

IN THE FEDERAL COURT OF CANADA

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

**MEMORANDUM OF FACT AND LAW OF THE RESPONDENTS,
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**

OVERVIEW

1. Sidney Chambaud, Gordon Pastion, Gerry Pastion, Christopher Yakinneah, Joseph (Bernard) Beaulieu, Raymond Hooka-Nooz, Thomas Ahkimnachie, Rally Pastion and Robert Tsonchoke (the "Applicants") have challenged two decisions pursuant to this application for judicial review:
 - a. the validity of section 267 of the *Budget Implementation Act*¹ respecting the *First Nations Cancellation and Postponement Regulations (Prevention of Diseases)*² and the *Regulations Amending the First Nations Election Cancellation and Postponement Regulations (Prevention of Diseases)*;³ and

¹ [Budget Implementation Act 2021](#), c 23, s 267 [BIA].

² [First Nations Cancellation and Postponement Regulations \(Prevention of Diseases\)](#), SOR/2020-84.

³ [Regulations Amending the First Nations Election Cancellation and Postponement, Regulations \(Prevention of Diseases\)](#): SOR/2021-78, Canada Gazette, Part II, Volume 155, Number 9, published April 28, 2021.

- b. the validity of a decision on October 7, 2021, to postpone the election of Chief and Council for the Dene Tha' First Nation (the "Nation") as a result of the COVID-19 pandemic (the "Council Decision").⁴
2. The submissions of the Respondents, 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 and Councillor Fabian Chonkolay (collectively referred to as the "Dene Tha' Respondents") respond specifically to the allegations respecting the Council Decision.
 3. The Council Decision is a reasonable decision that falls within the range of possible outcomes. Chief and Council acted within their customary authority to make a decision for the Nation in the emergency circumstances presented by the COVID-19 pandemic. While not required, prior to making the Council Decision, Chief and Council consulted with various Elders and other members of the Nation who expressed support for the Council Decision. If the Court is not satisfied that a customary authority has been established in these circumstances, the Dene Tha' Respondents submit that the standard for establishing a customary authority, as set out in *Bertrand v Acho Dene Koe First Nation*,⁵ fails to consider the nature of the COVID-19 pandemic and must be adjusted to recognize the unique, emergency conditions the COVID-19 pandemic has presented.
 4. In the further alternative, Chief and Council's jurisdiction to make the Council Decision is confirmed pursuant to section 267 of the *BIA*⁶ and the *First Nations Cancellation and Postponement Regulations (Prevention of Diseases)*.⁷

⁴ See BCR 2021-2022-027 in Certified Materials of the Respondents, Applicants' Motion Record ("AMR"), Tab 2(a), pp 0021-0022.

⁵ [Bertrand v Acho Dene Koe First Nation, 2021 FC 287](#) [Bertrand].

⁶ [Supra](#), s 267.

⁷ [Supra](#), s 4.

5. While reference is made to the *First Nations Cancellation and Postponement Regulations (Prevention of Diseases)* in the Council Decision, the Dene Tha' Respondents will not make submissions in response to the allegations of invalidity made by the Applicants respecting section 267 of the *BIA* and the *First Nations Cancellation and Postponement Regulations (Prevention of Diseases)*. The Attorney General of Canada is party to these proceedings and is in the best position to present arguments respecting the validity of this legislation.

PART I - STATEMENT OF FACTS

A. Facts Outlined by the Applicants

6. The Dene Tha' Respondents disagree with the assertion by the Applicants that the Chief and Council have "effectively declined to advance the Dene Tha' members' collective rights to self-government".⁸ This is not a factual assertion, but argumentative. The Applicants have not provided any factual or legal support for this assertion.
7. The Dene Tha' Respondents agree with the general summary of the evidence presented by the Applicants at paragraphs 13 to 15 and 19 of the Applicants' Memorandum of Fact and Law.⁹
8. The Dene Tha' Respondents add the following additional facts and clarifications on the facts as presented by the Applicants.

B. Consultation Practices

9. The Nation's people historically exercised a nomadic style of life on Denendeh, being the mass of land where the Dene people originated, with extended clan families. The decision-making practices were based on an oral history deeply rooted in the health, security and survival of the clan families.¹⁰ During peaceful or non-emergency times, such decisions may have been made following informal or casual conversations with members and other Elders. However, it was ultimately skillful leaders that made decisions.¹¹

⁸ Applicants' Memorandum of Fact and Law, AMR, Tab 6(b), p 0705, para 10.

⁹ Applicants' Memorandum of Fact and Law, AMR, Tab 6(b), p 0705-0706.

¹⁰ Affidavit of Chief James Ahnassay, Dene Tha' Respondents' Motion Record ("DTR"), [Tab 1A, p0005-0006](#), para 2.

¹¹ Affidavit of Chief James Ahnassay, DTR, [Tab 1A, p 0006](#), para 3.

C. Decision Making During Emergencies

10. The Nation's Council has previously used community engagements (or community meetings) to provide updates on the Nation's affairs, especially annual financial audit reporting.¹² More contemporary consultation requirements became more common as First Nations members began to demand more from the chiefs and councils respecting how a First Nation's administration used its annual federal funding allocations through contribution agreements.¹³
11. In recent years, Chief and Council may consult with members at town hall meetings where members are invited to provide feedback. Consultation may also take the form of discussions with Elders in the Nation. Ultimately, however, all decisions are made by Chief and Council unless a referendum is required.¹⁴ Decisions of Chief and Council are not based on a consensus of all members.¹⁵ Chief and Council will work on building consensus amongst the Council to decide on matters beneficial for the Nation's development. When consensus is not reached on Council, the matter is resolved by a simple majority vote of Council.¹⁶
12. Traditionally, in times of emergency, skillful leaders made decisions for the survival of clan families in the absence of any consultation with members and other Elders.¹⁷ For example, clan leaders made decisions respecting the relocation of sick individuals when dealing with outbreaks of diseases such as Spanish flu, smallpox and chicken pox.¹⁸ Decisions to relocate during flooding in 1962 were also made by the Nations' family leaders without consultation.¹⁹
13. More recently, in the Spring of 2019, wildfires endangered the communities of Chateh, Meander and Bushe River. Without consultation, Chief and Council ordered the evacuation of Chateh due to the emergency circumstances.²⁰

¹² Affidavit of Chief James Ahnassay, DTR, [Tab 1A, p 0006](#), para 4.

¹³ Affidavit of Chief James Ahnassay, DTR, [Tab 1A, p 0006](#), para 4.

¹⁴ For example, liquor control bylaws, land designations or Treaty or land claims settlement offer acceptances are done by voting in a referendum (see Affidavit of Chief James Ahnassay, DTR, [Tab 1A, p 0006](#), para 7).

¹⁵ Affidavit of Chief James Ahnassay, DTR, [Tab 1A, p 0006](#), para 7.

¹⁶ Affidavit of Chief James Ahnassay, DTR, [Tab 1A, p 0007](#), para 8.

¹⁷ Affidavit of Chief James Ahnassay, DTR, [Tab 1A, p 0006](#), para 3.

¹⁸ Affidavit of Chief James Ahnassay, DTR, [Tab 1A, p 0007](#), para 10.

¹⁹ Affidavit of Chief James Ahnassay, DTR, [Tab 1A, p 0007](#), para 13.

²⁰ Affidavit of Chief James Ahnassay, DTR, [Tab 1A, p 0007](#), para 14.

