Federal Court Cour fédérale

Date: 20241002

Docket: T-1077-23

Citation: 2024 FC 1546

Ottawa, Ontario, October 2, 2024

PRESENT: The Honourable Madam Justice Strickland

BETWEEN:

SHERI CLAXTON
VANESSA CLAXTON

Applicants

and

TSAWOUT FIRST NATION

Respondent

JUDGMENT AND REASONS

[1] The Applicants bring this application for judicial review in respect of a decision by Tsawout First Nation [Tsawout], dated May 31, 2022, to enter an agreement with Allan Claxton and Earl Claxton relating to Lot 47-6, CLSR 81466 on the East Saanich Reserve No. 2 [Lot 47-6]. This agreement provided that Allan Claxton and Earl Claxton would pay all debt related to Lot 47-6 in exchange for an unencumbered possessory interest in that property [Agreement]. The Applicants seek an order of this Court declaring the decision to be void and setting it aside.

Factual Background

[2] Sheri Claxton and her daughter Vanessa Claxton, the Applicants, are members of Tsawout, which is an Indian Band as defined in the *Indian Act*, RSC 1985, c I-5 [*Indian Act*]. Lot 47-6 is located on East Saanich Reserve No. 2 in British Columbia. Tsawout is the Respondent in this matter.

[3] Allan Claxton is also a member of Tsawout. He is not a party to the judicial review but, as will be described below, he along with his brother Earl Claxton are plaintiffs (and defendants by counterclaim) in related litigation in the British Columbia Supreme Court [BCSC]. Allan Claxton has also filed an affidavit in response to this application for judicial review. Therein he states that he served as Chief of Tsawout for 20 years (the specific time frame is not identified) and that after taking a few years off, he was elected as Councillor in 2021. He states that he served in that position for two years and did not run for re-election in July 2023, but continues to be involved with Tsawout and First Nation land issues generally. As such, Allan Claxton was a sitting Councillor when the Agreement was entered into by Tsawout on May 31, 2023.

[4] It is not in dispute that in 1957, Tsawout granted a Certificate of Possession [CP] for Lot 20 CLSR 58751 [Lot 20] to the Estate of Johnny Claxton. A registration in the Indigenous Services Canada, First Nations Land Registry [Registry] dated August 31, 1971, confirms the grant. In 1958, the Estate of Johnny Claxton transferred Lot 20 to Ernie Earl Claxton [Earl Sr.], Clyde and Louie Claxton, as recorded in the Registry on August 31, 1971. Lot 20 was subsequently subdivided into Lot 47 CLSR 63988 [Lot 47] and Lot 48 CLSR 63988 [Lot 48]. In

1978, Clyde and Louie Claxton transferred their interest in Lot 47 to Earl Sr., as recorded in the Registry on January 24, 1979. In April 1983, Earl Sr. transferred his interest in Lot 47 to his sons, Allan, Earl (Jr.) and Calvin Claxton, pursuant to which each of the brothers held a CP and an undivided 1/3 interest in Lot 47, as recorded in the Registry on May 20, 1983. In 1994, Lot 47 was further subdivided into four lots, including Lot 47-6, as indicated in a Registry entry dated April 12, 1999.

[5] On October 6, 1994, the three brothers, Allan, Earl and Calvin Claxton, each transferred their interest in Lot 47-6 to Tsawout, as indicated in a Registry entry dated April 4, 1999. It is generally agreed that this transfer was to secure a loan sought by Calvin Claxton to fund construction on Lot 47-6.

[6] More specifically, after the three brothers transferred their interest in Lot 47-6 to Tsawout, Calvin Claxton obtained a loan from or guaranteed by Tsawout, to finance construction of a log cabin on the property. Calvin did not finish construction of the log cabin and instead built a house on the property. Calvin lived in the house on the property until about 2002, when he transferred his band membership from Tsawout to Squamish Nation. As will be discussed below, there is no documentation of any sort in the records before me pertaining to that loan, nor any related agreements, demands for payment, or any default actions.

[7] It appears that in or around the early 2000s, Calvin Claxton defaulted on his loan.

[8] Calvin and Sheri Claxton were married. The records before me do not indicate when they married but it appears to be generally agreed that they separated in 1995 and divorced some years later.

[9] Sheri Claxton claims that she has lived in the house on Lot 47-6 continuously since 2005 and that Vanessa Claxton has lived in the house continuously since 1995 except for the period 2012-2014 when she was away at school.

[10] On March 13, 2015, Calvin Claxton signed an "Absolute Disclaimer of Possessory Interest in Reserve Land (for use by a non-band member inheriting an interest in reserve land)" [Absolute Disclaimer] by which he refused to accept any interest in land located on a reserve of Tsawout that was a gift of the estate of Earl Sr. The Absolute Disclaimer was registered with respect to Lot 47-6 in the Registry on December 18, 2015, and Allan and Earl Claxton are recorded as each holding a ½ undivided interest in Lot 47-6.

[11] On May 14, 2018, Tsawout wrote to Sheri Claxton stating that, as she had been advised by letter dated October 30, 2017, neither she nor her ex-husband Calvin had any legal right to the property, and demanding that she cease and desist interfering with people entering on the property to complete studies necessary for its development. Further, based on Tsawout's records, she had not been paying rent on the family home located on Lot 47-6 and that Tsawout had continued to pay the mortgage on the property. The letter states that it served as formal notice

that Sheri was required to vacate within 30 days and that failure to do so could lead to Tsawout taking eviction proceedings. Based on the records before me, Tsawout did not pursue eviction.

[12] On May 31, 2022, the Agreement was signed. This provides that, in exchange for an amount of $109,000 – which would satisfy any and all debt owed by Allan and Earl Claxton to Tsawout –, the two brothers would receive a clear possessory interest in Lot 47-6.

[13] On July 26, 2022, Allan and Earl Claxton delivered an eviction notice to the Applicants, which requested them to leave Lot 47-6 by August 31, 2022, advised them that the property was jointly owned by Allan and Earl and that there was no rental agreement in place that would permit the Applicants' continued occupation. The Applicants did not vacate.

[14] On August 31, 2022, Vanessa Claxton requested to speak with the Tsawout Chief and Council about the property dispute. By email dated September 7, 2022, the Tsawout Band Manager denied the request on the basis that the matter was deemed to be private in nature and not involving Tsawout band administration or Chief and Council.

[15] On September 1, 2022, Allan and Earl Claxton delivered a final eviction notice to the Applicants requiring them to leave Lot 47-6 by September 5, 2022, failing which Allan and Earl would file a claim against the Applicants. The Applicants did not vacate.

[16] On September 12, 2022, Allan and Earl Claxton filed a Notice of Civil Claim [Civil Claim] at the BCSC seeking, *inter alia*, a declaration that the Applicants are trespassing on Lot

47-6; an order for vacant possession of Lot 47-6; payment of sums owed to them, including rent; and, damages (*Claxton v Claxton*, 2023 BCSC 665 at para 7 [*Claxton #1*]).

[17] On September 15, 2022, Allan and Earl Claxton filed a Notice of Application seeking to have a portion of their Civil Claim determined summarily and an order for vacant possession, or, in the alternative, an interlocutory injunction requiring the Applicants to provide vacant possession pending trial (*Claxton v Claxton*, 2023 BCSC 2417 at para 14 [*Claxton #2*]).

[18] By letter dated November 5, 2022, Vanessa Claxton requested the Tsawout Chief and Council's permission to continue to occupy Lot 47-6. She claims that she did not receive a response to this request and there is no evidence in the records before me that she did.

[19] On November 8, 2022, the Tsawout Band Manager wrote a letter "To Whom it may Concern" which states that the action before the BCSC was a private dispute between individuals and that Tsawout did not have a direct interest in the matter. In her letter, the Band Manager also confirmed that Allan and Earl Claxton each held a CP for an undivided ½ interest in Lot 47-6. Further, that Tsawout had guaranteed a loan obtained by Calvin Claxton to finance construction of a log cabin on Lot 47-6 and her understanding was that, at that time, the three brothers each held and undivided 1/3 interest in the property. The Band Manager also wrote that as security for the loan, Tsawout required that the brothers' interest in the property be transferred to it for the duration of the loan and that Calvin Claxton subsequently defaulted on the loan and forfeited his interest in the property. She concluded her letter by stating that Allan and Earl Claxton had since paid off Calvin's debt and, as a result, Lot 47-6 was unencumbered.

[20] On November 18, 2022, Vanessa Claxton submitted a Notice of Dispute, on her own behalf and on behalf of her mother [Notice of Dispute], with Tsawout's Lands Manager pursuant to Part 8 of the *Tsawout First Nation Land Code*, 2007 [*Land Code*].

[21] On December 13, 2022, the Applicants submitted an Addendum to the Notice of Dispute [Addendum] to the Lands Manager. The grounds cited in the Notice are that the July 2022 decision of Tsawout to transfer its interest in Lot 47-6 to Allan and Earl Jr. was inconsistent with (a) the Conflict of Interest provisions in Part 5 of the *Land Code*; (b) Sheri Claxton's rights to possess, reside in, use and otherwise occupy the matrimonial home with her daughter Vanessa, as provided for in Part 7 of the *STAUTW First Nation SMELI (Matrimonial) Real Property Law No. 01-2012* [Matrimonial Property Law] and the *Family Homes on Reserves and Matrimonial Interests or Rights Act*, SC 2013, c 20 [FHRMIRA]; and (c) CELANEN, defined at Section 2.1 of the Matrimonial Property Law as "the body of WSANEC laws, customs and traditions, and includes the traditions and laws of individual families." The Applicants wrote in the Addendum that they were seeking recognition of Sheri Claxton's right to possess, reside in, use and otherwise occupy the SMELI (Matrimonial) Home at Lot 47-6 with her daughter Vanessa Claxton, in accordance with CELANEN and the Dispute Resolution Procedures established under Part 8 of the *Land Code*.

[22] By letter dated January 12, 2023, the Tsawout Band Manager informed the Applicants that the Notice of Dispute would not be sent to the Dispute Resolution Panel [January 12 Letter]. The Band Manager stated that this was because the dispute resolution procedures of the *Land Code* were not engaged as title to Lot 47-6 was not in dispute and, even if it were, the Applicants

had responded to the BCSC action which would preclude use of the *Land Code* dispute mechanism unless the court proceedings were complete or with the consent of the parties. According to Tsawout's Band Manager, the Matrimonial Property Law and the FHRMIRA [collectively, the Matrimonial Property Laws] did not apply because they require that the property at issue be owned by one of the spouses, but Calvin Claxton had surrendered his interest in Lot 47-6 and, in any event, the Applicants were out of time to make such a claim which, in any case, would have had to have been brought against Calvin. Further, the Dispute Resolution Panel would not have jurisdiction to grant the relief sought as the *Land Code* provides that dispute resolution does not apply to any dispute to which a spousal property law applies. The letter states that the Matrimonial Property Laws are clear that the BCSC is the venue where the claim would need to be pursued.

[23] On April 26, 2023, Justice Saunders of the BCSC found that an entitlement to an order of possession was not an appropriate issue for summary determination (*Claxton #1* at para 29). However, with respect to the injunctive relief sought by Allan and Earl Claxton, Justice Saunders found that Sheri and Vanessa Claxton had not proven that they had a legal right, pursuant to s 20(1) of the *Indian Act*, to possession of Lot 47-6 as of the hearing of the application, i.e., November 18, 2022. Accordingly, and as will be further discussed below, the interlocutory injunction requested by Allan and Earl Claxton was granted and the Applicants were ordered to vacate Lot 47-6 within 45 days of the Order, pending the trial of the civil claim (*Claxton #1* at paras 32-33). The Applicants did not vacate Lot 47-6.

[24] The Applicants subsequently filed a response to the Civil Claim as well as a counter claim in the BCSC action (*Claxton #2* at para 17). A copy of that pleading has not been provided to this Court.

[25] On May 23, 2023, the Applicants filed a notice of application in the BCSC seeking an order staying the execution of Justice Saunders' Order, more particularly the injunction, pending the trial of that action (*Claxton #2* at para 18).

