COURT NO. T-1714-21

FEDERAL COURT

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

RECORD OF THE RESPONDENT
THE ATTORNEY GENERAL OF CANADA

ATTORNEY GENERAL OF CANADA
Department of Justice Canada
Prairie Region, Calgary Office
601, 606 – 4th St, S.W.
Calgary, Alberta
T2P 1T1

Per: Glen Jermyn
Telephone: 403-299-3634
Facsimile: 403-299-3507
Email: Glen.Jermyn@justice.gc.ca

ATTORNEY GENERAL OF CANADA
Department of Justice Canada
Prairie Region, Edmonton Office
300, 10423 – 101 Street NW
Edmonton, AB
T5H 0E7

Per: Keelan Sinnott
Telephone: 780-495-5895
Facsimile: 780-495-2964
Email: Keelan.Sinnott@justice.gc.ca

TO: Federal Court Registry
Scotia Place
10060 Jasper Avenue
Tower 1, Suite 530
Edmonton, AB T5J 3R8

AND TO: **Orlagh J. O'Kelly**

Roberts O'Kelly Law
314, 103314, 104 Street NW
Edmonton, AB T5J 1A1
Tel: (780) 818-6748 / (780) 760-6752
Fax: (780) 669-7672
E-mail: orlagh@okellylaw.ca

Solicitors for the Applicant

AND TO: **Michael S. Solowan**

Brownlee LLP
Barristers and Solicitors
10155 102 Street NW
Edmonton, AB T5J 4G8
Tel: (780) 497-4800
Fax: (780) 424-3254
Email: msolowan@brownleelaw.com

Solicitors for the Respondents

TABLE OF CONTENTS

COURT NO. T-1714-21

FEDERAL COURT

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 RESPONDENT THE ATTORNEY GENERAL OF CANADA

ATTORNEY GENERAL OF CANADA
Department of Justice Canada
Prairie Region, Calgary Office
601, 606 – 4th St, S.W.
Calgary, Alberta
T2P 1T1

Per: Glen Jermyn
Telephone: 403-299-3634
Facsimile: 403-299-3507
Email: Glen.Jermyn@justice.gc.ca

ATTORNEY GENERAL OF CANADA
Department of Justice Canada
Prairie Region, Edmonton Office
300, 10423 – 101 Street NW
Edmonton, AB
T5H 0E7

Per: Keelan Sinnott
Telephone: 780-495-5895
Facsimile: 780-495-2964
Email: Keelan.Sinnott@justice.gc.ca

TABLE OF CONTENTS

OVERVIEW

1. The Dene Tha' First Nation is a custom election band that manages its own election processes without Canada's involvement. The safety of an election on a particular First Nation at any given point in time depends on a number of unique factors, including geography, vaccination rates, access to health care, the severity of the COVID pandemic at the material time, access to technology, and the First Nation's own election practices, such as mail-in or online voting. These unique factors are best assessed on a case-by-case basis by a First Nation's chief and council.

2. The *First Nations Elections Cancellation and Postponement Regulations (Prevention of Diseases)* ("*Regulations*") empowered First Nations to postpone elections only if necessary for public health, depending on their individual determination of risk. The Court in *Bertrand* found that section 4 of the *Regulations* was *ultra vires* the enabling provision of the *Indian Act*. Canada implemented section 267 of the *Budget Implementation Act* to remedy the *vires* issue identified in *Bertrand*. Section 267 provides a direct grant of clear constitutional authority from Parliament to the *Regulations*.

3. The Applicants' challenge to section 267 of the *Budget Implementation Act* should be dismissed. Section 267 does not immunize decisions from judicial review. Further, given the limited evidence available in summary proceedings and this judicial review in particular, this is not an appropriate proceeding to determine the nature, scope, and content of a specifically cognizable self-government right under section 35 of the *Constitution Act, 1982* and whether any such right was infringed.

4. To the extent that the Applicants argue a breach of section 3 of the *Charter*, it is well-established that section 3 does not apply to Band council elections. Finally, this judicial review will be moot as a Band council election will most likely be underway by the time that this judicial review proceeds to a hearing, and the *Regulations* have since been repealed.