14. Similarly, in the Summer of 2021, significant flooding endangered the community of Chateh. Without consultation, Chief and Council ordered the evacuation of residential areas of Chateh due to the emergency circumstances.²¹

D. Official Functions Cancelled in Event of Death in the Community

15. The election was originally to be held in October 2021. The Council Decision to postpone the election was made on October 7, 2021.²²
16. According to the Nation's customs, official functions are not allowed to proceed following deaths in the community, with all official functions being postponed until after a funeral has been held. In September and October 2021, there were 14 funerals held in the Nation.²³

E. The 1993 Election Regulation

17. The Applicants suggest that the Nation's "custom election law" was reduced to writing in 1993 as the *Dene Tha' First Nations Election Regulation 1993* (the "**Election Regulation**").²⁴ This suggests that the customs followed by the Nation prior to 1993 were incorporated into the Election Regulation. This is incorrect. The Election Regulation was formed out of a necessity to adapt to a colonial system that was brought to the Nation through a one-sided treaty system.²⁵
18. The Applicants further suggest that the Election Regulation confirms that there is no extension for the four-year term of office established by section 10(1) of the Election Regulation.²⁶ However, the Election Regulation is silent on the issue of an extension for the four-year term of office in emergency circumstances involving a global pandemic. The Election Regulation only provides as follows:

10(10) **NUMBER OF OFFICERS AND TERM** – Number on Council:
There shall be elected for the Dene Tha' First Nation, One (1) Chief and Eight (8) Councillors for a term of Four (4) years.

²¹ Affidavit of Chief James Ahnassay, DTR, [Tab 1A, p 0008](#), para 15.

²² BCR 2021-2022-027 in Certified Materials of the Respondents, AMR, Tab 2(a), p 0021-0022.

²³ Affidavit of Chief James Ahnassay, DTR, [Tab 1A, p 0008](#), para 16.

²⁴ Applicants' Memorandum of Fact and Law, AMR, Tab 6(b), p 0706, para 16.

²⁵ Affidavit of Chief James Ahnassay, DTR, [Tab 1A, p 0009](#), para 23.

²⁶ Applicants' Memorandum of Fact and Law, AMR, Tab 6(b), p 0706, para 17.

10(11) **FREQUENCY OF ELECTIONS** – General elections will take place, at least, every Four (4) years thereafter but may be also called at any time by a majority vote of Council.²⁷

19. With respect to the movement of the 2001 election from June to October,²⁸ a new revised draft Custom Code had been approved by a duly convened council, distributed to all households on the Dene Tha' Reserves and was not contested by 10 or more eligible electors. However, administration staff had posted the draft copy of the revised Custom Code rather than a final and complete copy after an election was called in 2001. This created a technical error and council of the time preferred to put the new Custom Code to a referendum vote. Due to the need to hold a referendum, the election was delayed to October 2001.²⁹
20. Further, the Applicants have characterized any attempts to amend the Election Regulation as attempts of Chief Ahnassay.³⁰ This is misleading. Chief Ahnassay does not act alone, but as part of Council in duly convened meetings.³¹

F. Consultation with Elders

21. In or about July and August 2021, Councillor Charlie Chambaud spoke with 12 members of the Dene Tha' First Nation, some of whom were Elders.³² All of these members and Elders advised Councillor Charlie Chambaud that they supported the election postponement from October 2021 to June 2022 because of concerns and risks surrounding the COVID-19 pandemic.³³ These individuals further advised Councillor Charlie Chambaud that they fully supported Chief and Council in their decision to postpone the election to protect the Nation's members and keep them safe during the pandemic.³⁴

²⁷ Election Regulation in Certified Materials of the Respondents, AMR, Tab 2(b), p 0038, s 10(10) and 10(11).

²⁸ Applicants' Memorandum of Fact and Law, AMR, Tab 6(b), p 0706, para 18.

²⁹ Affidavit of Chief James Ahnassay, DTR, [Tab 1A, p 0011-0012](#), para 37.

³⁰ Applicants' Memorandum of Fact and Law, AMR, Tab 6(b), p 0707, para 21.

³¹ Affidavit of Chief James Ahnassay, DTR, [Tab 1A, p 0011-0012](#), paras 33-36 and 38.

³² Affidavit of Charlie Chambaud, DTR, [Tab 1C, p 0031-0032](#), para 2.

³³ Affidavit of Charlie Chambaud, DTR, [Tab 1C, p 0032](#), para 3.

³⁴ Affidavit of Charlie Chambaud, DTR, [Tab 1C, p 0032](#), para 3.

22. In or about September 2021, Charlie Chisaakay, an Elder of the Dene Tha' First Nation, spoke to seven members and Elders of the Nation respecting a postponement of the election of Chief and Council from October 2021 to June 2022.³⁵ All of these members and Elders advised Charlie Chisaakay that they supported the election postponement from October 2021 to June 2022 because of concerns surrounding the COVID-19 pandemic.³⁶ These individuals advised Charlie Chisaakay that they appreciated Chief and Council were concerned about the safety of community members.³⁷

G. The Council Decision

23. On October 7, 2021, Chief and Council extended the end of their term of office from October 2021 to June 2022 (i.e. the "Council Decision"). This resolution was detailed in Band Council Resolution 2021-2022-027. The Council Decision provides in its entirety:

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 Northern (sic) Affairs Canada), has in order to address public health risks associated with voting, developed the First Nation Election Cancellation 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 Services Canada have indicated that they would honour and recognize DTFN's extension of the current term of office of up to one year including the extension of funding agreements and continuing to recognize current elected leadership until the next election is held.

³⁵ Affidavit of Charlie Chisaakay, DTR, [Tab 1B, p 0026-0027](#), para 2.

³⁶ Affidavit of Charlie Chisaakay, DTR, [Tab 1B, p 0027](#), para 3.

³⁷ Affidavit of Charlie Chisaakay, DTR, [Tab 1B, p 0027](#), para 3.

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 until at least 80% of the population is double vaccinated. Currently 41% have had their 2nd shot.³⁸
24. Contrary to the assertions of the Applicants,³⁹ minutes were taken at the October 7, 2021 Council meeting and included in the Certified Materials of the Respondents.⁴⁰
25. The Council Decision was distributed to members on October 12, 2021, with a letter from Chief and Council respecting the Council Decision:

Primary factors and considerations that influenced the decision to postpone the election were as follows:

- Alberta is currently enduring the “4th” wave of the COVID-19 pandemic that includes the highly infectious variant of concern, lineage B.1.617.2, also called the Delta variant. In each of our communities, we have had extreme cases of COVID-19 and our communities remains low in relation to the number of people who have been vaccinated. Currently, our Nation’s 3 communities have 41 percent of its members fully vaccinated...
- The health and safety of the residents of our communities, especially the unvaccinated and vulnerable individuals with immune compromised conditions. Immune compromised conditions are conditions such as heart, kidneys, liver, lung diseases, cancer, and other conditions as diabetes, arthritis, and other autoimmune diseases.

...

The Chief and Council’s main and top priority is to ensure the health & safety of our members during the current active pandemic. As you have read above, we have included a valuable and important incentive that should help our members to achieve the 80% vaccination rate. Once 80% is reached our communities will have the confidence in lower risk of infections or the severity of COVID-19 illness.⁴¹

³⁸ BCR 2021-2022-027 in Certified Materials of the Respondents, AMR, Tab 2(a), pp 0021-0022.

³⁹ Applicants’ Memorandum of Fact and Law, AMR, Tab 6(b), p 0711, para 38.

⁴⁰ Dene Tha’ First Nation Council Meeting Minutes in Certified Materials of the Respondents, AMR, Tab 2(II), p 0112-0114.

⁴¹ Election Postponement Announcement in Certified Materials of the Respondents, AMR, Tab 2(cc), p 0099.