[26] Also on May 23, 2023, the Applicants filed their Notice of Application in this Court seeking, among other relief, (a) a declaration that the decision of Tsawout to allocate an interest in Lot 47-6 to Allan and Earl Claxton is void on the basis that Tsawout failed to observe procedural fairness and that a reasonable apprehension of bias exists; (b) a declaration the decision be set aside on the basis that it relied on an erroneous assumption that Tsawout had properly allocated the interest in the property; and (c) an order setting aside the decision to enter into the Agreement and remitting it back for reconsideration.

[27] On September 29, 2023, having applied the legal test for a stay and based on the evidence before him, Justice Gaul of the BCSC found that the Applicants had no evident legal right that superseded Allan and Earl Claxton's CP and that he was satisfied that Allan and Earl had a legal right to the property which right was being infringed by the ongoing conduct of the Applicants (*Claxton #2* at paras 50, 70). As such, he dismissed the Applicants' application to stay the execution of Justice Saunders' injunction order but underscored that this was not the final

determination of Allan and Earl Claxton's claim against the Applicants or of the latter's counterclaim, which would both be decided later (*Claxton #2* at paras 72-74).

[28] On September 22, 2023, the Applicants filed an Amended Notice of Application.

[29] Before this Court, the Applicants assert that Sheri Claxton acquired a legal interest in the family home and Lot 47-6 over the course of her marriage to Calvin and as a result of payments made to Tsawout with respect to the property. Sheri attaches as an exhibit to her supporting affidavit a receipt on Tsawout letterhead in the amount of $515.20 dated February 27, 2012, and a Tsawout paycode history between September 2006 and March 2012 listing payments totaling $23,321.09. Sheri asserts these were payments for the occupancy of the home and repayment of the mortgage. The October 13, 2023, affidavit of Vanessa Claxton, filed in support of this judicial review, states "I have made payments to Tsawout for Lot 47-6" but provides no detail or documentation in support of this statement.

[30] On this point, an affidavit of Mr. Greg Diemer, the chief financial officer [CFO] of Tsawout, dated November 9, 2023 [Diemer Affidavit] filed by Tsawout in support of its response to the application for judicial review, states that he reviewed Tsawout's financial records and did not locate any records of payments received from the Applicants. The May 14, 2018, letter from the Band Manager notifying the Applicants that they were to vacate the property also states that, according to Tsawout's records, the Applicants had not paid rent to Tsawout.

Decision Under Review

[31] The Notice of Application indicates that the decision under review is Tsawout's decision to enter into the Agreement with Allan and Earl Claxton on May 31, 2022 (although the Notice of Application refers to a July 2022 decision, this would appear to be in error) with respect to Lot 47-6.

[32] However, in their written submissions, the Applicants assert that they are also challenging Tsawout's "related decision," being the January 12 Letter declining to refer the Notice of Dispute to the Dispute Resolution Panel as contemplated by the *Land Code*.

[33] This will be addressed below as a preliminary issue.

Issues and Standard of Review

[34] Tsawout raises the following three preliminary issues. In their written submissions, the Applicants identified and addressed the third of these issues:

i. Are the Applicants improperly challenging two distinct decisions?

ii. Is the application within the jurisdiction of the Federal Court?

iii. Is the application time-barred?

[35] The issues on the merits are:

> Issue 1: Did Tsawout owe the Applicants a duty of procedural fairness with respect to its decision to negotiate and sign the Agreement and/or in refusing to refer the Notice of Dispute to the Dispute Resolution Panel? If so, did Tsawout breach this duty?
>
> Issue 2: Was there a reasonable apprehension of bias respecting the involvement of Allan Claxton?

[36] The parties submit and I agree that questions of procedural fairness are reviewed on a correctness standard (*Mission Institution v Khela*, 2014 SCC 24 at para 79; *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 43). The court, owing no deference to the decision-maker, must ask "whether the procedure was fair having regard to all of the circumstances" (*Lipskaia v Canada (Attorney General)*, 2019 FCA 267 at para 14; *Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at para 56). If the court is satisfied that the procedure was not fair, then the application should be allowed.

Preliminary Comments

i. Representation by counsel

[37] Up until moments before the hearing, the Applicants were jointly represented by counsel. However, just prior to the hearing, Vanessa Claxton advised counsel that she would be representing herself at the hearing and discharged him. In the result, counsel presented the

application on behalf of Sheri Claxton and I permitted Vanessa to represent herself and present her case, to the extent not already covered by counsel for her mother.

ii. Certified tribunal record and affidavit evidence

[38] The original and Amended Notices of Application included a request (as permitted by Rule 317 of the *Federal Courts Rules*, SOR/98-106 [*Rules*]) by the Applicants that Tsawout provide them with the minutes and any other records regarding the allocation of interests in Lot 47-6 in 2022. The CTR filed by Tsawout contains only a certified copy of the Agreement. Tsawout did not file any supporting background affidavits of any members of Tsawout, e.g., Chief, Counsel or any representatives of Tsawout Chief and Counsel, other than the brief affidavit of the CFO speaking to his role in the negotiation of the Agreement. Tsawout did file an affidavit of Allan Claxton.

[39] Sheri Claxton filed an affidavit in support of this application for judicial review which includes two attached exhibits. Vanessa Claxton has also filed an affidavit in support of this application. However, the Application Record contains, among other things, affidavits filed in the BCSC matter which are not exhibits to or referred to in either supporting affidavit filed in this Court, including an unsigned affidavit of Vanessa Claxton, to which the Applicants refer in their written submissions. I decline to consider the latter.

[40] None of the affiants were cross-examined on their affidavits.

[41] As will be discussed below, the limited evidence before me raises, but does not resolve, many questions that are relevant to my determination of this matter.

iii. The BCSC decisions

[42] The parties' positions ultimately concern the status of the Applicants' interests, if any, in Lot 47-6.

[43] In that regard, Tsawout relies on the BCSC decisions to support its view that the Applicants have no legal interest in Lot 47-6. This view is the basis for Tsawout's position that it is was not required to provide notice to or consult with Sheri and Vanessa Claxton about entering into the Agreement. More specifically, Tsawout argues that the Agreement is private, not public, in nature and therefore does not engage procedural fairness requirements with respect to the Applicants and, in any event, that Tsawout was not required to consult with or give notice to the Applicants because they do not have legal interest in Lot 47-6.

[44] Conversely, the Applicants argue that while they do not hold a CP to Lot 47-6, they do have a legal interest in the property based on the *Land Code*, the FHRMIRA, the Matrimonial Property Law, their long time occupation of the house and improvements made to it, and, in particular and as stressed when appearing before me, the payments made to and accepted by Tsawout with respect to the property. According to the Applicants, the *Land Code* required Tsawout to consider their interests but Tsawout failed to do so and failed to afford them

procedural fairness with respect to the entering into the Agreement, which was further compounded by the January 12 Letter.

[45] Given this, it is perhaps helpful to set out here what the BCSC actually held, why and in what context.

i. Claxton #1

[46] *Claxton #1* was an application of the plaintiffs therein (Allan and Earl Claxton), brought under a summary trial rule, seeking summary judgment on the issues of the defendants' (Sheri and Vanessa Claxton) trespass and the plaintiffs' right to an order for vacant possession; or, alternatively, an interlocutory injunction requiring the defendants to give up vacant possession of the premises pending trial. Justice Saunders set out the underlying facts in that matter which are substantially the same as those before me. He concluded that he was unable to find the necessary facts, and that it would be unjust to decide, the issue of entitlement to an order for possession in the application then before him. This was because the plaintiffs sought to sever the issue of their entitlement to an order of possession from all other relief sought and, therefore, it would be inefficient to proceed summarily. Further, Justice Saunders found that:

> [27] Second, while Sheri and Vanessa have never held a certificate of possession, it appears that they continued to inhabit the House on the Premises to the knowledge of [Tsawout], and that [Tsawout] accepted mortgage or rent payments from Sheri for a period of several years. Under s. 25(2) of the [*Indian Act*], the right of possession of the Premises would appear to have reverted to [Tsawout] when Calvin transferred his band membership and failed to transfer his interest under s. 25(1). [Tsawout]'s subsequent acceptance of Sheri's payments would appear possibly to give rise to an equitable interest. That issue cannot be determined.

> [28] Further, while the plaintiffs relied upon Calvin's Disclaimer to have [Tsawout] transfer the right of possession to them, it is not at all clear that the Disclaimer had the legal effect contended by the plaintiffs. The Disclaimer was limited to the acceptance of gifts from Earl Sr.'s estate. However, Earl Sr. had already granted possessory rights to Calvin, and the plaintiffs, in 1983. I cannot find on the evidence that the estate had anything to give in respect of Lot 47-6; the effectiveness of the Disclaimer as an instrument entitling the plaintiffs to sole possession is therefore uncertain, on the evidence.

[47] However, with respect to the interlocutory application, in applying the *RJR-MacDonald v Canada (Attorney General)*, [1994] 1 SCR 311 [*RJR-MacDonald*] tripartite test for a stay, Justice Saunders found that, in trespass cases, if there is no arguable case against a plaintiff's right of possession, an injunction will normally lie against a trespasser without consideration of the second and third parts of the test. In that regard, when the evidence clearly establishes a plaintiff's rights, the onus shifts to the defendant to establish that their continuing possession of the property is as of right. In this context, the claim to possession "as of right" must be established as of the date of the application. Justice Saunders found that:

> [32] Under s. 20(1) of the [*Indian Act*], no member of a First Nation is in lawful possession of reserve land unless possession of the land has been allotted to them by the band council, with the Minister's approval. The defendants have not established that they meet that requirement. They have never held certificates of possession or a registered interest in the Premises. Under the [*Indian Act*], their possession is unlawful. They have not proven that they had a legal right to possession of the Premises as of the hearing of the application.
>
> [33] Accordingly, the interlocutory injunction is granted. Within 45 days of the date of this Order, the defendants will provide vacant possession of the Premises, pending the trial of this civil claim.
>
> [34] Should the defendants wish to contest the plaintiffs' claim, I further order that within 14 days of this Order, the defendants file a response to civil claim. If the defendants do not do so, the plaintiffs

> will be at liberty to pursue the remedies sought in the notice of civil claim, in default of pleading. Further, if the defendants oppose the plaintiffs' claim on the grounds of the defendants' opposition to decisions made or actions taken by [Tsawout], I order that they take all steps necessary to initiate legal proceedings to challenge decisions of [Tsawout], or to compel action by [Tsawout], as the case may be, within 45 days.

ii. Claxton #2

[48] In *Claxton #2*, Sheri and Vanessa Claxton, who had not vacated the property, sought a stay of the injunction until the underlying action was adjudicated. Justice Gaul, applying the serious issue branch of the *RJR-MacDonald* test, noted that relying upon the common law, including W̱SÁNEĆ customary law and the FHRMIRA, the defendants, i.e., Sheri and Vanessa Claxton in that matter, maintained that Sheri has a legal interest in the house and premises as the former spouse of Calvin Claxton, and that this interest has never been extinguished. The defendants also pointed to the fact that they have occupied the house for an extended period of time and have made mortgage or rental payments in relation to the premises that have been accepted by the Tsawout. Further, Justice Gaul noted that they had initiated proceedings in Federal Court challenging the Tsawout's decision to allocate an interest in the premises, on the basis that the decision breached the rules of natural justice and procedural fairness, and that there was no consultation with either of them before approving the allocation.

[49] Justice Gaul found:

> [28] With respect to the *FHRMIRA*, the plaintiffs submit that the provisions of this legislation have no applicability to the circumstances before the court and cannot be relied upon by the defendants as it was enacted in 2013, with associated Regulations promulgated in 2014. As these legislative provisions cannot be applied retroactively, they cannot, say the plaintiffs, apply to Sheri

Claxton's situation, given she separated from Calvin Claxton in or around 1995. I find this argument persuasive. I also accept that if the provisions of the *FHRMIRA* and its Regulations did apply to Sheri Claxton's situation, they would only found a claim against her former spouse, Calvin, and not the plaintiffs.