PART I – STATEMENT OF FACTS

5. The *First Nations Elections Cancellation and Postponement Regulations (Prevention of Diseases)* ("*Regulations*") came into force on April 8, 2020. The federal government implemented the *Regulations* to allow First Nations to postpone elections and to extend the term of office of their councils to avoid the risk of virus transmission in response to the threat posed by the COVID-19 pandemic.[1]

6. Sections 2 and 3 of the *Regulations* allow First Nations whose elections are governed by the *Indian Act* and the *First Nations Election Act*, respectively, to cancel or postpone elections and to extend the term of their council.[2] Section 4 of the *Regulations* deals with First Nations whose elections are governed by their own custom, more commonly referred to as custom bands or custom band elections. Section 4 reads:

> 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.[3]

7. In *Bertrand v Acho Dene Koe First Nation* ("*Bertrand*"), this Court found that section 4 of the *Regulations* was *ultra vires* because it went beyond the scope of the enabling provisions of the *Indian Act*, namely subsection 73(1)(f), which authorizes regulations to prevent, mitigate and control the spread of disease on reserves.[4] The declaration of invalidity took effect on May 31, 2021.

---

[1] *Bertrand v Acho Dene Koe First Nation*, 2021 FC 287 at para 1 [*Bertrand*] **[Tab 11]**.
[2] *Bertrand* at para 66 **[Tab 11]**; *First Nations Election Cancellation and Postponement Regulations (Prevention of Diseases)*, SOR/2020-84 [*Regulations*], ss 2, 3.
[3] *Regulations* s 4 **[Tab 6]**.
[4] *Bertrand* at paras 77-93, and 102 **[Tab 11]**.

8. As part of the *Budget Implementation Act*, 2021, No 1, SC 2021, c 23 ("*BIA*") section 267 retroactively deemed the *Regulations* as being validly made since April 8, 2020 as follows:[5]

> 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.

9. On or about October 7, 2021, the Respondent Band Council issued Band Council Resolution 2021-2022-027, which extended their term of office from October 2021 to June 2022 due to concerns with holding an election in the midst of the COVID-19 pandemic ("Decision").[6]

10. The *Regulations* were repealed on October 8, 2021.[7]

11. The Applicants' judicial review application challenges the Decision, and seeks declarations that section 267 is invalid on numerous grounds. Canada's submissions will focus on the issues raised regarding section 267 of the *BIA*.

PART II – POINTS IN ISSUE

12. The points in issue in this proceeding are:

a. Is the judicial review application moot and, if so, should the Court hear this moot case?

---

[5] *Budget Implementation Act*, 2021, No 1, SC 2021, c 23 [*BIA*], s 267 **[Tab 1]**.
[6] Application Record filed March 4, 2022 at 2. Certified Tribunal Record at pp 0021 – 0022.
[7] *Regulations* s 8 **[Tab 6]**.

b. Does section 267 unconstitutionally infringe access to justice and run contrary to section 96 of the *Constitution Act*, 1867?

c. Does section 267 unjustifiably infringe subsection 35(1) of the *Constitution Act*, 1982?

d. Does section 267 unjustifiably infringe section 3 of the *Charter*?

PART III – SUBMISSIONS

A. The judicial review will be moot, and hearing it will serve no useful purpose

13. The Respondent Band Council intends to hold an election in June 2022 in accordance with the Decision, and to appoint an electoral officer between April 4, 2022 and May 2, 2022.[8] As such, this judicial review will be moot by the time it proceeds to a hearing, as there will no longer be a live controversy between the parties.

14. The principle of mootness applies when a court's decision will have no practical effect. Generally, a court should not render a judgment if it will have no effect in resolving a controversy between the parties.[9] If subsequent events affect the relationship of the parties such that no live controversy exists that affects the rights of the parties, the case will be moot.[10]

15. Determining whether a matter should be dismissed as moot involves a two-step analysis:

a. Is there a live controversy between the parties? If not, the issue is moot.

