Federal Court  Cour fédérale

Date: 20210401

Docket: T-1274-20

Citation: 2021 FC 287

Ottawa, Ontario, April 1, 2021

PRESENT: Mr. Justice Sébastien Grammond

BETWEEN:

FLOYD BERTRAND

Applicant

and

ACHO DENE KOE FIRST NATION BAND COUNCIL, CHIEF GENE HOPE, COUNCILLOR JOE BERTRAND, COUNCILLOR ROGER BERTRAND, COUNCILLOR IRENE MCLEOD, COUNCILLOR ANGUS CAPOT-BLANC, COUNCILLOR DENNIS NELSON, COUNCILLOR DENNIS MCLEOD

Respondents

and

THE ATTORNEY GENERAL OF CANADA

Respondent

and

BAND MEMBERS' ALLIANCE AND ADVOCACY ASSOCIATION OF CANADA

Intervener

JUDGMENT AND REASONS

[1] This case deals with the validity of a measure taken by the federal government in response to the COVID-19 pandemic. When the virus reached Canada, several First Nations were about to hold elections. Holding elections typically involves various forms of public gatherings. To avoid the risk of virus transmission at such gatherings, the federal government made regulations authorizing First Nations to postpone elections and to extend the term of office of their councils.

[2] Invoking these regulations, Acho Dene Koe First Nation twice postponed its elections and extended its council's term of office, by a total of approximately one year. Acho Dene Koe asserts that the postponement and extension are also authorized by its customary law, independently of the federal regulations.

[3] The applicant, Mr. Bertrand, is a member of Acho Dene Koe. With the support of the intervener, the Band Members' Alliance and Advocacy Association of Canada, he challenges the validity of the federal regulations and Acho Dene Koe's decision to postpone the election.

[4] I agree with Mr. Bertrand. The federal regulations are invalid, because they are not authorized by the *Indian Act*. When the *Indian Act* is considered in its totality, it is clear that section 73(1)(f), which empowers the Governor in Council to make regulations "to prevent, mitigate and control the spread of diseases on reserves," does not encompass the regulation of

elections. Moreover, Acho Dene Koe's customary law requires elections to take place every three years and does not authorize the council to extend its own term of office.

I. Background

A. *Acho Dene Koe Governance*

[5] Acho Dene Koe First Nation is a signatory to Treaty 11. It is located in the hamlet of Fort Liard in the Northwest Territories, where many of its members reside. It does not have a reserve. Although I do not have precise population figures, I was informed that there are approximately 550 members of voting age.

[6] Like most, if not all First Nations in the Northwest Territories, Acho Dene Koe was never brought under the regime of sections 74-80 of the *Indian Act*, RSC 1985, c I-5 [the Act], for the election of its council. Its name was never listed in the *Indian Bands Council Elections Order*, SOR/97-138, made pursuant to section 74 of the Act. Thus, according to the definition of "council of the band" in section 2 of the Act, Acho Dene Koe's council is "chosen according to the custom." As I explain below, the term "custom" in the *Indian Act* refers to various forms of Indigenous laws, which are not limited to "custom" in the narrow sense.

[7] Elsewhere in Canada, a policy of the federal government allows First Nations whose elections are governed by the *Indian Act* to "revert to custom" upon showing that their members approved an election code containing certain specified features. For this reason, there is a tendency to equate custom with an election code. This association, however, does not hold for

First Nations, like Acho Dene Koe, that were never the subject of an order pursuant to section 74 of the Act: *Ratt v Matchewan*, 2010 FC 160 at paragraphs 8-10 [*Ratt*]. For these First Nations, the custom may be largely unwritten. This has been the source of some confusion in the present case. For some time, and up to his cross-examination in this case, Mr. Bertrand has asserted that because Acho Dene Koe lacks a valid election code, the *Indian Act* governs its elections. Through his counsel, he now acknowledges that this is incorrect and that custom governs the selection of Acho Dene Koe's council.

[8] I have limited information as to the content of Acho Dene Koe's electoral law. Mr. Bertrand provided his own evidence, as well as the affidavits of former Chief Harry Deneron and Elder Mary Kotchea. Mr. Deneron did not make himself available for cross-examination. Accordingly, I give little weight to his affidavit. Acho Dene Koe did not provide affidavits from its members, but filed council resolutions and other documents providing a summary outline of the recent history of its elections.

[9] Until 2007, elections in Acho Dene Koe were held every two years, although the council could call an early election. For example, Mr. Bertrand was elected chief in 2002 for a two-year term, but the council called another election in 2003, apparently to resolve a deadlock among its members. Mr. Bertrand was re-elected for two years, but lost to Mr. Deneron in the 2005 election.

[10] In 2007, the council proposed an election code, which, among other things, set the term of office of the council at three years. There is little evidence regarding the process by which the

code would have been ratified by the members, and there are indications that this process was widely regarded as deficient. I will return to the legal status of the 2007 code later in these reasons.

[11] In spite of the doubts regarding the validity or status of the 2007 code, the council adopted a resolution extending its term by one year. Elections were then held in 2008, 2011, 2014 and 2017, in each case for a three-year term. The current chief and council were elected on May 14, 2017. The 2017 election was conducted pursuant to a resolution setting May 14, 2020 as the end of the council's term.

[12] Acho Dene Koe began the process of preparing a new election code and circulated a draft to its members in the fall of 2019. This draft code provides for a three-year term. It was never adopted.

B. *The 2020 Extension of Term*

[13] On January 27, 2020, the council adopted three resolutions regarding the upcoming election. The first resolution purported to adopt the 2007 election code. In its recitals, the council expressed the view that Acho Dene Koe's members generally accept the code as establishing its custom election process. For reasons that were not explained, the council apparently abandoned the draft 2019 code. The two other resolutions set the date of the election for June 8, 2020 and extended the term of office of council by approximately three weeks.

[14] On March 11, 2020, the World Health Organization declared COVID-19 to be a pandemic. In the following days and weeks, all levels of government in Canada, including First Nations, implemented a wide array of measures intended to contain the pandemic. One specific impact of the pandemic on First Nations pertained to the holding of elections. Concerns were raised regarding the transmission of the virus at public events related to elections, including nomination meetings, campaigning and voting. In response to these concerns, on April 8, 2020, the federal government made the *First Nations Election Cancellation and Postponement Regulations (Prevention of Diseases)*, SOR/2020-84 [the Regulations].