26. The Council Decision was not a decision to change any part of the 1993 Regulations.⁴² Instead, it was in response to the emergency circumstances arising out of the COVID-19 pandemic to allow time for more members to become vaccinated, a reduction in the number of cases of COVID-19 in the community and warmer weather to assist in physical distancing and having less people indoors during election activities.⁴³
27. Councillor Charlie Chambaud did acknowledge that the Council Decision was an amendment to the four-year term of office. However, the Applicants have alluded to this “admission” being an admission to the amendment of the Election Regulation by way of the Council Decision.⁴⁴ On close review of the cross-examination transcript, Councillor Chambaud was not questioned about an amendment to the Election Code. Instead, he was questioned about an amendment to the “four-year term of office”:

Q (O’Kelly): And are you familiar with the 1993 regulations, custom code?

A (Chambaud): Yeah.

Q (O’Kelly): And that there – in section 10 of the custom code there is a four-year term of office. You’re familiar with that?

A (Chambaud): Yeah.

Q (O’Kelly): And so would you agree that that a Band Council Resolution we just looked at was an amendment to that four-year term of office?

A (Chambaud): Yeah.⁴⁵ [*emphasis added*]

28. There is no dispute that the term of the current Chief and Council was extended beyond four years. Such a statement does not equate to an admission on an amendment to the Election Regulation.

⁴² Affidavit of Chief James Ahnassay, DTR, [Tab 1A, p 0009](#), para 25; Transcript of cross-examination, Chief Ahnassay, AMR, Tab 5B, p 0657, lines 6 – 17.

⁴³ Affidavit of Chief James Ahnassay, DTR, [Tab 1A, p 0009](#), para 25.

⁴⁴ Applicants’ Memorandum of Fact and Law, AMR, Tab 6(b), p 0706, para 20.

⁴⁵ Transcript of cross-examination, Charlie Chambaud, AMR, Tab , 5A, p 0610 lines 23 – 27 and p 0611 lines 1 – 6.

29. In contrast, Chief Ahnassay was specifically asked about an amendment to the Election Regulation and disagreed with that characterization of the Council Decision:

Q (O’Kelly): Okay. And you recall that section 10 of the custom code refers to the four-year term of office. Would you agree with me that this decision amends that section by extending the four-year term of office?

A (Ahnassay): No it doesn’t.

Q (O’Kelly): And you would agree with me that you didn’t use the amendment procedure in the custom code to extend –

A (Ahnassay): No, we didn’t.

Q (O’Kelly): – your term in office?

A (Ahnassay): No we didn’t. It’s during emergency times.⁴⁶ [*emphasis added*]

H. Election to be Called

30. To hold an election in June 2022, Chief and Council will call an election and appoint an electoral officer between April 4, 2022 and May 2, 2022.⁴⁷

I. Demand Letter

31. The demand letter referenced by the Applicants was not received by Chief and Council.⁴⁸

J. Settlement Discussions Not Properly Before Court

32. The Applicants make reference to the contents of settlement discussions in their affidavits and Memorandum of Fact and Law. The contents of these discussions are irrelevant to the application for judicial review and not properly before the Court prior to a determination of the merit hearing.⁴⁹ As such, any reference to settlement discussions should be disregarded by the Court in considering the merits of this application for judicial review.

⁴⁶ Transcript of cross-examination, Chief James Ahnassay, AMR, Tab 5B, p 0657, lines 6-17.

⁴⁷ Affidavit of Chief James Ahnassay, DTR, [Tab 1A, p 0009](#), para 25.

⁴⁸ Affidavit of Chief James Ahnassay, DTR, [Tab 1A, p 0009](#), para 26.

⁴⁹ [Federal Court Rules, SOR/98-106](#), Rule 422 [*Federal Court Rules*]; [Alani v Canada \(Prime Minister\), 2017 FCA 120](#) at para 15; [Thibodeau v Halifax International Airport Authority, 2018 FC 223](#) at para 24.

PART II - POINTS IN ISSUE

33. The application for judicial review respecting the Council Decision raises the following issues for consideration:
- a. Is the application for judicial review moot and, if so, should the Court exercise its discretion to still consider the matter?
 - b. Should the Applicants be granted representative standing?
 - c. What is the applicable standard of review to be applied by the Court in reviewing Council's Decision?
 - d. Did Chief and Council have jurisdiction to make the Council Decision?
 - e. Did Chief and Council owe a duty of procedural fairness in making the Council Decision and, if owed, did Chief and Council satisfy that duty of procedural fairness?
 - f. If Chief and Council had jurisdiction to make the Council Decision, is the Council Decision reasonable?

PART III – SUBMISSIONS

A. Mootness

i. Test for Mootness

34. The leading authority in Canada on the issue of mootness is *Borowski v Canada (Attorney General)*, wherein the Supreme Court of Canada articulated a two-stage approach:

...First it is necessary to determine whether the required tangible and concrete dispute has disappeared and the issues have become academic. Second, if the response to the first question is affirmative, it is necessary to decide if the court should exercise its discretion to hear the case...In the interest of clarity, I consider that a case is moot if it fails to meet the 'live controversy' test. A court may nonetheless elect to address a moot issue if the circumstances warrant.⁵⁰

⁵⁰ [Borowski v Canada \(Attorney General\)](#), [1989] 1 SCR 342 at 353 [*Borowski*]; See also [Bertrand](#), *supra* at para 25.

35. The court may exercise its discretion in favour of hearing a moot matter where the interests served by a determination of the merits justify it.⁵¹ The criteria relevant to this determination are: (i) whether there remains an adversarial context between the parties; (ii) whether judicial economy is served by hearing the matter; and (iii) whether, in hearing the matter, the court would be intruding into the role of the legislative branch.⁵²
36. Where the matter in issue concerns the validity of particular legislation, the repeal of the subject legislation can operate to render the matter moot where the effect is to remove the legislative substratum of the matter. This may occur, for example, where the matter concerns the interpretation of a particular legislative provision which no longer exists, or is substantively different following a repeal.⁵³

ii. Issues are (or will be) Moot

37. The *First Nations Cancellation and Postponement Regulations (Prevention of Diseases)* was repealed according to its own terms on October 8, 2021.⁵⁴ As such, other than its relevance to the validity of the Council Decision, the issue of the validity of section 267 of the *BIA* is moot.
38. At the time of submission of this Memorandum of Fact and Law, no date has been set for hearing of this application for judicial review. Taking into account time required for scheduling, it is unlikely that this application will be heard prior to an election being called, if not held.
39. While an election has not been called as at the time of submission of this Memorandum of Fact and Law, Council's Decision requires an election to be held no later than June 2022. In accordance with those terms, an election will be called between April 4, 2022 and May 2, 2022.⁵⁵ An election may be called even sooner if at least 80% of the population is double vaccinated at an earlier date.⁵⁶

⁵¹ [Payne v Wilson \(2002\), 162 OAC 48](#) at para 18 (CA) [Payne].

⁵² [Borowski](#), *supra* at 358-363; See also [Bertrand](#), *supra* at para 27.

⁵³ See [Payne](#), *supra* at para 17; See also [Jesse v County of Vermilion, 2004 ABQB 868](#) at paras 50-54.

⁵⁴ [Supra](#), s 8.

⁵⁵ Affidavit of Chief James Ahnassay, DTR, [Tab 1A, p 0009](#), para 25.

⁵⁶ BCR 2021-2022-027 in Certified Materials of the Respondents, AMR, Tab 2(a), p 0022.