---

[8] Affidavit of Chief James Ahnassy affirmed February 7, 2022 at para 27.
[9] *David Suzuki Foundation v Canada*, 2019 FC 411 at paras 90-98 [*Suzuki*] **[Tab 17]**.
[10] *Borowski v Canada*, [1989] CarswellSask 241, [1989] 1 SCR 342 at para 15 (p 353) [*Borowski*] **[Tab 12]**.

b. If the issue is moot, should the Court exercise its discretion to hear the case?[11]

16. At the second step of the analysis, in determining whether to hear and decide a case even though it is moot, the Court's exercise of discretion should be guided by three factors: (a) the presence of an adversarial context; (b) the concern for judicial economy; and (c) consideration of whether the Court would be encroaching upon the legislative sphere.[12]

17. As an election will most likely be underway by the time that this judicial review proceeds to a hearing, and the *Regulations* in issue were repealed as of October 8, 2021,[13] there will no longer be a live controversy between the parties concerning the Decision. A review of the Decision will therefore serve no practical purpose. The Decision will have been overtaken by subsequent events such that the concerns raised will have disappeared.[14]

18. As for the second stage of the *Borowski* test, the relevant adversarial context will no longer apply once another election is underway. Concerns for judicial economy weigh in favour of not hearing this moot case. Finally, rendering a decision 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, which is not the proper role of the Court.[15]

B. Section 267 of the *BIA* is compliant with the rule of law and section 96 of the *Constitution Act,* 1867

No Notice of Constitutional Question

---

[11] *Borowski* at para 16 (p 353) **[Tab 12]**, and *Suzuki* at paras 84-85**[Tab 17]**.
[12] *Borowski* at paras 29-42 (pp 358-363) **[Tab 12]**.
[13] *Regulations* s 8 **[Tab 6]**.
[14] *Suzuki* at para 95 **[Tab 17]**.
[15] *Canadian Union of Public Employees (Air Canada Component) v Air Canada*, 2021 FCA 67 at para 13 **[Tab 15]**.

19. As a preliminary issue, it should be noted that the Applicants have not served a Notice of Constitutional Question as required under section 57 of the *Federal Courts Act*. Until that is done, the *Regulation*s and section 267 of the *BIA* cannot be judged invalid, inapplicable or inoperable.[16]

Section 267 of the BIA does not immunize decisions from Judicial Review

20. The Applicants' arguments that section 267 of the *BIA* is not compliant with section 96 of the *Constitution Act,* 1867 do not reflect section 267's scope, purpose, and effect.

21. Interpretation of a statutory provision is done by applying the "modern principle" of statutory interpretation. This requires that the words of a statute must be read "in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the *Act*, the object of the *Act*, and the intention of Parliament."[17]

22. A plain reading of section 267 of the *BIA* supports that the provision does not immunize any decisions from judicial review or otherwise grant unfettered discretion to Band councils. Section 267 of the *BIA* does not effect a blanket validation of all decisions made under the *Regulations*. This is clear from the crucial wording at the end of the provision, stating that the *Regulations* "are deemed to have been validly made and everything done under, and all consequences flowing from, those *Regulations*… are deemed effective as if those *Regulations* were so made." [Emphasis added]

23. In other words, section 267 simply deems valid the *Regulations*, and deems valid any reliance on the *Regulations* as if they had always been valid. Section 267 of the *BIA* is only concerned with the validity of the discretionary authority conferred by the *Regulations*, not the validity of the exercise of such discretionary authority.

24. Section 267 simply remedies the *vires* issue stemming from the *Bertrand* decision by expressly enabling section 4 of the *Regulations*. It provides certainty to

---

[16] *Federal Courts Act*, RSC 1985, c F-7, s 57 **[Tab 4]**.
[17] *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 117 **[Tab 14]**.

Band councils that may have relied on section 4 of the *Regulations* to postpone elections due to COVID-19 and ensures that postponements cannot now be challenged based on the section having later been found to have been *ultra vires*. Parliament's intention with section 267 was to dispel any doubts as to whether there was jurisdictional authority to adopt the *Regulations*. This clear legislative purpose is supported by the Finance Committee testimony referenced in the Applicants' record:

> However, the legislative base on which [the Regulations] sit has been questioned. [Section 267] simply serves to retroactively validate these regulations to ensure that they are valid and that the community government decisions made pursuant to these regulations are not put into question.[18]

Parliament's authority to enact section 267 of the BIA is distinct from the scope of authority under the Indian Act

