; *Democracy Watch* at para 13; *CUPE* at para 9; *Hakizimana v Canada (Public Safety and Emergency Preparedness)*, 2022 FCA 33 at para 20).

[28] In exercising its discretion to determine a moot matter, the Court should consider the extent to which each of the above three factors is present. This is not a mechanical process as the factors may not all support the same conclusion. Rather, the presence of one or two of the factors may be overborne by the absence of the third and visa versa (*Borowski* at p 363).

[29] In this matter, the Decision indicates that an election must be held no later than June 2022.

[30] The affidavit evidence of Chief James Ahnassay, affirmed on February 7, 2022, states that to hold an election in June 2022, in accordance with the Decision, and to allow enough time for nomination and polling notices, Chief and Council would call an election and appoint an electoral officer between April 4 and May 2, 2022. An earlier election could possibly be called if 80% of the DTFN population were double vaccinated.

[31] Prior to the hearing of this application, the Court noted the submissions of the Respondents and the AG indicating that the DTFN Council intended to appoint an electoral officer between April 4, 2022 and May 4, 2022, to hold an election in June 2022 and,

accordingly, that the matter is moot. The Court sought a joint update from the parties on the status of the intended election and, if an election had been scheduled, an indication from the Applicants if they intend to proceed with the application for judicial review.

[32] In response, counsel for Chief and Council provided a supplementary affidavit of Chief Ahnassay, affirmed on May 17, 2022, deposing that Chief and Council had called a general election and appointed an electoral officer to govern the election of Chief and Council. A general election for Chief will be held on June 8, 2022 and a general election for Councillors will be held on June 22, 2022. In that regard, Chief Ahnassay attached as an exhibit to his affidavit Band Council Resolution 2022-2023-006, passed at a meeting held on May 3, 2022, which sets the elections, appoints the electoral officer and attaches the election schedules.

[33] The Applicants' response to the Court's direction was to advise that they disagree that the matter is moot, other than the request for *mandamus* and *quo warranto*, and requested the Court exercise its discretion to decide the matters raised, referencing *Bertrand* and *McKenzie v Mikisew Cree First Nation*, 2020 FC 1184 at paras 52-53 [*McKenzie*].

[34] At the commencing of the hearing, I advised the parties that I would hear their submissions on mootness and would reserve my decision on that issue. I would also hear the submissions on the merits of the application. However, if I found that the matter was moot and decided I would not exercise my discretion to decide the matter on its merits, then a decision on the merits would not follow.

[35] I have found that the matter is moot.

[36] Elections for Chief and Council have now been called and I have no reason to believe that they will not have been held before these reasons are issued. Thus, the live controversy that gave rise to this application – the postponement of the election – has been rendered academic. This also means that the requested remedy of *mandamus* – compelling Chief and Council to call an election – no longer has application. Similarly, the requested order of *quo warranto* – seeking to remove Chief and Council from their elected offices effective October 31, 2021 – no longer serves a useful purpose. An order of *certiorari* quashing the Decision and remitting the matter back for redetermination also serves no purpose in light of the calling of the elections. In fact, this would only serve to delay that process.

[37] Further, and significantly, the Regulations were repealed on October 8, 2021. The fact that s 267 of the BIA is still in force – given the repeal of the Regulations and the calling of the elections – does not breathe any life into the Decision. It is moot. That is, even if s 267 of the BIA were found to be unconstitutional, this would have no impact on the Decision or the Applicants' rights in these circumstances.

[38] When appearing before me, the Applicants referred to *McKenzie* (at para 51) to support their submission that this matter is not moot as there is a remaining controversy. The Applicants submit that the remaining controversy is whether the Chief and Council had the authority to postpone the election. They submit that because Chief and Counsel have argued that they have customary authority to decide to postpone the election in the face of an emergency situation – the

pandemic – this could be viewed in the future as a foundation of such a custom. In my view, the mere fact that Chief and Council made such an argument in this matter does not establish a custom. I also have difficulty seeing how an argument made in response to an application for judicial review amounts to a precedent, as the Applicants submit. Further, and in any event, the issue of the authority grounding the Decision – whether by way of s 267 of the BIA and the Regulations or by custom – is moot as events have overtaken the Decision. That is, the desired effect of the Applicants' application for judicial review has been achieved as elections have been called (see: *Apotex Inc. v Canada (Health)*, 2016 FC 673 at paras 26, 32; *Doucet-Boudreau v Nova Scotia (Minister of Education)*, 2003 SCC 62 at para 17).