[29] The plaintiffs advance a similarly persuasive argument with respect to the defendants' attempt to rely upon the common law and W̱SÁNEĆ customary law as bases for their claims. I agree with counsel for the plaintiffs that any claim Sheri Claxton may have based on these potential legal avenues would be as against Calvin Claxton and not the plaintiffs.

[30] The defendants maintain that case authorities confirm that traditional use and occupation of land gives rise to lawful possession, even in the absence of a certificate of possession. In my respectful view the defendants are misinterpreting the jurisprudence they cite.

[31] In *George v. George*, 1996 CanLII 8396 (BC CA), [1997] 2 C.N.L.R. 62 (B.C.C.A.), Madam Justice Rowles concluded, on behalf of a unanimous court, that the specific facts of the case permitted the trial judge to find that the appellant was in lawful possession of the land in dispute, regardless of the fact that they had not obtained a certificate of possession under the *Indian Act*. However, the evidence in *George* satisfied the court that the band council had allotted the land in question to the appellant and that the Minister had consented to it pursuant to the *Indian Act*. These facts do not exist in the present case, as [Tsawout] has not allotted the Premises to the defendants, nor has the Minister consented to such an allotment. In this respect, I agree with the submissions of counsel for the plaintiffs that *George* is not authority for the proposition that traditional use and occupation gives rise to lawful possession.

[32] In my view, the same can be said with respect to the legal principles that can be derived from *Nicola Band v. Trans-Canada Displays Ltd.*, 2000 BCSC 1209 and *Penticton Indian Band v. Jack*, 2013 BCSC 2587.

[33] In *Nicola Band*, Madam Justice Smith concluded:

> [151] The recognition of traditional or customary use of land cannot create a legal interest in the land that would defeat or conflict with the provisions of the *Act*. Such an approach to governance by a band council would be adverse to its fiduciary duty to

> manage reserve lands in the best interests of all band members. As stated by Rae J. at page 330 in *Leonard v. Gottfriedson*, supra:
>
> > It should be apparent that the chief and councillors of a band are in a position of trust relative to the interests of the band generally, the band's assets and the members of the band.
>
> …
>
> [162] The above findings may be summarized as follows:
>
> > …
> >
> > 4. Ownership of lands based on traditional or customary use of the land does not exist independent of interests created by the *Act*. Recognition of an individual's traditional occupation of reserve lands does not create a legal interest or entitlement to those lands unless and until the requirements of the *Act* are met.
>
> …

[34] While Justice Saunders was, quite understandably in my view, not prepared to discount the possibility that the defendants held some form of equitable interest in the Premises based upon payments they have made to [Tsawout] relating to the property, that possibility was not sufficient to convince him that the injunction sought by the plaintiffs ought not to be granted. I come to the same conclusion on the present application. In my opinion, even if the defendants have some form of equitable claim, it does not prevail over or trump the clear requirements of the *Indian Act*, and in particular s. 20. Support for this conclusion can be found in *Squamish Indian Band v. Findlay*, 1981 CanLII 401 (BC CA), 26 B.C.L.R. 376 (C.A.) and *Leonard v. Gottfriedson*, 1980 CanLII 585 (BC SC), 21 B.C.L.R. 326 (S.C.).

[35] The defendants also argue that their Federal Court challenge to the [Tsawout]'s allocation of the Premises provides a basis for a finding that there is a triable issue in the present case. I do not find that argument persuasive. The allocation in question, based on the evidence before me, was made in 1979 when [Tsawout] granted a certificate of possession for the Premises to the plaintiffs and

> Calvin Claxton's father, Earl Claxton Senior. In 1983, right to possess the Premises was granted to the plaintiffs and Calvin Claxton.
>
> [36] In my opinion, what the defendants are actually challenging is not the decision of [Tsawout] to allocate an interest in the Premises. Rather, it is the private agreement between [Tsawout] and the plaintiffs in which the plaintiffs agreed to pay the debt that their brother Calvin had incurred and secured against the Premises, in return for which they would obtain a clear possessory interest in the Premises.
>
> [37] I am not convinced that this challenge to [Tsawout]'s conduct constitutes a viable ground upon which I can find that there is a serious issue to be tried in the present case.
>
> [38] The dispute is between the plaintiffs, who hold a certificate of possession, issued in accordance with the provisions of the prevailing legislation, over the Premises, and the defendants, who claim an interest in the Premises, based upon a historical relationship with Calvin Claxton and an assertion of traditional use and occupation of the Premises.

[50] Justice Gaul found that although the threshold for this branch of the *RJR-MacDonald* test is low, the defendants had not convinced him that there was a serious issue to be tried. He stated that the various bases upon which they relied for their claim to the premises were unsustainable and that included the one involving an alleged equitable interest. Further, in his opinion, once a CP has been granted, all of the incidents of ownership of the property in question are vested in the band member who possesses the CP, including the right and ability to have trespassers removed from the property. He accepted the submissions of plaintiffs' counsel that the claims being advanced by the defendants were not supported by the facts or applicable law and, consequently, they were, using counsel's words, "doomed to fail."

[51] When considering irreparable harm branch of the test, Justice Gaul repeated that the plaintiffs have a CP, and consequently they have the exclusive right to possess the premises. The defendants had no evident legal right that superseded the plaintiffs' CP. He stated that there was also no evidence before him that the house or premises are particularly unique or special, or that the defendants have invested any significant effort into making improvements to them. He found that if the stay was denied and the house was razed and the premises redeveloped, the defendants would still be able to pursue their counterclaim for damages against the Plaintiffs.

[52] Justice Gaul concluded that the plaintiffs had a legal right to the premises and that the right was being infringed by the ongoing conduct of the defendants. However, he underscored that he made his decision based on the evidence presented to him, as well as the submissions of counsel and the state of the law as he understood it. But that this was not a final determination of the plaintiffs' claim against the defendants or the defendants' counterclaim against the plaintiffs. That would have to be decided later.

Preliminary Issues

Preliminary issue 1: Are the Applicants challenging two distinct decisions?

Tsawout's position

[53] Tsawout submits that in their Amended Notice of Application, the Applicants challenge Tsawout's decision "to allocate an interest in the Family Home on Lot 47-6 on the East Saanich Reserve No. 2 […] to Allan Claxton and Earl Claxton in July 2022." This decision was to enter into the Agreement. However, in their Memorandum of Fact and Law, the Applicants seek to

broaden the scope of the decision being challenged by characterizing the January 12 Letter as another aspect of Tsawout's decision to "relinquish the Band's interest" in Lot 47-6 to Allan and Earl. Tsawout submits that any issues respecting the January 12 Letter are not properly before the Court and should not be considered as Rule 302 of the *Rules* requires two separate applications for the two decisions, or leave of the Court to pursue them together. Tsawout argues that an exemption to Rule 302 is not warranted in this case.

[54] Further, that the Applicants' complaint was fully answered by Justice Saunders' decision (*Claxton #1* at para 23) and, even if the dispute resolution provisions of the *Land Code* applied, the Applicants attorned to the jurisdiction of the BCSC to have their dispute decided by that court.

[55] In any case, Tsawout asserts that it is unclear to what extent, if any, the January 12 Letter relates to the relief sought. Rather, it appears that the purpose of challenging the January 12 Letter is to assist the Applicants in overcoming the 30-day limitation period.

Applicants' position

[56] When appearing before me the Applicants submitted that the substantive issue before the Court is Tsawout's decision to relinquish its interest in Lot 47-6 by entering into the Agreement. However, that there are "related decisions" being (a) the September 7, 2022, refusal to allow the Applicants to raise the dispute with Chief and Council; (b) the lack of response by Chief and Council to the November 5, 2022, request by the Applicants that they be permitted to remain on the land; and (c) the January 12 Letter. The Applicants submit that if the January 12 Letter is a

distinct decision then, together, these decisions or actions can be seen as a continuing course of conduct and Rule 302 can be applied as they are all are directly connected to the relinquishment of Tsawout's interest in Lot 47-6. Further, that the factors set out in *David Suzuki Foundation v Canada (Health)*, 2018 FC 380 [*Suzuki*] favour this outcome.

Analysis

[57] Rule 302 states that unless the Court orders otherwise, an application for judicial review shall be limited to a single order in respect of which relief is sought.

[58] The Amended Application for Judicial Review identifies the decision challenged as the decision to allocate an interest in the "Family Home" on Lot 47-6 to the Respondents "in July 2022 (the Decision)" (presumably meaning May 31, 2022). The relief sought is a declaration that the July 2022 decision is void on the basis that Tsawout failed to observe procedural fairness and because a reasonable apprehension of bias exists. The Applicants also seek an order setting aside Tsawout's decision to allocate an interest in Lot 47-6 to the Allan and Earl Claxton and remitting the decision back to Tsawout for reconsideration with a direction to consider the Applicants' rights and interests.

[59] The Amended Notice of Application does not explicitly mention the January 12 Letter as a decision under review. However, *Part 3: Grounds and legal basis for the relief sought* of the Amended Notice of Application states:

> 29. As a result of Tsawout's breach of procedural fairness, the purported transfer of Tsawout's interest in ~~Minister's decision to issue a Certificate of Possession~~ for Lot 47-6 to Allan and Earl in

> 2022, ~~and to enter the certificate and particulars in the Reserve Land Register,~~ was void, made in error and without regard to Sheri's and Vanessa's rights at common law and under the *Family Homes on Reserves and Matrimonial Interests or Rights Act*, SC 2013, c 20 and the *STAUTW Matrimonial Property Law*. This breach was compounded by Tsawout's decision in January 2023 to deny Sheri and Vanessa's application for Dispute Resolution, as provided for in the *Land Code*.
>
> (amendments by underline and strikeout are original)

[60] The Amended Notice of Application also included new grounds and legal basis for the relief sought, namely the *First Nations Land Management Act*, SC 1999, c 24 [*FNLMA*] and the Matrimonial Property Law.

[61] When appearing before me, counsel for Sheri Claxton submitted that the Agreement is the substantive decision under review but that there were related procedural decisions, intimately connected to the Agreement, which comprise a continuing course of conduct, specifically, the breaching of the duty of procedural fairness. These were the September 7, 2022, refusal to allow the Applicants to raise the dispute with Chief and Council, the lack of response by Chief and Council to the November 5, 2022, request that the Applicants be permitted to remain on the property and the January 12 Letter. In my view, this displays a continuing course of conduct, which is a permissible exception to Rule 302.

[62] As held in *Suzuki*, referenced by both parties, the factors to be considered in determining whether there is a continuing act or course of conduct include, for the purposes of Rule 302, (a) whether the decisions are closely connected; (b) whether there are similarities or differences in the fact situations, including, the type of relief sought, the legal issues raised, the basis of the

decision and decision-making bodies; (c) whether it is difficult to pinpoint a single decision; and (d) based on the similarities and differences, whether separate reviews would be a waste of time and effort (*Mahmood v Canada*, 1998 CanLII 8450 (FC); *Truehope Nutritional Support Ltd v Canada (Attorney General)*, 2004 FC 658 at para 6; *Potdar v Canada (Citizenship and Immigration)*, 2019 FC 842 at paras 18 – 20; *Canadian Coalition for Firearm Rights v Canada (Attorney General)*, 2021 FC 447 at paras 20-21).

[63] With respect to the first *Suzuki* factor, whether the decisions are closely connected, in my view, the Agreement, and the other communications culminating in the January 12 Letter, are closely connected. The facts grounding each decision are the same, i.e., the conflicting claimed interests in Lot 47-6. Further, the basis for both decisions and the subject conduct were premised on the same reasoning: Tsawout (by way of the CFO) negotiated and signed the Agreement without notifying the Applicants of Tsawout's intent to transfer its interest in Lot 47-6 to Allan and Earl Claxton on the premise that the Applicants had no legal right to Lot 47-6. This is also mainly the reason why Tsawout (by way of the Band Manager) refused the Applicants' request to have the dispute referred for dispute resolution pursuant to the *Land Code*, the other stated reasons being that the Applicants were out of time and that the BCSC was said to be the appropriate forum. In both instances, the decisions pertain to Tsawout's transfer of its interests in Lot 47-6 to Allan and Earl Claxton and to the Applicants' claim that they were denied procedural fairness and that a reasonable apprehension of bias arises in that regard. As such, I find that the basis of the Applicants' challenge before this Court is the same in both decisions.