25. Section 267's ability to validate section 4 of the *Regulations* does not depend on jurisdiction over custom band elections pursuant to the *Indian Act*. The Court in *Bertrand* found section 4 of the *Regulations* to be *ultra vires* because it was beyond the scope of the enabling provision, that being subsection 73(1)(f) of the *Indian Act*.[19] It is well-established that the validity of delegated legislation, such as regulations, is determined by the scope of the enabling statute or the scope of the statutory mandate.[20]

26. Parliament's authority to enact section 267 of the *BIA* is distinct from the scope of authority under the *Indian Act* to regulate custom band elections. Parliament's authority to enact legislation is derived from the Constitution, not from other legislation as is the case with regulations. Section 267 of the *BIA* does not derive its authority from

---

[18] Standing committee on Finance, 43rd Parliament, 2nd Session, June 1, 2021, Minutes of Proceeding, Christopher Duschenes (Director General, Economic Policy Development, Lands and Economic Development, Department of Indigenous Services) at p 35 **[Tab 42]**.
[19] *Bertrand* at paras 4, 77 and 84-93 **[Tab 11]**.
[20] *Bertrand* at paras 73-74 **[Tab 11]**, *Katz Group Canada Inc v Ontario (Health and Long-Term Care)*, 2013 SCC 64 at para 24 **[Tab 26]**, and *Green v Law Society of Manitoba*, 2017 SCC 20 at para 26 **[Tab 24]**.

the *Indian Act* – it derives its authority directly from Parliament. Pursuant to subsection 91(24) of the *Constitution Act*, 1867, Parliament has exclusive legislative authority over all matters related to "Indians, and Lands reserved for the Indians."[21]

27. As the Applicants acknowledge in their own submissions, the "deeming power of a sovereign legislature allows retroactive legislation to deal with *vires* issues."[22] That is the case here. Parliament, having exclusive authority pursuant to subsection 91(24) of the *Constitution Act*, 1867 over "Indians, and Lands reserved for the Indians" has enacted section 267 of the *BIA* to remedy the *vires* issue that the Court in *Bertrand* found with section 4 of the *Regulations*. Parliament has deemed the *Regulations* to have been validly enacted, by a clear and direct grant of authority.

28. Band council elections, including custom elections, form an integral part of primary federal jurisdiction pursuant to subsection 91(24) of the *Constitution Act*, 1867. As a form of Indigenous customary law, customary election processes are an emanation of the federal common law similar to the common law of Aboriginal and treaty rights, which fall within the federal sphere of competence.[23] Customary election processes have also been judicially recognized as an area over which the Federal Court has jurisdiction.[24] It reasonably follows that custom band elections are an area over which Parliament has jurisdiction.[25]

29. Further, section 267 of the *BIA* should not be found inoperative in this case merely because there had, at one point, been ongoing litigation from an appeal of the

---

[21] *The Constitution Act, 1867*, 30 & 31 Vict, c 3, s 91 **[Tab 2]**.
[22] Applicant's Memorandum of Fact and Law at para 57. See also *Régie des rentes du Québec v Canada Bread Company Ltd*, 2013 SCC 46 at paras 24-33 [*Régie des rentes du Québec*] **[Tab 37]**.
[23] *Gamblin v Norway House Cree Nation Band Council*, 2012 FC 1536 at para 38 [*Gamblin*] **[Tab 21]**, citing *Ratt v Matchewan*, 2010 FC 160 at paras 101-103 [*Ratt*] **[Tab 35]** and *R v Côté*, 1996 CanLII 170 (SCC), [1996] 3 SCR 139 at para 49 **[Tab 34]**.
[24] *Gamblin* at paras 40-41, 50, and 53-54 **[Tab 21]**, *Thomas v One Arrow First Nation*, 2019 FC 1663 at para 14 **[Tab 39]**, *Ratt* at para 106 **[Tab 35]**.
[25] See *Indian Act*, RSC 1985, c I-5 at section 2(1) council of the band, and section 74(1), and *Bertrand* at para 87 **[Tab 11]**.

Bertrand decision. The Supreme Court of Canada has found that "it is settled law that declaratory provisions have an immediate effect on pending cases, and are therefore an exception to the general rule that legislation is prospective."[26]

30. Regardless, it is the present litigation that matters, and section 267 of the *BIA* was enacted well before this judicial review application was brought. As such, section 267 of the *BIA* operates and applies in this case.