40. In this respect, a number of steps must take place in accordance with the Election Regulation before an election can be held:
- a. The Electoral Officer must be appointed not less than 21 days before nomination day;⁵⁷
 - b. The Electoral Officer must prepare an Electors' List of all eligible electors which is presented to Chief and Council for approval and signature;⁵⁸
 - c. The Electoral Officer must at least 10 clear days before the date of the election, draft and post a Notice of Nomination;⁵⁹
 - d. The Electoral Officer must at least 10 days prior to the date scheduled for the poll, post a notice of poll.⁶⁰
41. Additional evidence and an application to strike may be brought in this regard once this matter has been scheduled and the election called. However, this issue is raised on a preliminary basis given the timing of this application, the terms of the Council Decision and the repeal of the *First Nations Cancellation and Postponement Regulations (Prevention of Diseases)* prior to the application for judicial review having been filed.

iii. No Basis for Considering Moot Matter

42. In *Bertrand*, the matter before the Court was similarly considered moot. However, Justice Grammond ultimately exercised his discretion to consider the matter.⁶¹
43. This matter is distinguishable from *Bertrand*. The pandemic is at a much different stage than in April 2021, and the concerns raised in *Bertrand* respecting the ongoing nature of the *First Nations Cancellation and Postponement Regulations (Prevention of Diseases)* are no longer at issue. Nearly six months have passed since the repeal of the *First Nations Cancellation and Postponement Regulations (Prevention of Diseases)* and there is no evidence before the Court to suggest that there is any intention to pass such legislation again. Once an election is called for the Nation, there is no evidence to suggest ongoing effects of or litigation respecting the *First Nations Cancellation and Postponement Regulations (Prevention of Diseases)*.

⁵⁷ Election Regulation in Certified Materials of the Respondents, AMR, Tab 2(b), p 0026, s 1(1).

⁵⁸ Election Regulation in Certified Materials of the Respondents, AMR, Tab 2(b), p 0026, s 1(3).

⁵⁹ Election Regulation in Certified Materials of the Respondents, AMR, Tab 2(b), p 0026, s 1(6).

⁶⁰ Election Regulation in Certified Materials of the Respondents, AMR, Tab 2(b), p 0030, s 4(3).

⁶¹ [Bertrand](#), *supra* at paras 24 – 41.

44. Passage of a provision like section 267 of the *BIA* is not unique to the *First Nations Cancellation and Postponement Regulations (Prevention of Diseases)* and can be considered when there is a live issue between parties to be resolved.
45. The Council Decision was made in the context of a worldwide pandemic on a scale that has not been experienced in recent history. Chief and Council's authority to exercise such power is specific to the circumstances of the pandemic and the Nation's customs. Once an election has been called, this issue will be resolved, and no adversarial context will remain between the parties. Any findings by the Court would be specific to the circumstances involving the pandemic as at the time of Council's Decision. This is not a matter that has relevance beyond the parties. While written materials have been prepared at this stage, the mootness issue could be considered as a preliminary matter in the interests of judicial economy. The Court is not barred from determining a matter is moot at the hearing of this application and adjourning prior to considering the merits.⁶² Mootness "applies if at any stage the foundation for the action disappears".⁶³
46. Ultimately, this is not a circumstance where the Court should exercise its discretion to consider a matter that is moot and the matter should be dismissed outright on this basis. In the event the Court goes on to consider the matter despite the Respondents' position on mootness, the Dene Tha' Respondents have addressed the substance of the Applicants' challenge to the Council Decision.

B. Representative Standing

47. The Applicants have relied on a "petition signed by approximately 307 eligible voters within days of the [Council] Decision being rendered"⁶⁴ in support of their application for representative standing under Rule 114 of the *Federal Court Rules*.⁶⁵ The Dene Tha' Respondents reject the suggestion that the referenced petition establishes support for the Applicants' decision to bring this application for judicial review. Specifically, the Applicants have failed to establish that they are authorized to act on behalf of the represented persons as required by Rule 114(1)(b).⁶⁶

⁶² See for example, [Murugamoorthy v Canada \(Citizenship and Immigration\)](#), 2018 FC 650; [Canadian Union of Public Employees v Canada \(Transport\)](#), 2015 FC 142.

⁶³ [Borowski](#), *supra* at 363.

⁶⁴ Applicants' Memorandum of Fact and Law, AMR, Tab 6(b), p 0705, para 11.

⁶⁵ [Federal Court Rules](#), *supra*, Rule 114.

⁶⁶ [Ibid](#), Rule 114(1)(b).

48. Councillor Charlie Chambaud provided evidence that Albert Apannah and David Martel Sr., both of whom Charlie Chambaud had consulted with prior to the Council Decision, had signed the petition but not had it explained to them prior to signing.⁶⁷ In this respect, the purpose of the petition is not listed on every page that is signed. Instead, all that is presented on several pages is a list of signatures and dates.⁶⁸
49. Further, the petition referenced by the Applicants makes no reference to this application for judicial review and provides no authorization to act on behalf of the members of the Nation. Instead, it makes reference to a demand for an election “as soon as possible”.⁶⁹ Even if it could be accepted that each of the individuals that signed the petition understood what they were signing, a petition for an election “as soon as possible” is not equivalent to a petition supporting an application for judicial review before the Federal Court of Canada challenging the authority of Chief and Council to make the Council Decision. The Applicants have not provided sufficient evidence to suggest that they have authority to act as representatives of members of the Nation against the Chief and Council. Chief and Council are elected and duly authorized to represent the Nation. The Applicants are not representative of the Nation.
50. As such, it should not be accepted that this application is brought at the will of the members.

C. Standard of Review

51. The standard of reasonableness presumptively applies whenever a court reviews an administrative decision.⁷⁰ This presumption may be rebutted in two circumstances:
- a. where the legislature has prescribed the standard of review or has provided a statutory appeal mechanism thereby signaling the legislature’s intent that appellate standards should apply;⁷¹

⁶⁷ Transcript of cross-examination, Charlie Chambaud, AMR, Tab 5A, p 0607, lines 5 – 27, p 0608, lines 1 – 27, and p 0609, lines 1 – 4.

⁶⁸ See Petition Attached as Exhibit B to Affidavit of Sidney Chambaud, AMR, Tab 4(A)(b), pp 0459-0460, 0462-0465, 0467-0470 and 0472-0476.

⁶⁹ Petition Attached as Exhibit B to Affidavit of Sidney Chambaud, AMR, Tab 4(A)(b), p 0458; See also Petition Attached as Exhibit C to Affidavit of Sidney Chambaud, AMR, Tab 4(A)(c), p 0478.

⁷⁰ [Canada \(Minister of Citizenship and Immigration\) v Vavilov, 2019 SCC 65](#) at paras 16, 23, 25 [*Vavilov*].

⁷¹ *Ibid* at paras 17 and 33.

b. where the rule of law requires the application of the correctness standard, such as constitutional questions, general questions of law of central importance to the legal system as a whole and questions regarding the jurisdictional boundaries between two or more administrative bodies.⁷²

52. The issue of whether the Chief and Council have jurisdiction or authority to postpone the election does not fall into any of the circumstances identified by the Supreme Court as requiring the application of the correctness standard. The Federal Court has found that “the Supreme Court’s decision in *Vavilov* does not change the application of the reasonableness standard of review to a band council decision regarding its authority or jurisdiction to take challenged actions”.⁷³ As such, Council’s Decision must be reviewed for intelligibility, justification and transparency.⁷⁴

53. In the Notice of Application, the Applicants have alleged that the Council Decision was inconsistent with and/or violated the Applicants’ right to vote under section 3 of the *Charter of Rights and Freedoms*.⁷⁵ The Applicants’ Memorandum of Fact and Law simply describes Council’s Decision as “inconsistent” with the *Charter* values of democracy.⁷⁶ The Dene Tha’ Respondents submit that the Applicants have failed to establish any limit on rights under the *Charter* as a result of the Council Decision made by Chief and Council. To the extent that the Applicants do rely on section 3 of the *Charter*, it has been found not to apply to aboriginal self-government given the specific reference in the provision to “members of the House of Commons or of a legislative assembly”.⁷⁷ Despite these limitations on the Applicants’ argument, if the Court does consider any constitutional issues respecting the *Charter*, those issues would be best described as a case in which it

⁷² *Ibid* at paras 17, 53.