[64] As to the second *Suzuki* factor, whether there are similarities or differences in the facts, including with respect to the relief sought, the legal issues raised, the basis of the decision, and the decision-making bodies, as indicated above, there are factual similarities underlying the decisions/course of conduct, the legal issues raised are also similar as are the basis of the two decisions. Further, and contrary to Tsawout's assertion, I do not agree that the Agreement and the January 12 Letter were made by different decision makers. The CFO and the Band Manager were both acting on behalf of Tsawout when they made the respective decisions. There is no evidence before me that they were afforded discrete decision-making powers pertaining to the subject decisions. Although the CFO may have negotiated the terms of the Agreement, as he was instructed to do by the Band Manager, he signed the agreement on behalf of Tsawout. This is confirmed by the Diemer Affidavit which states that from time to time he is called upon to negotiate agreements with third parties "on behalf of Tsawout", and also states "I signed the Agreement on behalf of The Agreement is attached…". Although this is an incomplete sentence, Tsawout's written submissions state that the CFO "signed the Agreement on Tsawout's behalf." What is not demonstrated by the records before me is whether the CFO had authority to execute the Agreement on Tsawout's behalf without Chief and Council first having accepted the terms of same (which may or may not have required a band counsel resolution).

[65] As to the January 12 Letter, this was signed by the Band Manager. She did not file an affidavit and there is no evidence before me to suggest that she was acting otherwise than on behalf of Tsawout Chief and Council when making the decision. That said, and as will be discussed below, nor does the record explain the source of the Band Manager's authority to

decline to submit the Notice of Dispute to the Dispute Resolution Panel for consideration. Or, for that matter, to dismiss the allegation of a conflict of interest.

[66] Finally, on this factor, I also do not agree with Tsawout that it is unclear how the January 12 Letter relates to the relief sought. The application seeks a declaration that the Agreement is void, based on a breach of procedural fairness, and remitting the matter back to Chief and Council for reconsideration. The Notice of Dispute is not in the records before me, however, the Addendum is an exhibit to Sheri Claxton's affidavit. The remedies it seeks include the setting aside of the decision purporting to transfer Tsawout's interest in Lot 47-6, i.e., the Agreement. As such, the January 12 Letter, by which Tsawout refuses to submit the Notice of Dispute to the Dispute Resolution Panel, supports the Applicants' allegation that Tsawout continued its breach of the duty of procedural fairness by denying the Applicants an opportunity to be heard by an independent panel.

[67] With respect to the third *Suzuki* factor, whether it is difficult to pinpoint a single decision, here it is not difficult to distinguish between each decision. That being said, the January 12 Letter relates to the Agreement. The Agreement is the vehicle by which Tsawout purports to transfer its interest in Lot 47-6. Without the Agreement, the Applicants would not have filed the Notice of Dispute pertaining to it.

[68] Finally, with respect to whether separate judicial reviews would be a waste of time and effort, of this I have little doubt considering the similarities of the facts, legal issues raised and

the basis of each decision. The core issue with respect to each decision is whether Tsawout owed the Applicants a duty of procedural fairness and whether it was breached.

[69] As to Tsawout's submission that it would suffer prejudice should the Court consider the decisions as a continuing course of conduct because the full record in respect of the January 12 Letter is not before the Court, I note that the Addendum sets out in detail the grounds for the Notice of Dispute. Further, the responding January 12 Letter provides the basis for the refusal to submit the Notice of Dispute to the Dispute Resolution Panel. The Amended Notice of Application also asserts that the various alleged breaches of procedural fairness were compounded by Tsawout's January 12 Letter denying the Applicants application for dispute resolution, which is provided for in the *Land Code*. As such, Tsawout was not taken by surprise by this issue.

[70] I agree that it is possible that the full record upon which the Band Manager based the January 12 Letter may not currently be before the Court. But that record is and was in Tsawout's hands and it has not specified how or what specific prejudice it might suffer based on the absence of the complete record. I also note that the Applicants requested the minutes and any other records regarding the allocation of interests in Lot 47-6 in 2022 in their Amended Notice of Application and that Tsawout does not appear to have disclosed any such material. As such, if any prejudice were to be suffered by the absence of a full record it would likely be suffered by the Applicants, who have not had the benefit of the disclosure of any records relied upon by Tsawout either when the CFO signed the Agreement on its behalf or when the Band Manager refused to refer the Notice of Dispute to the Dispute Resolution Panel.

[71] In my view, applying the *Suzuki* factors in these circumstances leads to a determination that the Agreement, the subsequent communications and the January 12 Letter constitute a continuing course of conduct by or on behalf of Tsawout pertaining to the Applicant's allegation of a lack of procedural fairness.

Preliminary Issue 2: Is the application within the jurisdiction of the Federal Court?

Tsawout's position

[72] Tsawout argues that the Federal Court does not have jurisdiction for three reasons.

[73] First, because judicial review is only available where the impugned decision affects the applicant's rights or legal situation. Here, Tsawout argues the Agreement does not affect the Applicants' rights, impose obligations or cause them prejudice as they have no legal right to the house or Lot 47-6 as was determined in *Claxton #2*. Tsawout says that the Agreement does not create or modify the Applicant's legal situation and quashing it would not entitle them to continue to live in the house. Nor is the fact that they will need to move a sufficient basis to find a legal right (citing *George v Heiltsuk First Nation*, 2023 FC 1705 at paras 36, 52 [*Heiltsuk*]).

[74] Second, an application for judicial review can only be brought against a "federal board, commission or tribunal," as defined in s 2 of the *Federal Courts Act*, RSC 1985, c F-7 [*Federal Courts Act*]. The test to determine whether a person or body falls within the definition considers the jurisdiction or power the body or person seeks to exercise and the source or origin of that jurisdiction or power (citing *Oceanex Inc v Canada (Transport)*, 2019 FCA 250 at paras 27-30

[*Oceanex*]). The primary determinative factor is the source of the power (citing *Munroe v Canada (Attorney General)*, 2021 FC 727 at para 90). Tsawout submits that it was not acting as a "federal board, commission or other tribunal" when it entered the Agreement with Allan and Earl Claxton as it was not exercising powers conferred by the *Indian Act* or other federal legislation. The Agreement is not concerned with the allocation of an interest in reserve land granted pursuant to the *Indian Act* or the *Land Code*: rather, it settled an outstanding debt that encumbered Allan and Earl's interest in Lot 47-6 after Calvin defaulted on his loan and transferred his membership to Squamish Nation. Nor was Council involved in the debt negotiation process.

[75] Third, decisions of First Nations, their councils or bodies created by them are amenable to judicial review only if they are of a public character. Decisions that are private in nature cannot be judicially reviewed (*Heiltsuk* at paras 41-43). Tsawout refers to and applies the factors identified by the Federal Court of Appeal in *Air Canada v Toronto Port Authority*, 2011 FCA 347 [*Air Canada*], which assist in distinguishing between private and public decisions, and submits that this supports its position that the Agreement is private in nature.

Applicants' position

[76] When appearing before me, counsel for Sheri Claxton submitted that Tsawout was exercising its authority under the *Land Code* which was enacted under the *FNLMA* and that there need not be an allocation of reserve land to engage the *Land Code*. In that regard, paragraphs of the preamble of the *Land Code* indicate that Tsawout "wishes to enhance opportunities for its members to participate in governance matters and to benefit equitably from its land and

resources" and that Tsawout "wishes to reassume management of its lands and resources, rather than having them managed under the *Indian Act.*" This demonstrates the public nature of decision making around reserve lands. Counsel also applied the *Air Canada* factors and submitted that they supported the Applicants' position.

Analysis

i. Do the Agreement and the January 12 Letter affect the Applicants' rights, impose obligations or cause them prejudice?

[77] Subsection 18.1(1) of the *Federal Courts Act* states that an application for judicial review may be made by the Attorney General of Canada or by anyone directly affected by the matter in respect of which relief is sought.

[78] In that regard, Twasout is correct that this has been interpreted to mean that judicial review is only available where the impugned decision affects the applicant's rights or legal situation. However, judicial review can also be available when the decision causes prejudice to the applicant. As stated in *Heiltsuk*:

> [36] In other words, to use a consecrated phrase, the decision challenged must affect the applicant's rights, impose obligations on them or cause them prejudice: *Forest Ethics Advocacy Association v Canada (National Energy Board)*, 2013 FCA 236 at paragraph 20 [*Forest Ethics*]; *Air Canada v Toronto Port Authority*, 2011 FCA 347 at paragraph 29, [2013] 3 FCR 605 [*Air Canada*]; *Taseko Mines Limited v Canada (Environment)*, 2019 FCA 319 at paragraph 36; *Democracy Watch v Canada (Attorney General)*, 2021 FCA 133 at paragraph 29. The fact that an applicant suffers inconvenience or indirect financial consequences from the decision or has a moral interest in the matter is not sufficient: *Forest Ethics*, at paragraphs 26–29; *League for Human*

> *Rights of B'nai Brith Canada v Canada*, 2010 FCA 307 at paragraph 58, [2012] 2 FCR 312.

[79] Further, in *Forest Ethics*, cited above, the Federal Court of Appeal considered the words "directly affected" in subsection 18.1(1) of the *Federal Courts Act* and stated that a party has a "direct interest" under this subsection when it is prejudicially affected in some direct way (*Forest Ethics* at para 20 citing *League for Human Rights of B'Nai Brith Canada v Odynsky*, 2010 FCA 307 at paras 57-58; *Rothmans of Pall Mall Canada Ltd v Canada (MNR)*,1976 CanLII 2258 (FCA), [1976] 2 F.C. 500 (C.A.); *Irving Shipbuilding Inc v Canada (A.G.)*, 2009 FCA 116).

[80] Tsawout's view is that the Agreement does not affect the Applicants' rights, impose obligations or cause them prejudice because *Claxton #2* has determined that they have no legal right to the house or Lot 47-6.

[81] *Claxton #1* and *Claxton #2* are not binding on this Court. However, and in any event, it is significant to note that in *Claxton #1*, in the context of the application for summary judgment, Justice Saunders found that he was unable, and that it would be unjust, to decide the issue of entitlement to an order for possession of Lot 46-7 in the application then before him. Further, he found that it appeared that Tsawout had accepted mortgage or rent payments from Sheri Claxton who, with Tsawout's knowledge, had continued to occupy the premises after the right of possession appeared to revert to Tsawout pursuant to s 25(2) of the *Indian Act*. He stated that Tsawout's acceptance of those payments gave rise to the possibility of an equitable interest in the property – which Justice Saunders also could not determine in the context of the application then before him. He additionally found that it was not at all clear that the Absolute Discharge had the

legal effect contended by Allan and Earl Claxton. Justice Saunders further stated that he could not find on the evidence before him that Earl Sr.'s estate had anything to give in respect of Lot 47-6 and that the effectiveness of the Absolute Discharge as an instrument entitling Allan and Earl Claxton to sole possession was uncertain.

[82] What Justice Saunders did determine was that, on the first branch of the *RJR MacDonald* test for a stay, in a trespass case, when the evidence clearly establishes a plaintiff's rights, then the onus shifts to the defendant to establish their continuing possession "as of right" as of the date of the application. He found, given s 20(1) of the *Indian Act* and the fact that the Applicants had never held CPs, that they had not proven a legal right of the property *as of the hearing of the application*. He therefore granted the injunction application.

[83] Thus, to my mind, it is significant to note that Justice Saunders' finding as to Allan and Earl Claxton's legal right to Lot 47-6 was limited to the stay application before him, in the context of trespass, and the evidence before him at that time. He explicitly declined to make a determination as to the issue of Allan and Earl's entitlement to an order for possession (i.e., their legal right to possession) and raised concerns about a possible equitable interest by the Applicants as well as the effect of the Absolute Discharge.