The principle of the Rule of Law cannot invalidate legislation

31. The Supreme Court of Canada recently confirmed that unwritten constitutional principles, such as the rule of law, cannot be used as a device for invalidating otherwise valid legislation.[27] The Supreme Court of Canada also did not apply the rule of law to invalidate legislation in *Reference re code of Civil Procedure (Que.)*.[28] Rather, it was determined that the provisions at issue were invalid because they intruded upon the core jurisdiction of the Superior Courts which includes their ability to act effectively as courts of general jurisdiction over private law matters. The Quebec legislature had created an unconstitutional parallel Court to the provincial Superior Court.

The UN Declaration on the Rights of Indigenous Peoples is an important interpretative aid only

32. Regarding the Applicants' arguments concerning the United Nations Declaration on the Rights of Indigenous Peoples ("UN Declaration"), neither it nor *An Act respecting the United Nations Declaration on the Rights of Indigenous Peoples* ("*UN Declaration Act*") provide any basis to declare section 267 of the *BIA* to be invalid.

33. The UN Declaration[29] was adopted by the United Nations General Assembly on September 13, 2007. It is an international human rights instrument that affirms

---

[26] *Régie des rentes du Québec* at para 26 **[Tab 37]**.
[27] *Toronto (City) v Ontario (Attorney General)*, 2021 SCC 34 at paras 57, 63, and 72-73 [*Toronto*] **[Tab 40]**.
[28] *Reference re Code of Civil Procedure (Que.)*, art. 35, 2021 SCC 27 **[Tab 36]**.
[29] United Nations Declaration on the Rights of Indigenous Peoples, GA Res. 61/295, UN GAOR, 61st Sess., Supp. No. 49 Vol. III, UN Doc. A/61/49 (2007) **[Tab 8]**.

international standards, rights and principles as they apply to Indigenous peoples and may be used as a contextual aid in interpreting domestic law.

34. In May 2016, Canada announced its full endorsement of UN Declaration, undertaking to adopt and implement it in accordance with the Canadian Constitution. On June 21, 2021, Parliament adopted the *UN Declaration Act*.[30]

35. The *UN Declaration Act* provides a framework for implementation of the UN Declaration at the federal level by requiring that the Government of Canada take all measures necessary to ensure that the laws of Canada are consistent with UN Declaration, and that an action plan be prepared and implemented to achieve the objectives of UN Declaration. Both of these obligations must be carried out in consultation and cooperation with Indigenous peoples in Canada. In essence, it provides a framework for furthering the implementation of the UN Declaration in Canada and a process for discussions between the Crown and Indigenous peoples on measures to contribute to the implementation of the UN Declaration over time.

36. The UN Declaration describes a range of both individual and collective rights of Indigenous peoples around the world, including collective rights relating to, among other things, observation and enforcement of treaties (Article 37), redress relating to rights over lands, territories and resources including restitution, return or compensation (Article 28), and the right to prompt decision-making through just and fair procedures for the resolution of conflicts and disputes (Article 40). The UN Declaration also acknowledges that the rights contained in the Declaration are not absolute, and can be subject to limitations (Article 46).

37. While an appellate Court has not yet considered the *UN Declaration Act*, Courts have confirmed that the UN Declaration can serve as an interpretive aid to Canadian

---

[30] *United Nations Declaration on the Rights of Indigenous Peoples Act*, SC 2021, c 14 **[Tab 9].**

law.[31] However, neither the UN Declaration nor the *UN Declaration Act* can displace the Constitution or clear statutory language, nor has any Canadian Court suggested that the UN Declaration itself has constitutional status.[32] Giving the UN Declaration constitutional force would require a constitutional amendment.

38. While the UN Declaration is a persuasive source to aid in the interpretation of laws,[33] the Court's interpretation of legislation must remain grounded in the legislative text. Based on all of the foregoing, and Canada's previous submissions regarding the validity of section 267 of the *BIA*, neither the UN Declaration nor the *UN Declaration Act* provide any basis to question the validity of section 267 or to otherwise declare it invalid.

C. This is not an appropriate proceeding to determine Aboriginal rights issues

39. The Applicants have not satisfied the requirements of Rule 114 to bring this application as a representative proceeding. Namely, the Applicants have not satisfied that they have been duly authorized to act on behalf of the Band members as required under Rule 114(1)(b).[34] The Applicants' lack of representative standing prohibits them from asserting collective Aboriginal rights under section 35 in this proceeding.