⁷³ [McKenzie v Mikisew Cree First Nation, 2020 FC 1184](#) at para 27 [*McKenzie*], citing [Tourangeau v Smith’s Landing First Nation, 2020 FC 184](#) at para 25.

⁷⁴ *Vavilov*, *supra* at para 15.

⁷⁵ [Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 \(UK\), 1982, c 11 \[Charter\]](#); Notice of Application, AMR, Tab 1, p 0006.

⁷⁶ Applicants’ Memorandum of Fact and Law, AMR, Tab 6(d), p 0728, para 113.

⁷⁷ *Charter*, *supra*, s 3; [Taypotat v Taypotat, 2013 FCA 192](#) at paras 27-29, overturned on other grounds [Kahkewistahaw First Nation v Taypotat, 2015 SCC 30](#); [Orr v Peerless Trout First Nation, 2015 FC 1053](#) at paras 64-72; [Orr v Peerless Trout First Nation, 2015 ABQB 5](#) at para 17; [Hardy et al v Westbank First Nation et al, 2003 BCSC 878](#) at para 9; [Haig v Canada, \[1993\] 2 SCR 995](#) at 1031; See also [Baier v Alberta, 2007 SCC 31](#) at para 39.

is “alleged that the effect of the administrative decision being reviewed is to unjustifiably limit rights under the *Canadian Charter of Rights and Freedoms*” as opposed to one “in which the issue on review is whether a provision of the decision maker’s enabling statute violates the *Charter*”.⁷⁸ As such, the standard of review of reasonableness, as set out in *Doré v Barreau du Quebec* would apply.⁷⁹

54. Issues of procedural fairness are reviewed on the correctness standard.⁸⁰ Applying the correctness standard of review, the reviewing court determines if the duty of procedural fairness owed to the applicant was breached.⁸¹ The duty of procedural fairness is flexible and variable and requires an appreciation of the context, the statute, and the affected rights.⁸²

D. Jurisdiction to make the Council Decision

55. As was the case in *Bertrand*, if Dene Tha’ law authorizes the extension and postponement of the Chief and Council election, it is unnecessary to consider the effect and validity of the *BIA*. The Dene Tha’ Respondents submit that the Council Decision was authorized by Dene Tha’ custom which provides Chief and Council authority to make decisions in the absence of consultation in the event of an emergency.

i. Custom Supports Council’s Authority to Act

56. *Bertrand* summarized the test developed for the recognition of custom:

The test developed by this Court for the recognition of custom is tied to the concept of consent of the governed. In *Bigstone v Big Eagle*, [1993] 1 CNLR 25 (FCTD) at 34, Justice Strayer stated that custom includes “practices for the choice of a council which are generally acceptable to members of the band, upon which there is a broad consensus”...One of its consequences must be underlined: custom is made by the community, not the council.⁸³ [*citations omitted*]

⁷⁸ [Vavilov](#), *supra* at para 57.

⁷⁹ [Doré v Barreau du Quebec](#), 2012 SCC 12 at paras 42-58; See also [Vavilov](#), *ibid* at para 57.

⁸⁰ [McKenzie](#), *supra* at paras 29 – 30; See also [Su v Canada \(Citizenship and Immigration\)](#), 2022 FC 366 at paras 11 – 13.

⁸¹ [McKenzie](#), *ibid* at para 30; See also [Elson Canada \(Attorney General\)](#), 2019 FCA 27 at para 31; See also [Connolly v Canada \(National Revenue\)](#), 2019 FCA 161 at para 57.

⁸² [Baker v Canada \(Minister of Citizenship and Immigration\)](#), 1999 SCC 699 at para 22 [*Baker*].

⁸³ [Bertrand](#), *supra* at para 37.

57. In *Bertrand*, this Court recognized that a custom may take many forms, being expressed through an election code or similar legislation or, potentially, finding its origin in practice.⁸⁴
58. Unlike in *Bertrand*, the Nation does have an election code. The Election Regulation provides as follows with respect to the term of office and frequency of elections:
- 10(10) **NUMBER OF OFFICERS AND TERM** – Number on Council:
There shall be elected for the Dene Tha’ First Nation, One (1) Chief and Eight (8) Councillors for a term of Four (4) years.
- 10(11) **FREQUENCY OF ELECTIONS** – General elections will take place, at least, every Four (4) years thereafter but may be also called at any time by a majority vote of Council.⁸⁵
59. The Election Regulation is silent on the circumstances facing Council at the time of the Council Decision – whether an election can be postponed and the term of Chief and Council extended in the event of an emergency. This is explicitly referenced in the Council Decision which states “the DTFN Election Code is silent on the extension of 4-year election terms and does not contemplate pandemics or catastrophes”.⁸⁶
60. This is not a circumstance where the election code has exhaustively covered a topic such that there is no residual or continuing custom.⁸⁷ The Election Regulation does not cover the field, as suggested by the Applicants.⁸⁸ Matters where Band legislation has been found to “cover the field” are distinguishable from the circumstances presently before the Court.
61. For example, in *McKenzie*, at issue was whether an indefinite suspension of a councillor was covered by the Mikisew Cree First Nation election regulations. While the election regulation in that instance was silent on suspensions, it did govern the removal of councillors from office. Since the suspension was not time limited, it effectively amounted to removal of the councillor and, therefore, the election regulation “covered the field”.⁸⁹ Similar findings were made in *Shirt v Saddle Lake Cree Nation*.⁹⁰

⁸⁴ *Ibid* at paras 38-39.

⁸⁵ Election Regulation in Certified Materials of the Respondents, AMR, Tab 2(b), p 0038, s 10(10) and 10(11).

⁸⁶ BCR 2021-2022-027 in Certified Materials of the Respondents, AMR, Tab 2(a), p 0021.

⁸⁷ [Da'naxda'xw First Nation v Peters, 2021 FC 360](#) at para 160 [*Peters*]; See also [Whalen v Fort McMurray No 468 First Nation, 2019 FC 732](#) at para 80 [*Whalen*]; See also [McKenzie](#), *supra* at para 81.

⁸⁸ Applicants' Memorandum of Argument and Law, AMR, Tab 6(d), p 0728, para 114.

⁸⁹ [McKenzie](#), *supra* at paras 65 – 69.

⁹⁰ [Shirt v Saddle Lake Cree Nation, 2022 FC 321](#) at para 73.