[39] The Applicants also submitted that although in response to the Court's direction they had indicated that the request for *mandamus* and *quo warranto* were rendered moot by the calling of the election, they now took the view that the remedy of *quo warranto* was still available to them. As I understood their submission, Chief and Council should be retroactively removed from office to provide "clarity" for the purposes of the next election – including to ensure that the next Council will have a full four-year term in office.

[40] I do not agree. As I have indicated above, the requested order of *quo warranto* no longer serves a useful purpose. Further, there is no suggestion by the Respondents that the term of office for the chief and council that will be elected would be anything other than the fixed four-year term, commencing immediate following the upcoming elections. Nor is it apparent to me how granting *quo warranto* would "clarify" this.

[41] I also note that the applicant in *Bertrand* argued that the relief of *quo warranto* remained relevant because the current council was illegally in office which could affect the validity of its decisions. Justice Grammond rejected that argument in the absence of any challenge to a specific decision made by current council and held that the remedies of *mandamus* and *quo warranto* would both be moot on the date of the new election.

[42] In this matter, the new election will have been held prior to the issuance of these reasons. The remedy of *quo warranto* is therefore moot. I also see no practical utility in effecting a retroactive removal of Chief and Council from office and courts "should not grant remedies when they serve no useful purpose" (*CUPE* at para 14, citing *Vavilov* at para 140; *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association,* 2011 SCC 61 at para 55).

[43] As I have found that the matter is moot, this leaves the question of whether the Court should exercise its discretion and hear the matter on it merits. I am declining to exercise my discretion to do so.

[44] As to the first factor, there remains an "adversarial context" in that all parties were represented at the hearing and the Applicants asserted that the matter was not moot and should be heard on it merits while the Respondents and the AG disagreed and, all parties argued the issues as they would have done in the absence of a mootness issue (*Borowski* at p 363; *CUPE* at para 10; *Democracy Watch* at paras 14-15; *Jama v. Canada (Attorney General)*, 2022 FC 37 at para 33).

[45] The concern for judicial economy is the second factor to be considered in determining whether to hear a moot case. This concern will be met if the special circumstances of the case justify the use of scarce judicial resources to resolve the matter. The concern may be partially answered in moot cases where the Court's decision will have some practical effect on the rights of the parties, even though it will not have the effect of determining the controversy which gave rise to the action. The expenditure of judicial resources may also be warranted where the moot matter is of a recurring nature but brief duration – that is – to ensure that an important question which might independently evade review is heard by the court. For example, the validity of an interlocutory injunction prohibiting strike action because in most cases the strike would be settled before the case reached the court. And, in cases which raise an issue of public importance where the economics of judicial involvement are weighed against the social costs of continued uncertainty in the law (*Borowski* at p. 361).

[46] In my view, there is no practical utility in deciding this matter on its merits. And, although the Applicants rely on *Bertrand* to urge a different outcome, the circumstances differ in the matter before me.

[47] In *Bertrand,* Justice Grammond decided to exercise his discretion and determine the matter before him on its merits even though he found that it was moot. He found that there were two main reasons for doing so: to clarify important issues with respect to the effect of the pandemic of First Nations' electoral processes, that is, the validity of the Regulations, as well as the framework for assessing a First Nation's assertion of a customary power to extend the term of its council.

[48] As to the validity of the Regulations, Justice Grammond stated that their validity had been questioned in academic commentary and that it was not desirable to leave the issue unsettled. Justice Grammond was of the view that these issues did not belong to the past as the pandemic was not over. And, while the Regulations were set to expire on April 8, 2022, their effects might continue for the following six months, or perhaps longer, and the Governor in Council might choose to renew them. Further, despite their importance for First Nations governance and the fact that the Regulations had been in force for almost one year, these issues had so far evaded review. He stated that terms of office may have been extended for periods shorter than the time necessary to perfect an application for judicial review and that he had been informed that applications to this Court challenging the validity of the Regulations were discontinued when an election was called. Further, if the Acho Dene Koe First Nation was correct in asserting a general power to postpone elections in exigent circumstances, that power would not be subject to a sunset clause.