40. The Applicants rely on a petition that was circulated to members of the Band disputing the postponement of the election as the basis for representative standing. However, the petition gave no authorization to the Applicants from the Band members to file and bring this application for judicial review. The petition makes no reference to asserting section 35 rights or commencing legal proceedings on behalf of

---

[31] For example, see *AltaLink Management Ltd v Alberta (Utilities Commission)*, 2021 ABCA 342 at paras 122-123 **[Tab 10]**; *Laliberte v Canada (Attorney General)*, 2019 FC 766 at paras 55-56 **[Tab 29]**.
[32] For example, see *East Prairie Metis Settlement v Alberta*, 2021 ABQB 762 at para 35 **[Tab 18]**.
[33] *Québec (Attorney General) v 9147-0732 Québec inc.*, 2020 SCC 32 at para 35 **[Tab 33]**.
[34] *Federal Courts Rules*, SOR/98-106, Rule 114 **[Tab 5]**.

the Band members, the results of which would be binding on them. Self-appointed individuals are not permitted to assert collective Aboriginal rights on behalf of an Aboriginal community without sufficient authorization.[35]

41. The Applicants advance as members of the Dene Tha' First Nation that they have an Aboriginal right to self-government and that both section 4 of the *Regulations* and section 267 of the *BIA* interfere with that Aboriginal right.

42. A judicial review is intended to be an expedited judicial process to determine the reasonableness of a particular decision on limited evidence – typically in the form of an affidavit(s). The presence of constitutional issues alone does not provide an opportunity to introduce new evidence on judicial review. The essential purpose of judicial review is the review of decisions, not the determination, by trial *de novo*, of questions that were not adequately canvassed in evidence at the tribunal.[36]

43. The Federal Court of Appeal has recognized that summary proceedings, such as judicial review applications, are not usually the appropriate proceedings for determining Aboriginal rights. Such determinations require full discovery, examination of expert evidence, historical testimony and documentary evidence, and significant court time:[37]

> *Beckman* dealt with the consultation provisions in the LSCFN Treaty and whether the honour of the Crown and the duty to consult had been breached. However, questions of Aboriginal and treaty rights and the issue of whether these rights have been infringed require full discovery, the examination of a myriad of expert evidence in the field of ethnography, genealogy, linguistics, anthropology, geography, as well as oral history and historical documentary evidence (*Tshilqot'in Nation;*

---

[35] *Enge v Canada (Indigenous and Northern Affairs)*, 2017 FC 932 at para 98 **[Tab 19]**, citing *Ross River Dena Council v Canada (Attorney General)*, 2009 YKSC 38 at para 26 **[Tab 38]**, *Komoyue Heritage Society v British Columbia (Attorney General)*, 2006 BCSC 1517 at para 35 **[Tab 28]**.
[36] *Gitxsan Treaty Society v Hospital Employees' Union*, 1999 CarswellNat 1488, [2000] 1 FC 135 (FCA) at paras 13 and 15 **[Tab 22]**.
[37] *Prophet River First Nation v Canada*, 2017 FCA 15 at paras 77-80 [*Prophet River*] **[Tab 32]**.

> *Delgamuukw)*. It is not uncommon for a trial related to section 35 rights to exceed 300 days of evidence and argument (*ibid.*). Clearly, an application for judicial review is not typically the best forum for this kind of resolution.[38]

44. Similarly, the Court in *Grandjambe v Canada* found that, in that particular judicial review proceeding, it was not appropriate to deal with the determination of asserted treaty rights under section 35 notwithstanding the narrow scope of the right that was claimed to be infringed, and refused to deal with those matters.[39] The decision under review was the refusal of the Superintendent of Wood Buffalo National Park for a construction permit for a harvesting cabin.

45. The nature, scope, and content of the right of self-government remain to be determined on the facts and evidence in a particular case.[40] In order for the nature, scope and content of the Aboriginal right to be determined in this matter, a significant evidentiary record would be required involving the production of documents (both modern and historical), expert evidence, and most likely oral history evidence.[41] The Applicants have not provided this record.