62. Dealing with similar facts in *Fort McKay First Nation v Orr*, the Federal Court of Appeal found that the election code at issue set out “very detailed, carefully constructed, and precisely worded provisions regulating when and how councillors may be removed or suspended.” The Court of Appeal went on to note that “[i]t would be surprising if such demanding regulation could be so easily circumvented by relying upon an undefined, general, inherent power”.⁹¹ A similar election code was considered in *Whalen* where the Court came to the same conclusion.⁹²
63. In the above case law, the ultimate outcome of the council decision was already covered by the applicable election code. That is, the council was effectively doing the same thing provided for in the election code, but utilizing different language to describe what was done.
64. The Election Regulation cannot be said to be “very detailed, carefully constructed, and precisely worded” respecting the timing of elections.
65. Further, in the described case law, the matters that were “covered” by the Band legislation could reasonably be contemplated at the time of adoption of the Band legislation. In contrast, the COVID-19 pandemic is not a circumstance that could have been considered and covered by the Election Regulation.
66. It is not reasonable to suggest that in order for Chief and Council to retain authority over postponement of an election in order to address a world-wide pandemic, such circumstances would have to be specifically included in the Election Regulation. While the Nation had faced emergencies before, this issue was clearly not contemplated in the Election Regulation. The circumstances faced by Council at the time of the Council Decision could not have been foreseen when drafting the Election Regulation. As such, it is not clear how the Election Regulation could be found to “cover the field” in the circumstances. Instead, the customary power and authority of Chief and Council to make decisions in the event of an emergency remains.

⁹¹ [Fort McKay First Nation v Orr, 2012 FCA 269](#) at para 18.

⁹² [Whalen](#), *supra*, paras 42 - 55.

67. Specifically, when dealing with outbreaks of diseases such as the Spanish flu, smallpox and chicken pox, clan leaders historically made decisions respecting the relocation of sick individuals.⁹³ Similarly, Chief and Council have made unilateral decisions respecting the relocation of communities in the event of flood or fire without consultation with members.⁹⁴ This authority to make decisions in the event of an emergency have been accepted by the community and followed without challenge. The authority remains with Chief and Council as a residual or continuing custom that is not addressed by the Election Regulation.

ii. Emergency Circumstances

68. In the alternative, in the event the Court determines that the Dene Tha' Respondents have not satisfied the burden of establishing a custom in these circumstances, the Dene Tha' Respondents submit that the test applied in *Bertrand* establishes an impossible bar to meet in the extraordinary circumstances presented by the COVID-19 pandemic. This Court is not strictly bound to the findings in *Bertrand*:

The doctrine which applies to the judges' treatment of decisions of their colleagues on the same court is judicial comity. The decision of one judge of the Federal Court does not bind the other judges of the Federal Court in the sense that failing to follow the decision of a colleague is an error which justifies appellate intervention...

This does not mean that judges are free to disregard the decisions of their colleagues. Judicial comity is a doctrine which seeks to promote uniformity and predictability in the law. Litigants and appellate courts expect that judges will consider the decisions of their colleagues carefully and, if they choose to differ, will explain why. One way of doing this is to distinguish the facts of the two cases or to identify relevant legal principles which were not addressed.⁹⁵

69. The concept of requiring community consensus or a consistent practice⁹⁶ to support a finding of a custom is antithetical to a decision to postpone the election due to a global pandemic. The unique, once in a lifetime nature of the pandemic necessarily requires that no situation such as that faced by Council will have been considered before, and certainly not in the 28 years between adoption of the Election Regulation in 1993 and the Council

⁹³ Affidavit of Chief James Ahnassay, DTR, [Tab 1A, p 0007](#), para 10.

⁹⁴ Affidavit of Chief James Ahnassay, DTR, [Tab 1A, p 0007-0008](#), paras 13-15.

⁹⁵ [Friedman v Canada \(National Revenue\), 2021 FCA 101](#) at paras 29-30.

⁹⁶ [Bertrand](#), *supra* at para 52.

Decision in 2021. There are various factors that influenced Chief and Council's decision in these circumstances including, but not limited to, the progress of a wave of infections throughout Alberta, the vaccination status of members and the recommendations preferring outdoor gatherings over indoor ones (which factor is inherently also impacted by weather).

70. If the Court does not accept the emergency authority exercised by Chief and Council in natural disasters such as fire and flood, then the standard established for customs in the emergency circumstances of the pandemic will never be satisfied. Besides such natural disasters, no circumstances have come close to the circumstances faced in the pandemic. Such an approach would leave the Chief and Council with no ability to address the changing circumstances in order to protect members.

iii. Jurisdiction Based on Budget Implementation Act

71. In the further alternative, section 267 of the *BIA*, together with the *First Nations Election Cancellation and Postponement Regulations (Prevention of Diseases)* and the *Regulations Amending the First Nations Election Cancellation and Postponement Regulations (Prevention of Diseases)*, offers a complete answer to the Chief and Council's jurisdiction to make the Council Decision. Section 267 provides as follows:

DIVISION 30
First Nations Elections
Regulations deemed valid

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.

SECTION 30
Élections au sein de premières nations
Règlements réputés valides
267 Le *Règlement concernant l'annulation ou le report d'élections au sein de premières nations (prévention de maladies)*, pris le 7 avril 2020 et portant le numéro d'enregistrement DORS/2020-84, et le *Règlement modifiant le Règlement concernant l'annulation ou le report d'élections au sein de premières nations (prévention de maladies)*, pris le 8 avril 2021 et portant le numéro d'enregistrement DORS/2021-78, sont réputés avoir été valablement pris, et les actes accomplis sous leur régime depuis le 8 avril 2020, ainsi que les conséquences découlant de ces règlements depuis cette date, sont réputés s'appliquer comme s'ils avaient été ainsi pris.⁹⁷

⁹⁷ [Supra](#), s 267.

72. Section 4(1) of the *First Nations Election Cancellation and Postponement Regulations (Prevention of Diseases)*, as amended, provides that 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.⁹⁸ There is no dispute that the Nation's Chief and Council are chosen according to custom.
73. As outlined above, the Dene Tha' Respondents are not in a position to respond to the allegations respecting the validity of the Federal legislation. However, if the Court dismisses the application for judicial review in respect of the Federal legislation, then, in turn, the Council Decision was made within Council's jurisdiction pursuant to that legislation.
74. Council's consideration of whether the extension of the term of office was necessary to prevent, mitigate or control the spread of disease on its reserve is discussed further below respecting the reasonableness of the decision.

E. No Breach of Natural Justice

75. The Applicants suggest that notice was required to be given to all members prior to the Council Decision.⁹⁹ The Applicants have not offered any analysis as to the level of procedural fairness required in these circumstances, or the basis for such grounds.
76. The content of the duty of fairness is determined with regard to the particular facts in each case, based on a number of factors, as outlined by the Supreme Court of Canada in *Baker*:
1. The nature of the decision being made and the process followed in making it;
 2. The nature of the statutory scheme and terms of the statute pursuant to which the body operates;
 3. The importance of the decision to the individual or individuals affected;

⁹⁸ *Supra*, s 4.

⁹⁹ Applicants' Memorandum of Fact and Law, AMR, Tab 6(d), p 0728, para 114.

4. The legitimate expectations of the person challenging the decision; and
 5. The choices of procedure made by the agency itself.¹⁰⁰
77. None of the above noted factors are more important than another. The closer an administrative process is to judicial decision making, the more likely procedural protections resembling a trial will be required. Typically, where there is no appeal procedure or the decision is final in nature, greater procedural protections will be required.¹⁰¹ Further, the more important a decision is to an individual, or the greater the impact on an individual's life, the higher the duty of fairness owed.¹⁰²
78. The Applicants must provide evidence to satisfy the high standard to establish legitimate expectations:
- If a public authority has made representations about the procedure it will follow in making a particular decision, or if it has consistently adhered to certain procedural practices in the past in making such a decision, the scope of the duty of procedural fairness owed to the affected person will be broader than it otherwise would have been. Likewise, if representations with respect to a substantive result have been made to an individual, the duty owed to him by the public authority in terms of the procedures it must follow before making a contrary decision will be more onerous.¹⁰³
79. A lower level of procedural fairness is suggested where the statute is silent on the procedure to be followed, and it is left to the decision maker to choose the procedure.¹⁰⁴
80. If applicable, the *First Nations Election Cancellation and Postponement Regulations (Prevention of Diseases)* is silent with respect to the procedure to be followed in postponing a custom election. Further, there are no notice or procedural requirements, besides disposition of election documents, in provisions of the *Regulation* respecting postponement of elections under the *Indian Act* or under the *First Nations Elections Act*.¹⁰⁵ The procedure to be followed is ultimately left to Chief and Council.