[49] Time has passed since *Bertrand* was decided and circumstances have changed. Unlike the circumstance before Justice Grammond, the Regulations have now been repealed, on their own terms, on October 8, 2021. There is no evidence before me suggesting that they may be re-enacted. Further, the Regulations have been repealed for more than 7 months as of the date of the hearing of this matter. This means that any declaration that s 267 is unconstitutional (and, in the result, that the Regulations therefore remain *ultra vires*, per *Bertrand*) would have no practical effect on the rights of the Applicants because DTFN elections have now been called and because no new decisions can be taken under the repealed Regulations. This is not a matter of a recurring nature. Nor is there any evidence before me that the Regulations and s 267 were evasive of

review during the period from June 29, 2021, when Parliament passed the BIA, until the repeal of the Regulations on October 8, 2021 or in the months immediately following the repeal. Further, given the repeal of the Regulations there is no residual uncertainty surrounding their operation or the related operation of s 267 of the BIA.

[50] When appearing before me the Applicants referred to an Order issued by Case Management Judge Ring in *Wigwas v Gull Bay First Nation* (Court File No T-553-21, unreported). The applicants in that matter sought an order permitting them to discontinue their application for judicial review in light of the passage of s 267 of the BIA. At issue was the question of costs and, in particular, whether the applicants had taken steps to discontinue the application in a timely way. In my view, this Order does not support the Applicants' suggestion that the assessment of the constitutionality of s 267 is evasive of judicial review. The applicants in that case brought their application for judicial review prior to *Bertrand* being decided and reassessed their case in the context of *Bertrand* and the subsequent implementation of s 267 of the BIA. In other words, the applicants in that matter decided to discontinue their application in light of s 267 and its impact on the issues raised in that proceeding. I am not persuaded that this demonstrates that decisions made pursuant to the Regulations to extend a term of office or postpone an election, are immunized from judicial review.

[51] As to the third factor, as stated in *Borowski*, pronouncing judgments in the absence of a dispute affecting the rights of the parties may be viewed as intruding into the role of the legislative branch. In my view, any declaration on the constitutionality of s 267 of the *BIA* would be lawmaking in the abstract, as at this stage the Applicants' interest in the Decision and the

constitutionality of s 267 is purely "jurisprudential" rather than practical. Further, this jurisprudential interest is itself moot since the Regulations have been repealed *(CUPE* at para 7). As stated by the Federal Court of Appeal "gratuitously interpreting the former wording of the provision in issue, in a case with no practical consequences, just to create a legal precedent, would be a form of law-making for the sake of law making. That is not our proper task." (*CUPE* at para 13).

[52] When appearing before me and addressing mootness, the Applicants asserted that the Court should make an inference that Chief and Council's promise to call the election at a later date – without actually setting a date for the election – was part of a tactical litigation strategy intended to delay the litigation for the purposes of rendering this application moot and evading judicial review. That is, that they delayed the litigation to achieve that outcome, and the election was not called until after this matter was set down for a hearing.

[53] In my view, this assertion cannot succeed. While the Applicants now take issue with the length of time it took to bring this matter before the Court, the matter was case managed. If the Applicants had concerns with what they now say were intentional delays on the part of Chief and Council, then they should have been raised with the case management judge and, if they disagreed with orders issued by the case management judge, then the Applicants could have appealed them. In my view, it is not open to the Applicants to allege before me procedural matters that were or should have been dealt with before the case management judge. Nor do the Applicants point to any finding of the case management judge that supports their assertion of delay by Chief and Council as a tactical litigation strategy.

[54] It is also of note that the Decision Chief and Council extended their term of office until June 2022. And, by resolution dated May 3, 2022, they appointed an Electoral Officer and set out a schedule for the elections. The Elections were scheduled to be held within the timeframe originally identified in the Decision.