[15] On April 20, 2020, Acho Dene Koe's council adopted a resolution noting concerns with conducting an election or a membership meeting, extending the council's term until November 14, 2020 and postponing the election to October 14, 2020. The resolution's recitals include the following:

> WHEREAS on April 9, 2020, the Government of Canada provided Acho Dene Koe First Nation with a copy and interpretation of the *First Nations Election Cancellation and Postponement Regulations (Prevention of Diseases)* (the "Regulations"); and
>
> WHEREAS Acho Dene Koe First Nation's Custom Election Code is silent on the cancellation or postponement of an election; and […]
>
> WHEREAS Acho Dene Koe First Nation Council has serious and well-founded concerns that holding June 2020 election poses a serious risk of the spread or infection of COVID-19 to candidates, Acho Dene Koe First Nation members and the residents of Fort Liard […]

[16] On September 14, 2020, the council adopted a further resolution extending the term of council by another six months, that is, until May 14, 2021, and setting the date of the election for

April 14, 2021. The council noted the same concerns as in previous resolutions. The resolution also contains the following recitals:

> WHEREAS in 2007, Council as they extended the term of the leadership for twelve (12) months to allow for continuity in negotiations involving the self-government and land claim with the Government of Canada and the Government of Northwest Territories; and
>
> […]
>
> WHEREAS as a result, the Chief and Council of Acho Dene Koe First Nation have found that the membership supports a postponement of the election from November 2020 to May 2021 as being justifiable to allow for continuity with the treaty negotiations, to provide for the management of member support during the pandemic consistently, and for the protection of health and welfare of elders and members during both the election campaigning and the actual balloting on election vote day; […]

[17] On October 22, 2020, Mr. Bertrand brought the present application for judicial review of the September 14, 2020 decision, and seeking orders of *mandamus* and *quo warranto* and a declaration that the Regulations are *ultra vires*.

[18] On December 7, 2020, council adopted a further resolution calling the election, appointing a chief electoral officer and an appeals committee consisting of one person, Mr. Garth Wallbridge, a lawyer in Yellowknife. Of note, the resolution states that these appointments are made pursuant to the 2007 election code.

[19] Given an outbreak of COVID-19 in the community, the date of the election was postponed from April 14 to April 26, 2021.

[20] Meanwhile, Mr. Bertrand filed his nomination papers for chief. The returning officer, however, rejected his candidacy, because of his outstanding debt towards one of Acho Dene Koe's subsidiaries. Mr. Bertrand applied for judicial review of this decision and brought a motion for interim relief. Although the motion was heard concurrently with this application, I issued my decision on the motion first, given the urgency. For reasons indexed as 2021 FC 257, I dismissed Mr. Bertrand's motion. Nothing in the present reasons affects the decision I made regarding the motion.

II. Analysis

A. *Preliminary Issues*

(1) Time Limit

[21] Acho Dene Koe argues that Mr. Bertrand did not bring the present application within 30 days of the decision challenged, as required by section 18.1(2) of the *Federal Courts Act*, RSC 1985, c F-7. The decision challenged is the council's resolution of September 14, 2020. However, Mr. Bertrand states in his affidavit that he learned of this decision only on September 24, 2020. Therefore, he brought this application within the prescribed time limit.

[22] Moreover, to the extent that Mr. Bertrand is seeking a writ of *quo warranto*, which challenges a person's authority to hold public office, the time limit set by section 18.1(2) does not apply, as the remedy is not in respect of a decision: *Krause v Canada*, [1999] 2 FC 476 (CA).

[23] At this juncture, I would also point out that changes in a First Nation's laws, including customary laws, are not "decisions" that must be challenged within 30 days. If a decision is challenged, the Court may decide whether the custom on which the decision is alleged to be based has been proven. The fact that the events giving rise to the custom happened in a distant past does not insulate the matter from review.

(2) Mootness

[24] Acho Dene Koe also argues that the matter has become moot because an election has been called for April 26, 2021. It also notes that the Regulations will be repealed on April 8, 2021, according to their own terms. The Attorney General does not raise the mootness argument.

[25] According to the decision of the Supreme Court of Canada in *Borowski v Canada (Attorney General),* [1989] 1 SCR 324 [*Borowski*], to decide whether a case should be dismissed as moot, courts must ask themselves the following questions:

1) Whether the required tangible and concrete dispute has disappeared and the issues have become academic; and

2) Whether, if the response to the first question is affirmative, the court should exercise its discretion to hear the case.

[26] I agree that the immediate dispute that gave rise to this application will lose its substance because of the April 26 election. The electoral process is well underway and there is no reason to believe that it will be postponed again. In this regard, Mr. Bertrand concedes that his application for an order of *mandamus* compelling Acho Dene Koe to hold an election is now moot. Nevertheless, he asserts that *quo warranto* remains relevant, as the fact that the current council is

illegally in office could affect the validity of its decisions. In the absence of a challenge to a specific decision made by the current council, I fail to see any practical difference between *quo warranto* and *mandamus*. An order of *quo warranto* would simply remove office holders whose term is set to expire in a matter of days or weeks. Both remedies will become moot on April 26 or shortly thereafter.

[27] This, however, does not end the inquiry. According to *Borowski*, courts have discretion to hear moot matters. In that case, the Supreme Court highlighted three considerations that are relevant to the exercise of this discretion: the adversarial nature of the judicial process, the need to promote judicial economy and the adjudicative role of the courts; see also *Amgen Canada Inc v Apotex Inc*, 2016 FCA 196 at paragraph 16. In particular, the Court in *Borowski* recognized that judicial economy might be counterbalanced by the fact that a question has proved evasive of review or that there is a social cost to leaving the issue unsettled.