¹⁰⁰ [Baker](#), *supra* at paras 23-27.

¹⁰¹ [Ibid](#) at para 24.

¹⁰² [Ibid](#) at para 25.

¹⁰³ [Agraira v Canada \(Public Safety and Emergency Preparedness\)](#), 2013 SCC 36 at para 94.

¹⁰⁴ [Baker](#), *supra* at para 27.

¹⁰⁵ [First Nations Election Cancellation and Postponement Regulations \(Prevention of Diseases\)](#), *supra*, ss 2 – 3.

81. If the *First Nations Election Cancellation and Postponement Regulations (Prevention of Diseases)* is not applicable, according to custom, Chief and Council ultimately make all decisions. In some circumstances, consultation by Chief and Council may take the form of town hall meetings where members are invited to provide feedback. Consultation may also take the form of discussions with Elders who help to guide Chief and Council.¹⁰⁶ In these circumstances, while consultation was not required in the emergency circumstances, consultation with Elders and members did take place prior to the Council Decision, as evidenced in the Affidavits of Charlie Chisaakay and Councillor Charlie Chambaud.¹⁰⁷ More widespread consultation with members of the Nation was not required and, in the circumstances, not possible as a result of the Nation's customs. As noted above, official functions are not allowed to proceed following deaths in the community, with all official functions being postponed until after a funeral has been held. In September and October 2021, there were 14 funerals held by the Nation.¹⁰⁸ Six of these were between September 25, 2021 and October 8, 2021. To call on members to gather while losses were being dealt with by families would not have been appropriate according to the Nation's customs.¹⁰⁹
82. The Council Decision to extend the term of Chief and Council is important. However, in making the Council Decision, Chief and Council were not weighing the rights of one party over the other; they were making an administrative decision regarding what action was in the best interests of the Nation and its members as a whole. No legitimate expectations have been established by the Applicants in respect of the Council Decision.
83. Considering all of these factors, a low level of procedural fairness was owed in the circumstances. To the extent that any duty of procedural fairness was owed, that duty was satisfied by way of the consultation with Elders and members that was completed by Councillor Charlie Chambaud and Elder Charlie Chisaakay.¹¹⁰ Additional notice or consultation was not required.

¹⁰⁶ Affidavit of Chief James Ahnassay, DTR, [Tab 1A, p 0006](#), paras 5-7.

¹⁰⁷ Affidavit of Charlie Chisaakay, DTR, [Tab 1B, p 0026-0027](#); Affidavit of Charlie Chambaud, DTR, [Tab 1C, p 0031-0032](#).

¹⁰⁸ Affidavit of Chief James Ahnassay, DTR, [Tab 1A, p 0008](#), para 16.

¹⁰⁹ Affidavit of Chief James Ahnassay, DTR, [Tab 1A, p 0008](#), para 17,

¹¹⁰ See Affidavit of Charlie Chambaud, DTR, [Tab 1C, p 0031-0032](#), paras 2 – 3; See also Affidavit of Charlie Chisaakay, DTR, [Tab 1B, p 0026-0027](#), paras 2 – 3.

F. Council Decision was Reasonable

84. Having regard for the circumstances and the full contents of the Certified Materials of the Respondent, the Council Decision was reasonable. While the Applicants have not addressed standard of review in their submissions, the submissions respecting the Council Decision are framed from a “correctness” standard of review – suggesting there was only one way to proceed in October 2021. However, when applying a reasonableness approach to review, as required, it is clear that Council’s Decision falls “within a range of possible, acceptable outcomes which are defensible in respect of the facts and law”.¹¹¹ If the *First Nations Election Cancellation and Postponement Regulations (Prevention of Diseases)* is found to apply, Council’s conclusion that the postponement to June 2022 was necessary to prevent, mitigate or control the spread of disease, was within the range of possible outcomes.
85. The COVID-19 pandemic has had a drastic impact on operations of the Nation. At the time of the Council Decision:
- a. Essential service workers, support workers and non-remote infrastructure workers were required to apply for permission to work in Dene Tha’ First Nation Communities;¹¹²
 - b. Daily log sheets were in use to confirm entry into the community;¹¹³
 - c. Daily screening questionnaires were used for Dene Tha’ staff,¹¹⁴ and
 - d. Chief and Council had declared a State of Local Emergency.¹¹⁵

¹¹¹ [Dunsmuir](#), *supra* at para 47; See also, [Vavilov](#), *supra* at para 86, citing [Dunsmuir](#).

¹¹² Community Clearance Application Electronic Template in Certified Materials of the Respondents, AMR, Tab 2(q), pp 0068- 0069; Application for Permission to Work in the Community of Chateh Template in Certified Materials of the Respondents, AMR, Tab 2(ttt), p 0178-0179; DTFN Community Clearance Approval Letter Template in Certified Materials of the Respondents, AMR, Tab 2(g), pp 0048; Community Clearance Approval Letter Template in Certified Materials of the Respondents, AMR, Tab 2(qqq), p 0172.

¹¹³ Checkpoint Entry-Exit Daily Log Sheet Template in Certified Materials of the Respondents, AMR, Tab 2(uuu), p 0180.

¹¹⁴ Dene Tha’ DAILY Staff Access Screening Questionnaire – Fitness for Work, Applicants’ Record in Certified Materials of the Respondents, AMR, Tab 2(sss), p 0177.

¹¹⁵ Band Council Resolution 2019-2020-0037 regarding State of Local Emergency in Certified Materials of the Respondents, AMR, Tab 2(vvv), p 0181.

86. Contrary to the submissions of the Applicant,¹¹⁶ council meeting minutes were produced as part of the Certified Materials of the Respondents.¹¹⁷ On review of the meeting minutes, it is clear that the primary concern was about member safety and low vaccination rates.¹¹⁸ Online voting was considered, however, concerns were raised with confirming eligibility to vote through an online forum.¹¹⁹ While postponing the election was not the only option available to Council, nothing requires Council to take the “least invasive” measure. Instead, the analysis is whether the Council Decision falls “within a range of possible, acceptable outcomes.”
87. At the time of the Council Decision, Alberta was enduring the “4th wave” of the COVID-19 pandemic involving the Delta variant. Only 41% of members were fully vaccinated and the Nations’ communities had had extreme cases of COVID-19.¹²⁰ The ISC – Alberta Region COVID-19 Update for Chiefs dated August 18, 2021, explained that “[v]accines [were] the best path forward towards protecting...the health of...communities” and strongly recommended that “First Nations aim to have at least 80% of eligible persons (70% minimum) fully immunized (first and second doses) against COVID-19”.¹²¹
88. With respect to the postponement to June 2022, it has been recognized throughout the COVID-19 pandemic that outdoor activities are generally safer than indoor activities. Holding the election in the summer when there is better weather allows for the use of tents and having members outdoors rather than indoors for election matters.¹²² Further, at the time of the Council Decision in October 2021, there had already been two summers with COVID-19. In both the summer of 2020 and 2021, cases of COVID-19 were lower than in the winter and spring, prompting the lessening or removal of restrictions and an “open for summer” approach across the Province.¹²³

¹¹⁶ Applicants’ Memorandum of Fact and Law, AMR, Tab 6(d), p 0711, para 38.