Conclusion

[55] In conclusion, and despite the very able advocacy of counsel for the Applicants, I am not persuaded that in these circumstances there remains a live controversy between the parties nor that there is any practical utility in deciding the matter on its merits or that it would be appropriate to do so. Accordingly, I find that the matter is moot and I decline to exercise my discretion to decide it on the merits. The application for judicial review is dismissed.

Costs

[56] Neither the Applicants nor Chief and Council made written submissions as to costs. The AG indicated in its submissions that it does not seek costs.

[57] When appearing before me the Applicants submitted that it would be unfair to award costs against them as it was not clear that the matter was moot and because the elections were not called until May 3, 2022. Further, that there was a public interest aspect to the application. They submitted that if any costs were to be awarded against the Applicants, then they should be nominal.

[58] Chief and Council submit that it was always known that the matter would be moot as the Decision indicated that the election would be called in June 2022. Chief and Council dispute the Applicants' submission that they caused delay or that there was a litigation strategy of delay.

[59] Neither the Applicants nor Chief and Council were prepared to further address costs when appearing before me. I suggested that they take a week to try to reach agreement; however, no joint submission has been received.

[60] Pursuant to Rule 400 (1) of the *Federal Courts Rules* (SOR/98-106), the Court has full discretionary power over the amount and allocation of costs and the determination of by whom they are to be paid. In exercising that discretion the Court may consider the factors set out in Rule 400(3), which include: the result of the proceeding; the importance and complexity of the issues; whether the public interest in having the proceeding litigated justifies a particular award of costs; any conduct of a party that tended to shorten or unnecessarily lengthen the duration of the proceeding; and, any other matter that the Court considers relevant. The Court may fix all or part of any costs by reference to Tariff B and may award a lump sum in lieu of, or in addition to, any assessed costs (Rule 400(4)).

[61] Here, the Applicants have not been successful in their application for judicial review. However, there is an imbalance in financial resources of the Applicants and Chief and Council and the issue was related to band governance. And, when the Applicants filed their application for judicial review, it was not moot. That said, when the Regulations were repealed it was apparent that that the elections would have to be held by the end of June 2022 as indicated in the

Decision and there was no ongoing uncertainty pertaining to the operation of s 267 of the BIA and the Regulations. While I appreciate that the Applicants view the “success” in *Bertrand* as having been defeated by the effecting of s 267 of the BIA, the reality in these changed circumstances was that there was a high probability that this matter could be found to be moot.

[62] As a result, I would order costs against the Applicants, in the all-inclusive amount of $1500.00 payable to Chief and Council.

JUDGMENT IN T-1714-21

THIS COURT'S JUDGMENT is that

1. The application for judicial review is dismissed; and
2. Chief and Council shall have their costs against the Applicants, in the all-inclusive amount of $1500.00.

"Cecily Y. Strickland"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1714-21
STYLE OF CAUSE:	SIDNEY CHAMBAUD, GORDON PASTION, GERRY PASTION, CHRISTOPHER YAKINNEAH, JOSEPH (BERNARD) BEAULIEU, RAYMOND HOOKA-NOOZ, THOMAS AHKIMNACHIE, RALLY PASTION, ROBERT TSONCHOKE ON THEIR OWN BEHALF AND ON BEHALF OF THE MEMBERS OF THE DENE THA' FIRST NATION v DENE THA' BAND COUNCIL, CHIEF JAMES AHNASSAY, COUNCILLOR CHARLIE CHAMBAUD, COUNCILLOR ANDREW BEAULIEU, COUNCILLOR GABBRIEL DIDZENA, COUNCILLOR SHANE PROVIDENCE, COUNCILLOR STEPHEN DIDZENA, COUNCILLOR ANDREA GODIN, COUNCILLOR JEFF CHONKOLAY, COUNCILLOR FABIAN CHONKOLAY and THE ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	BY VIDEOCONFERENCE USING ZOOM
DATE OF HEARING:	MAY 26, 2022
JUDGMENT AND REASONS:	STRICKLAND J.
DATED:	JUNE 29, 2022

APPEARANCES:

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