[28] In light of these factors, I exercise my discretion to hear this matter on the merits. The main reason is that in doing so, I will clarify important issues with respect to the effect of the COVID-19 pandemic on First Nations' electoral processes: the validity of the Regulations and the framework for assessing a First Nation's assertion of a customary power to extend the term of its council. From the outset, the validity of the Regulations has been questioned: see, for example, Paul Daly, "Broad Regulations on Narrow Statutory Bases: The First Nations Election Cancellation and Postponement Regulations (Prevention of Diseases) SOR/2020-84", online: https://www.administrativelawmatters.com/blog/2020/05/27/broad-regulations-on-narrow-

statutory-bases-the-first-nations-election-cancellation-and-postponement-regulations-prevention-of-diseases-sor-2020-84/ (May 27, 2020). It is not desirable to leave the issue unsettled.

[29] These issues do not belong to the past. The COVID-19 pandemic is not over. While the Regulations are set to expire on April 8, their effects may continue for the following six months, or perhaps longer, and the Governor in Council may choose to renew them. If Acho Dene Koe is correct in asserting a general power to postpone elections in "exigent circumstances," this power would not be subject to any sunset clause.

[30] Despite their importance for First Nations governance and the fact that the Regulations have been in force for almost one year, these issues have so far evaded review. Terms of office may have been extended for periods shorter than the time necessary to perfect an application for judicial review. In this regard, I am informed that applications to this Court challenging the validity of the Regulations were discontinued when an election was called. Moreover, First Nation members who wish to bring such challenges may well face practical difficulties. On occasion, this Court has heard cases involving issues of importance for First Nations governance despite the matter being moot: see, for example, *Esquega v Canada (Attorney General)*, 2007 FC 878 at paragraph 52, [2008] 1 FCR 795; *McKenzie v Mikisew Cree First Nation*, 2020 FC 1184 at paragraphs 52-53.

[31] In addition, the adversarial process was fully functioning in this case and the relief sought is compatible with the Court's adjudicative role. Thus, exercising my discretion to hear the matter on the merits is consistent with the framework laid out in *Borowski*.

B. *Extension of Term of Office According to Acho Dene Koe Law*

[32] The first step of the analysis is to consider the validity of the extension of the council's term of office and the postponement of the election from the perspective of Acho Dene Koe law. If this law authorizes the extension and postponement, it will be unnecessary to consider the effect and validity of the federal Regulations.

[33] The parties have discussed two sources of Acho Dene Koe law. One is written and legislated: the 2007 election code. The other one is custom properly speaking, that is, the practices followed by Acho Dene Koe and attracting the broad consensus of its members.

[34] Acho Dene Koe has not taken a firm position as to the validity of the 2007 code, but states that its main features, including a three-year term of office, have acquired the force of custom. Moreover, it argues that the custom is flexible and allows the incumbent council to extend its own term of office in "exigent circumstances." Mr. Bertrand disputes these assertions and rather takes the position that the customary term of office is two years and that the current council's term ended in 2019.

[35] For the following reasons, I find that the evidence does not establish that the 2007 code was validly enacted or acquired the force of custom. Nevertheless, the three-year term of office is now firmly entrenched. However, there is no basis for the council's power to extend its own term.

(1) Nature and Proof of Written and Customary Indigenous Laws

[36] The *Indian Act* states that a First Nation's council is "chosen according to the custom of the band," unless the election regime in sections 74-80 is specifically made applicable to that First Nation. In doing so, Parliament referred to a set of norms that find their source and legitimacy outside of the Canadian legal system and that can be described as Indigenous law: *Gamblin v Norway House Cree Nation Band Council*, 2012 FC 1536 at paragraph 34; *Pastion v Dene Tha' First Nation*, 2018 FC 648 at paragraph 7, [2018] 4 FCR 467 [*Pastion*]. In *Bone v Sioux Valley Indian Band No 290*, [1996] 3 CNLR 54 (FCTD), at paragraph 31 [*Bone*], Justice Heald mentioned that the *Indian Act*

> …does not confer a power upon a Band to develop a custom for selecting its council. Rather, it recognizes that an Indian Band has customs, developed over decades if not centuries, which may include a custom for selecting the Band's Chief and Councillors.

[37] The test developed by this Court for the recognition of custom is tied to the concept of consent of the governed: *McLeod Lake Indian Band v Chingee* (1998), 165 DLR (4^{th}) 358 (FCTD) at paragraph 8 [*Chingee*]. 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." This test has been followed ever since: see, for example, *Oakes v Pahtayken*, 2010 FCA 169 at paragraph 5. One of its consequences must be underlined: custom is made by the community, not the council: *Bone*, at paragraph 29; *Bacon St-Onge v Conseil des Innus de Pessamit*, 2017 FC 1179 at paragraph 72, aff'd 2019 FCA 13 [*Bacon St-Onge*]; *Whalen v Fort McMurray No. 468 First Nation*, 2019 FC 732 at paragraph 48, [2019] 4 FCR 217 [*Whalen*].

[38] Pursuant to this test, this Court has recognized various forms of Indigenous law, beyond "custom" in the strict meaning of the word: *Whalen*, at paragraph 32.

[39] First, a First Nation may enact an election code or similar legislation through the vote of a majority of its members. This combines what Professor John Borrows calls the positivistic and deliberative sources of Indigenous law: *Canada's Indigenous Constitution* (Toronto: University of Toronto Press, 2010) at pages 35-51 [Borrows, *Indigenous Constitution*]. Provided that the conditions in which the vote was taken were satisfactory, this Court has been prepared to consider that codes adopted by a First Nation's membership constitute "custom" in this sense: *Chingee*; *Taypotat v Taypotat*, 2012 FC 1036, at paragraphs 29-35 [*Taypotat*].

[40] Second, custom may find its origin in practice. Custom, indeed, need not be written: *Bone*, at paragraph 56. Nevertheless, to be recognized as custom in this sense, a practice must still attract the broad consensus of the community. In *Francis v Mohawk Council of Kanesatake*, 2003 FCT 115 at paragraph 36, [2003] 4 FC 1133 [*Francis*], my colleague Justice Luc Martineau described the relevant burden of proof as follows:

> For a rule to become custom, the practice pertaining to a particular issue or situation contemplated by that rule must be firmly established, generalized and followed consistently and conscientiously by a majority of the community, thus evidencing a "broad consensus" as to its applicability.