¹¹⁷ See Dene Tha’ First Nation Council Meeting Minutes in Certified Materials of the Respondents, AMR, Tab 2(II), p 0112- 0114.

¹¹⁸ Dene Tha’ First Nation Council Meeting Minutes in Certified Materials of the Respondents, AMR, Tab 2(II), p 0112-0113.

¹¹⁹ Dene Tha’ First Nation Council Meeting Minutes in Certified Materials of the Respondents, AMR, Tab 2(II), p 0113.

¹²⁰ Letter from Chief and Council to Members re: Council Decision in Certified Materials of the Respondents, AMR, Tab 2(z), p 0089-0090.

¹²¹ Indigenous Services Canada – Alberta Region Update for Chiefs in Certified Materials of the Respondents, AMR, Tab 2(fff), p 0144.

¹²² Questioning transcript of Chief James Ahnassay, AMR, Tab 5B, p 0662-0663.

¹²³ See Open for Summer Lottery in Certified Materials of the Respondents, AMR, Tab 2(nnn), p 0163; Dene Tha’ First Nation & Emergency Management Team Re-opening Plans – July 1, 2020 in Certified Materials of the Respondents, AMR, Tab 2(aaaa), p 0189.

89. In addition, postponing the election until June 2022 would provide opportunity for more members to be vaccinated.¹²⁴ From January 1, 2021 to December 31, 2021, there were 54 deaths in the Nation. Twelve of these deaths were related to COVID-19, nine of which were not vaccinated at all and three of which had only their first dose of a vaccine.¹²⁵
90. The Council Decision was also made in consultation with Indigenous Services Canada and other band councils faced with similar circumstances. On September 9, 2021, Jamie Brown, Regional Director General for the Alberta Region of Indigenous Services Canada, contacted Chief Ahnassay thanking him for collaboration and leadership in keeping community members safe, and providing the *First Nations Election Cancellation and Postponement Regulations (Prevention of Diseases)* as a guide for Chief and Council's decision.¹²⁶ There were also five other postponements within Treaty 8 of which Chief and Council were aware.¹²⁷
91. The Applicants make reference to a "Vax Fest", an event designed to encourage vaccination, that they allege would have been larger than required to hold a fair election with at least one advance poll.¹²⁸ The Applicants have not provided any evidence in support of this allegation with respect to the size of the event, nor its similarity to an election. In doing so, the Applicants have compared a voluntary vaccination event geared towards specific members of the community to an election that, while not strictly mandatory, is geared towards involving the entire community. The decision of Chief and Council to postpone the election so as to ensure the safety of the entire community and minimize risk of a COVID-19 breakout in the community as a result of nomination and election activities is not comparable to a voluntary vaccination event.
92. As Council's Decision was made specifically with respect to the October 2021 election and did not amend any future terms of council, there was no amendment to the Election Regulation.¹²⁹ As such, compliance with the amendment provisions in the Election Regulation was not required.

¹²⁴ Affidavit of Chief James Ahnassay, DTR, [Tab 1A, p 0009](#), para 25.

¹²⁵ Affidavit of Chief James Ahnassay, DTR, [Tab 1A, p 0008](#), para 18.

¹²⁶ Correspondence from Jamie Brown, Regional Director in Certified Materials of the Respondents, AMR, Tab 2(zz), p 0134-0135.

¹²⁷ Email from Chief James Ahnassay to Chief and Council in Certified Materials of the Respondents, AMR, Tab 2(y), p 0129.

¹²⁸ Applicants' Memorandum of Fact and Law, AMR, Tab 6(d), p 0728, para 113.

¹²⁹ See Affidavit of Chief James Ahnassay, DTR Record, [Tab 1A, p 0009](#), para 25; Questioning transcript of Chief Ahnassay, AMR, Tab 5B, p 0657, lines 6 – 17.

93. It is clear that Council's Decision falls "within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" and should be upheld on review.¹³⁰

PART IV - ORDER SOUGHT

94. The Dene Tha' Respondents ask that this application for judicial review be dismissed, with costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

DATED at Edmonton, Alberta, this 4th day of April, 2022.

BROWNLEE LLP
PER:



MICHAEL S. SOLOWAN and REBECCA L. KOS

Counsel for 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 and Councillor Fabian Chonkolay

¹³⁰ [Dunsmuir](#), *supra* at para 47; See also, [Vavilov](#), *supra* at para 86, citing [Dunsmuir](#).

PART V - LIST OF AUTHORITIES

Appendix A: Legislation

1. [Budget Implementation Act, 2021, c 23](#)
2. [First Nations Cancellation and Postponement Regulations \(Prevention of Diseases\), SOR/2020-84](#)
3. [Regulations Amending the First Nations Election Cancellation and Postponement Regulations \(Prevention of Diseases\): SOR/2021-78, Canada Gazette, Part II, Volume 155, Number 9, published April 28, 2021](#)
4. [Federal Court Rules, SOR/98-106, Rule 114 and 422](#)
5. [Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 \(UK\), 1982, c 11, s 3](#)

Appendix B: Authorities

6. [Bertrand v Acho Dene Koe First Nation, 2021 FC 287](#)
7. [Alani v Canada \(Prime Minister\), 2017 FCA 120](#)
8. [Thibodeau v Halifax International Airport Authority, 2018 FC 223](#)
9. [Borowski v Canada \(Attorney General\), \[1989\] 1 SCR 342](#)
10. [Payne v Wilson \(2002\), 162 OAC 48 \(CA\)](#)
11. [Jesse v County of Vermilion, 2004 ABQB 868](#)
12. [Muruqamoorthy v Canada \(Citizenship and Immigration\), 2018 FC 650](#)
13. [Canadian Union of Public Employees v Canada \(Transport\), 2015 FC 142](#)
14. [Canada \(Minister of Citizenship and Immigration\) v Vavilov, 2019 SCC 65](#)
15. [Dunsmuir v New Brunswick, 2008 SCC 9](#)
16. [McKenzie v Mikisew Cree First Nation, 2020 FC 1184](#)
17. [Tourangeau v Smith's Landing First Nation, 2020 FC 184](#)
18. [Taypotat v Taypotat, 2013 FCA 192](#), overturned on other grounds [Kahkewistahaw First Nation v Taypotat, 2015 SCC 30](#)
19. [Orr v Peerless Trout First Nation, 2015 FC 1053](#)

20. [Orr v Peerless Trout First Nation, 2015 ABQB 5](#)
21. [Hardy et al v Westbank First Nation et al, 2003 BCSC 878](#)
22. [Haig v Canada, \[1993\] 2 SCR 995](#)
23. [Baier v Alberta, 2007 SCC 31](#)
24. [Doré v Barreau du Quebec, 2012 SCC 12](#)
25. [Su v Canada \(Citizenship and Immigration\), 2022 FC 366](#)
26. [Elsion Canada \(Attorney General\), 2019 FCA 27](#)
27. [Connolly v Canada \(National Revenue\), 2019 FCA 161](#)
28. [Baker v Canada \(Minister of Citizenship and Immigration\), 1999 SCC 699](#)
29. [Da'naxda'xw First Nation v Peters, 2021 FC 360](#)
30. [Whalen v Fort McMurray No 468 First Nation, 2019 FC 732](#)
31. [Shirt v Saddle Lake Cree Nation, 2022 FC 321](#)
32. [Fort McKay First Nation v Orr, 2012 FCA 269](#)
33. [Friedman v Canada \(National Revenue\), 2021 FCA 101](#)
34. [Agraira v Canada \(Public Safety and Emergency Preparedness\), 2013 SCC 36](#)