[84] *Claxton #2* concerned the Applicants' motion seeking a stay of the injunction. Justice Gaul found, for the reasons I have described above, that the tripartite test for a stay had not been met, including because a serious issue had not been established. He stated that, in his view, once a CP had been granted, all of the incidents of ownership in the property in question are vested in

the member who possess the CP, including the right and the ability to have trespassers removed. However, he underscored that his decision was not a final determination. Allan and Earl Claxton's claim against the Applicants or the Applicants' counterclaim against Allan and Earl would be decided later - presumably at the trial of that action.

[85] All of which is to say that while Tsawout asserts, and relies on the assertion, that the BCSC has determined that the Applicants have no legal right to Lot 47-6, based on my reading of the injunction and stay decisions, which are interlocutory in nature, no final determination in that regard has actually been rendered. Further, the status of Allan and Earl Claxton's legal right to the property has yet to be determined.

[86] Given this, the potential remains that the Agreement could be found to directly affect the Applicants' legal or other rights, impose legal obligations (to vacate the property) and/or cause prejudicial effects (being required to leave the property and having no future stake in it or its development and/or being deprived of the dispute resolution process provided in the *Land Code*). These prejudicial effects are not merely an inconvenience or indirect financial consequences, nor a moral interest which were found to be insufficient in *Heiltsuk*.

[87] As to the January 12 Letter, this acknowledges the Applicants' submission of a Notice of Dispute that the Applicants sought to resolve the dispute by way of the *Land Code*. The letter states that the 2007 version of the *Land Code* that the Applicants had provided (and is found in the Applicants' Record before this Court) was amended by a community ratification vote in 2013, providing a copy of same (although the 2013 version is not in the records before me).

[88] Part 8 of the 2007 version of the *Land Code*, Dispute Resolution, sets out the procedure to be followed to file a dispute and how the dispute will be resolved and states that:

> 36.1 The intent of this Part is to ensure that all persons entitled to possess, reside upon, use or otherwise occupy First Nation Land:
>
> > (a) do so harmoniously with due respect for the rights of others and of the First Nation; and
> >
> > (b) have access to First Nation procedures to resolve disputes.

[89] The dispute resolution procedure includes facilitated discussions and mediation. If these are not successful, then the Dispute Resolution Panel "will" hear the dispute (s 41.1). In this case, the Band Manager advised in the January 12 Letter that Tsawout would not be sending the Notice of Dispute to the Dispute Resolution Panel, for the reasons set out – including the Band Manager's assertion that there "is no dispute about title to the Lot."

[90] While not raised by the parties, upon review of the *Land Code*, I am unable to ascertain where the Band Manger is afforded the authority to make a determination that a Notice of Dispute will not be put before the Dispute Resolution Panel and on what basis such a determination can be made. According to s 36.4(b) of the *Land Code*, which provides that "a person who has a dispute with another person or with the First Nation in relation to the possession, use or occupation of First Nation Land" may file a Notice of Dispute, it appears that the Applicants were entitled to the dispute resolution procedure provided therein.

[91] All of which is to say, had the dispute been referred to the Dispute Resolution Panel, it may or may not have agreed with the Band Manager's conclusions. But, in either event, the

Applicants appear to have had a right to a hearing pursuant to the *Land Code* and there is no apparent authority for the Band Manager's refusal to refer the Applicants' request. The failure to forward the dispute to the Dispute Resolution Panel affects the Applicants legal rights in that regard.

[92] Lastly, as will be discussed below, I note that band councils have a general obligation of procedural fairness towards band members whose rights or interests may be affected by a decision (see *Salt River First Nation #195 (Salt River Indian Band #759) v Martselos*, 2008 FCA 221 at para 42; *Sparvier v Cowessess Indian Band (TD)*, 1993 CanLII 2958 (FC), [1993] 3 FC 142 [*Sparvier*]). In my view, given that the Applicants have been residing on Lot 47-6 since at least 1995, they clearly had interests (regardless of nature) that stood to be negatively affected by Tsawout's decision to negotiate and sign the Agreement and further decision to deny them the dispute resolution procedure provided in the *Land Code*.

[93] For all these reasons, I find that the Agreement and the January 12 Letter have the potential to affect the Applicants' rights (whether legal or equitable), which rights have not yet been finally determined, impose obligations on them and cause them prejudice. Accordingly, that the Court has the jurisdiction, pursuant to s 18.1(1) of the *Federal Courts Act*, on the basis that the Applicants are directly affected by the subject decision.

ii. Was Tsawout acting as federal board, commission or other tribunal?

[94] Tsawout's second jurisdictional argument is that it was not acting as a "federal board, commission or other tribunal" when it entered the Agreement as it was not exercising powers

conferred by the *Indian Act* or other federal legislation, specifically that it did not grant interests in reserve land pursuant to the *Indian Act* or the *Land Code*. Rather, it settled an outstanding debt that encumbered Allan and Earl Claxton's interest in Lot 47-6 after Calvin Claxton defaulted on his loan and also transferred his membership to Squamish Nation. Nor was Council involved in the debt negotiation process that lead to the Agreement. The Band Manager asked the CFO to negotiate the Agreement and neither the Band Manager nor the CFO were exercising powers conferred by federal legislation in doing so.

[95] To address this submission, I note that s 18(1)(a) of the *Federal Courts Act* grants this Court exclusive original jurisdiction to issue the remedies set out, which include writs of *certiorari* and the granting of declaratory relief "against any federal board, commission or other tribunal" which term is defined in s 2 of that Act. The parties do not assert that Chief and Council of First Nations, or entities created by them, do not fall within that definition. Rather, that the issue in this matter is whether Tsawout was acting as a federal board, commission or other tribunal when it, by way of the CFO, entered into the Agreement and refused, by way of the Band Manager, to refer the Applicants' request for dispute resolution by way of the January 12 Letter. That is, when doing so, was Tsawout exercising powers granted or recognized under the *Indian Act* or other federal legislation.

[96] The Federal Court of Appeal has developed a two-step test to determine whether a body is (or is acting in its capacity as) as a federal board, commission or other tribunal within the meaning of s 2 of the *Federal Courts Act*. The Court must determine "what jurisdiction or power" the body seeks to exercise and then "what is the source or the origin" of that jurisdiction

or power (*Canadian Judicial Council v Girouard*, 2019 FCA 148 at para 34 citing *Anisman v Canada (Border Services Agency)*, 2010 FCA 52, at para 29; *Mikisew Cree First Nation v Canada (Governor General in Council)*, 2018 SCC 40 at para 109; see also *Oceanex* at paras 27-30). Further, it is the source of a tribunal's authority, and not the nature of either the power exercised or the body exercising it, that is the primary determinant of whether it falls within the s 2 definition (*Oceanex* at para 29).

[97] In considering the source of the powers exercised, it is perhaps helpful to first look at the Agreement.

[98] The Agreement is an offer to purchase. It indicates that by virtue of an outstanding "Debt" (that term is not defined, nor is the amount of the Debt stated, rather, that payment of the amount of $109,000 will satisfy all outstanding Debt) owed to the "Vendor" (Tsawout) by the "Purchasers" (Allan and Earl Claxton) who have an (undescribed) interest in the lands and premises described in the Agreement, the Purchasers seek to retire any and all Debt related to the "Property" (Lot 47-6) and receive clear possessory interest in the Property subject only to listed encumbrances (there were none listed). There is no description of the underlying loan to Calvin Claxton, of any prior interests held by the Purchasers and transferred to Tsawout, or the status of Tsawout's interest in the Property at the time of the Agreement. Rather, the Vendor's warranties include that (a) Tsawout has full and absolute right and power to retire the Debt and surrender any and all interest it holds in the Property to the benefit of the Purchasers Possessory Interest (which term is not defined) therein; (b) Tsawout has the power to dispose of any interest it holds

in the Property which binds the Purchaser's Possessory Interest therein free and clear of all encumbrances; and (c) the Property will be free and clear of all encumbrances.

[99] The Agreement makes no reference to the granting of CPs or Permanent Interests (defined in the *Land Code* as meaning a CP issued under s 20(2) of the *Indian Act* or equivalent tenure issued under the *Land Code*). It does, however, when addressing closing documents, require Tsawout to deliver executed documents prior to the closing date in order to complete the transaction in accordance with its terms. It also provides that where appropriate, closing documents will have been executed in registerable form "including without limitation, a transfer of the land (the "Transfer") … any documents and certificates referred to herein and such other documents as may be reasonably necessary for more perfectly and absolutely transferring, assuring and vesting title to the Property to the Purchaser as contemplated hereby." There is no evidence before me as to what, if any, documentation was generated prior to closing to facilitate the transfer.

[100] As described in *Cyr v Batchewana First Nation of Ojibways*, 2022 FCA 90 [*Cyr*], each First Nations territory is governed by one of three types of land management: the *Indian Act* land management framework; the *FNLMA* regime; or a self-government arrangement as a stand-alone agreement or as part of a modern treaty (*Cyr* at para 4). The self-government arrangement is not at play in this case.-And, as an aside, the *FNLMA* was repealed and replaced by the *Framework Agreement on First Nation Land Management Act*, SC 2022, c 19, s 121 [*Framework Agreement Act*] on December 15, 2022. This does not impact any land codes, individual agreements, First Nation laws or documents, including licences and other authorizations, contracts and other

instruments or acts, that were issued, granted, entered into or made in accordance with the *FNLMA* and that were in force on the day on which the *Framework Agreement Act* comes into force (*Framework Agreement Act*, s 123(a)).

[101] Section 20 of the *Indian Act* limits the lawful possession of reserve lands by a person unless, with approval of the Minister, possession of the land has been allocated to that person by the band council whereupon the Minister may issue a CP:

> **Possession of lands in a reserve**
>
> 20 (1) No Indian is lawfully in possession of land in a reserve unless, with the approval of the Minister, possession of the land has been allotted to him by the council of the band.
>
> **Certificate of Possession**
>
> (2) The Minister may issue to an Indian who is lawfully in possession of land in a reserve a certificate, to be called a Certificate of Possession, as evidence of his right to possession of the land described therein.

[102] As described in *Cyr*, under the *FNLMA*, the First Nation must enact a land code in accordance with s 6(1) of that Act to include general rules and procedures in connection with all the land in the reserve set aside for the First Nation. This affords the band greater control over their lands and resources, and First Nations using this framework can pass laws for the development and protection of lands, as well as issue licences and leases with community approval. In this land management framework, federal ministerial involvement and approval are reduced (*Cyr* at para 6).

[103] In this case, the *Land Code* preamble states that states that Tsawout wishes to reassume management of its lands and resources by entering into a Framework Agreement on First Nation Land Management. Section 4.2 of the *Land Code* states that the Framework Agreement is ratified when Tsawout approves the *Land Code*, and based on the 2007 version of the *Land Code* before me, it appears the *Land Code* was adopted at least by 2007.

[104] I agree with Tsawout that the Agreement itself is not directly concerned with the allocation of CPs pursuant to s 20 of the *Indian Act*. Accordingly, from that perspective and viewed in isolation, its decision to enter into the Agreement would not be subject to review by this Court.

[105] However, the source of the authority for development of the *Land Code* is federal legislation, the *FNLMA*. The *Land Code* stipulates that an interest in First Nation Land may only be created, granted, disposed of, assigned or transferred by an instrument issued in accordance with the *Land Code* (s 26.11). In *Jimmie v Council of the Squila First Nation*, 2018 FC 190 [*Jimmie*], the First Nation in that case, like Tsawout, had been granted the right to exercise control and management over its reserve lands pursuant to the *FNLMA* and had established a land code. At paragraph 39 of *Jimmie*, the Court stated that this scheme was "rooted in federal law," that it was an important source for the subject eviction decision at issue in that matter and was relevant to an assessment of whether the band council in that case was acting as a federal board, commission or other tribunal when it made the decision. The Court in *Jimmie* found that the Court had jurisdiction to deal with the First Nations council decision to evict the applicant.