[41] A court asked to declare the content of a First Nation's custom must of course base itself on the evidence before it. In this regard, the party who invokes custom must prove it: *Fort McKay First Nation v Orr*, 2012 FCA 269 at paragraph 20. It may be relatively easy to deduce custom from practice with respect to the basic parameters of an electoral regime, for example the

term of office or the number of councillors. With respect to more specific features of the regime, however, a generalized and consistently followed practice may be more difficult to establish. If the party invoking such a custom fails to bring sufficient evidence, the feature in question will be held to be absent from the First Nation's electoral regime. For example, our Court has held that there is no appeal mechanism unless proof is made according to the *Francis* standard: *Anichinapéo v Papatie*, 2014 FC 687 at paragraphs 45-47; *Shirt v Saddle Lake Cree Nation*, 2017 FC 364 at paragraph 45 [*Shirt*]; *Redhead v Miles*, 2019 FC 1605 at paragraph 54. The same is true of rules allowing for the removal or recall of councillors: *Joseph v Schielke*, 2012 FC 1153 at paragraphs 37-41; *Whalen*, at paragraphs 57-67.

[42] Before proceeding further, I note that Indigenous laws may have sources other than positivistic, deliberative or customary. For example, Professor Borrows mentions sacred or natural sources: Borrows, *Indigenous Constitution*, at 23-34. Professor Aaron Mills suggests that Indigenous laws are rooted in Indigenous philosophies and worldviews: "The Lifeworlds of Law: On Revitalizing Indigenous Legal Orders Today" (2016) 61:4 McGill LJ 847. As in *Ratt*, Indigenous election laws may be rooted in such sources. As the parties have not attempted to prove such sources in the present case, I will say nothing further about this possibility.

(2) The 2007 Draft Election Code

[43] If the 2007 draft election code formed part of Acho Dene Koe's law, this would settle the issues regarding the council's term of office. However, the evidence is insufficient to establish that this draft either was adopted in 2007— as "positivistic" Indigenous law— or was generally followed thereafter, so that it became customary Indigenous law.

[44] The parties brought little evidence from witnesses having first-hand knowledge of the process through which the draft was put before Acho Dene Koe's membership. Mr. Bertrand states that after having learned of the purported adoption of the draft at a little-attended membership meeting, he initiated a petition against the adoption of the draft, which garnered about 60 signatures, and brought his concerns to the attention of the regional director of the department then known as Indian and Northern Affairs. In a letter to the chief and council dated May 31, 2008, the regional director, Mr. George Cleary, stated:

> It has been expressed that the ratification process used to adopt the new election code did not allow for meaningful participation by the majority of community members. We have been informed that membership may not have been provided with adequate notice and therefore did not have an opportunity to participate in the ratification process. This in turn may have significantly impacted upon the results of the vote.
>
> In light of the concerns raised by your membership, I would urge you to revisit the ratification process with your membership in a way that allows for full community participation in the process.

[45] Based on this information, and bearing in mind that the party alleging custom must prove it, I cannot find that the 2007 draft code was enacted in a manner that attracted the broad consensus of the community, according to the guidelines laid out in *Chingee* and *Taypotat*.

[46] The 2007 draft code may nevertheless have acquired the force of custom if it has been generally followed and accepted: *Bone*, at paragraphs 61-64. In this regard, Acho Dene Koe suggests that the draft code was applied without protest in all elections since 2008.

[47] There is no doubt that elections took place every three years from 2008 to 2017. There is, however, little information regarding the precise rules that were applied. Council resolutions

calling elections in 2008 and 2017 made no reference to the 2007 code, and the 2011 and 2014 resolutions were not filed in evidence. Public notices of the election provide no information in this regard. During this period, returning officers made contradictory statements. For example, the 2017 returning officer stated, in a Facebook post for the information of community members, that the 2007 draft code had never been ratified. Meanwhile, she apparently applied certain provisions of the same code. In the absence of testimony from those involved in the process, it is very difficult to draw firm conclusions.

[48] Contrary to Acho Dene Koe's submissions, there were indeed protests against the 2007 code. In 2008 and 2019, Mr. Bertrand initiated petitions signed by approximately 60 members of the community, challenging the lack of community ratification of the code. While such petitions, in a community of approximately 500 persons, are not an insuperable obstacle to the formation of a custom, they remain a relevant factor. In any event, the lack of protest is not, in itself, conclusive evidence of community consensus: *Shirt*, at paragraph 45.

[49] In 2019, faced with this uncertainty, Acho Dene Koe launched a process to draft and enact a new election code. In an "Information Release" dated August 26, 2019, the council justified the endeavour by the "inconsistencies and unclarity about what rules are to be followed for an election for ADKFN." Engaging in this process is an implicit admission that the 2007 draft code had not become Acho Dene Koe's custom by virtue of being generally and consistently followed.

[50] In this context, the council could not, by way of its January 27, 2020 resolution, purport to "adopt" the 2007 code. As explained above, custom results from the broad consensus of the community, not the decision of council. The council cannot circumvent this principle by stating its opinion as to the broad consensus of the membership, if the evidence does not bear out the assertion.

(3) Length of Term of Office

[51] Mr. Bertrand argues that the customary term of office of the council is two years. From his perspective, the council's term of office would have expired in May 2019. This is incorrect. Irrespective of the status of the 2007 draft election code, the term of office of Acho Dene Koe's council is three years.

[52] The length of the term of office is one of the most conspicuous features of a democratic system. For this reason, it will be relatively easy to show that consistent practice in this regard attracts the community's tacit consensus. In this case, the fact that the last four elections have been held for a three-year term weighs considerably in favour of a finding that this has become the norm.

[53] Nevertheless, Mr. Bertrand argues that he has consistently protested the three-year term and insisted that the customary term is two years. In particular, he points to petitions signed by Acho Dene Koe members in 2008 and 2019. The first 2008 petition, however, expressed opposition to the 2007 draft election code because of lack of community consultation and did not mention the length of term. The second 2008 petition opposed a postponement of the election

beyond the three-year term and did not mention a two-year term. The 2019 petition for an immediate election was based on the idea that Acho Dene Koe's elections were governed by the *Indian Act*, a position no longer put forward by Mr. Bertrand. Moreover, this Court's case law clearly marks the distinction between broad consensus and unanimity. While the opinion of about 60 members should not be casually disregarded, it is insufficient in the present context to prevent the emergence of a custom in a community of more than 500 members, where a practice is consistently followed for four successive elections.