46. This judicial review is not the appropriate proceeding for the determination of the nature, scope, and content of the rights advanced by the Applicant members of the Dene Tha First Nation. The evidence available on this judicial review does not establish the nature, scope, and content of a specifically cognizable Aboriginal right under subsection 35(1). As such, it is neither necessary nor feasible for this Court to determine whether an infringement has occurred.

---

[38] *Prophet River* at para 80 **[Tab 32]**.
[39] *Grandjambe v Canada*, 2019 FC 1023 at paras 131-135 **[Tab 23]**. See also *Kitkatla Band v Canada*, 2000 CanLII 15087 (FC) at para 19 **[Tab 27]** and *Francis v Mohawk Council of Kanesatake*, 2003 FCT 115 (CanLII), [2003] 4 FC 1133 at para 78 **[Tab 20]**.
[40] *Canada (Attorney General) v Munsee-Delaware Nation*, 2015 FC 366 at paras 50-51 **[Tab 13]**.
[41] *Prophet River* at paras 78-80 **[Tab 32]**.

D. Section 3 of the *Charter* does not apply to Band council elections

47. The jurisprudence does not support that section 3 of the *Charter* applies to Band council elections. The Supreme Court of Canada has found that the wording of section 3 of the *Charter* is quite narrow, guaranteeing only the right to vote in elections of representatives of the federal and provincial legislative assemblies.[42] This interpretation is well-supported by a plain reading of section 3 itself:

> Every citizen of Canada has the right to vote in an election of members of the House of Commons or of a legislative assembly and to be qualified for membership therein.[43]

48. The Federal Court of Appeal has also found that section 3 of the *Charter* does not apply to Band elections.[44]

49. In *Crow v Blood Band*, the plaintiff brought an action after he was removed as a Band councillor and was disqualified from running for office as Chief. The Court noted that the question of whether the *Charter* even applied to the Band's Custom Election Bylaw was a complicated one involving interpretation of sections 25 and 32 of the *Charter*. Without deciding the issue, the Court assumed that the *Charter* generally did apply and ultimately found that section 3 of the *Charter* did not apply as it was only applicable to federal and provincial elections.[45]

50. Other Courts have found that the *Charter* generally does apply to Band councils whether acting according to a custom code or under the *Indian Act*,[46] but no jurisprudence has found that section 3 applies to Band council elections. The

---

[42] *Haig v R*, 1993 CarswellNat 2353 (SCC), [1993] 2 SCR 995 at paras 60 (pp 1030-1031) and 64 (p 1033) **[Tab 25]**.
[43] *The Constitution Act, 1982*, Schedule B to the Canada Act 1982 (UK), 1982, c 11 [*Charter*], s 3 **[Tab 3]**.
[44] *Orr v Peerless Trout First Nation*, 2016 FCA 146 at para 7 **[Tab 31]**. See also analysis in the underlying decision *Orr v Peerless Trout First Nation*, 2015 FC 1053 at paras 70-72 **[Tab 30]**.
[45] *Crow v Blood Band*, 1996 CarswellNat 53 (FC), [1996] FCJ No 119 at paras 21-23 **[Tab 16]**.
[46] *Woodward v Council of the Fort McMurray*, 2010 FC 337 at paras 26-31 **[Tab 41]**.

Applicants' suggested interpretation of section 3 of the *Charter* risks amending or subverting the limits of the deliberately chosen text, and goes against well-established jurisprudence.[47]

51. As section 3 of the *Charter* does not apply to Band council elections, there is no need to determine whether section 267 of the *BIA* infringes section 3, or whether that infringement could be justified under section 1 of the *Charter*.

PART IV – ORDER SOUGHT

52. Canada requests that the Applicants' challenges to section 267 of the *BIA* be dismissed.

53. Canada does not seek its costs of this application.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 4th day of April, 2022.

Glen Jermyn (electronically signed)
ATTORNEY GENERAL OF CANADA

Department of Justice Canada
Prairie Region (Calgary office)
601, 606 – 4th St, S.W.
Calgary, Alberta T2P 1T1
Fax number: 403-299-3507 / 780-495-2964

Per: Glen Jermyn and Keelan Sinnott
Telephone number: 403-299-3634 / 780-495-5895
Email: Glen.Jermyn@justice.gc.ca /
Keelan.Sinnott@justice.gc.ca

Solicitors/Counsel for the Respondent

[47] *Toronto* at paras 82 and 84 **[Tab 40]**.