[106] In terms of the Agreement itself, while it does not directly address how the transfer of Tsawout's interest in Lot 47-6 to Allan and Earl Claxton will be effected, that transfer is clearly its intent. Not merely the repaying of a debt. The Agreement, in effect, facilitates this grant or transfer.

[107] In my view, if the *Land Code* has application, then the source of Tsawout's power to transfer or grant interest in Lot 47-6 stems from the *Land Code* which is rooted in federal law and, as will be discussed further below, is public in nature. While entering into the Agreement may not have been an exercise of that power, the Agreement serves to facilitate the intended transfer of interests in Lot 47-6, which is such an exercise. And, if the *Land Code* does not apply to the transfer of interests in Lot 47-6 by way of the Agreement, then the *Indian Act* applies and it is the federal source of the power and governs the transfer of the property.

[108] It has to be said, however, that in this matter, there are many unanswered questions about the transfer. For example, whether Allan and Earl Claxton's respective 1/3 CP interests were extinguished by the transfer to Tsawout and/or upon the alleged default of the loan in 2002. If so, then presumably an allocation by way of new CPs, if the *Indian Act* applies, or Permanent Interests, if the *Land Code* applies, would have to follow the Agreement, but there is no evidence before me that this has been done. Presumably, this is the subject of the BCSC litigation.

[109] Similarly, given that the three Claxton brothers had obtained their respective 1/3 interests in 1983 by way of a transfer from Earl Sr. and transferred their respective interests to Tsawout in 1994, it is difficult to see how, in 2015, Calvin Claxton could have refused to accept any interest

Earl Sr.'s estate by way of the Absolute Disclaimer (having already done so) or how, as a result, Allan and Earl Claxton were then granted a 1/2 interest in Lot 46-7 (given that they had transferred their respective 1/3 interests to Tsawout in 1999 and Calvin defaulted on the loan in 2002). And, if in 2005 they were holders of 1/2 interests, what was the status of the defaulted loan to Calvin Claxton? Why would Tsawout transfer back to Allan and Earl Claxton a 100% interest in Lot 47-6 if Allan and Earl had transferred their respective 1/3 interests in the property to Tsawout to facilitate the loan - which was subsequently defaulted upon by Calvin and remained unpaid?

[110] In that regard, I note that Tsawout's written representations indicate that CP holders are generally unable to obtain conventional mortgages because banks cannot obtain security interest in reserve land. However, Ministerial Loan Guarantees [MLG] enable First Nations to obtain loans from creditors on their own behalf or on behalf of members. A Tsawout member holding a CP can request the First Nation to apply for a loan. To be eligible, the member must transfer their interest (their CP) to the First Nations. Tsawout's submissions state that "the member has no rights in the transferred land, other than those set out in a signed tenancy agreement." According to Tsawout's written representations, monthly payments are to be made on the loan for a specified period of time after which Tsawout offers the member the opportunity to purchase a permanent interest in the property (to buy back the CP) for a nominal fee if (a) no arrears are owed (related to the property or otherwise); (b) they are a registered Tsawout member; and (c) they have made all of the required monthly payments.

[111] However, in this case there is no affidavit evidence filed by any person as a representative of Tsawout Chief and Council to provide background information generally in support of these submissions, to explain how the transfers by Allan and Earl Claxton to Tsawout were affected in these circumstances, or otherwise in response to the application for judicial review. It is also unclear to me why Tsawout would choose to file an affidavit of Allan Claxton knowing that he has a clear personal interest in this matter and that the Applicants assert that he was in a position of conflict of interest. Or, for that matter, and given the allegation of a conflict of interest with respect to the Agreement, why Tsawout would chose to retain the same counsel in this matter that Allan and Earl Claxton have retained in the Civil Claim.

[112] That said, in support of the above description of rent-to-own arrangements on Tsawout land, Allan Claxton's affidavit refers to and attaches portions of the Tsawout Housing Policy Manual 2018 as well as Tsawout Housing Forms dated 2020. The record does not show that these were in effect when Calvin Claxton obtained his loan.

[113] All of which is to say that in simply signing the Agreement, Tsawout may not have been acting as a federal board, commission or other tribunal. However, in order to effect the Agreement, Tsawout would have to take steps to transfer or grant CPs or Permanent Interests as demonstrated by the terms of the Agreement. This would appear to require the exercise of powers conferred by or whose source is the *Indian Act* or the *Land Code* by way of the *FNLMA*. Similarly, as for the January 12 Letter, Tsawout's Band Manager's refusal to refer the Applicants' Notice of Dispute to the Dispute Resolution Panel was based on an interpretation of

the *Land Code*, which is a public law rooted in the *FNLMA*. Accordingly, in these circumstances, I find that the Court has jurisdiction to address this application for judicial review.

iii. Are the decisions of a public character?

[114] In *Oceanex*, the Federal Court of Appeal referenced *Highwood Congregation of Jehovah's Witnesses (Judicial Committee) v Wall*, 2018 SCC 26 which held at paragraph 14 that judicial review is available only where two conditions are met – "where there is an exercise of state authority and where that exercise is of a sufficiently public character" [emphasis added by the Federal Court of Appeal] (*Oceanex* at para 30). Further, that the Supreme Court had agreed with the observation at paragraph 52 of *Air Canada*, that bodies that are public may nonetheless make decisions that are private in nature and that these private decisions are not subject to judicial review. The Federal Court of Appeal in *Oceanex* found that the same prerequisite applies in determining reviewability under the *Federal Courts Act* – that "it is necessary to consider whether the powers exercised by the body in a particular instance are public in nature or of a private character" (*Oceanex* at para 31 citing *Zaidi v Immigration Consultants of Canada Regulatory Council*, 2018 FCA 116 at paras 6, 8-9 and referring to the *Air Canada* factors that may assist in making this determination).

[115] In *Air Canada*, the Federal Court of Appeal held that:

> [60] In determining the public-private issue, all of the circumstances must be weighed: *Cairns v. Farm Credit Corp.*, 1991 CanLII 13600 (FC), [1992] 2 F.C. 115 (T.D.); *Jackson v. Canada (Attorney General)* (1997), 7 Admin. L.R. (3d) 138 (F.C.T.D.). There are a number of relevant factors relevant to the determination whether a matter is coloured with a public element, flavour or character sufficient to bring it within the purview of

> public law. Whether or not any one factor or a combination of particular factors tips the balance and makes a matter "public" depends on the facts of the case and the overall impression registered upon the Court. […]

[116] Accordingly, I will apply the *Air Canada* factors.

[117] *The character of the matter for which review is sought* – this asks whether the matter is a private, commercial matter, or is of broader import to members of the public. Here the Agreement is concerned with the retirement of a debt in exchange for the transfer of an unencumbered possessory interest in Lot 47-6. Viewed in isolation, this would appear to be a private commercial matter. However, when Tsawout entered into the Agreement, it was well aware that the Vanessa and Sheri Claxton had been residing on the property since 1995 and 2005 respectively and that they had not responded to the Tsawout demand in May 2018 to vacate. This demand was based on Tsawout's view that the Applicants held no legal interest in the property.

[118] While Tsawout argues that the Agreement is not grounded in the *Land Code*, for the reasons above it appears to me that to effect the transfer of interests in the property which the Agreement contemplates, the *Land Code* must be engaged if Allan and Earl Claxton's interests ceased in 1999. This indicates a public character.

[119] I would also note that in *Cyr*, the Federal Court of Appeal considered the appellant's argument that the *Jimmie* case was misapplied by the Federal Court to the facts in his case. The Federal Court of Appeal found that the land code in *Jimmie* had to be approved by the community and the band council had to power to enact certain laws in accordance with its land

code, thus making the land code closer to a public law (*Cyr* at para 68). Similarly, in this case, Tsawout's *Land Code* provides that the council may make laws in accordance with its land code (Part 2) and that the *Land Code* will come into effect if the members approve it (s 47.1(a)). Accordingly, *Jimmie* and *Cyr* support a conclusion that the *Land Code* is a public law that confers the power to administrate interests in the reserve land to Tsawout and that the exercise of that power is public in nature.

[120] Further, contrary to Tsawout's submission with respect to the Diemer Affidavit, it does not state that on a day-to-day basis the CFO negotiates agreements pertaining to the transfer of property interests. Rather, the affidavit states that from time to time the CFO is called upon to negotiate agreements with third parties – who could be contractors, suppliers and local government – on behalf of Tsawout. The CFO makes no mention of negotiating with band members as to the resolution of loans leading to the transfer of property interests. And, as the Applicants point out, the preamble of the *Land Code* states that Tsawout wishes to enhance opportunities for its members to participate in governance matters and to benefit equitably from its land and resources. This again suggests a public character.

[121] As to the January 12 Letter, this pertains to the request for dispute resolution under the *Land Code*. Section 36.7 of the *Land Code*, under the Dispute Resolution part of the Code, states that all persons involved in a dispute must be treated fairly, given a full opportunity to present their case and be given reasons for a decision. This process is clearly public in nature.

[122] While Tsawout asserts that the January 12 Letter decision maker is the Band Manger, not Council, and that the decision is part of the day-to-day management of Tsawout's operations, as I have indicated above, I have been unable to locate any authority in the *Land Code* by which the Band Manager may refuse to remit a Notice of Dispute to the Dispute Resolution Panel, as contemplated by the *Land Code*, and instead make the decision themselves. On its face, this would appear to usurp the authority and role of the Dispute Resolution Panel. Nor is there evidence from Tsawout establishing that taking such a step is part of the Band Manager's day-to-day work or that she has authority to make such determinations without Council or other approval.

[123] *The nature of the decision-maker and its responsibilities* – this asks whether the decision-maker is public in nature, such as a Crown agent or a statutorily-recognized administrative body, and charged with public responsibilities. It also asks whether the matter under review is closely related to those responsibilities. Here Tsawout entered into the Agreement. While it may have been negotiated and signed on Tsawout's behalf by the CFO, Tsawout is the party to the Agreement, not the CFO.

[124] Further, the *Land Code* provides broad authority to Tsawout over land management. It states that Council will perform all of the duties and functions, and exercise all of the powers of the First Nation that are not specifically assigned to an individual or body established under the *Land Code* (s 6.3). The *Land Code* also provides for the establishment of a Land Management Committee whose roles include the resolution of land disputes (s 22.1). In addition, an interest in First Nation Land may only be created, granted, disposed of, assigned or transferred by an

instrument issued in accordance with the *Land Code* (s 26.1). Any such interest created or granted after the *Land Code* comes into effect is not enforceable unless it is registered in the Tsawout Lands Register (s 25.2). As such, the Agreement facilitates the transfer of interests in Tsawout's land, which is the responsibility of Council or the Land Management Committee and is of public nature.

[125] *The body's relationship to other statutory schemes or other parts of government* – this indicates that if the body is woven into the network of government and is exercising a power as part of that network, its actions are more likely to be seen as a public matter. Mere mention in a statute, without more, may not be enough. Here, in terms of the Agreement, this factor has little application as I have found that the CFO was acting on behalf of Tsawout when signing the Agreement. As to the January 12 Letter, as indicated above, the source of the Band Manager's authority to make this decision is unknown. In any event, the refusal to submit the Notice of Dispute was clearly woven into the *Land Code* and the decision making it contemplates is public in nature.

[126] *The suitability of public law remedies* – this indicates that if the nature of the matter is such that public law remedies would be useful, then courts are more inclined to regard it as public in nature. Tsawout argues that setting aside the Agreement and sending it back for redetermination would not provide a different result. However, this is premised on Tsawout's belief that the Applicants' legal rights are not affected by the Agreement, based on *Claxton #2*. As I have indicated above, no final determination has been made by the BCSC in that regard or with respect to the legal rights of Allan and Earl Claxton. What is at issue before this Court is

whether the Applicants were denied procedural fairness when Tsawout entered the Agreement, which would lend itself for a public law remedy. As to the January 12 Letter, it seems clear to me that the nature of that decision is one where public law remedies – setting aside the refusal and sending the dispute for review by the Dispute Resolution Panel – would ensure that procedural fairness is observed in reaching a determination.