[54] Thus, irrespective of the legal status of the 2007 draft election code, Acho Dene Koe's custom is to hold elections every three years. Accordingly, the council was acting in accordance with custom when it called an election for May 2020. The more difficult question is whether custom authorized it to postpone this election beyond May 2020 because of the COVID-19 pandemic or other reasons.

(4) Power to Extend Term of Office

[55] Acho Dene Koe argues that its council has the customary power to extend its term of office in "exigent circumstances," such as the current pandemic. I am unable to agree with Acho Dene Koe, because it has failed to demonstrate that the alleged practice is "firmly established, generalized and followed consistently and conscientiously by a majority of the community," as required by Justice Martineau in *Francis*.

[56] The main element invoked in support of the alleged custom is a 2007 resolution of the council extending its term of office for one year. The reason given for the extension was the following:

> WHEREAS Acho Dene Koe First Nation Band Council agrees that the current two year term of office for Chief and Council which ended on July 14, 2007, is insufficient to allow for completion and/or follow through to occur on proposed economic development projects and issues relating to treaty and overlap issues with Canada, British Columbia and the Yukon Governments. Continuity of Chief and Council is essential for the final stages of discussion and negotiation.

[57] It is very difficult to draw any conclusion from such a resolution. Such an extension happened only once. Its validity was not tested at the time. There is no subsequent general or consistent practice. A power to extend is also difficult to reconcile with the recent, consistent practice of fixed-term elections every three years.

[58] Other aspects of the evidence militate against the recognition of such a custom. Assuming for the sake of argument that the 2007 draft election code was intended to reflect existing custom, it does not contain any reference to an open-ended power of the council to extend its term. Likewise, the 2019 draft code only contains provisions allowing for a one-week postponement for acts of God, natural catastrophes or the death of a community member.

[59] Moreover, the April 20, 2020 and September 14, 2020 resolutions expressly note the silence of Acho Dene Koe's custom election code regarding the cancellation or postponement of an election. The resolutions do not assert any customary power to extend the term of office of

council as is asserted now, although the September 14 resolution refers to the one-year extension in 2007.

[60] Acho Dene Koe argues that the early election call in 2003, when Mr. Bertrand was chief, is proof of the council's discretion with respect to its own term of office. Calling an early election, however, is quite different from the council extending its own term. If all councillors agree, this is functionally equivalent to collective resignation. An early election call may deprive dissenting councillors of the possibility of serving the full term for which they were elected, but it does not deprive the members of the community of the right to select their leaders on a regular basis.

[61] In 2014, elections were held in August instead of June, but I have very little information regarding the reasons for this relatively short delay. I am unable to draw any conclusions from this situation.

[62] More generally, Acho Dene Koe invites me to view the issue from the perspective of First Nations self-government, which would require flexibility in the application of custom. I approach this argument with caution. As I mentioned in *Thomas v One Arrow First Nation*, 2019 FC 1663 at paragraphs 29-31, self-government does not translate into unlimited powers for First Nations councils. Rather, where First Nations have not enacted positivistic laws, self-government manifests itself through the broad consensus of the community.

[63] Thus, any assertion of “flexibility” or an open-ended power to extend the term of office must be tested against what we know of the community’s views. As I demonstrated above, Acho Dene Koe members expect to have the opportunity to choose their leaders at fixed intervals. For more than a decade, the interval has been three years. Very cogent evidence would be required to establish a custom that would free the council from the obligation to face its constituents at fixed intervals. I also note that the categories of “exigent circumstances” alleged to authorize the council to extend its own term of office goes far beyond natural catastrophes or similar events and include the council’s opinion that the extension would be beneficial to the pursuit of various projects. Such a custom would be very difficult to reconcile with the democratic principle embraced by Acho Dene Koe members.

[64] Thus, the council cannot rely on custom to extend its term of office beyond the usual three-year term. In particular, the September 14, 2020 resolution, which is the focus of the present application, cannot be supported by such a custom. The only remaining possibility, to which I now turn, is that it was authorized by the federal Regulations.

C. *Validity of the Regulations*

[65] Mr. Bertrand challenges the validity of section 4 of the Regulations and seeks a declaration that it is invalid. For the following reasons, I agree with him.

[66] The Regulations came into force on April 8, 2020. Sections 2 and 3 allow First Nations whose elections are governed by the *Indian Act* and the *First Nations Elections Act*, SC 2014, c 5, respectively, to cancel or postpone elections and to extend the term of their council. Section 4

deals with First Nations whose elections are governed by their own election law. It is the provision directly relevant to this case. It reads as follows:

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.	**4 (1)** Le conseil d'une première nation dont le chef et les conseillers sont choisis selon la coutume de celle-ci peut proroger le mandat du chef et des conseillers si la prorogation est nécessaire pour la prophylaxie de maladies dans la réserve, même si cette coutume est silencieuse à l'égard d'une telle situation.

[67] Section 5 regularizes the situation of First Nations that failed to hold an election scheduled for the period between March 9, 2020 and April 8, 2020. Sections 6 and 7 provide that a council's term of office cannot be extended more than twice nor for more than six months each time, and that the Minister must be informed by way of resolution; these sections do not apply to First Nations governed by their own election law. Lastly, section 8 provides that the Regulations are repealed one year after their coming into force, that is, on April 8, 2021.

[68] At the outset, I must address the suggestion that with respect to First Nations governed by their own election law, the Regulations merely provide guidelines to help First Nations interpret their own custom with respect to extension of their councils' term of office. The confusion in this regard may originate from the following statement contained in an information note sent to Acho Dene Koe and, presumably, other First Nations, shortly after the Regulations came into force:

> The Regulations do not provide any additional directives for Custom Election Code Bands, and these bands are therefore invited to refer to the applicable provisions of their respective codes. However, if the Custom Election Code does not provide for

> postponement of election in the current exceptional circumstances, the Regulations can serve as a guide.