PART V – LIST OF AUTHORITIES

Appendix A: Statutes and Regulations

1. *Budget Implementation Act*, 2021, No 1, SC 2021, c 23
2. *Constitution Act, 1867*, 30 & 31 Vict, c 3
3. *Constitution Act, 1982*, Schedule B to the Canada Act 1982 (UK), 1982, c 11
4. *Federal Courts Act*, RSC 1985, c F-7
5. Federal Courts Rules, SOR/98-106
6. *First Nations Election Cancellation and Postponement Regulations (Prevention of Diseases)*, SOR/2020-84
7. *Indian Act*, RSC 1985, c I-5
8. United Nations Declaration on the Rights of Indigenous Peoples, GA Res. 61/295, UN GAOR, 61st Sess., Supp. No. 49 Vol. III, UN Doc. A/61/49 (2007).
9. *United Nations Declaration on the Rights of Indigenous Peoples Act*, SC 2021, c 14

Appendix B: Authorities

10. *AltaLink Management Ltd v Alberta (Utilities Commission)*, 2021 ABCA 342
11. *Bertrand v Acho Dene Koe First Nation*, 2021 FC 287
12. *Borowski v Canada*, [1989] CarswellSask 241, [1989] 1 SCR 342
13. *Canada (Attorney General) v Munsee-Delaware Nation*, 2015 FC 366
14. *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65
15. *Canadian Union of Public Employees (Air Canada Component) v Air Canada*, 2021 FCA 67
16. *Crow v Blood Band*, 1996 CarswellNat 53 (FC), [1996] FCJ No 119
17. *David Suzuki Foundation v Canada*, 2019 FC 411
18. *East Prairie Metis Settlement v Alberta*, 2021 ABQB 762
19. *Enge v Canada (Indigenous and Northern Affairs)*, 2017 FC 932

20. *Francis v Mohawk Council of Kanesatake*, 2003 FCT 115 (CanLII), [2003] 4 FC 1133

21. *Gamblin v Norway House Cree Nation Band Council*, 2012 FC 1536

22. *Gitxsan Treaty Society v Hospital Employees' Union*, 1999 CanLII 7628 (FCA), [2000] 1 FC 135 (FCA)

23. *Grandjambe v Canada*, 2019 FC 1023

24. *Green v Law Society of Manitoba*, 2017 SCC 20

25. *Haig v Canada (Chief Electoral Officer)*, 1993 CanLII 58 (SCC), [1993] 2 SCR 995

26. *Katz Group Canada Inc v Ontario (Health and Long-Term Care)*, 2013 SCC 64

27. *Kitkatla Band v Canada*, 2000 CanLII 15087 (FC)

28. *Komoyue Heritage Society v British Columbia (Attorney General)*, 2006 BCSC 1517

29. *Laliberte v Canada (Attorney General)*, 2019 FC 766

30. *Orr v Peerless Trout First Nation*, 2015 FC 1053

31. *Orr v Peerless Trout First Nation*, 2016 FCA 146

32. *Prophet River First Nation v Canada*, 2017 FCA 15

33. *Québec (Attorney General) v 9147-0732 Québec inc.*, 2020 SCC 32

34. *R v Côté*, 1996 CanLII 170 (SCC), [1996] 3 SCR 139

35. *Ratt v Matchewan*, 2010 FC 160

36. *Reference re Code of Civil Procedure (Que.)*, art. 35, 2021 SCC 27

37. *Régie des rentes du Québec v Canada Bread Company Ltd.*, 2013 SCC 46

38. *Ross River Dena Council v Canada (Attorney General)*, 2009 YKSC 38

39. *Thomas v One Arrow First Nation*, 2019 FC 1663

40. *Toronto (City) v Ontario (Attorney General)*, 2021 SCC 34

41. *Woodward v Council of the Fort McMurray*, 2010 FC 337

Secondary Sources

42. Standing committee on Finance, 43rd Parliament, 2nd Session, June 1, 2021, Minutes of Proceeding, Christopher Duschenes (Director General, Economic Policy Development, Lands and Economic Development, Department of Indigenous Services)