[127] *The existence of compulsory power* – this indicates that the existence of compulsory power over the public at large or over a defined group, such as a profession, may be an indicator that the decision is public in nature. This is to be contrasted with situations where parties consensually submit to jurisdiction. This factor has no application in this matter.

[128] *An "exceptional" category of cases where the conduct has attained a serious public dimension* – that is, where a matter has a very serious, exceptional effect on the rights or interests of a broad segment of the public, it may be reviewable. This may include cases where the existence of fraud, bribery, corruption or a human rights violation transforms the matter from one of private significance to one of great public moment. While the resolution of the Applicants interests, if any, in Lot 47-6 is of great significance to them, this does not fall within the exceptional category of cases. The failure to refer the request for dispute resolution to the Dispute Resolution Panel could have broader implications if that is a practice of Tsawout. However, I would still not see it as reaching the exceptional category.

[129] *The extent to which a decision is founded in and shaped by law as opposed to private discretion* – if the particular decision is authorized by or emanates directly from a public source

of law such as statute, regulation or order, a court will be more willing to find that the matter is public. This is all the more the case if that public source of law supplies the criteria upon which the decision is made. Matters based on a power to act that is founded upon something other than legislation, such as general contract law or business considerations, are more likely to be viewed as outside of the ambit of judicial review. As discussed above, while the Agreement is on its face private in nature, to effect it engages public law considerations. And, again, although Tsawout's Band Manager's authority to refuse to submit the Notice of Dispute to the Dispute Resolution Panel is unclear, this is clearly woven into the *Land Code.*

[130] Viewing the circumstances in whole, and considering the *Air Canada* factors, I find that the Agreement and January12 Letter are acts, conduct or decisions that are public in character. Thus, the Federal Court has jurisdiction to decide on the judicial review brought by the Applicants.

Preliminary issue 3: Is the application time-barred?

[131] Considering my prior conclusion that the Agreement and the January 12 Letter constitute a continuing course of conduct, this preliminary issue is moot as the 30-day limitation period provided in subsection 18.1(2) of the *Federal Courts Act* does not apply to a matter which involves a course of conduct (*Key First Nation v Lavallee*, 2021 FCA 123 at paras 35-36; *Suzuki* at paras 156-157).

[132] Even if the Agreement and the January 12 Letter were not part of a continuing course of conduct, for the reasons that follow I would have granted the extension of time to file the application for judicial review.

[133] In brief, the Applicants argue that the interests of justice strongly favour granting an extension to May 23, 2023, i.e., the date they filed their application for judicial review, approximately three months after the 30-day deadline following notification of Tsawout's refusal to refer Notice of Dispute to the Dispute Resolution Panel for resolution pursuant to the *Land Code.* Further, that they have demonstrated that they meet the factors to be considered by the Court in that regard.

[134] Conversely, Tsawout asserts that the decision to allocate an interest in what is now Lot 47-6 was made in 1957 and that the Applicants are long out of time to apply for judicial review of that decision. Further, that the Applicants were aware of Allan and Earl Claxton's claim of ownership since at least July 26, 2022, when they received the eviction letter. As to the January 12 Letter, this was received on that date but the application for judicial review was not filed until May 23, 2023. Tsawout submits that overall, it is not in the interests of justice for the Court to grant an extension of time.

[135] First, I disagree with Tsawout's assertion that the Applicants are challenging the allocation of interests in Lot 47-6. Viewed broadly, the Applicants' submissions clearly pertain to Tsawout's alleged breach of duty of procedural fairness (including bias) with respect to the Agreement and the January 12 Letter. The Applicants' concern is with the decision of Tsawout

in 2022 to relinquish or transfer its interest in the property without notice to or an opportunity for the Applicants to be heard on this disposition. Accordingly, they are not challenging the allocation of interests that occurred in 1957.

[136] Second, the time period prescribed in subsection 18.1(2) of the *Federal Courts Act* begins to run when an applicant has knowledge of a final decision that they wish to challenge (*Meeches v Assiniboine*, 2017 FCA 123 at para 40). Thus, in my view, the 30-day time limit would have started to run from the time the Applicants were made aware of the Agreement, being November 16, 2022, as part of an affidavit filed by Allan Claxton in the BCSC matter. In that event, this would mean the application should have been filed by December 16, 2022. It was filed five months late on May 23, 2023. As it would be the Agreement that would be challenged had I not found that the subject decisions are part of Tsawout's continuing course of conduct, I do not agree with Tsawout that time should have started running when the Applicants became aware of Allan and Earl Claxton's claim of ownership in July 26, 2022, when they received the first Eviction Letter.

[137] That said, this Court has discretion to grant an extension of time under subsection 18.1(2) of the *Federal Courts Act*. As held in *Canada (Attorney General) v Larkman*, 2012 FCA 204 [*Larkman*], the following factors are relevant to the determination of whether the Court should exercise that discretion:

1) Did the moving party have a continuing intention to pursue the judicial review application?

2) Does the moving party have a reasonable explanation for the delay?

3) Is there some potential merit to the application for judicial review?

4) Is there prejudice to the other party from the delay?

(*Larkman* at para 61; see also *Thompson v Canada (Attorney General)*, 2018 FCA 212 at para 5).

[138] The importance of each question depends upon the circumstances of each case and not all of the four questions need be resolved in the moving party's favour. In certain cases, particularly in unusual cases, other questions may be relevant. However, the overriding consideration when granting an extension is that the interests of justice be served (*Larkman* at para 62, 85 and 90).

[139] With respect to continuing intention, the Applicants point out that they made several attempts to have their dispute heard by Tsawout before bringing their claim to the courts, namely through its Chief and Council and the dispute resolution process provided in the *Land Code*. They have also presented a defence and a counterclaim in the BCSC proceedings commenced by Allan and Earl Claxton. Lastly, they refer to *Crowchild v Tsuut'ina Nation*, 2017 FC 861 [*Crowchild*] to argue that the Court has granted an extension of time of considerably longer duration, i.e., approximately nine months.

[140] Tsawout first argues that *Crowchild* is distinguishable on its facts as the First Nation in that case did not issue CPs and the applicants in that case followed the First Nations custom and practice in seeking to resolve the matter internally rather than going to Court. Tsawout also submits that it advised the Applicants that their concerns were of a private nature, do not involve Chief and Council and that the BCSC is the proper venue for their claims. Further, that there is

no evidence that the Applicants contacted Tsawout to discuss the January 12 Letter prior to filing the application and that it appears that they did so only after Justice Saunders pointed out that they could not challenge Tsawout's actions or decisions in the BCSC proceeding to which Twasout was not a party.

[141] In my view, the factual differences raised by Tsawout in *Crowchild* are not the point. The question is whether the facts before me would justify the exercise of discretion. Here, on August 31, 2022, and before Allan and Earl Claxton filed the Civil Claim, the Applicants asked to speak with Chief and Council about the dispute but were denied by the Band Manager based on the view that the matter was private in nature and did not involve Chief and Council. After the Civil Claim was filed, on November 5, 2022, the Applicants also requested permission from Chief and Council to continue to occupy the premises. Their unchallenged evidence is that no response was received. On November 18, 2022, they submitted the Notice of Dispute and on December 13, 2022, they submitted the Addendum.

[142] While the January 12 Letter conveys the dismissal of the Applicants' concerns, this does not mean that the Applicants did not seek to assert them. Further, Tsawout's assertion that there is no evidence that the Applicants contacted Tsawout to discuss the January 12 Letter prior to filing the application is simply not relevant. Moreover, the January 12 Letter was very clear that it was refusing to submit the Notice of Dispute to the Dispute Resolution Panel. It left little to discuss. I am satisfied that in the circumstances of this matter the Applicants have demonstrated a continued intention to pursue their application.

[143] The Applicants also submit that their personal circumstances are highly relevant to the assessment of whether there is a reasonable explanation for the delay. These include their low income, social-economic status, their circumstances as Indigenous persons including the additional barriers to access to justice that they face as such, and their circumstances as single women and persons with multiple health conditions an additional barriers to justice. They also point out the inequity of resources between them as compared to Tsawout as a First Nations government with access to substantial financial resources, professional staff and ongoing legal counsel. For its part, Tsawout submits that the Applicants offer no supporting evidence or details of there assertion that their personal circumstances justify they delay.

[144] It is true that the Applicants have offered little detail of their circumstances, but nor does Tsawout deny that they exist. I also note that the Applicants have relied on willing but very new and inexperienced counsel, acting on a *pro bono* basis, to assist them to the extent possible. In my view, their circumstances, in particular the inequality of resources between the Applicants and Tsawout, would reasonably justify the delay.

[145] As to the merits of the matter, while the Applicants' positions as to their legal or other interests in Lot 47-6 are by no means certain to prevail, there are enough unanswered questions surrounding the status of the rights purported to have been transferred to Allan and Earl Claxton from Tsawout, and any equitable or other interests that the Applicants may have in Lot 47-6, that I could not entirely discount this factor.

[146] Finally, the Applicants submit that Tsawout will suffer no particular prejudice if the extension is granted. Tsawout submits that it will be prejudiced because private contracts must retain a degree of finality and certainty. While I agree that finality and certainty must form part of the assessment of the interests of justice (*Larkman* at para 87), in this case Allan and Earl Claxton's possessory interest, if any, in Lot 47-6 has not yet been resolved in the Civil Claim. Tsawout as well as Allan and Earl Claxton were not taken by surprise by the Applicants' claim to an interest in Lot 47-6 (Allan Claxton being a long standing Councillor and was such when the Agreement was entered into) and finality of contracting by Tsawout, in general, is not put in doubt by granting an extension of time.

[147] Considered together, and given the circumstances, I find that the overarching interests of justice would have favoured the grant of an extension of time to file the application had I not concluded that the Agreement and January 12 Letter comprise part of a continuing course of conduct.

[148] I now turn to the substantive issues in this case.

Issue 1: Did Tsawout owe the Applicants a duty of procedural fairness with respect to its decision to negotiate and sign the Agreement and/or in refusing to refer the Notice of Dispute to the Dispute Resolution Panel? If so, did Tsawout breach this duty?

[149] As previously stated, bands, band councils and internal band administrative bodies must generally provide procedural fairness to the person whose rights or interests may be affected (J Woodward, *Aboriginal Law in Canada* (loose-leaf), at § 7:44 [Woodward] citing *Sparvier v Cowessess Indian Band (T.D.)*, [1993] 3 FC 175 [*Sparvier*]; see also *Baker v Canada (Minister*

of Citizenship and Immigration), [1999] 2 SCR 817 at para 20). This duty to procedural fairness includes a right to a fair hearing, which in itself includes a duty to give notice to the person whose rights or interests may be negatively affected by a decision of the band, band council or administrative body (Woodward citing *Sparvier*). Notice, an opportunity to make submissions and a full and fair consideration of those submissions have been characterized as the most basic requirements of the duty of fairness (*Orr v Fort McKay First Nation*, 2011 FC 37 at para 12; *Gadwa v Kehewin First Nation*, 2016 FC 597 at paras 48-53).

[150] I have set out the facts and circumstances surrounding this matter above. To answer this question on the merits it is sufficient to say here that, while in the normal course Tsawout would likely not be obliged to advise third parties of an intention to enter into an offer to purchase property, which could rightly be considered to be a private contractual matter (*Bellegarde v Carry the Kettle First Nation*, 2024 FC 699 at para 58; *Heiltsuk* at para 43), here Lot 47-6 was known by Tsawout to have been occupied by the Applicants for a very long time. Calvin Claxton defaulted on his loan in 2002 yet, based on the evidence before me, Tsawout took no steps until 2018 to remove the Applicants. At that time, it demanded that the Applicants stop interfering with persons sent to the property (presumably by Tsawout) to complete studies for its development and advised the Applicants that, it its view, they had no legal right to the property, demanding they vacate or be subject to eviction. Tsawout did not follow through with this. Instead, four years later, in 2022, it entered into the Agreement with Allan Claxton (then a Councillor) and Earl Claxton who then sought to have the Applicants removed from the property.