[69] In reading this note, one must bear in mind that section 4 does not set any parameters for the exercise of the power to extend the term of office of council with respect to First Nations governed by their own election law. In contrast, the other provisions of the Regulations provide a much more precise framework with respect to First Nations governed by the *Indian Act* or the *First Nations Elections Act*, for example regarding the maximum length of an extension. What the information note appears to contemplate is that these other provisions may nevertheless serve as guidelines when a First Nation governed by its own law exercises the power conferred by section 4. This does not detract from the incontrovertible fact that section 4 clearly grants a power, "even if the custom does not provide for such a situation."

[70] In any event, I have shown that the power to postpone an election or to extend the council's term does not flow from Acho Dene Koe's custom or election law. Thus, the September 14, 2020 resolution extending the term of office of the council can only be valid if the Regulations specifically empowered the council to adopt such a measure.

(1) Analytical Framework

[71] Mr. Bertrand's first ground for challenging the validity of the Regulations is that the Governor in Council—that is, the federal cabinet—did not have the power to make them. They would be beyond the powers—in Latin, *ultra vires*—that Parliament granted to the Governor in Council in the *Indian Act*.

[72] Indeed, the requirement that regulations be based on statutory authority is a fundamental component of the rule of law. According to this principle, every exercise of state power must find its source in a legal rule: *Reference re Secession of Quebec*, [1998] 2 SCR 217, at paragraph 71 [*Secession Reference*]. As much as legislation must be authorized by the constitution, regulations must be authorized by legislation. "[R]egulatory bodies can exercise only those legislative powers that were delegated to them by the legislature:" *Catalyst Paper Corp v North Cowichan (District)*, 2012 SCC 2 at paragraph 15, [2012] 1 SCR 5 [*Catalyst Paper*].

[73] All parties agree that the method to determine if regulations are *ultra vires* was outlined by the Supreme Court of Canada in *Katz Group Canada Inc v Ontario (Health and Long-Term Care)*, 2013 SCC 64, [2013] 3 SCR 810 [*Katz Group*]. In that case, at paragraph 24, the Court held that a "successful challenge to the vires of regulations requires that they be shown to be inconsistent with the objective of the enabling statute or the scope of the statutory mandate." The importance of determining the scope of the statutory mandate for determining the validity of delegated legislation was underscored again in *Green v Law Society of Manitoba*, 2017 SCC 20 at paragraph 26, [2017] 1 SCR 360 [*Green*].

[74] Indeed, in *West Fraser Mills Ltd v British Columbia (Workers' Compensation Appeal Tribunal)*, 2018 SCC 22 at paragraph 12, [2018] 1 SCR 635, the Supreme Court of Canada stated, referring to its previous decision in *Katz Group*:

> Determining whether the regulation at issue represents a reasonable exercise of the delegated power is, at its core, an exercise in statutory interpretation, considering not only the text of the laws, but also their purpose and the context.

[75] There is a debate regarding the extent to which the principles established in *Katz Group* have been affected by the Supreme Court's more recent decision in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*]. See, for example, John Mark Keyes, "Judicial Review of Delegated Legislation: The Long and Winding Road to *Vavilov*" (2020), online: https://ssrn.com/abstract=3630636; John Evans, "Reviewing Delegated Legislation After *Vavilov*: *Vires* or Reasonableness" (2021) 34 CJALP 1. Given the circumstances of the present case, it is not necessary to wade into these issues.

[76] For our purposes, it is enough to say that, insofar as *Vavilov* directs me to assess the validity of the Regulations on a reasonableness standard, this requirement was already present in earlier cases. For example, in *Katz Group*, at paragraphs 25-26, the Supreme Court directed courts to adopt a generous approach and to refrain from cutting down the scope of the delegated law-making power through a narrow or technical interpretation of the enabling statute. See also, in this regard, *Catalyst Paper*, at paragraph 25; *Green*, at paragraph 20.

(2) Scope of Enabling Provisions

[77] Having laid out the applicable analytical framework, I can now inquire into whether the Governor in Council was empowered to make the Regulations. The Attorney General asserts that the Regulations are authorized by section 73(1)(f) of the *Indian Act*, which reads as follows:

73 (1) The Governor in Council may make regulations	**73 (1)** Le gouverneur en conseil peut prendre des règlements concernant :
[…]	[…]

(f) to prevent, mitigate and control the spread of diseases on reserves, whether or not the diseases are infectious or communicable;	**f)** la prophylaxie des maladies infectieuses ou contagieuses, ou non, sur les réserves;
[…]	[…]

[78] I note in passing that the Attorney General does not contend that the Regulations are authorized by federal legislation other than the *Indian Act*. In particular, the *Time Limits and Other Periods Act (COVID-19)*, enacted by section 11 of the *Act Respecting Further COVID-19 Measures*, SC 2020, c 11, does not appear to deal with First Nations governance issues.

[79] The Attorney General and Acho Dene Koe argue that this is a broad conferral of power, which encompasses any measure aimed at achieving the stated purpose of preventing, mitigating and controlling the spread of diseases. As the Regulations were intended to reduce the risk of spread of COVID-19 resulting from public gatherings associated with elections, they would fall within the purview of section 73(1)(f). Any effect on elections would be accessory or incidental and would not render the Regulations invalid.

[80] I am unable to agree with these submissions. They ignore the scheme of the *Indian Act* and they would validate the Regulations based on their purpose only, without any consideration of the means contemplated by Parliament.

[81] Enabling provisions are typically framed in a manner that refers to well-understood subject matters or areas of government regulation, for example the regulation of traffic or zoning

in sections 81(1)(b) and (g) of the *Indian Act*. In turn, these regulatory regimes often pursue well-understood purposes, for example, safety in the case of traffic regulation.

[82] Purpose, however, must not overcome subject matter in the definition of regulatory power. In interpreting legislation, including grants of regulatory power, we must pay attention not only to the ends pursued by Parliament, but also to the means intended to be used. As Professor Ruth Sullivan writes in *Statutory Interpretation*, 3rd ed (Toronto: Irwin Law, 2016) at 186, "[t]he legislature never pursues a goal single-mindedly, without qualification, and at all costs." Thus, pursuing the statutory purpose does not constitute a free-standing basis for the validity of delegated legislation. For example, in *Innovative Medicines Canada v Canada (Attorney General)*, 2020 FC 725 at paragraph 208, my colleague Justice Michael Manson rejected an attempt to invoke the purpose of legislation to save regulatory provisions that were outside the statutory mandate:

> An interpretation that may accord with an objective of the Patented Medicines Regime, but is inconsistent with the Board's mandate within the scheme of the *Patent Act* and flies in the face of the ordinary meaning of the "price" at which a medicine is "sold" is not reasonable.

[83] Thus, ascertaining the scope of the power delegated by Parliament cannot rely on statutory purpose only. It must resort to the usual tools of statutory interpretation, including the text and the scheme of the legislation.

[84] Let us begin with the text. The English version of section 73(1)(f) is the basis for the Attorney General's suggestion that Parliament intended to delegate a power circumscribed only by its purpose, namely, "to prevent, mitigate and control the spread of diseases." The French

version, however, conveys a slightly different idea. In larousse.fr, "*prophylaxie*" is defined as : "*ensemble des moyens médicaux mis en œuvre pour empêcher l'apparition, l'aggravation ou l'extension des maladies.*" Here, the focus is not only on the aims of the measures, but also on the means ("*moyens médicaux*" or medical means). In my view, the French version is more precise and more compatible with Parliament's intent: *R v Daoust*, 2004 SCC 6 at paragraphs 29-30, [2004] 1 SCR 217.

[85] Of course, as mentioned above, these concepts should receive a generous interpretation. But they are not boundless. For example, no one would suggest that section 73(1)(f) empowers the federal government to set up an income replacement regime, simply because such a regime might induce citizens to remain at home, thereby reducing contacts and the risk of transmitting COVID-19. Thus, the prevention, mitigation and control of the spread of disease is not merely a purpose that the government may pursue by whatever means it sees fit. It is the description of a subject matter.

[86] In this case, I do not need to provide an abstract or comprehensive definition of this subject matter. This is because there are enough indications in the *Indian Act* of what it does not encompass, and these indications are sufficient to conclude that the Regulations are *ultra vires*.

[87] The first of these indications is the basic fact that the *Indian Act* does not regulate customary elections or, in other words, elections held pursuant to Indigenous law. As I explained above, the *Indian Act* merely recognizes Indigenous laws regarding the selection of leaders; it does not empower First Nations to enact such laws. It would therefore be surprising that the

Indian Act would grant a regulatory power over a topic not within its purview. In other words, having withdrawn from the regulation of these elections, Parliament should not lightly be taken to have authorized the Governor in Council to re-enter the field, other than through clear statutory language.

[88] Second, with respect to elections governed by the *Indian Act*, section 76 gives the Governor in Council a specific power to make regulations. This suggests that regulating elections was not considered to be within the purview of the regulation-making powers granted by section 73(1), nor within the more general power, found in section 73(3), to "make orders and regulations to carry out the purposes and provisions of this Act." Thus, elections constitute a subject matter separate from those listed in section 73. If regulating elections held pursuant to the *Indian Act* is not within the scope of section 73 then, *a fortiori*, elections held pursuant to Indigenous law must also be excluded.

[89] The third indication is the separation drawn by the *Indian Act* between issues of governance and land management. Elections are a matter of governance, but section 73(1)(f) confers a power related to land management. This is illustrated by the *Indian Act*'s very important distinction between the concepts of First Nation (or "band") and reserve. A First Nation is a collective or group of individuals. A reserve is a parcel of land. Each is the focus of different portions of the *Indian Act*. For example, sections 18-41 and 53-60 deal with various aspects of the management of reserves, whereas sections 5-17 and 74-86 deal with First Nations governance issues, in particular membership, elections and powers of their councils. The distinction is also present in more recent self-government regimes. See, for example, the

distinction between the powers enumerated in Parts I and III of Schedule III to the *Yukon First Nations Self-Government Act*, SC 1994, c 35.

[90] The distinction between governance and land management issues is underscored by the fact that a not insignificant number of First Nations, like Acho Dene Koe, do not have reserves. Thus, the provisions of the *Indian Act* regarding reserves do not apply to them. Yet, these First Nations remain subject to the provisions regarding governance. Moreover, many First Nation members reside off reserve. Since the decision of the Supreme Court of Canada in *Corbiere v Canada (Minister of Indian and Northern Affairs)*, [1999] 2 SCR 203 [*Corbiere*], they are allowed to vote in council elections. For this reason, First Nations often conduct advance polls in urban centres where a significant number of their members reside. Thus, First Nation elections are often conducted both on and off reserve, and are sometimes not linked to any reserve.

[91] For these reasons, Parliament cannot have intended that a regulatory power that applies only to reserves would encompass governance issues, in particular elections. The scope of most of the powers granted by section 73(1), including the power to take measures to prevent, mitigate and control the spread of diseases in section 73(1)(f), is limited to reserves. This indicates that Parliament viewed these powers in terms of land management, not governance.

[92] To be sure, my conclusion that the Regulations are *ultra vires* does not rest upon the fact that Acho Dene Koe lacks a reserve. The lack of a reserve would certainly be a relevant factor in deciding whether a First Nation reasonably exercised the power granted by the Regulations. Rather, the territorial dimension of the powers enumerated in section 73 is an indication of

Parliament's will to grant regulatory powers over topics typically assigned to local authorities, such as the regulation of traffic or inspection of buildings. Indeed, many of the powers granted to the federal government by section 73 are also granted to First Nation councils by section 81. A First Nation may not use the powers granted by section 81 to regulate elections or change electoral custom: *Whalen*, at paragraphs 68-73. Given the similarity between the powers granted by the two sections, the same restriction must also apply to section 73 powers.

[93] The Attorney General argues that the Regulations' effect on elections is merely incidental. I am unable to agree. Of course, if the Governor in Council made, pursuant to section 73(1)(f), regulations prescribing the wearing of masks in public places on reserves, they could incidentally apply to elections. But something entirely different is at stake here. The Regulations deal solely with elections. Most importantly, they directly regulate one of the basic parameters of democracy, the length of term of elected officials. Parliament cannot have contemplated that such a crucial feature could be changed by an incidental effect of regulations made for an entirely different purpose or regarding an entirely different subject matter.