[151] My point here is that while Tsawout held a view in 2018 that the Applicants had no legal right in the property, it understood from the Applicants' failure to leave the property that they did not agree that they had no interest in Lot 47-6. Based on the evidence before me, Tsawout did not afford the Applicants an opportunity to address this issue before entering into the Agreement with Allan and Earl Claxton and effectively denied them this opportunity when the Applicants' request to refer their dispute to the Dispute Resolution Panel was rejected.

[152] The issue before me is not whether the Applicants do, or do not, have any legal or other interest in the property. Rather, the issue is that they were not given notice of the intent to enter into the Agreement, afforded an opportunity to address the matter before Tsawout entered into the Agreement - which facilitated the transfer of Tsawout's interest in Lot 47-6 to Allan and Earl Claxton - or afforded an assessment of their position either in the context of the Agreement or the January 12 Letter. In these particular circumstances, the Applicants were denied procedural fairness.

[153] With respect to the January 12 Letter, in the absence of any evidence that the Band Manager had authority under the *Land Code* or otherwise to refuse to refer the Notice of Dispute for determination, the Applicants were denied the procedural fairness requirements incorporated, pursuant to s 37 of the *Land Code*, that all persons in a dispute must be treated fairly, given a full opportunity to present their case and be given reasons for a decision made by the Panel, as this did not occur.

Issue 2: Was there a reasonable apprehension of bias on behalf of Allan Claxton?

[154] The test for a reasonable apprehension of bias is well established. It asks, "what would an informed person, viewing the matter realistically and practically – and having thought the matter through – conclude. Would he think that it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly" (*Committee for Justice and Liberty v National Energy Board*, 1976 CanLII 2 (SCC), [1978] 1 SCR 369, adopted by much subsequent jurisprudence).

[155] There is a presumption of impartiality, and the threshold for rebutting that presumption and making a finding of real or perceived bias is high. The onus of demonstrating bias lies with the person who is alleging its existence and requires cogent evidence (see, for example, *R v S(RD)*, 1997 CanLII 324 (SCC), [1997] 3 SCR 484 at paras 113-114, 117; *Cojocaru v British Columbia Women's Hospital and Health Centre,* 2013 SCC 30 at para 22).

[156] The Applicants submit there is a reasonable apprehension of bias as Allan Claxton was an elected Tsawout Councillor at the time the Agreement was made. They argue that one of the fundamental tenets of procedural fairness is to have one's case heard by an impartial decision-maker and that any decision which is tainted by a reasonable apprehension of bias is void. Further, that the existence of a decision-maker's personal interest in a matter can give rise to a heightened requirement for procedural fairness and impartiality. They add that elected band councillors owe a fiduciary duty to band members and should be held to the high standard to which other fiduciaries are held.

[157] Twasout submits that the Applicants have not provided any evidence that gives rise to a reasonable apprehension of bias. It adds that Tsawout's Council was not involved in the negotiation process and that in any case, Allan and Earl Claxton did not obtain a benefit from the Agreement.

[158] The affidavit of Allan Claxton confirms that he was an elected councillor when the Agreement was negotiated. He states that he understood that he had a duty to avoid any real, potential or apparent conflict of interest and acted in accordance with the STAUTW Council Governance Manual and states that the Agreement was negotiated by the CFO, and that Chief and Council were not involved in the negotiations. Allan Claxton was not cross-examined on his affidavit. Tsawout did not provide any information relevant to this matter.

[159] In these circumstances, the Applicants have not met their onus of demonstrating a reasonable apprehension of bias.

[160] As a concluding point, I again emphasize that the evidence before me was limited. The absence of any background affidavit evidence from Tsawout added to the lack of factual clarity. There may well be other facts that would have affected my assessment but that information is simply not before me. This factors into my determination of the remedies below.

Remedies

[161] The Applicants seek a declaration that Tsawout's relinquishment of its interest in Lot 47-6 to Allan and Earl Claxton is void given the failure of Tsawout to observe procedural fairness

and given that a reasonable apprehension of bias exists. They also seek an order setting aside that decision and remitting the matter back to Tsawout Chief and Council for reconsideration, taking the Applicants' interests into consideration.

[162] In this case, given the limited information before me and the outstanding Civil Claim, I am reluctant to declare the Agreement void. However, I agree that the Applicants have been denied procedural fairness with respect to the Agreement and the January 12 Letter. If afforded a procedurally fair process, the outcome may, or may not be, a determination that the Agreement improperly purported to effect the transfer of Tsawout's interest to Allan and Earl Claxton or that the Applicants do, or do not have legal, equitable or other rights or interests in the property. I make no findings in that regard. I do note that the 2007 version of the *Land Code* provides the following:

> Improper Transactions Void
>
> 26.3 A deed, lease, contract, document, agreement or other instrument of any kind by which the First Nation, a Member or any other person purports to create, grant, dispose of, assign or transfer an interest or license in relation to First Nation Land after the date this Land Code comes into effect is void if it contravenes this Land Code.

[163] Accordingly, I will order that, to the extent that it has the jurisdiction to do so, the Dispute Resolution Panel will address the whole of the Applicants' concerns - being the entering into the Agreement as well those issues currently set out in the Addendum to the Notice of Dispute. The Dispute Resolution Panel shall assess the dispute in accordance with the process set out in the *Land Code* and/or any other rules of procedure that may have been developed with respect to same and were applicable at the time of the Agreement and the Notice of Dispute. The

Dispute Resolution Panel will make its findings independent of and uninfluenced by the position taken by Tsawout in the January 12 Letter or any other positions previously taken with respect to this dispute, including by Tsawout, the Applicants and Allan and Earl Claxton. The process adopted by the Dispute Resolution Panel (which will include timely disclosure by Tsawout of its relevant records) will afford the Applicants the opportunity to respond and make submissions as to their interests in Lot 47-6. That process will include assessment of the status of Tsawout's interests in Lot 47-6 leading up to and at the time of the Agreement – including the unanswered questions raised in my reasons.

[164] The Dispute Resolution Panel will then render a written decision giving its reasons for its determinations. This will include either confirming that the Agreement can properly serve as a vehicle to transfer Tsawout's interest in Lot 47-6 or determining that the Agreement cannot effect an unencumbered possessory interest to Allan and Earl Claxton in accordance with the *Land Code* in force at the time of the Agreement, as well as the other issues raised in the Addendum to the Notice of Dispute.

[165] In the event that the Dispute Resolution Panel determines that it does not have jurisdiction to consider the entry into the Agreement by Tsawout, then Tsawout Chief and Council shall effect a procedurally fair process (which will include timely disclosure by Tsawout of its relevant records) that will enable the Applicants the opportunity to respond and make submissions as to their interests in Lot 47-6. That process will also take into consideration the status of Tsawout's interests in Lot 47-6 leading up to and at the time of the Agreement – including the unanswered questions raised in my reasons. Tsawout Chief and Council – or any

panel that it might convene to independently assess this issue – will then render a written decision giving its reasons for its determination and either confirming that the Agreement properly serves to transfer Tsawout's interest in Lot 47-6 or determining that the Agreement cannot effect an unnumbered possessory interest to Allan and Earl Claxton. Notwithstanding its conclusion on its jurisdiction to consider the entry into the Agreement, the Dispute Resolution Panel will address the issues arising pursuant to the further amended Addendum to the Notice of Dispute as set out above.

[166] Should the Dispute Resolution Panel and/or the Chief and Council, having afforded the Applicants a procedurally fair process, determine that Tsawout was not in a position to relinquish its interests in Lot 47-6 to Allan and Earl Claxton and to provide them with an unencumbered possessory interest in Lot 47-6 by way of the Agreement, then the Applicants may request that the Court issue a further order declaring the Agreement to be void. I will remain seized of this matter.

[167] It goes without saying that Allan and Earl Claxton cannot have any involvement in the above decision making (which is discreet from their ability to make any representations on their own behalf as a part of the above processes).

[168] As to costs, while both parties sought their costs in this matter, I am exercising my discretion under Rule 400 of the *Federal Courts Rules* and am declining to award of costs.

JUDGMENT IN T-1077-23

THIS COURT'S JUDGMENT is that:

1. The application for judicial review in T-1077-23 is granted in part;

2. The Court declines to declare the Agreement void at this time;

3. The Court orders the Dispute Resolution Panel shall address the whole of the Applicants' concerns with respect to both the Agreement and issues currently set out in the Addendum to the Notice of Dispute. In that regard:

    (a) The Dispute Resolution Panel shall assess the dispute in accordance with the process set out in the *Land Code* and/or any other rules of procedure that may have been developed with respect to same and were applicable at the time of the Agreement and the Notice of Dispute. That process will include the timely disclosure by Tsawout of its relevant records and will afford the Applicants the opportunity to make submissions as to their claimed interests in Lot 47-6;

    (b) The Dispute Resolution Panel will assess of the status of Tsawout's interest in Lot 47-6 leading up to and as of the time of the Agreement, including consideration of the questions identified in these reasons;

    (c) The Dispute Resolution Panel will make its findings independent of and uninfluenced by the position taken by Tsawout in the January 12 Letter or any other positions previously taken with respect to this

dispute, including by Tsawout, the Applicants and Allan and Earl Claxton;

(d) The Dispute Resolution Panel will render a written decision giving its reasons for its determinations. This will either confirm that the Agreement properly serves as a vehicle to transfer Tsawout's interest in Lot 47-6 or determine that the Agreement cannot validly effect an unencumbered possessory interest to Allan and Earl Claxton in accordance with the *Land Code* in force at the time of the Agreement, as well as determine the other issues raised in the Addendum to the Notice of Dispute;

4. In the event that the Dispute Resolution Panel determines that it does not have jurisdiction to consider the entry into the Agreement by Tsawout, then Tsawout Chief and Council shall effect a procedurally fair process that will include the timely disclosure by Tsawout of its relevant records and will afford the Applicants the opportunity to make submissions as to their claimed interests in Lot 47-6. Tsawout will assess of the status of Tsawout's interest in Lot 47-6 leading up to and as of the time of the Agreement, including consideration of the questions identified in these reasons Tsawout Chief and Council – or any panel that it might convene to independently assess this issue – will then render a written decision giving its reasons for its determination either that Agreement properly serves as a vehicle to transfer Tsawout's interest in Lot 47-6 or determine that the Agreement cannot validly effect an unencumbered possessory interest to Allan and Earl

Claxton in accordance with the *Land Code* in force at the time of the Agreement. Notwithstanding its conclusion on its jurisdiction to consider the entry into the Agreement, the Dispute Resolution Panel will address the issues arising pursuant to the further amended Addendum to the Notice of Dispute as set out above;

5. The Dispute Resolution Panel and/or Tsawout shall take these reasons into consideration when effecting their above determinations;

6. The Dispute Resolution Panel and/or Tsawout shall determine the timelines for the steps necessary to effect the above process(es). However, the process(es) shall be complete and written reasons given by no later than six months from the date of this decision;

7. Should the Dispute Resolution Panel and/or the Chief and Council, having afforded the Applicants a procedurally fair process, determine that Tsawout was not in a position to relinquish its interests in Lot 47-6 to Allan and Earl Claxton and to provide them with an unencumbered possessory interest in Lot 47-6 by way of the Agreement, then the Applicants may request that the Court issue a further order declaring the Agreement to be void; and

8. No costs are awarded.

"Cecily Y. Strickland"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1077-23
STYLE OF CAUSE:	SHERI CLAXTON, VANESSA CLAXTON v TSAWOUT FIRST NATION
PLACE OF HEARING:	VANCOUVER, BRITISH COLUMBIA
DATE OF HEARING:	JULY 18, 2024
JUDGMENT AND REASONS:	STRICKLAND J.
DATED:	OCTOBER 2, 2024

APPEARANCES:

Benjamin Isitt	FOR THE APPLICANT (SHERI CLAXTON)
Vanessa Claxton	FOR THE APPLICANT (ON HER OWN BEHALF)
John Gailus Courtenay Jacklin	FOR THE RESPONDENT

SOLICITORS OF RECORD:

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