(3) Policy Considerations

[94] During oral argument, the Attorney General emphasized the unprecedented nature of the COVID-19 pandemic and stressed the fact that the Regulations were a component of the decisive measures the government had to take to protect the health and safety of Canadians. As elections involve public gatherings and close personal interaction, and given the heightened vulnerability of many First Nation members, the overcrowding of houses in many communities and the lack of

health care facilities in remote communities, the government found that allowing First Nations to cancel or postpone elections would contribute to fighting the pandemic.

[95] I do not doubt that these are serious policy considerations. They are, however, irrelevant to the issue I have to decide. Policy considerations are not part of the framework for deciding whether regulations are *ultra vires*: *Katz Group*, at paragraphs 27-28. Thus, it does not assist Mr. Bertrand to argue that the Regulations could have employed more circumscribed measures to achieve their purpose. Conversely, it does not assist the Attorney General to insist on the necessity of taking strong and swift measures to fight the pandemic. The sole issue before me, I repeat, is whether the power to make the Regulations flows from the *Indian Act*.

[96] In a nutshell, the government is asking me to tolerate an invalid exercise of power because it was done for a good reason. This is simply incompatible with the rule of law, which requires that every exercise of state power find its source in a legal rule: *Secession Reference*, at paragraph 71. Going down that road would involve courts in giving their blessing, after the fact, to unlawful government action based on its desirability from a policy perspective. There is nothing further removed from the judicial role.

[97] Moreover, if I were to venture on this terrain, I would surely need to consider countervailing policy objectives, most importantly the democratic principle, which underpins Canada's constitution: *Secession Reference*, at paragraph 65. For the members of the many First Nations who have chosen to select their leaders by democratic means, the ability to vote is a

fundamental interest: *Corbiere*, at paragraphs 90-91, *per* L'Heureux-Dubé J. Fixed or maximum terms of office are a crucial component of democracy.

[98] Striking a balance between competing policy considerations, however, is the role of the elected branches of government, not judges. This is why the validity of delegated legislation does not depend on the court's assessment of its policy merits: *Katz Group*, at paragraphs 27-28. This separation of validity and policy merits cuts both ways: the fact that regulations appear to be desirable from a policy perspective has no bearing on their validity. Thus, the Governor in Council's views regarding the desirability of the Regulations cannot save them if they are not authorized by the *Indian Act*.

[99] I would add that this is not mere formalism. The requirement that delegated powers stay within the purview of the delegation serves important objectives. It fosters democratic accountability, by ensuring Parliament's ultimate control over policy choices. In certain cases, it also fosters respect for the manner in which Parliament distributed delegated powers among different entities. Here, for instance, Parliament decided to recognize election laws made by a category of First Nations, instead of subjecting them to the *Indian Act* regime. This affords a certain degree of self-government to these First Nations. Keeping the Governor in Council within the bounds set by the *Indian Act* preserves this autonomy.

(4) Other Arguments Pertaining to the Validity of the Regulations

[100] As I conclude that the Regulations are *ultra vires*, I need not consider other arguments raised by Mr. Bertrand, including the alleged conflict between the Regulations and Acho Dene Koe custom and the fact that the Regulations would constitute an illegal subdelegation of power.

D. *Other Arguments Pertaining to the Validity of the Extension of Term of Office*

[101] In the event that Acho Dene Koe's council was found to have the power to extend its own term, Mr. Bertrand made arguments to the effect that the council's exercise of this power, in its September 14, 2020 resolution, was unlawful. In particular, he submits that the council had a duty to consult the First Nation's members prior to making this decision. He also argues that the decision to postpone the election for almost one year was unreasonable and disproportionate, given that it was possible to conduct an election safely in the circumstances. As I have found that the council lacks the power to extend its own term of office, I need not consider these arguments.

III. Disposition

[102] As the election will take place shortly, it is not necessary to issue relief in the nature of *mandamus* or to quash the decision extending the council's term of office. In the circumstances, it is sufficient to issue declarations that the council lacked the power to extend its own term of office and that section 4 of the Regulations is *ultra vires*.

[103] The Attorney General asks that any declaration of invalidity that I may issue be suspended for a period of 90 days. Mr. Bertrand insists that the suspension should not be for more than 30 days. I am sensitive to the implications of this judgment not only on the federal government, but also on First Nations that may have availed themselves of the powers granted by the Regulations and will have to hold elections on short notice. On the other hand, I cannot ignore the fact that members of such First Nations have been illegally deprived of the opportunity to vote for the selection of their leaders. I consider that a 60-day suspension will afford sufficient time to all parties affected.

[104] At the hearing, certain parties made submissions as to costs. These submissions, however, were incomplete. It is preferable to give the parties a further occasion to make submissions regarding costs, taking the outcome of the application into account.

JUDGMENT in T-1274-20

THIS COURT'S JUDGMENT is that:

1. The council of Acho Dene Koe First Nation did not have the power to extend its own term of office.
2. Section 4 of the *First Nations Election Cancellation and Postponement Regulations (Prevention of Diseases)*, SOR/2020-84, is *ultra vires* and invalid.
3. This declaration of invalidity is suspended for 60 days after the date of this judgment.
4. The applicant will serve and file his costs submissions, not to exceed 10 pages, no later than 15 days after the date of this judgment.
5. The respondents will serve and file their costs submissions, not to exceed 10 pages, no later than 15 days after the applicant's costs submissions are filed.

"Sébastien Grammond"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1274-20
STYLE OF CAUSE:	FLOYD BERTRAND v ACHO DENE KOE FIRST NATION BAND COUNCIL, CHIEF GENE HOPE, COUNCILLOR JOE BERTRAND, COUNCILLOR ROGER BERTRAND, COUNCILLOR IRENE MCLEOD, COUNCILLOR ANGUS CAPOT-BLANC, COUNCILLOR DENNIS NELSON, COUNCILLOR DENNIS MCLEOD AND THE ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	HEL BY VIDEOCONFERENCE BETWEEN OTTAWA, ONTARIO, EDMONTON, ALBERTA, CALGARY, ALBERTA AND VANCOUVER, BRITISH COLUMBIA
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JUDGMENT AND REASONS:	GRAMMOND J.
DATED:	APRIL 1, 2021

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